

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

NICHOLAS HARRISON; and OUTSERVE-)
SLDN, INC.,)
)
Plaintiffs,)

v.)

RICHARD V. SPENCER, in his official)
capacity as Acting Secretary of Defense;)
MARK T. ESPER, in his official capacity as)
Secretary of the Army; and the UNITED)
STATES DEPARTMENT OF DEFENSE,)
)
Defendants.)

No. 1:18-cv-641-LMB-IDD

RICHARD ROE; VICTOR VOE; and)
OUTSERVE-SLDN, INC.,)
)
Plaintiffs,)

v.)

RICHARD V. SPENCER, in his official)
capacity as Acting Secretary of Defense;)
MATTHEW P. DONOVAN, in his official)
capacity as acting Secretary of the Air Force;)
and the UNITED STATES DEPARTMENT)
OF DEFENSE,)
)
Defendants.)

No. 1:18-cv-1565-LMB-IDD

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



TABLE OF CONTENTS

INTRODUCTION.....1

ARGUMENT.....2

I. OUTSERVE LACKS STANDING TO BRING SUIT ON BEHALF OF ITS
PURPORTED MEMBERS.....2

II. OUTSERVE’S THEORY OF DIRECT INJURY SHOULD BE REJECTED.7

A. Plaintiffs do not meet their burden to establish that OutServe suffered injuries
sufficient for Article III standing.8

B. OutServe’s purported direct injuries resulted from their own resource allocation
decisions, and are therefore legally insufficient to establish standing.....9

1. *Lane* is controlling, on-point precedent.9

2. OutServe’s purported injuries are the self-inflicted result of prioritizing
competing organizational programs, which is not a cognizable injury.12

3. The evidence demonstrates that OutServe’s increased volume of legal services
requests is not cognizable harm and is the result of its own publicity, not
Defendants’ policies.13

4. The evidence demonstrates that OutServe’s alleged program delays were
caused by Plaintiffs’ decisions, not Defendants’ policies.....15

C. Many alleged injuries were incurred after Plaintiffs filed suit.16

CONCLUSION.....17



INTRODUCTION

It is now readily apparent that Plaintiffs cannot demonstrate that OutServe-SLDN (“OutServe”) has standing. After a month of supplemental discovery, Plaintiffs have failed to provide any additional satisfactory evidence in support of standing. Instead, the brief merely retreads the same legal arguments made in Plaintiffs’ original opposition, largely relying on uncorroborated and self-serving interrogatory responses and deposition testimony. The Court should reject these arguments and dismiss OutServe from the *Harrison* and *Roe* cases for lack of standing.

OutServe brought suit in an exclusively representational capacity, seeking to assert the interests of its purported members. *See* Defs.’ Mem. in Supp. Renewed Mot. to Dismiss OutServe 29-30 (“Defs.’ Mem.”), *Harrison* ECF No. 155; *Roe* ECF No.; Defs.’ Reply Supp. Renewed Mot. to Dismiss OutServe 16-20 (“Reply Br.”), *Harrison* ECF No. 177; *Roe* ECF No. 137. During the supplemental discovery period, Plaintiffs produced no additional evidence in support of their assertions that OutServe is a traditional membership organization or even the functional equivalent of one. Indeed, Plaintiffs’ only argument is that it should be considered the functional equivalent of a membership organization under the laxer indicia of membership factors applied in two circuits to Protection & Advocacy (“P&A”) Systems. Not only has the Court already questioned the validity of extending this analysis, which applies to organizations serving developmentally disabled and mentally ill clients, to OutServe, but even if the Court ultimately did so, OutServe’s evidence fails to establish standing even under this reduced standard.

Plaintiffs’ supplemental brief focuses primarily on their unpled theory that OutServe has suffered a direct injury caused by Defendants’ policies. Though the failure to plead this jurisdictional basis for its claims is fatal, even if the Court were to consider direct injury, OutServe’s arguments fail under controlling Fourth Circuit precedent. Contrary to Plaintiffs’ recycled legal



arguments, a self-inflicted diversion of resources is insufficient to establish standing. Furthermore, Plaintiffs' claims of injury are unsupported by evidence, with the exception of a self-serving, uncorroborated supplemental interrogatory response and the conclusory testimony of OutServe's Executive Director. In short, OutServe's assertions of direct injury simply do not hold up legally or factually. Because OutServe lacks standing as a representative of its members and it has suffered no direct injury, it should be dismissed as a Plaintiff in both the *Harrison* and *Roe* suits.

ARGUMENT

I. OUTSERVE LACKS STANDING TO BRING SUIT ON BEHALF OF ITS PURPORTED MEMBERS.

For the reasons Defendants have previously set forth, OutServe is not a traditional voluntary membership organization.¹ *See* Defs.' Mem. 17-26; Reply Br. 10-15; Defs.' Supp. Br. in Support of Defs.' Renewed Mot. to Dismiss Pl. OutServe-SLDN 4-9 ("Defs.' Supp. Br."), *Harrison* ECF No. 210, *Roe* ECF No. 192. Plaintiffs invite the Court to find that OutServe is the functional equivalent of a traditional membership organization, re-arguing their position that the Court should adopt an unprecedented expansion of "indicia of membership" based on the relaxed standard permitted by some Circuits for federally-authorized P&A Systems. *See* Pls.' Supp. Br. 12-15 (citing *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1110 (9th Cir. 2003) and *Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999)). The Fourth Circuit has never recognized such an expansion to the indicia of membership analysis. Similar attempts at expansion of that theory have been rejected – even by courts that recognize this exception – and such an expansion should be rejected here. *See Ass'n for Retarded Citizens of Dall. v. Dall. Cty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th

¹ While Plaintiffs state that they "are not abandoning" their claim to be a traditional membership organization, they have failed to identify any supplemental evidence in support of their assertion. Accordingly, Plaintiffs continue to press only "whether OutServe represents individuals who have the 'indicia of membership.'" *See* Pls.' Supp. Br. in Opp. to Defs.' Renewed Mots. to Dismiss Pl. OutServe-SLDN 12 n.7 ("Pls.' Supp. Br."), *Harrison* ECF No. 205, *Roe* ECF No. 187.

Cir. 1994) (concluding that the P&A system bears “no relationship to [a] traditional membership group”); *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 810 (8th Cir. 2007) (same); *Disability Advocates, Inc. v. N. Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 158 (2d Cir. 2012) (rejecting the relaxed interpretation of indicia of membership test outside of the context of a P&A System).² The Court should decline Plaintiffs’ invitation to draw an analogy between a P&A System, which operates under federal authorization and has an organizational structure defined by statute, and OutServe, which does not have any similar statutory mandate. *See* Reply Br. 8-10. As the Court noted during the hearing on the motion to dismiss, Plaintiffs’ proposed interpretation would eviscerate meaningful standing requirements for any advocacy organization. Ex. ZZ, Hr’g Tr. 23:23-25:19. However, even if the Court were to analyze OutServe under the standards applied in the P&A System cases, the supplemental evidence confirms that OutServe does not meet even this more relaxed standard.³

First, although the *Hunt* indicia-of-membership analysis requires that the organization’s Board of Directors be composed entirely of members of the organization, Plaintiffs argue that OutServe should be judged according to the less stringent standards applicable to the Boards of

² The Plaintiffs make a brief attempt to argue that the circuit decisions inapposite to *Mink* and *Stincer* are incorrectly decided because “constituents” of a P&A System should be viewed as members. *See* Pls.’s Supp. Br. 15 n.8. On the contrary, these courts recognized that there is a clear distinction between constituents who benefit from the services of an organization designed to help them and members who possess full control of the organization under the *Hunt* indicia-of-membership analysis. The same reasoning is applicable to OutServe’s purported members – their relationship with the national organization is more aligned with that of a constituent than a member.

³ Defendants reject Plaintiffs’ implication that LGBTQ or HIV-positive service members are ill-equipped for exclusive self-governance in the same way as the indigent criminal defendants who have been found mentally incompetent in *Mink*, 322 F.3d at 1110, or the mentally ill patients represented in *Stincer*, 175 F.3d at 886, just because those marginalized populations are capable of “some level” of self-advocacy. Pls.’ Supp. Br. 15

P&A Systems. *See Wash. State Apple Advert. Comm'n v. Hunt*, 432 U.S. 333, 344-45 (1977). P&A Systems are created by federal statute, and the regulations expressly permit a Board to include non-members, but only if the non-members constitute a minority of the Board and “broadly represent or are knowledgeable about the needs of the clients served by the P&A system.”⁴ 42 C.F.R. § 51.22. Of course, OutServe’s Board does not operate under any specific statute or regulation limiting the service of non-members to a minority of the total composition of the Board. And OutServe’s assertions that the Board is sometimes made up of a “significant majority” of individuals who meet the identity requirements of OutServe membership is not supported by the record. *See* Defs.’ Supp. Br. 10 (citing Ex. U, Pls.’ Resps. Second Interrogs. No. 7). Rather, the documents produced by Plaintiffs indicate that, at the time the *Harrison* and *Roe* suits were filed, only 8 of the 15 Board members met the identity requirement, the smallest possible majority.⁵ *See* Pls.’ Resps. Second Interrogs. No. 7.

Plaintiffs shift to arguing instead that permitting “allies of the LGBTQ community” to join its Board is the same as having Board Members that are knowledgeable about the needs of its clients as required in the P&A System context. Pls.’ Supp. Br. 13-14. But Plaintiffs offer no explanation or evidence regarding how “allies of the LGBTQ community” possesses any particular knowledge of

⁴ The proper meaning of the phrase “knowledgeable about the needs of the clients” can be gleaned from the description of the membership in the P&A System advisory council. That description indicates that such individuals would include “attorneys, mental health professionals, individuals from the public who are knowledgeable about mental illness, [and] provider[s] of mental health services.” 42 U.S.C. § 10805(a)(6)(B).

⁵



OutServe’s clients or even a broad-based ability to understand and represent the needs of LGBTQ or HIV-positive servicemembers or veterans.

In any event, the evidence establishes that OutServe’s Board Members are not selected because of their specialized knowledge about OutServe’s clients; instead, they are selected for their lobbying and/or fundraising capabilities. *See* Defs.’ Supp. Br. 11-12 & n.12. The nomination forms for recent OutServe Board Members demonstrate this point. [REDACTED]

[REDACTED]

Plaintiffs also suggest that OutServe is like a P&A System organization because OutServe allows relatives of its constituents to serve on its Board. But, P&A Systems permit family members and guardians on the Board only because the organizations’ clients may not be able to represent themselves. Plaintiffs do not contend that the same is true of an LGBTQ or HIV-positive service member.

Second, Plaintiffs’ argument that the existence of its Military Advisory Council (“MAC”) provides the same feedback that the statutorily required advisory council in P&A systems also fails. As an initial matter, the supplemental evidence demonstrates there was no MAC at the time the

[REDACTED]

Harrison suit was filed, so it should not even be considered in that case. *See* Defs.’ Supp. Br. 5 (citing Ex. Z, Minutes of Inaugural MAC Meeting, Oct. 30, 2018). To the extent that the Court considers the MAC in *Roe*, the MAC is not analogous to the advisory councils in P&A Systems. A P&A System advisory council advises the organization on “policies and priorities.” There is no record evidence that the MAC has ever advised OutServe on its policies and priorities in any meaningful sense. *See* Defs.’ Supp. Br. 17-18 (citing Ex. Y, July 2, 2019 Deposition of Anthony Blevins 72:12-73:7, 87:4-89:13 (“Blevins Second Dep.”)).

Third, although Plaintiffs attempt to offer additional argument that OutServe is “subject to the influence of those it seeks to represent,” that assertion is completely uncorroborated and, in fact, contradicted by record evidence. [REDACTED]

[REDACTED] Finally, the Court should reject any argument that OutServe receives and responds to feedback via email or Facebook, *see* Pls.’ Supp. Br. 14, because, despite having had the opportunity, Plaintiffs have refused to provide any evidence supporting this assertion. *See* Defs.’ Supp. Br. 14 (citing Ex. AAA, Pls.’ Objs. to Defs.’ Second Reqs. for Prod. No. 40).

Fourth, OutServe’s organization is unlike that of the P&A Systems in other meaningful ways. Plaintiffs argue that, like a P&A System, OutServe provides a direct conduit for its clients to contact it. *See* Pls.’ Supp. Br. 14. But, unlike a P&A System, OutServe’s client contact system lacks the critical feature of providing a grievance process, where clients who are not adequately served can appeal a decision. *See Mink*, 322 F.3d at 1110 (citing 42 U.S.C. § 10805); *Stincer*, 175 F.3d at 886 (same). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Here again the evidence demonstrates that OutServe’s unelected leaders run the organization without any meaningful buy-in from its purported members.

For all the foregoing reasons, OutServe has failed to meet its burden to establish that it is a traditional voluntary membership organization or that its purported members possess the indicia of membership as the *Hunt* analysis requires. *See* Defs.’ Mot. 8-29, Reply Br. 2-16, Defs.’ Supp. Br. 2-20. In fact, OutServe’s evidence fails to demonstrate that its purported members have even the level of self-governance allowed under the more relaxed standard used for P&A Systems. Accordingly, OutServe does not have standing to represent its purported members.

II. OUTSERVE’S THEORY OF DIRECT INJURY SHOULD BE REJECTED.

“In determining whether an organization has standing,” the Court “must conduct the same inquiry as in the case of an individual.” *Lane*, 703 F.3d at 674 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982)). In the context of direct injury to an organization, the focus is whether the defendants’ allegedly wrongful conduct causes an “increase [in] the resources [the organization] must devote to programs independent of its suit” against the defendant. *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (citing *Havens*, 455 U.S. at 379); *see also Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1140-41 (D.C. Cir. 2011) (“[T]he diversion of resources to litigation or investigation in anticipation of litigation does not constitute an injury in fact sufficient to support standing . . .”).

Plaintiffs’ un-pled theory of direct injury fails on multiple independent grounds. At the outset, Plaintiffs’ pleading omission is fatal. *See* Reply Br. 16-17. Further, Plaintiffs do not meet

their burden of proof to establish that OutServe suffered a legally cognizable injury or show that Defendants' policies caused OutServe's alleged injuries. Although Plaintiffs argue that a "raft" of OutServe's programs and services have been delayed as a direct result of OutServe's alleged diversion of resources, *see* Pls.' Supp. Br. 4-5, 9, the critical flaw in this argument is that this was the result of a voluntary choice, which is insufficient to establish direct injury.

A. Plaintiffs do not meet their burden to establish that OutServe suffered injuries sufficient for Article III standing.

Plaintiffs bear the burden of proof to establish standing "with the manner and degree of evidence required at the successive stages of litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Yet, Plaintiffs' Opposition and Supplemental Brief still make a number of allegations that OutServe suffered injury to its programs with no corroborating documentary evidence of the program's existence, the plans it had for the program, or any delay. *See* Defs.' Supp. Br. 25. At this stage of litigation, OutServe cannot establish an injury sufficient for Article III standing through bare, uncorroborated assertions of delays to undocumented, unscheduled new initiatives.

[REDACTED]

[REDACTED]

Lane involved claims of a direct injury arising from an organizational plaintiff, SAF, which is a “non-profit membership organization” with a purpose that 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.” *Lane*, 703 F.3d at 671 (citation omitted). Like OutServe, SAF’s organizational purposes included advocacy, education, and legal action. *Id.* Like OutServe, SAF claimed that it had to “expend resources” to respond to challenged laws. *Id.* And like OutServe, SAF claimed it was injured because it had to respond to legal inquiries from its members regarding the operation and consequences of the challenged policies. But those facts, according to the Fourth Circuit, do not constitute a “diversion of resources” sufficient to establish standing. *Id.* at 675. Indeed, the Fourth Circuit reasoned that a contrary holding “would be to imply standing for organizations with merely ‘abstract concern[s] with a subject that could be affected by an adjudication.’” *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976)).

Plaintiffs’ argument that *Lane* is distinguishable falls flat. *See* Pls.’ Supp. Br. 8-11. First, Plaintiffs argue that OutServe’s situation is different because it has specifically identified programs that were delayed by its diversion of resources, whereas SAF argued only that the diversion of resources had reduced the funds it had available for its other programs. *See* Pls.’ Supp. Br. 9. That distinction is semantic, nothing more. If an organization with multiple purposes and programs loses funds, there must be some program that will receive less resources than might have otherwise been available. There is no basis in the *Lane* opinion to believe that the Fourth Circuit would have found standing had SAF specifically named the programs that had lost funds. *See Lane*, 703 F.3d at 675 (quoting *Fair Emp’t Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994)).

Second, Plaintiffs have no basis to argue that OutServe’s situation is distinguishable because

OutServe is “more” of a legal services organization than SAF. *See* Pls.’ Supp. Br. 9. In *Lane*, the Fourth Circuit found it sufficient that “legal action” was one of SAF’s purposes. *See Lane*, 703 F.3d at 675. In this regard, SAF and OutServe are in the same position. Both organizations joined lawsuits as plaintiffs because their organizational purposes included impact litigation. *Id.*

Third, Plaintiffs argue that the issue of “bootstrap[ping]” standing is not an issue here, because OutServe is not expending resources specifically to establish standing. Pls.’ Supp. Br. 9. But that contention fails as a matter of fact and law. OutServe did not even plead this theory of injury and raises it only after suit commenced – a clear indication it was a post hoc attempt to manufacture standing on this theory. As evidence of this, Plaintiffs cite multiple instances of delays to programs that were not even conceived until after OutServe brought suit. *See infra* II.C.

Accordingly, any alleged strain on OutServe’s resources is exactly the type of bootstrapping that *Lane* warns against. *See Lane*, 703 F.3d at 675 (citing *Ass’n for Retarded Citizens of Dallas*, 19 F.3d at 244 (observing that if a court finds standing for an organization that redirects some of its resources to litigation and legal counseling in response to actions of another party would “impl[y] that any sincere plaintiff could bootstrap standing by expending its resources in response to actions of another”)). In any event, even if the alleged diversions at issue were not akin to the bootstrapping of standing, they remain voluntary choices – not actions caused or compelled by governmental action – and would remain insufficient to establish standing on a diversion of resources theory under governing precedent.

Finally, even if the Court were to follow Ninth Circuit rather than Fourth Circuit precedent in analyzing OutServe’s claims of direct injury, OutServe’s allegations still fail. The Ninth Circuit requires an organization to suffer *both* a diversion of its resources and a frustration of its mission. *See La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). Because OutServe’s core mission is to provide direct legal services to HIV-positive service

members, it cannot possibly claim that providing such advice is a frustration of its purpose. *See* Ex. A, Pl. OutServe’s Resp. to Defs.’ Interrogs. No. 2; *see also* *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 285-86 (3d Cir. 2014) (“additional expenditures . . . consistent with [an organization’s] typical activities” are not an injury); *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010) (actions that did not “differ from the [organization]’s routine . . . activities” did not confer standing); *Knowledge Ecology Int’l v. Nat. Insts. of Health*, No. PJM 18-1130, 2019 WL 1585285, at *6 (D. Md. Apr. 11, 2019) (finding no standing because providing advice about the challenged policies was “very much in line with [the organization’s] core mission.”). Accepting Plaintiffs’ argument would open the door to any legal services organization to claim injury in the same manner.

2. OutServe’s purported injuries are the self-inflicted result of prioritizing competing organizational programs, which is not a cognizable injury.

Standing may not be based on a plaintiff’s self-inflicted injury. *See Clapper v. Amnesty Int’l, Inc.*, 568 U.S. 398, 415-18 (2013). Plaintiffs admit that OutServe’s diversion of resources resulted from a “shift in priorities.” Pls.’ Supp. Br. 3. But Plaintiffs’ assertion that OutServe was “forced” to make this decision because of the government’s policy is squarely contrary to law and the record evidence. An organization “cannot manufacture the injury [needed for standing] by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all.” *See La Asociacion de Trabajadores de Lake Forest*, 624 F.3d at 1088. Moreover, all the policies being challenged, except for DoDI 1332.45, were in place when OutServe expanded its mission to include HIV advocacy, and challenging the accessions policy was a knowing choice as part of its expansion. *See* Defs.’ Supp. Br. 23.

Further, in their supplemental briefing, Plaintiffs confirm that OutServe makes “tough choices about which policy initiatives to push in Congress, and what legal work must take priority.” Pls.’ Supp. Br. 5. But Plaintiffs still fail to explain how this sort of system is any different than those

choices made by all organizations operating with fixed resources. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] An organization making normal operational choices in determining how to pursue its internal objectives is insufficient to give rise to Article III standing. *See Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 n.4 (D.C. Cir. 2005) (organization's "mere interest in a problem, no matter how longstanding[,] . . . is not sufficient by itself" for standing (citation omitted)); *see also Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 542 (S.D.N.Y. 2006) ("[Plaintiff's] entire reason for being is to pursue the sort of advocacy . . . that it has pursued in this case [Plaintiff] simply made a choice about where and how to spend its limited resources.").

3. The evidence demonstrates that OutServe's increased volume of legal services requests is not cognizable harm and is the result of its own publicity, not Defendants' policies.

Next, Plaintiffs allege that OutServe suffered an injury in the form of a "massive increase in legal-services requests" related to the military's HIV policies, despite its organizational goal to increase its provision of legal services. *See* Pls.' Supp. Br. 9. But the limited record tells a different tale.⁶ [REDACTED]

⁶ Defendants primarily rely on OutServe's summary responses in its interrogatory because Plaintiffs did not produce redacted client files or call records to support its assertion that its requests for legal services were related to the accessions, retention, and deployment policies challenged in *Harrison* and *Roe*. *See* Defs.' Supp. Br. 3-4 (citing Defs.' Second Reqs. for Prod. Nos. 43-44). [REDACTED]

[REDACTED] Thus, the data

simply does not support any conclusion that OutServe's resources were strained by this relatively low call volume.

Indeed, if anything, the evidence reflects that voluntary actions by OutServe caused the increase in inquiries about the challenged policies. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Accordingly, Plaintiffs have failed to substantiate that Defendants' policies, and not OutServe's own publicity regarding these suits and its overall expansion of legal services, resulted in increased volume of legal services inquiries.

[REDACTED]

[REDACTED]

7 [REDACTED]

[REDACTED]

Furthermore, although OutServe complains about its alleged increase in requests for legal services, Plaintiffs offer no evidence that OutServe has suffered any cognizable injury because of the increase of the calls. [REDACTED]

[REDACTED]

4. The evidence demonstrates that OutServe's alleged program delays were caused by Plaintiffs' decisions, not Defendants' policies.

OutServe's claims of harms to its programs fare no better upon scrutiny. These program delays were created and perpetuated by its own decisions, not caused by Defendants' policies.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In any event, the alleged delays would not be sufficient to establish direct injury because most were incurred after the complaints were filed, *see infra* II.C, OutServe failed to corroborate the remaining alleged delays with any documentary evidence, *see supra* II.A, and those delays in any event cannot constitute direct injury as a matter of law, *see supra* II.B.1.

C. Many alleged injuries were incurred after Plaintiffs filed suit.

As a final matter, most of OutServe’s claims of delayed programs and services cannot be used to support a finding of direct injury because the alleged injuries were not incurred until after the Complaints were filed. To satisfy Article III, an injury in fact must be both “concrete and particularized” and “actual or imminent” at the time the plaintiff files suit. *Lujan*, 504 U.S. at 569 n.4 (“The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.”); *Doctors Nursing & Rehab. Ctr. v. Sebelius*, 613 F.3d 672, 677 (7th Cir.2010) (“[T]he general rule is that ‘we analyze jurisdiction based on the events at the time the case is brought.’” (quoting *Hukic v. Aurora Loan Svcs.*, 588 F.3d 420, 427 (7th Cir. 2009)))

The *Harrison* Complaint was filed on May 30, 2018, and the *Roe* Complaint was filed on December 18, 2018. Complaint, *Harrison* ECF No. 1; Complaint, *Roe* ECF No. 1. Alleged harms

[REDACTED]

that occurred after those dates cannot support standing. Yet Plaintiffs admit that many of its delays occurred after filing suit in one or both cases or did not provide evidence of when the delay occurred.¹⁰ See Pls.’ Supp. Br. 3-5.

To substantiate that delays occurred before filing suit, OutServe could have provided its client files, communications, and advocacy plans (with appropriate redactions), but it chose not to. This is so even though Defendants requested such records, the Court indicated that the records produced by Plaintiffs prior to the initial close of discovery were insufficient, and long-standing Fourth Circuit precedent requires OutServe to present such evidence. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1130 (4th Cir. 1987) (holding that, “[w]hen an inference can be supported by evidence to save it from the status of speculation,” then the “non-moving party should present that evidence”). Collectively, these program delays, which occurred after OutServe filed suit, cannot form the basis for the injury upon which the suits were based.

In sum, OutServe’s belated and un-pled theory of direct injury fails to establish its standing because it is based on self-inflicted organizational choices, many of which were incurred after filing suit, and, in any event, were not caused by Defendants’ policies.

CONCLUSION

For the foregoing reasons and those set forth in Defendants’ memorandum and reply memorandum in support of their Renewed Motion to Dismiss, the Court should dismiss OutServe as a plaintiff in the *Harrison* and *Roe* cases for lack of standing.

¹⁰ [REDACTED]

DATE: July 19 2019

Respectfully submitted,

G. ZACHARY TERWILLIGER
United States Attorney

/s/

R. TRENT MCCOTTER
Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3845
Fax: (703) 299-3983
trent.mccotter@usdoj.gov

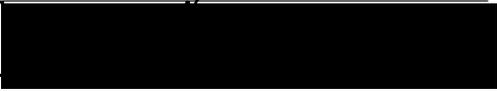
JOSEPH H. HUNT
Assistant Attorney General
Civil Division

ANTHONY J. COPPOLINO
Deputy Director
Federal Programs Branch

JOSHUA C. ABBUHL
KERI L. BERMAN
REBECCA CUTRI-KOHART
ROBERT M. NORWAY
Trial Attorneys
U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20530
Telephone: (202) 353-0889
Facsimile: (202) 616-8460
robert.m.norway@usdoj.gov

Counsel for Defendants

EXHIBIT BBB

OutServe-SLDN Board of Directors
Nomination Form 



[t] 202.328.3244 • [f] 202.797.1635
P.O. Box 65301 • Washington, D.C. • 20035-5301

STRONGER. TOGETHER.

Board of Directors

Form

Nomination

Date [REDACTED]

Name [REDACTED]
First MI Last Familiar name

Home
Address: [REDACTED]
Phone: [REDACTED] E-mail: [REDACTED]

Employer
Name: [REDACTED]
Position: [REDACTED]
Address: [REDACTED]
Phone: [REDACTED] E-mail: [REDACTED]
Type of business or organization: [REDACTED]

Preferred method of contact: [REDACTED]

Please list boards and committees that you serve on, or have served on (business, civic, community, fraternal, political, professional, recreational, religious, social).

Organization	Role/Title	Dates of Service
[REDACTED]	[REDACTED]	[REDACTED]

Education background/Awards and honors (Military background if applicable)

[REDACTED]



OutServe-SLDN.org

/OutServe.SLDN @OutServeSLDN

Where specifically does your interest lay in board activities? (i.e. development, special events, community outreach, PR, Policy, leadership)

[Redacted]

As with most non-profits there is a suggested “give or get” for each board member. Are you willing to accept this commitment?

[Redacted]

Please describe some of the skills you possess and how you feel these skills may be valuable in your role as a board member.

[Redacted]

What motivates you to seek a position on the Board of Directors for OutServe-SLDN?

[Redacted]

Do you have any questions concerning the Director’s Position Description?

[Redacted]

Please tell us anything else you’d like to share.

[Redacted]

Thank you very much for applying



OutServe-SLDN.org

/OutServe.SLDN

@OutServeSLDN

Please note: It is not unusual for many people to be nominated for a few open Board positions. A rigorous selection process follows nominations, including screening, interviews, reference checks, and matching applicants with current Board needs.



OutServe-SLDN.org

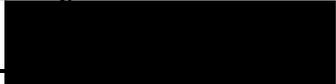


/OutServe.SLDN



@OutServeSLDN

EXHIBIT CCC

OutServe-SLDN Board of Directors
Nomination Form for 



[t] 202.328.3244 • [f] 202.797.1635
P.O. Box 65301 • Washington, D.C. • 20035-5301

STRONGER. TOGETHER.

Name

First MI Last Familiar name

Home

Address: _____

Phone: _____

E-mail: _____

Employer

Name: _____

Position: _____

Address: _____

Phone: _____ E-mail: _____

Type of business or organization: _____

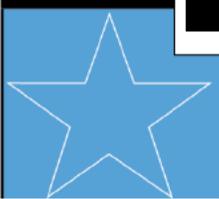
Preferred method of contact: _____

Please list boards and committees that you serve on, or have served on (business, civic, community, fraternal, political, professional, recreational, religious, social).

Organization	Role/Title	Dates of Service
[REDACTED]		

Education background/Awards and honors (Military background if applicable)

[REDACTED]



OutServe-SLDN.org

/OutServe.SLDN @OutServeSLDN

Where specifically does your interest lay in board activities? (i.e. development, special events, community outreach, PR, Policy, leadership)

[Redacted]

As with most non-profits there is a suggested “give or get” for each board member. Are you willing to accept this commitment?

[Redacted]



OutServe-SLDN.org

 /OutServe.SLDN

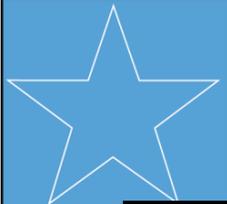
 @OutServeSLDN



OutServe-SLDN.org

 /OutServe.SLDN

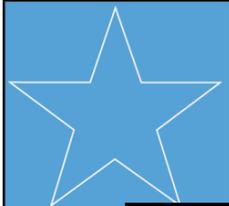
 @OutServeSLDN



OutServe-SLDN.org

 /OutServe.SLDN

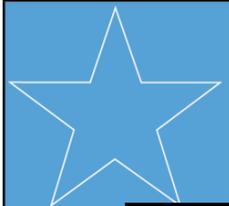
 @OutServeSLDN



OutServe-SLDN.org

 /OutServe.SLDN

 @OutServeSLDN



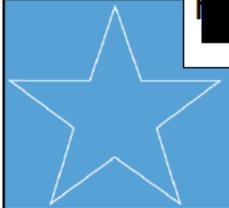
OutServe-SLDN.org

 /OutServe.SLDN

 @OutServeSLDN

Please describe some of the skills you possess and how you feel these skills may be valuable in

[Redacted text area]



What motivates you to seek a position on the Board of Directors for OutServe-SLDN?

[Redacted]

Do you have any questions concerning the Director's Position Description?

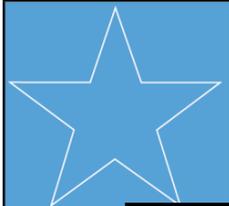
[Redacted]

Please tell us anything else you'd like to share.

[Redacted]

Thank you very much for applying

Please note: It is not unusual for many people to be nominated for a few open Board positions. A rigorous selection process follows nominations, including screening, interviews, reference checks, and matching applicants with current Board needs.



OutServe-SLDN.org

 /OutServe.SLDN

 @OutServeSLDN

EXHIBIT DDD

OutServe-SLDN Board of Directors
Nomination Form for 



[t] 202.328.3244 • [f] 202.797.1635
P.O. Box 65301 • Washington, D.C. • 20035-5301

STRONGER. TOGETHER.

Board of Directors Nomination Form

Date _____
Name _____
First MI Last Familiar name

Home
Address: _____
Phone: _____ **E-mail:** _____

Employer
Name: _____
Position: _____
Address: _____
Phone: _____ **E-mail:** _____
Type of business or organization: _____

Preferred method of contact: _____

Please list boards and committees that you serve on, or have served on (business, civic, community, fraternal, political, professional, recreational, religious, social).

Organization Role/Title Dates of Service

[Redacted table content]

Education background/Awards and honors (Military background if applicable)

[Redacted content]



OutServe-SLDN.org

/OutServe.SLDN @OutServeSLDN

[Redacted]

Where specifically does your interest lay in board activities? (i.e. development, special events, community outreach, PR, Policy, leadership)

[Redacted]

As with most non-profits there is a suggested “give or get” for each board member. Are you willing to accept this commitment?

[Redacted]

Please describe some of the skills you possess and how you feel these skills may be valuable in your role as a board member.

[Redacted]

What motivates you to seek a position on the Board of Directors for OutServe-SLDN?

[Redacted]

Do you have any questions concerning the Director’s Position Description?

[Redacted]

Please tell us anything else you’d like to share

[Redacted]

Thank you very much for applying

Please note: It is not unusual for many people to be nominated for a few open Board positions. A rigorous selection process follows nominations, including screening, interviews, reference checks, and matching applicants with current Board needs.



OutServe-SLDN.org

 /OutServe.SLDN  @OutServeSLDN

EXHIBIT EEE

OutServe-SLDN Board of Directors
Nomination Form for 



[t] 202.328.3244 • [f] 202.797.1635
P.O. Box 65301 • Washington, D.C. • 20035-5301

STRONGER. TOGETHER.

Board of Directors Nomination Form

Date [REDACTED]

Name [REDACTED]
First MI Last Familiar name

Home Address: [REDACTED]
Phone: [REDACTED] E-mail: [REDACTED]

Employer Name: [REDACTED]
Position: [REDACTED]
Address: [REDACTED]
Phone: [REDACTED] E-mail: [REDACTED]
Type of business or organization: [REDACTED]

Preferred method of contact: [REDACTED]

Please list boards and committees that you serve on, or have served on (business, civic, community, fraternal, political, professional, recreational, religious, social).

Organization	Role/Title	Dates of Service
[REDACTED]	[REDACTED]	[REDACTED]

Education background/Awards and honors (Military background if applicable)
[REDACTED]



OutServe-SLDN.org

/OutServe.SLDN @OutServeSLDN

Where specifically does your interest lay in board activities? (i.e. development, special events, community outreach, PR, Policy, leadership)

[Redacted]

As with most non-profits there is a suggested “give or get” for each board member. Are you willing to accept this commitment?

[Redacted]

Please describe some of the skills you possess and how you feel these skills may be valuable in your role as a board member.

[Redacted]

What motivates you to seek a position on the Board of Directors for OutServe-SLDN?

[Redacted]

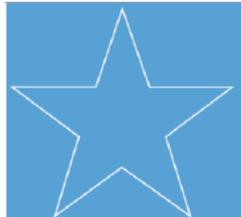
Do you have any questions concerning the Director’s Position Description?

[Redacted]

Please tell us anything else you’d like to share.

Thank you very much for applying

Please note: It is not unusual for many people to be nominated for a few open Board positions. A rigorous selection process follows nominations, including screening, interviews, reference checks, and matching applicants with current Board needs.



OutServe-SLDN.org

 /OutServe.SLDN

 @OutServeSLDN



EXHIBIT FFF

Blevins Second Deposition Additional Pages

1 STATES DEPARTMENT OF DEFENSE, :
2 Defendants. :

3 - - - - - X

4 Washington, DC

5 Tuesday, July 2, 2019

6 [REDACTED]

7 30(b)(6) Deposition of OutServe, Inc., by
8 and through its representative ANTHONY L. BLEVINS, a
9 witness herein, called for examination by counsel for
10 Defendants in the above-entitled matter, pursuant to
11 notice, the witness being duly sworn by Rebecca L.
12 Stonerock, a Notary Public in and for the District of
13 Columbia, taken at the offices of the United States
14 Department of Justice, 1100 L Street NW, Washington,
15 DC, at 9:35 a.m., Tuesday, July 2, 2019, and the
16 proceedings being taken down by Stenotype by Rebecca
17 L. Stonerock, RPR, and transcribed under her
18 direction.

19
20
21
22

1 APPEARANCES:

2

3 On behalf of the United States

4 Department of Justice:

5 REBECCA CUTRI-KOHART, ESQ.

6 KERI BERMAN, ESQ.

7 United States Department of Justice

8 1100 L Street NW

9 Washington, DC 20005

10 (202) 514-0265

11 rebecca.cutri-kohart@usdoj.gov

12

13 On behalf of OutServe and the witness:

14 PETER E. PERKOWSKI, ESQ.

15 OutServe-SLDN, Inc.

16 P.O. Box 65301

17 Washington, DC 20035-5301

18 (800) 538-7418

19 peterp@outserve.org

20

21 Also Present:

22 Claudia Murray, DOJ

1 Q. So it was an organizational goal to bring
2 in more legal -- requests for legal help?

3 A. Yes, ma'am.

4 Q. And it looks like you were fairly
5 successful in meeting that goal?

6 A. Yes.

7 Q. Were you targeting even more, or was this
8 about the type of numbers you were looking for?

9 A. This was more than we were expecting.

10 Q. Okay. What were you expecting?

11 A. [REDACTED].

12 Q. What -- besides reaching out to the
13 communities, what else did your -- OutServe do to
14 increase awareness of your legal services?

15 A. We tried to share stories from folks that
16 we had assisted with our -- like through Mailchimp
17 and on social media.

18 Q. And since this was 2017, were you sharing
19 any stories at this time about HIV services?

20 A. I don't think we had shared anything about
21 HIV at this point.

22 Q. [REDACTED]

1

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

4

Q. Was one of those people the one that says

5

one was an enlisted man denied a commission to the

6

JAG Corps. That was Plaintiff Harrison?

7

A. Yes.

8

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

12

[Redacted]

20

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

1 [REDACTED] [REDACTED] [REDACTED]
2 Q. Just to circle back, in the entirety of
3 2017, did any of your advertising or publications to
4 your general population advertise that your legal
5 services included HIV advocacy?

6 A. On our website -- when we verbally spoke
7 with folks, we let them know that we included HIV in
8 our mission. But that was the extent of it.

9 Q. So let's turn to 2018. Did you start
10 promoting or advertising that your legal services
11 included HIV in 2018?

12 A. Yes. It was listed on our website.

13 Q. And did you also include advertising that
14 either talked about Nick Harrison's situation or the
15 Harrison case regarding accessions?

16 A. We did share Mr. Harrison's story.

17 Q. And how about, did any of your advertising
18 or publication or information about legal services
19 talk about the Roe case and your work regarding
20 retention?

21 A. I don't recall.

22 Q. Did any of your advertising in 2018,

1 including publications or education about your legal
2 services, talk about the "deploy or get out" policy?

3 A. We did speak about the "deploy or get out"
4 policy, yes.

5 Q. How so?

6 A. We answered questions when people asked
7 about it.

8 Q. In terms of advertising or letting people
9 know that you were providing legal services, did you
10 let people know about the "deploy or get out" policy?

11 A. Not in terms of advertising. We do have
12 an HIV forum, though, which is -- we have those
13 chapters, we have a forum specifically for those that
14 are living with HIV. In there is when we let people
15 know that we offered these services. But on a
16 broader scale like through Mailchimp or something,
17 no.

18 Q. So in terms of your Facebook group, you
19 let the HIV-positive forum members know that you
20 provided litigation services?

21 A. Right. Right.

22 Q. Or legal advice?

1 A. Yes, ma'am.

2 [REDACTED]

[REDACTED]

[REDACTED]

3 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Q. And there's also an amicus brief. Is that
9 a new amicus brief or one we've talked about before?

10 A. I'm not sure. That would all be in
11 Mr. Perkowski's invoices, though.

12 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

22 [REDACTED]

1 [REDACTED]

10 BY MS. CUTRI-KOHART:

11 [REDACTED]

1 [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

7 [Redacted]

17 [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

1 [Redacted] [Redacted]

[Redacted]

[Redacted] [Redacted] [Redacted]

[Redacted]

5 [Redacted] [Redacted]

[Redacted] [Redacted] [Redacted]

[Redacted]

[Redacted] [Redacted] [Redacted]

[Redacted]

[Redacted]

[Redacted] [Redacted] [Redacted]

[Redacted] [Redacted] [Redacted]

[Redacted]

[Redacted]

[Redacted] [Redacted] [Redacted]

[Redacted]

[Redacted]

[Redacted] [Redacted] [Redacted]

[Redacted] [Redacted] [Redacted]

[Redacted]

[Redacted] [Redacted] [Redacted]

[Redacted]

[Redacted] [Redacted] [Redacted]

1 [REDACTED]

10 [REDACTED]

1 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

MR. PERKOWSKI: Can we go off the record?

9 MS. CUTRI-KOHART: Yes, we can go off the
10 record.

11 (Discussion off the record.)

12 BY MS. CUTRI-KOHART:

13 Q. We can go back on the record.

14 [REDACTED]
[REDACTED]

EXHIBIT GGG

2016 End of Year Legal Report

INTERNAL MEMORANDUM

To: Matt Thom, Executive Director
Cc: Peter Perkowski, Counsel
From: Andy Blevins, Legal & Policy Associate
Re: 2016 EOY Report _ Legal & Policy Department

I. EXECUTIVE SUMMARY

[REDACTED]

II. DEPARTMENT PERSONNEL & LEGAL PARTNERSHIPS

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

III. LEGAL CLIENTS

[REDACTED]

A. DISCHARGE UPGRADES

[REDACTED]

C. BENEFITS CLAIMS

[REDACTED]

D. TRANSGENDER SERVICE

[REDACTED]

E. CLIENT STATISTICS

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4. Service Relationship

[REDACTED]

5. Rank

[REDACTED]

6. How the clients were received (phone, email, web, etc.)

[REDACTED]

IV. POLICY INITIATIVES

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

V. PUBLIC ENGAGEMENT

[REDACTED]

VI. CONSIDERATIONS FOR 2017

[REDACTED]

EXHIBIT HHH

2017 End of Year Legal Report

INTERNAL MEMORANDUM

To: Matt Thorn, President & CEO
Cc: Peter Perkowski, Legal Director

From: Andy Blevins, Law & Policy Director

Re: 2017 EOY Report - Legal & Policy Department

I. EXECUTIVE SUMMARY

[REDACTED]

[REDACTED]

II. DEPARTMENT PERSONNEL & LEGAL PARTNERSHIPS

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

D. Community and Government Partnerships

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

III. LEGAL CLIENTS

[REDACTED]

E. Other Legal Matters

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

III. POLICY PROGRAMMING

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

EXHIBIT III

2018 End of Year Legal Report

INTERNAL MEMORANDUM

To: Andy Blevins, Executive Director
Cc: Members of the Board of Directors

From: Corrine Cole, Legal & Policy Manager
Peter Perkowski, Legal & Policy Director

Re: 2018 EOY Report – Legal & Policy Department

I. EXECUTIVE SUMMARY

[Redacted]

II. DEPARTMENT PERSONNEL & LEGAL PARTNERSHIPS

[Redacted]

a. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

