

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

RICHARD ROE et al.,  
Plaintiffs,  
v.

RICHARD V. SPENCER et al.,  
Defendants.

Civil No. 1:18-cv-01565

NICHOLAS HARRISON et al.,  
Plaintiffs,  
v.

RICHARD V. SPENCER et al.,  
Defendants.

Civil No. 1:18-cv-00641

**PLAINTIFFS' REPLY IN RESPONSE TO DEFENDANTS' SUPPLEMENTAL BRIEF  
IN SUPPORT OF RENEWED MOTIONS TO DISMISS PLAINTIFF OUTSERVE-SLDN**

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
ARGUMENT .....	1
I. OUTSERVE COMPLIED WITH ITS DISCOVERY OBLIGATIONS.....	1
II. DEFENDANTS’ ATTACKS ON OUTSERVE’S DIRECT ORGANIZATIONAL STANDING ARE MERITLESS .....	4
III. DEFENDANTS’ ARGUMENTS AGAINST ASSOCIATIONAL ORGANIZATIONAL STANDING ALSO FAIL .....	8
A. OutServe Is a Traditional Membership Organization.....	8
1. OutServe provides benefits to members that it does not provide to non-members.....	8
2. Defendants conflate corporate legalities with common-law standing requirements.....	11
B. OutServe Is the Functional Equivalent of a Membership Organization.....	12
1. Members participate in selecting OutServe leaders.....	13
2. Members serve in OutServe leadership <i>and</i> influence its direction .....	13
3. Members finance OutServe activities.....	17
IV. CONCLUSION .....	18

**TABLE OF AUTHORITIES**

**Cases**

	<b>Page</b>
<i>AARP v. EEOC</i> , 226 F. Supp. 3d 7 (D.D.C. 2016).....	18
<i>AARP v. EEOC</i> , 267 F. Supp. 3d 14 (D.D.C. 2017), <i>on reconsideration</i> , 292 F. Supp. 2d (D.D.C. 2017).....	11, 12
<i>Air Alliance Houston v. U.S. Chem. &amp; Safety Hazard Inv. Board</i> , 365 F. Supp. 3d 118, 129 (D.D.C. 2019).....	12
<i>Hunt v. Wash. State Apple Advert. Comm’n</i> , 432 U.S. 333 (1977).....	11, 12
<i>Lane v. Holder</i> , 703 F.3d 668 (4th Cir. 2012) .....	4, 5
<i>Oregon Advocacy Center v. Mink</i> , 322 F.3d 1101 (9th Cir. 2003) .....	13, 14, 18
<i>Tower S. Prop. Owners Ass’n v. Summey Bldg. Sys., Inc.</i> , 47 F.3d 1165, 1995 WL 60765 (4th Cir. 1995) .....	11
<i>Washington Legal Foundation v. Leavitt</i> , 477 F. Supp. 2d 202, 211 (D.D.C. 2007).....	12
<i>White Tail Park, Inc. v. Stroube</i> , 413 F.3d 451 (4th Cir. 2005) .....	4

**Rules**

Fed. R. Civ. P. 26(b)(1).....	1
Fed. R. Civ. P. 33(a)(1).....	1

## INTRODUCTION

Despite Defendants' portrayal of the additional evidence revealed in the interim discovery period, the facts confirm that Defendants' motion should be denied. The underlying facts show that OutServe has experienced direct injury and, as a membership organization dedicated to providing legal and advocacy services to its constituents, has standing to bring claims on behalf of those constituent members.

## ARGUMENT

Additional discovery verifies Plaintiffs' original arguments in support of OutServe's standing as an organizational plaintiff. Plaintiffs have—despite Defendants' incomplete description of the record—produced evidence sufficient to support its standing both as a party directly injured by Defendants' actions and a membership organization representing the interests of its harmed individual members.

### **I. OUTSERVE COMPLIED WITH ITS DISCOVERY OBLIGATIONS.**

Defendants' first argument has nothing to do with standing: they take issue with OutServe's production of documents. But OutServe met its discovery obligations.

The Federal Rules limit the scope of discovery:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1). For documents and things, the Rules permit the discovery of "items in the responding party's possession, custody, or control." Fed. R. Civ. P. 33(a)(1). No rule requires a party to create documents to satisfy a discovery demand, and no rule requires the

metaphysical impossibility of producing documents that do not exist. OutServe complied with these rules, and none of Defendants' arguments reveal otherwise.

*First*, Defendants take issue with OutServe's production of donor information, including demographic details about donors participating in other activities with the organization. *See* Defs.' Supp. Br. in Support of Defs.' Renewed Motions to Dismiss Pl. OutServe-SLDN ("Defs.' Supp. Br.") at 2-3. But as OutServe informed the Court (and counsel, in deposition testimony as long ago as February), OutServe does not track the sexual orientation, gender identity, or military affiliation of its donors. *See* Ex. A, Excerpts from February 28, 2019 Deposition of Anthony Blevins ("Blevins 2.28.19 Dep.") 168:6-13; *Roe* ECF No. 192, *Harrison* ECF No. 210, Ex. ZZ, Hearing Transcript May 31, 2019 ("Hr'g Tr.") 23:8-10. Moreover, due to vendor non-cooperation, OutServe could not obtain a complete set of donor data in any event. *See* Ex. B, Excerpts from July 2, 2019 Deposition of Anthony Blevins ("Blevins 7.2.19 Dep.") 300:15-22.

In addition, while Plaintiffs' counsel promised the Court that they would do their best to provide information cross-referencing members' multiple touchpoints with the organization, counsel also represented that it might not be possible to do so.<sup>1</sup> As it turned out, it was not. As noted above, donor data was incomplete, rendering cross-referencing fruitless. And, as OutServe explained to Defendants in interrogatory responses, OutServe has no member database from which to cull this information:

OutServe does not maintain a membership database, and the lists that it does maintain (donor lists, subscribers lists, and member pages on OutServe Chapter & Forum Facebook groups) do not track all of the

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<sup>1</sup> Though Defendants claim that they requested this information, they did not. As their own exhibits make clear, Defendants sought donor information and member information, but not information about members engaged in multiple ways with the organization. *See Roe* ECF No. 192, *Harrison* ECF No. 210, Ex. AAA, Defs.' Second Set of Reqs. for Prod. Nos. 36-37, 45; *See Roe* ECF No. 192, *Harrison* ECF No. 210, Ex. U, Defs.' Second Set of Interrogs. ("Defs.' Second Set of Interrogs.") Nos. 11, 15.

information requested in the interrogatory, such that producing those lists with personally identifying information redacted and/or anonymized would reveal no meaningful information in response to the interrogatory. In particular, OutServe does not ask donors or subscribers to provide their sexual orientation or history of military service. And while Chapters & Forums are open to members only, redacting and producing those Facebook member lists would be time-consuming and, ultimately, unhelpful.

*Roe* ECF No. 187, *Harrison* ECF No. 205, Ex. B, Pl. OutServe’s Resp. to Defs.’ Second Set of Interrog. (“OutServe Resp. to Second Interrog.”) Nos. 12, 16. In short, Defendants are fussing about the failure to produce documents and information that simply does not exist and that could not be created in such a short time frame.

*Second*, Defendants take issue with the alleged failure to provide “additional evidence” of OutServe’s direct injury. *See* Defs.’ Supp. Br. at 3-4. But here Defendants conflate the lack of documents and the lack of evidence. OutServe did produce evidence, in the form of a lengthy, comprehensive interrogatory response (*see Roe* ECF No. 187, *Harrison* ECF No. 205, Ex. A, OutServe’s Second Supp. to Interrog. No. 3 (“OutServe’s Resp. to Second Interrog. No. 3”)) and deposition testimony. The documentary evidence that Defendants want—client case files—are entirely privileged, and a “summary of information contained within them” does not exist (and, if it did, would be privileged too).<sup>2</sup> Given OutServe’s heavy focus on legal services and advocacy, strict compliance with Defendants’ document requests would have required OutServe to produce nearly every document or email created in the last four years. *See Roe* ECF No. 192, *Harrison* ECF No. 210, Ex. AAA, Defs.’ Second Set of Reqs. for Prod. (requesting “all documents and communications” in these categories: “related to requests ... for services from 2015 to the present” (RFP 43), “related to OutServe’s decision on whether to provide any form of services

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<sup>2</sup> Defendants claim that this information is needed to substantiate OutServe’s claims. But the alleged need for corroboration does not override the attorney-client privilege.

from 2015 to the present” (RFP 44), supporting the identification of every one of OutServe’s members (RFP 45), “related to OutServe’s participation in the *Harrison* suit” (RFP 48), and “related to OutServe’s participation in the *Roe* suit” (RFP 51).) That is not a result contemplated by the Federal Rules.

*Third*, Defendants criticize the alleged failure to produce evidence on the benefits of OutServe membership. *See* Defs.’ Supp. Br. at 4. This isn’t true, as set forth below. But beyond that, Defendants did not even request this information.

OutServe did not ignore the Court’s requests or fail to produce records in which the Court expressed interest. Those documents simply do not exist, and they could not be created despite best efforts. None of it affects OutServe’s standing.

## **II. DEFENDANTS’ ATTACKS ON OUTSERVE’S DIRECT ORGANIZATIONAL STANDING ARE MERITLESS.**

Defendants’ arguments against OutServe’s direct standing are legally incorrect and factually unsupported. The Court should reject them.

OutServe’s diversion of resources in response to Defendants’ policies is a quintessential example of Article III injury in fact. *See* Pls.’ Supplemental Br. in Opp’n to Defs.’ Renewed Motions to Dismiss Pl. OutServe-SLDN (“Pls.’ Supp. Br.”) at 5-6, *Roe* ECF No. 187, *Harrison* ECF No. 205 (citing *White Tail Park, Inc. v. Stroube*, 413 F.3d 451 (4th Cir. 2005)). Plaintiffs’ Supplemental Brief details why resource reallocation is exactly the sort of harm that establishes direct standing, and those arguments won’t be repeated here. Defendants’ argument in opposition relies primarily on *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012). Plaintiffs’ Supplemental Brief contains an extensive argument as to why *Lane* does not apply here (Pls.’ Supp. Br. at 8-12), and those arguments also will not be repeated.

Aside from *Lane*, Defendants pepper their arguments with several points that assign blame to anyone else—including OutServe—other than themselves as the cause of OutServe’s injuries. *See* Defs.’ Supp. Br. at 22-29. None of these points have any merit.

*First*, Defendants in fact caused OutServe’s expansion of legal services to assist members with HIV. Though OutServe decided in 2015 to expand into HIV-related *advocacy* work—engaging Congress and the Pentagon on the policies—that work was abandoned after the election of 2016. *See Roe* ECF No. 187, *Harrison* ECF No. 205, Ex. A, OutServe’s Resp. to Second Interrog. No. 3. The increase in HIV-related *legal* work began in 2017, after Defendants’ refused to commission three academy cadets and one enlisted man based solely on their HIV status. *Id.* Both HIV-related legal and advocacy work increased even more in early 2018 with Defendants’ Deploy or Get Out Policy, and again later that year after Defendants decided to start separating Airmen with HIV (*id.*)—an entirely new problem created by the Air Force’s reinterpretation of existing policy. OutServe did not simply decide to expand; its members brought their legal problems to OutServe, and OutServe responded. This would not have been necessary but for Defendants’ policies and actions.

*Second*, OutServe’s need to prioritize HIV legal work—and to a certain extent other legal work—for its members stems from the fact that there is no other organization actually doing it, or that has the knowledge and experience to do it. The legal work OutServe does for its members is highly specialized, requiring knowledge of military regulations and procedures. OutServe cannot easily outsource this work or pass it on to partners or law firms. Referral partners simply do not exist for much of this work. When it can, OutServe has done so. *See* Ex. B, Blevins 7.2.19 Dep. 31:18-20 (testifying that OutServe is lucky to have a number of partner organizations assisting transgender service members). But it has no such partners for its

members with HIV. *See* Ex. B, Blevins 7.2.19 Dep. 31:22-32:4, 242:8-19, 289:3-291:11 (testifying repeatedly that OutServe is the subject-matter expert in this area); *id.* at 167:21-170:5, 241:12-242:21 (testifying that there is no other organization serving this population). Even on matters for which OutServe has engaged partners, such as these lawsuits, OutServe's Legal Director must remain involved to provide insight and knowledge re military law, regulation, and procedure. *See id.* at 132:16-21, 169:4-170:5, 178:4-11.

*Third*, project delays are real and direct injures to OutServe. Clients experiencing delays, such as D.K. and A.M. (*see Roe* ECF No. 187, *Harrison* ECF No. 205, Ex. A, OutServe's Resp. to Second Interrog. No. 3, at 12), may not face immediate consequences, but OutServe faces reputational harm of being slow, non-responsive, or uncaring. Partners expecting educational or training materials and programs from OutServe may come away with the impression that OutServe is unreliable as a matter of course and choose not to continue professional relationships.

*Fourth*, there is no requirement to mitigate harm in this context; the question is only whether OutServe experienced direct injury. Defendants essentially argue that OutServe is not making the best use of the resources supposedly available to it, so it cannot actually claim a resource-expenditure-related harm. *See* Defs.' Supp. Br. at 26-27. But Defendants' (unsupported) assertions that OutServe would have been able to avoid harms had it only called upon partners to do the work presupposes both that OutServe would have been able to secure competent partners to execute its delayed programs and that OutServe would have done so with no internal resource drain. The argument has no basis in fact.

*Fifth*, blaming budget limitations and general resource allocation decisions for OutServe's injuries ignores the real issue: were it not for Defendants' policies and actions,

OutServe would have been able to accomplish the tasks that it delayed or reprioritized, as set forth in its Interrogatory Response. *See Roe* ECF No. 187, *Harrison* ECF No. 205, Ex. A, OutServe’s Resp. to Second Interrog. No. 3, at 9-10, 12-13. Thus, Defendants’ policies and actions are causing OutServe’s injuries. *See Plfs.’ Supp Br.* at 6-8 (citing cases).

*Sixth*, OutServe’s financial distress is an irrelevant side issue. Budget cuts did not affect the Executive Director or the Legal Director, and OutServe is claiming a diversion of resources only as to the work of these two staff members. *See Roe* ECF No. 187, *Harrison* ECF No. 205, Ex. A, OutServe’s Resp. to Second Interrog. No. 3 at 9-13. Defendants may argue that OutServe should hire more staff, but this argument—and the purported need to hire more staff to handle the additional work Defendants have created—further demonstrates that OutServe has suffered direct injury.

*Seventh*, OutServe’s accumulation of harms supports a finding of direct injury. Though Defendants identify some examples of direct injury that occurred after litigation commenced, *see Defs.’ Supp. Br.* at 25-26, these examples continue to be relevant. Specifically, OutServe has an obligation to maintain standing throughout the suits, and these examples show that harm is ongoing.<sup>3</sup>

In the end, Defendants’ arguments amount to second guessing OutServe’s choices to provide legal services to its members—something OutServe has been doing for over 25 years. These arguments fail to acknowledge Defendants’ own role in bringing about these challenges,

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<sup>3</sup> For the reasons set forth in its Supplemental Brief, Plaintiffs do not concede that time and resources spent on these lawsuits may not be considered as direct injury. OutServe is a legal-services organization with a mission to fight for its members and is therefore not “manufactur[ing] the injury necessary to maintain a suit” (*Defs’ Supp. Br.* at 22 n.19); it is merely doing its job. But even if true, the time and resources spent on *Harrison* and *Deese, et al. v. Shanahan, et al.* (D. Md.) (filed at the same time as *Harrison*, then re-filed in Maryland) may be considered for standing in *Roe*.

by refusing commissions to three cadets and one enlisted man, and by reinterpreting Air Force policy to require the separation of Airmen with HIV, all of which occurred in the last three years. As a legal services organization, OutServe responded to these policies and actions, and has been directly harmed as a result.

### **III. DEFENDANTS' ARGUMENTS AGAINST ASSOCIATIONAL ORGANIZATIONAL STANDING ALSO FAIL.**

OutServe has demonstrated that it has standing either as a traditional membership organization or the functional equivalent of one. Defendants' arguments fail to rebut that showing.

#### **A. OutServe Is a Traditional Membership Organization.**

Defendants' attacks on OutServe's standing as a traditional membership organization do not pass muster. Defendants make two arguments: (1) that OutServe provides the same benefits to members and non-members, and (2) that OutServe's status as a non-profit corporation negates its status as a membership organization. Both are wrong.

##### **1. OutServe provides benefits to members that it does not provide to non-members.**

The argument that OutServe provides "the same benefits to members and non-members alike" is incomplete and misleading. *See* Defs.' Supp. Br. at 5-6. Defendants ignore and misconstrue the bulk of OutServe's activities, and a review of the entire record shows that Defendants' argument is meritless.

Since around 2014, OutServe's mission has been "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." *Roe* ECF No. 131, *Harrison* ECF No. 168, Ex. A, OutServe's Resp. to Second Interrog. No. 3 at 2. To accomplish that mission, OutServe performs three main functions: legal services

and advocacy, education, and membership and chapter services. *Roe* ECF No. 131, *Harrison* ECF No. 168, Ex. E, Decl. of Anthony Blevins in Support of Pls.’ Opp’n to Defs.’ Renewed Motions to Dismiss Pl. OutServe-SLDN (“Blevins Dec.”) ¶ 4. Two out of three of these functions are for members *only*, and the third is offered to non-members primarily for the benefit of members.

*Legal services and advocacy:* OutServe is a “non-partisan, non-profit, legal services, watchdog and policy organization that represents the U.S. LGBTQ+ military community.” *Roe* ECF No. 131, *Harrison* ECF No. 168, Ex. C. Pls.’ Resp. to Defs.’ Interrog. No. 2 (“Pls.’ Resp. to Interrog. No. 2”). Thus, legal services are offered and provided only to members. *See Roe* ECF No. 131, *Harrison* ECF No. 168, Ex. E, Blevins Dec. ¶ 5(b), (c), (d); *see also, e.g.*, Ex. B, Blevins 7.2.19 Dep. 84:1-10, 97:21-99:11. Advocacy is on behalf of “Service members” within OutServe’s constituency. *See Roe* ECF No. 131, *Harrison* ECF No. 168, Ex. E, Blevins Dec. ¶ 5(a). Only by ignoring OutServe’s legal services and advocacy activity—OutServe’s largest function and historically its oldest—can Defendants’ claim that OutServe provides “the same” benefits to members and non-members alike.

*Membership and Chapter Services:* All of the evidence, without contradiction, is that only members may join OutServe’s Chapters. *See* Ex. A, Blevins 2.28.19 Dep. 150:10-152:3; *Roe* ECF No. 187, *Harrison* ECF No. 205, Ex. B, OutServe Resp. to Second Interrog. No. 12; *Roe* ECF No. 192, *Harrison* ECF No. 210, Ex. ZZ, Hr’g Tr. 15:3-4. To counter this, Defendants raise a distraction: non-members may attend some—not all, but some—Chapter social events. *See* Defs.’ Supp. Br. at 5. The argument is flawed: social events are only one, and not even the primary, benefit of Chapter membership:

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.

*Roe* ECF No. 131, *Harrison* ECF No. 168, Ex. E, Blevins Dec. ¶ 7.

Thus, Chapter membership comes with benefits that non-members do not enjoy: emotional support networks of people who are experiencing or have experienced marginalization while serving, and career advancement and professional growth advice and support. Simply allowing a Chapter member to bring a spouse or guest does not mean that OutServe provides “the same” benefits to members and non-members alike. And in the broader sense, allowing members to bring spouses and guests is actually a benefit to the member. It furthers the goal of establishing member social support and lessening the effects of marginalization, isolation, and ostracization *of the member*. Defendants’ argument once again cherry picks and misconstrues the evidence.

*Education services:* Defendants are correct: OutServe does offer educational services to more than just members. OutServe “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.” *Roe* ECF No. 131, *Harrison* ECF No. 168, Ex. E, Blevins Dec. ¶ 6. But this is the only OutServe benefit that is not exclusively reserved for members (select social events notwithstanding). Even so, these education services are ultimately for the benefit of OutServe’s members. By educating providers, OutServe is seeking to improve the access to and quality of

services that its members receive from those providers. Ultimately, these OutServe services too are for the members' benefit.

In sum, the vast bulk of OutServe's activities, functions, and benefits are reserved for members. Even those that are provided to others are ultimately for the purpose of benefitting members. Defendants are simply wrong that non-members receive "the same" benefits.

**2. Defendants conflate corporate legalities with common-law standing requirements.**

Defendants spend three pages of their brief arguing that corporate legalities demonstrate that OutServe is not a membership organization. Defs.' Supp. Br. at 6-9. The argument is meritless, because statutory definitions are not determinative in considerations of associational standing.

As stated repeatedly, 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 v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). But "the 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. 2d 238 (D.D.C. 2017) (*AARP II*). In fact, "no court has precisely defined" what traditional membership organization means. *Id.* at 22. In its Opposition to the Renewed Motion to Dismiss, Plaintiffs showed that, whatever the definition, precedent favors finding that it is a traditional membership organization. *See* Pls.' Opp'n to Defs.' Renewed Motions to Dismiss Pl. OutServe-SLDN ("Pls. Opp'n") at 5-7, *Roe* ECF No. 131,

*Harrison* ECF No. 168 (citing *Air Alliance Houston v. U.S. Chem. & Safety Hazard Inv. Board*, 365 F. Supp. 3d 118, 129 (D.D.C. 2019)). Plaintiffs will not repeat those arguments here.

Defendants argue for a more rigid and formulaic definition, one that refers to an organization's Articles of Incorporation and Bylaws. *See* Defs.' Supp. Br. at 6-9. For support, Defendants cite just one case: *Washington Legal Foundation v. Leavitt*, 477 F. Supp. 2d 202, 211 (D.D.C. 2007) ("*WLF*"). But *WLF* contains no analysis of the definition of "member." It merely states that plaintiffs were not members as defined by *WLF*'s Articles of Incorporation and then analyzes standing under a "functional equivalence" test, noting that organizations without "formal members" can still have associational standing. *Id.* Defendants' argument—that "members" for standing purposes must be the same as "members" under corporate legal documents—takes *WLF* too far.

In fact, Defendants' interpretation of *WLF* is inconsistent with later decisions from the same court, which note that there is no precise definition of "membership organization" under the traditional test. *See AARP II*, 267 F. Supp. 3d at 22. And the same court recently rejected the arguments Defendants make here, concluding that an environmental health and justice nonprofit was a membership organization based on facts remarkably similar to those supporting OutServe's associational standing here. *See Air Alliance*, 365 F. Supp. 3d at 129. Again, Plaintiffs will not repeat those arguments. *See* Pls.' Opp'n at 5-7.

**B. OutServe Is the Functional Equivalent of a Membership Organization.**

In their zeal to remove OutServe as a plaintiff threatening their unconstitutional policies, Defendants twist both the facts and the law in an attempt to undermine OutServe's showing that it is the functional equivalent of a membership organization. Considering all the facts under the

correct legal standard, and not just those highlighted by Defendants, OutServe meets all of the requirements of the “indicia of membership” test.

**1. Members participate in selecting OutServe leaders.**

It is true that OutServe does not hold member-wide elections. Defendants go further, though, arguing that OutServe “lack[s] interest” in allowing members to elect their own leaders. Defs.’ Supp. Br. at 10. The suggestion is disingenuous. The reason is not disinterest; it is lack of resources: OutServe does not have the money or the time to develop an election infrastructure and conduct a membership election. *See* Ex. B, Blevins 7.2.19 Dep. 73:13-74:3 (“OutServe does not have the resources to conduct an annual board election through its membership ranks” because OutServe has “so many members” and does not “have that broad database” necessary to “distill that information right now.”). Defendants themselves acknowledge that OutServe is a resource-strapped organization. *See* Defs.’ Supp. Br. at 22, 24. Funneling limited funds and personnel time—which are already taxed—into such an election effort, rather than into services that benefit its members would be a massive waste and would further undermine OutServe’s mission.

In any event, for purposes of the functional equivalence test, “[an organization’s] constituents [need not be] the only ones who choose the leadership of [an organization].” *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1111 (9th Cir. 2003). OutServe meets this standard for the reasons set forth in its prior briefing.

**2. Members serve in OutServe leadership and influence its direction.**

To satisfy this portion of the test, OutServe need only show that its members serve in leadership *or* influence its direction. *See* Defs.’ Supp. Br at 9 (stating the test). While only

either leadership or influence is required, Defendants' brief confirms that OutServe satisfies both. Only by moving the goalposts can Defendants claim that OutServe does not.

*Serving in leadership:* The evidence confirms that OutServe members serve on the Board, on the Military Advisory Council ("MAC"), and as Chapter Leaders.<sup>4</sup> Defendants do not dispute this. In fact, they confirm that OutServe's Board and MAC is member majority (*see* Defs.' Supp. Br. at 10-13), often substantially (*see Roe* ECF No. 187, *Harrison* ECF No. 205, Ex. B, OutServe Resp. to Second Interrog. No. 7).<sup>5</sup> Rather, Defendants make the unremarkable observation that some non-members also serve on these bodies. But the participation of non-members in leadership is not a disqualification for associational standing. No authority holds otherwise. *See Mink*, 322 F.3d at 1111 (finding "functional equivalence" even where "constituents ... are not the only ones who many serve on OAC's leadership bodies"). Finally, Defendants take issue with evidence that board members are targeted for fundraising prowess—hardly surprising, given the role of a nonprofit Director—and with the lack of evidence that members have used a Board nominating process. *See* Defs.' Supp. Br. at 12. These arguments do not negate member leadership or influence, and only barely pertain to those considerations.

Defendants also incorrectly suggest that non-members serve as Chapter Leaders, misconstruing a presentation addressing the need to identify "local" members—as opposed to members who are not local—to serve. *See* Defs.' Supp. Br. at 12-13. Again, only members serve as Chapter Leaders, and there is no contrary evidence. Further, it is irrelevant that

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<sup>4</sup> These facts were also discussed in Plaintiffs' Supplemental Brief. Pls.' Supp. Br. at 13-14.

<sup>5</sup> Defendants claim that, at the time the complaints were filed, "seven of fifteen Directors lacked the military affiliation to qualify" as a member. Defs.' Supp. Br. at 11-12. This is incorrect; there were nine member Directors, including one who desired to and was prevented from serving. *See Roe* ECF No. 187, *Harrison* ECF No. 205, Ex. B, OutServe Resp. to Second Interrog., No. 7. (As a reminder, OutServe's membership definition includes applicants or "future warriors.") This means that 60% of the Board comprised members.

members need approval to remove a Chapter Leader. *See* Defs.’ Supp. Br. at 13. Members initiate the removal and vote on it. *See* Ex. B, Blevins 7.2.19 Dep. 103:13-18. The necessity of Executive Director approval contradicts neither leadership nor influence by members.

*Influencing direction:* Defendants transform the inquiry of whether members “influence the direction” of OutServe into a requirement that members have “meaningful control over the direction of the organization.” Defs.’ Supp. Br. at 13. The Court should reject Defendants’ position. The evidence demonstrating members’ influence over OutServe’s strategy and direction is set out at length in OutServe’s supplemental brief. *See* Pls.’ Supp. Br. at 13-14. Defendants do not contest it. Instead, they complain about the alleged lack of documentary evidence—not to be confused with the lack of evidence generally. It is true that OutServe did not comb through every comment on every post on each one of its 81 Facebook groups. But there is plenty of other evidence, including deposition testimony and interrogatory responses.

While decrying the alleged lack of documentary evidence, Defendants also diminish the documentary evidence it did receive: OutServe’s 2014 and 2019 membership surveys. *See* Defs.’ Supp. Br. at 14-16. Defendants take issue with the questions asked (*id.*), but they do not—and cannot—contradict the testimony that OutServe uses the results to help set strategic direction. *See* Ex. B, Blevins 7.2.19 Dep. 57:8-58:10, 59:7-60:8. It is not necessary, as Defendants suggest, to ask directly about specific programs or activities for the survey results to be useful in influencing organizational direction.<sup>6</sup> Nor is it relevant, or even important, that the

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<sup>6</sup> Defendants appear to believe that to show “member influence,” OutServe must solicit and then follow member opinion on specific activities, such as these lawsuits. But member opinion is often diverse, especially on controversial matters. OutServe is guided by its mission—“equal service”—not by the dissent of a small number of vocal members who express opposition. Member feedback contrary to its mission influences OutServe to direct more attention to education and support, not to abandon the parts of its constituency that needs help.

2014 survey results did not show a significant response related to HIV, or that it was a Director (who is a member) who raised Defendants' exclusionary policies related to HIV (in response to another member's inquiry) at a Board meeting in 2015. *See* Defs. Supp. Brf. at 25. Defendants fail to explain why Board input does not constitute "member influence," particularly when it is reported to the Board by a member about another member. And survey results are not the only influence on OutServe's direction: so are inquiries for legal services, which is what launched OutServe's need to shift resources into HIV-related legal work. *See Roe* ECF No. 187, *Harrison* ECF No. 210, Ex. A, OutServe's Resp. to Second Interrog. No. 3 at 6-8, 11-12; *Roe* ECF No. 187, *Harrison* ECF No. 210, Ex. B, OutServe Resp. to Second Interrog. Nos. 9-10, 13-14; *see also* Ex. B, Blevins 7.2.19 Dep. 152:10-155:14 ("[OutServe] knew [it] had members that ... were living with HIV, even though we didn't know how many there were. And because this one member came forward with [accessions] issues, we knew he wasn't the only one having an issue.").

Regarding the MAC: Defendants massively understate the MAC's advisory role, wrongly focusing on what the MAC has done *so far* as opposed to what it is tasked to do. *See* Defs.' Supp. Br. at 17 (discussing that "to date" the MAC has drafted membership survey questions and developed the regional directors' toolbox). The MAC's mission "is to support and advise the work of the Board and staff ... on the basis of the wisdom and experience gained during distinguish military careers as actively-serving servicemembers, veterans, and spouses." *See Roe* ECF No. 187, *Harrison* ECF No. 205, Ex. E, OutServe-SLDN Military Advisory Council Mission and Responsibilities. The MAC's "Mission and Responsibilities" document includes a long list of ways that the MAC can provide advice and counsel to the Board, including assisting in program evaluation (which Defendants' acknowledge they have done), helping

determine the need for new programs, and acting as the conduit of information to the Board. *See id.* Defendants again decry the lack of MAC “control” over organizational decisions—MAC co-chairs cannot make motions or vote on Board resolutions, for example—but they key here is influence, not control. *See* Defs.’ Supp. Br. at 17-18.

Regarding the local Chapters and members: Defendants try to have it both ways. First, Defendants highlight actual influence in the form of feedback that local members provided to the Board through the Executive Director. *See* Defs.’ Supp. Br. at 18. Again focusing incorrectly on “control,” Defendants claim that a purported “‘disconnect’ between ‘Board and constituency’” somehow shows that members do not direct the organization. *Id.* Instead, this demonstrates member influence, not the opposite.<sup>7</sup> Second, Defendants argue that Chapter Leaders are restricted in their messaging to local members. *Id.* But insisting on consistent messaging from the top down says nothing about how members, from the bottom up, can influence the organization. Defendants say nothing about the latter, which is what is important for the standing inquiry. The evidence—including what is highlighted in Plaintiffs’ supplemental brief and need not be repeated—demonstrates that bottom-up member influence is working as needed.

The Court should reject Defendants’ attempts to reframe and redefine what OutServe must show for standing purposes. Member leadership and influence is well supported.

### **3. Members finance OutServe activities.**

On member financing, Defendants once again attempt to improperly tighten the legal standard that OutServe must meet. Citing no authority, Defendants argue that members must

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<sup>7</sup> Defendants’ Supplemental Brief also shows that the complaints of local members were heard, and the member feedback resulted in organizational change: namely, the selection of additional board members to increase the “mil/vet/spouse representation.” *See* Defs.’ Supp. Br. at 10 (noting that in January 2019, OutServe added several new board members that met identity requirements).

“fully or primarily fund the organization or this litigation.” Defs.’ Supp. Br. at 19. This is not correct: even where an organization is “funded primarily by [a third party], and not by its constituents,” it may still qualify as the functional equivalent of a membership organization. *Mink*, 322 F.3d at 1111; *see also AARP v. EEOC*, 226 F. Supp. 7, 17 (D.D.C. 2016) (finding that an organization satisfied the indicia of membership criteria where membership financing accounted for 19% of total revenue).

As noted above, OutServe was unable to obtain complete donation records because vendors failed to respond to requests for information. *See* Ex. B, Blevins 7.2.19 Dep. 300:15-22. But prior testimony—that members constitute 75% of donations—remains uncontradicted. Defendants did not challenge that testimony, and all they do now is decry the lack of documentary evidence to support it.<sup>8</sup>

In sum, Defendants’ attempt to impose a higher burden on Plaintiffs to show associational standing—and shift the goalposts to make that showing more difficult—should be rejected. Plaintiffs have satisfied their burden, and Defendants’ arguments fail.

#### **IV. CONCLUSION**

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

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<sup>8</sup> In his original deposition, OutServe’s Executive Director provided the basis for his testimony on the 75% number, stating that it was based on “firsthand knowledge” of the people on the donor list. That is, “[l]ooking over the document, [he] know[s] that [each donor is] a service member” or not. *See* Ex. A, Blevins 2.28.19 Dep. 167:16-168:20.

Dated: July 19, 2019

/s/ Scott Schoettes

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Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I certify that, on the 19th 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 19, 2019

Respectfully submitted,

/s/ John Harding

# EXHIBIT A

*Excerpts from February 28, 2019 Deposition of  
Anthony Blevins*

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF VIRGINIA  
3 ALEXANDRIA DIVISION

4 - - - - - x

5 NICHOLAS HARRISON, et :

6 al., :

7 Plaintiffs, :

8 v. :

9 PATRICK M. SHANAHAN, in : No

10 his official capacity as : 1:18-cv-641-LMB-IDD

11 Acting Secretary of :

12 Defense, et al., :

13 Defendants. :

14 - - - - - x

15 (Caption continued on next page)

16 CONTAINS CONFIDENTIAL INFORMATION

17 Deposition of OUTSERVE-SLDN, INC.,

18 By and through its Designated Representative

19 ANTHONY BLEVINS

20 Washington, D.C.

21 Thursday, February 28, 2019

22 9:35 a.m.

23 Job No.: 262768

24 Pages: 1 - 236

25 Reported By: Jessica Croxford, RPR

1 (Caption continued from previous page)  
2 - - - - - x  
3 RICHARD ROE; VICTOR VOE; :  
4 and OUTSERVE-SLDN, INC., :  
5 Plaintiffs, :  
6 v. :  
7 PATRICK M. SHANAHAN, in :  
8 his official capacity as : No.  
9 Acting Secretary of : 1:18-cv-1565-LMB-  
10 Defense; HEATHER A. : IDD  
11 WILSON, in her official :  
12 capacity as Secretary of :  
13 the Air Force; and the :  
14 UNITED STATES DEPARTMENT :  
15 OF DEFENSE, :  
16 Defendants. :

17 - - - - - x

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1 Deposition of ANTHONY BLEVINS held at the  
2 offices of:

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U.S. Department of Justice  
1100 L Street, NW  
Washington, D.C. 20005  
(202) 307-0334

Pursuant to notice, before Jessica Croxford,  
RPR, Notary Public in and for the District of  
Columbia.

1                   A P P E A R A N C E S

2   ON BEHALF OF PLAINTIFF OUTSERVE-SLDN, INC:

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8

9   ON BEHALF OF THE DEFENDANTS:

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11          KERI L. BERMAN, ESQUIRE

12          U.S. DEPARTMENT OF JUSTICE

13          CIVIL DIVISION

14          1100 L STREET, NW

15          WASHINGTON, D.C. 20005

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17

18

19                               - - -

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1 groups advertised or marketed in any way?

2 A Solely by virtue of highlighting them  
3 through social media, in our newsletter, and on  
4 our website, and then the lists that we have on  
5 our website.

6 Q How do your moderators -- when somebody  
7 makes a join request to the group, how do your  
8 moderators determine whether they should be  
9 allowed to join?

10 A So anonymity and protection of my  
11 members is of chief importance to me, so we vet  
12 them. We make sure that they actually do fall  
13 into those identity categories, and those are  
14 through conversations with the individual. Or  
15 if, for example, they're a well-known member  
16 that is transferring from Germany to Colorado,  
17 we don't need to re-vet them, and that they  
18 identify with one of these areas of service as  
19 well.

20 Q So by conversations, how are those  
21 conversations held? Phone? In person?

22 A Yeah. It varies on the person. It can  
23 be via phone. It can be via Skype or  
24 BlueJeans.

25 Q Would you ever allow somebody to join

1 the groups by virtue of electronic  
2 communication only?

3 A Only if they were previously vetted.

4 Q Okay. How do you confirm somebody is  
5 HIV-positive to join the HIV-positive group?

6 A So we don't require them to submit their  
7 medical documentation by any means. But  
8 because that's one of the more sensitive  
9 groups, the leader's private, so they need to  
10 be added by a member of the staff or a chapter  
11 leader directly so that they can't, for  
12 example -- so on our website, we list "Andy  
13 Blevins is the chapter leader of Colorado. You  
14 can contact him here." Because the  
15 HIV-positive group is so sensitive, we don't do  
16 that. We say "listed privacy." So a member of  
17 the staff would take care of that.

18 Q What -- I know that many people on  
19 Facebook use their full names, but there are  
20 other people that use pseudonyms or initials as  
21 their Facebook identity.

22 Are people allowed to join your private  
23 groups if their Facebook identity is a  
24 pseudonym?

25 A I mean, we would vet them to make sure,

1 you know, that they still fall within that.  
2 But we don't discriminate based on the name  
3 they use on Facebook, no.

4 Q Okay. So it's possible that the other  
5 members of the group might not exactly know who  
6 else is in the group?

7 A No. I would not say that. So  
8 especially -- since we're talking about HIV  
9 forums specifically, I'll use that.

10 The HIV forum is very small.  
11 Everybody -- it is very interactive in that.  
12 We don't have "lurkers," I would call it, or  
13 people who -- like, "what is he doing here"  
14 because we worry about the comfort of folks.  
15 Every time we add somebody to one of those  
16 forums, we introduce them as well.

17 Q How many people are in your Positive  
18 Forum?

19 A I think it's about 90 right now.

20 Q Okay. Is there -- has there been, like,  
21 a kind of a max and min size? Has it grown and  
22 contracted?

23 A It's been between like 75 and 100.  
24 Obviously, when we found it seven years ago, it  
25 was much smaller, but --

1 team.

2 Q Which would include Lambda Legal?

3 A That would include Lambda Legal.

4 Q Do we need to take another break or do  
5 you want to keep going?

6 A Can I get more water?

7 (A recess was taken.)

8 BY MS. CUTRI-KOHART:

9 Q So I want to go back to donations.

10 Since donating when combined with the  
11 identity of being LGBT and a member of the  
12 service makes you a member, can you quantify in  
13 some way how many donations would come from  
14 people who would not become a member after they  
15 donate?

16 A So folks that are not part of the  
17 service and identities, I would approximate  
18 about 75 percent of our donations come from  
19 people we consider members and the other  
20 25 percent come from folks we consider allies.

21 Q Okay. And then I just want to kind of  
22 clean up a few things about membership before  
23 we move on to the next subject.

24 You do not maintain a list of all the  
25 members of OutServe; is that correct? One

1 list?

2 A One -- no, we do not have one list.

3 Q And members are not required to register  
4 with OutServe in any way as a member?

5 A No.

6 Q There are -- you do have a list of  
7 donors, however?

8 A Yes.

9 Q And on that list, you can identify which  
10 donors have become members of OutServe and  
11 which ones haven't?

12 A We do not mark on that list if they are  
13 a member, no.

14 Q So how do you identify from your donors  
15 which ones have become members?

16 A That's usually from firsthand knowledge  
17 of the individual. Looking over the document,  
18 they know that they're a service member or a  
19 military spouse, or we will need to -- if we  
20 need to, we'll vet them and go back and check.

21 Q And then in terms of memberships in the  
22 forums or local chapters, you only really  
23 maintain a list of people who are not in your  
24 social media group?

25 A Correct.