

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

NICHOLAS HARRISON and	.	Civil Action No. 1:18cv641
OUTSERVE-SLDN, INC.,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	Alexandria, Virginia
	.	May 31, 2019
PATRICK M. SHANAHAN, Acting	.	9:02 a.m.
Secretary of Defense, et al.,	.	
	.	
Defendants.	.	

RICHARD ROE; VICTOR VOE; and	.	Civil Action No. 1:18cv1565
OUTSERVE-SLDN, INC.,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	
	.	
PATRICK M. SHANAHAN, Acting	.	
Secretary of Defense, et al.,	.	
	.	
Defendants.	.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	JOHN W.H. HARDING, ESQ.
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(APPEARANCES CONT'D. ON PAGE 2)

(Pages 1 - 27)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 APPEARANCES: (Cont'd.)

2 FOR THE PLAINTIFFS:

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1 P R O C E E D I N G S

2 THE CLERK: Civil Actions 18-641, Nick Harrison, et
3 al. v. James N. Mattis, et al.; and Civil Action 18-1565,
4 Richard Roe, et al. v. United States Department of Defense, et
5 al. Would counsel please note their appearances for the
6 record.

7 MR. McCOTTER: Good morning, Your Honor. Trent
8 McCotter, Assistant United States Attorney, for defendants; and
9 with me is Rebecca Cutri-Kohart, from Federal Programs, who
10 will be arguing today, Your Honor.

11 THE COURT: Good morning.

12 MS. CUTRI-KOHART: Good morning.

13 MR. HARDING: Good morning, Your Honor. John Harding
14 from Winston & Strawn for plaintiffs. With me today is Kara
15 Ingelhart from Lambda Legal and Peter Perkowski from
16 OutServe-SLDN.

17 MR. PERKOWSKI: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. HARDING: With Your Honor's indulgence, we have
20 one matter of housekeeping. Ms. Ingelhart has been admitted
21 pro hac vice in the Roe case. Her pro hac vice motion is still
22 pending in Harrison, and we would request the Court grant that
23 motion this morning to allow Ms. Ingelhart to argue.

24 THE COURT: Is the paperwork submitted?

25 MR. HARDING: Yes.

1 THE COURT: When was it submitted?

2 MR. HARDING: It was submitted May 21.

3 THE COURT: I don't know why it hasn't come upstairs,
4 but we'll take care of that today, all right?

5 MR. HARDING: Thank you, Your Honor.

6 THE COURT: Thank you.

7 All right, we have before us today the defendants'
8 renewed motion to dismiss, and this only addresses the
9 institutional plaintiff, OutServe, and the issues are whether
10 or not OutServe either through the concept of being an
11 association or an entity that has the appropriate standing to
12 represent a group of -- the group of people affected by the
13 potential injunction in this case or whether it itself has
14 directly incurred the damages sufficient to give it the proper
15 standing.

16 It's been well briefed, but I think there's still a
17 lot of holes in this record. I recognize that the government
18 has -- or the defendants have indicated that fact discovery is
19 completed, but I'm not satisfied that we've gotten enough
20 information.

21 First of all, as I understand, one of the arguments
22 that has been made here by the defense is that the concept of
23 direct injury was raised at the last minute, that it's not
24 explicitly alleged in the complaint as a basis for standing.

25 On the other hand, the plaintiff has come back and

1 indicated that the discovery request was made on the 30th day
2 before the end of discovery so that there wasn't really, just
3 by the nature of the timing of discovery, enough time to
4 provide for the answer to the interrogatory and then to develop
5 whether or not there was sufficient evidence in that respect.

6 So I want first of all to have the plaintiff respond
7 on the issue of the direct injury. If there were more time,
8 tell me what other information you could provide to the Court
9 as to the actual scope of the direct injury, or do you feel
10 that everything is in the record now that supports your
11 position that the -- that OutServe has actually suffered and is
12 suffering direct injury because of this litigation?

13 MS. INGELHART: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MS. INGELHART: At this time, plaintiff OutServe
16 would assert that the direct harm experienced by OutServe is
17 reflected in the declaration of OutServe's president, Anthony
18 Blevins, which is in support of our opposition.

19 THE COURT: Well, for example, I mean, he mentions
20 the fact that resources are being diverted, but, you know,
21 anytime an entity sues, you're diverting some resources. So
22 the real question, it seems to me, is I have no sense from the
23 representations in the, in the Blevins declaration, for
24 example, how many court martials or how many criminal matters,
25 because you mention that sometimes there is representation or

1 assistance made with members of this group who are facing those
2 types of problems and that OutServe provides services to such
3 folks.

4 Over the last year or two, how many of those has
5 OutServe been involved with and has OutServe because of the
6 attention being paid to this litigation had to turn away people
7 who were calling in and saying we need help, we're about to be,
8 you know, charged with a particular offense involving, you
9 know, our sexual orientation or something that falls within the
10 gambit of the areas that you-all address.

11 Do you have any kind of information along those
12 lines?

13 MS. INGELHART: Your Honor, we would have to examine
14 OutServe's records in order to collect that information to
15 provide it to the Court.

16 THE COURT: All right. So tell me, how does OutServe
17 keep its records? When you -- you have a central office,
18 right, with three or four staff people, paid staff people, and
19 then you have volunteers. How many volunteers do you have in
20 your office?

21 MS. INGELHART: Your Honor, I am unaware at this
22 moment how many volunteers OutServe has, but I could inquire to
23 provide that information to the Court.

24 THE COURT: Does OutServe have an actual physical
25 office?

1 MS. INGELHART: OutServe does have a physical office
2 in Washington, D.C., yes, Your Honor, but some staff work
3 remotely.

4 THE COURT: Are all the -- and the staff are -- well,
5 you only have three staff people. You have volunteers. How
6 many volunteers do you have at any one time?

7 MS. INGELHART: Your Honor, I do not know the answer
8 to that question, but I could inquire and give that information
9 to the Court once I secure it.

10 THE COURT: Well, don't we have the legal counsel
11 from OutServe here?

12 MS. INGELHART: That's correct.

13 THE COURT: You should know --

14 MR. PERKOWSKI: Yes, Your Honor.

15 THE COURT: Why don't you two switch positions. You
16 should know a little bit more about -- that's your full-time
17 position?

18 MR. PERKOWSKI: Technically, no, Your Honor. I am a
19 consultant, but it occupies varying amounts of my time,
20 depending from month to month. It feels like a full-time job,
21 but I'm the sole legal director, yes.

22 THE COURT: All right. So you're the legal director
23 for the organization. So I would assume then that you are, you
24 are aware if somebody contacts OutServe with a legal problem --

25 MR. PERKOWSKI: I am.

1 THE COURT: -- you're aware of that contact.

2 MR. PERKOWSKI: Yes, Your Honor.

3 THE COURT: What records do you keep of such
4 contacts?

5 MR. PERKOWSKI: They're electronic. Most of them are
6 by e-mail, and some are by phone, but even the phone inquiries
7 come through an e-mail exchange.

8 THE COURT: All right. Do you, do you then log those
9 in somehow?

10 MR. PERKOWSKI: Recently, we did start logging.
11 Beginning, I think, late last year, we moved to the Salesforce
12 Platform, so automatically those calls get input as a new
13 inquiry into Salesforce, and as time permits, we go back and
14 put the archives inquiries into Salesforce as well, but for the
15 past inquiries, it's mainly an e-mail server where we keep the
16 e-mails as evidence of the client file.

17 THE COURT: And -- well, do you make a client file
18 then for each one of those inquiries that comes in?

19 MR. PERKOWSKI: Not a physical file, no.

20 THE COURT: No, but do you keep an electronic file?

21 MR. PERKOWSKI: Yes.

22 THE COURT: So you could go back and say, you know,
23 Mary, Mary Doe called on May 1 with a question about, you know,
24 spouse benefits for her, for her lesbian spouse or something
25 like that?

1 MR. PERKOWSKI: Yes.

2 THE COURT: All right. And then do you -- if you
3 write back, if you respond, does that go into that same file?

4 MR. PERKOWSKI: So, the inquiries come through to a
5 legal e-mail address, and if they're staffed out to either me
6 or a legal staff, those responses may come from the individual
7 e-mails, but those are also maintained in the e-mail inboxes of
8 the individual staff person.

9 THE COURT: I mean, now, there are other advocacy
10 groups with which you connect, correct?

11 MR. PERKOWSKI: Yes, Your Honor.

12 THE COURT: All right. So sometimes a request may
13 come in, and rather than OutServe handling it, you'll send it
14 over to one of these groups that is helping you out or law
15 firms that are assisting?

16 MR. PERKOWSKI: Yes. We do have pro bono partners
17 and also organizational partners that we work with on some
18 cases, yes, but if it's a member of our organization and it's a
19 legal matter, then we typically handle it ourselves.

20 THE COURT: Are there any other organizations that
21 you are aware of that are specifically representing active or
22 former military people in these special categories?

23 MR. PERKOWSKI: I know that there are organizations
24 that do work for servicemembers and veterans. None of them
25 specifically have as a mission serving LGBTQ and HIV-positive

1 members, although they do that -- do serve that population in
2 addition to the broader population. So OutServe is the only
3 one that I'm aware of that has a mission focused on those
4 communities.

5 THE COURT: So it's a very specific subset of a much
6 larger set.

7 MR. PERKOWSKI: That's, that's correct.

8 THE COURT: All right. And my understanding is that
9 "OutServe" is actually a new name. I mean, you merged with,
10 with another group a couple of years ago.

11 MR. PERKOWSKI: That was in 2012, Your Honor, yes.

12 THE COURT: Do you have a sense as to actually how
13 many -- well, you get contributions.

14 MR. PERKOWSKI: Yes.

15 THE COURT: What's your contribution base? How many
16 individuals have been -- have contributed to OutServe, let's
17 say, in the year 2017 and again in the year 2018? Do you know
18 that?

19 MR. PERKOWSKI: I don't know that, and it's not in
20 the record. The percentage of members who are -- percentage of
21 the donor base who are members is a part of the record, and I
22 believe it was 75 percent.

23 THE COURT: So, so I want that fleshed out a bit
24 more. Where I'm driving at is I'm not comfortable that I have
25 before me yet a sufficiently specific record --

1 MR. PERKOWSKI: Okay.

2 THE COURT: -- to rule on what I think is a
3 potentially close question but a very important question, and
4 I'm not going to rule on it until I'm satisfied I've got a full
5 record, and this kind of detail is what I'm looking for.

6 My review of the Blevins declaration and even of the
7 portions of the deposition that I've had a chance to look at
8 and the interrogatory answers basically gives sort of
9 categories of matters, but I don't have any real detail as to
10 what's within those categories, but you just answered an
11 interesting question.

12 So are you telling me then that approximately 75
13 percent of those who have made a monetary contribution have
14 also participated in a chapter or have participated in some
15 other component of membership?

16 MR. PERKOWSKI: Not necessarily, Your Honor.

17 THE COURT: All right.

18 MR. PERKOWSKI: So by virtue of being either a
19 servicemember, a veteran, or a person who wants to serve and
20 being LGBTQ or living with HIV --

21 THE COURT: Right.

22 MR. PERKOWSKI: -- and making a donation makes you a
23 member.

24 THE COURT: Oh.

25 MR. PERKOWSKI: So of the donor base, 75 percent

1 would fall into that category.

2 THE COURT: All right. So what you've just told me
3 then is that 75 percent of your donors are what I'm calling the
4 subset of military people, all right, shorthand.

5 MR. PERKOWSKI: Yes.

6 THE COURT: All right. So 25 percent are people who
7 are outside of that subset.

8 MR. PERKOWSKI: Yes, Your Honor.

9 THE COURT: In other words, people who may have just,
10 you know, strong feelings that people in the subset should have
11 equal rights, that sort of thing, but they themselves are
12 not -- what about a family member? What if you have the spouse
13 of or, say, the mother of a person who's in the subset or a
14 father? Can they become a member in your view?

15 MR. PERKOWSKI: So at the time the suit was filed,
16 no, that was not in our, the membership population. It was
17 only servicemembers, veterans, and people who wanted to serve.

18 As we mentioned in our brief, the organization
19 recently served with -- combined with the American Military
20 Partner Association, which focuses on LGBTQ family and spouses.
21 So now, yes, those would be considered our members, but for the
22 purposes of this motion and because that merger is just now
23 occurring, we're not considering them members at this time.

24 THE COURT: In terms of the donations that you get,
25 how many of the individuals who have donated, members of the

1 subset who have made a donation, are also participating in a
2 chapter, get the newsletter, those sorts of things? Do you
3 have a sense of that?

4 MR. PERKOWSKI: I don't believe that sort of
5 cross-referencing is done, Your Honor.

6 THE COURT: Well, if they -- if somebody makes a
7 donation, do they automatically start getting e-mail messages
8 or any kind of feedback from the organization? I know myself
9 if I've made a \$25 -- I just did it the other day. I went to a
10 concert and made a \$25 donation, and all of a sudden, I'm
11 getting e-mails from the group that I heard. So I'm curious as
12 to whether you have that automatic system once somebody gives
13 you some money.

14 MR. PERKOWSKI: My understanding is unlike other
15 organizations, where it's an opt-out, ours is an opt-in. You
16 would have to click a button to receive newsletters when you're
17 on the donation page.

18 THE COURT: All right. Do you have the ability to do
19 that cross-reference?

20 MR. PERKOWSKI: That I don't know.

21 THE COURT: That's something the Court is looking
22 for. I'd be very interesting in seeing. So it's an opt-in, so
23 that would suggest that anybody who has gone to the trouble of
24 requesting to be getting your information has certainly
25 exhibited a definite interest in connection with your

1 organization.

2 MR. PERKOWSKI: Right. And all people -- and you can
3 get the newsletter without doing the donation as well. There's
4 a separate signup form for that.

5 The issue is that you can, you know, Your Honor or
6 anybody in the public can sign up for the newsletter, but we
7 wouldn't consider you a member because you're not in the
8 populations that we serve.

9 THE COURT: But what, what is the significance of
10 your considering somebody a member? I mean, again, one of the
11 arguments the defense is making is that, you know, there are
12 not the necessary indicia of membership here. I mean, one of
13 the things they point to is that traditionally, if one is a
14 member of an organization, one has voting rights, that one can
15 vote on policy decisions or vote on who's going to run the
16 organization, whatever.

17 So what is, what is the exchange? What benefit does
18 an individual get for being considered a member by Outsource
19 (sic)?

20 MR. PERKOWSKI: So the significance is that -- Your
21 Honor mentioned the combination 2012. SLDN was not a
22 membership organization. It was a legal services organization.

23 OutServe was a membership organization, and it
24 defined itself as people who are LGBT and serving. So when the
25 entities merged, that continued, and as we added on to our

1 mission to include veterans and future warriors, then that
2 definition continued to expand.

3 What do you get? Well, only members can join
4 chapters. Nonmembers like family members and spouses can
5 participate in chapter activities, but they're not considered a
6 member. So you have that benefit.

7 And as a chapter member -- well, I'll give you the
8 other benefits. You can join the chapter. You can join the
9 Military Advisory Committee.

10 THE COURT: Explain the Military Advisory Committee.

11 MR. PERKOWSKI: The Military Advisory Committee is
12 a -- I'm sorry, it's the Council -- is a group of members who
13 advises the executive director on issues that are affecting our
14 community, so people who are serving veterans and future
15 warriors. So those are all membership, and they -- the
16 executive director consults with the Military Advisory Council
17 on issues that are percolating up through our membership so
18 that we know where to focus our resources, we know where to
19 focus our advocacy efforts and our legal efforts.

20 THE COURT: So this Military Advisory Council, it's
21 one council, or are there multiple ones?

22 MR. PERKOWSKI: It's one council.

23 THE COURT: And, and how does it operate? Does it
24 have in-person meetings? Does it work as an e-mail or some
25 sort of an internet-based platform? How does it operate?

1 MR. PERKOWSKI: The members are geographically
2 diverse, so that meetings are generally by phone and video. I
3 believe they're once a month. The council currently has been
4 split into, I think, two subgroups to focus on two different
5 areas of concern that the organization is working on.

6 THE COURT: Is one of them HIV positive?

7 MR. PERKOWSKI: No. It's more of a functional or
8 organizational review of -- it's not issue specific.

9 THE COURT: All right. All right. So if one is
10 considered to be a member -- how many members -- how many
11 individuals are in this Military Advisory Council?

12 MR. PERKOWSKI: I'm not sure exactly, but I believe
13 it's around 20, maybe 25.

14 THE COURT: And these are people who volunteer for
15 it; they want to be part of it? In other words, you are a
16 member of our group, and you are invited to join this? Is that
17 how it happens?

18 MR. PERKOWSKI: Yeah. The executive director
19 consults with the Board, with staff like myself, about adding
20 and continuing the membership of people with diverse
21 backgrounds, for example, enlisted versus officer, veterans
22 versus active duty, and geographic diversity, gender diversity,
23 and racial diversity as well; and we also want to pick people
24 who are active in the issues that we address as an
25 organization.

1 THE COURT: And was the Military Advisory Council
2 involved at all in talking about the litigation strategy of
3 either the Harrison or the Roe-Voe cases?

4 MR. PERKOWSKI: I believe that that information is in
5 the record, and the answer was no, they were not consulted.

6 THE COURT: That's what I thought.

7 MR. PERKOWSKI: So their, their involvement in terms
8 of the guidance to the executive director is more broad-based,
9 and it's informing the executive director about issues where
10 the organization should focus its efforts.

11 THE COURT: They're the ones on the ground.

12 MR. PERKOWSKI: They're the ones on the ground.

13 THE COURT: Bringing information up to what I'll call
14 management or leadership.

15 MR. PERKOWSKI: Yes, Your Honor.

16 THE COURT: Um-hum.

17 MR. PERKOWSKI: And similarly, the chapters operate
18 like that as well, so chapters are full of active duty
19 currently serving, and the chapter leaders have their own group
20 that meet periodically, and there are two leaders of the
21 chapter leaders, if you will, and those two leaders are ex
22 officio to -- as staff, and they advise the executive director
23 as well.

24 So members of the chapters influence the direction of
25 the organization in that, in that way as well by communicating

1 with the chapter leaders, who communicates with the executive
2 director.

3 THE COURT: And the chapters themselves, I got the
4 impression that they sometimes do have physical meetings, or is
5 it all online chat rooms and that sort of thing?

6 MR. PERKOWSKI: No, they frequently do, Your Honor,
7 because the chapters are -- the chapters are geographical.

8 THE COURT: I recognize that. And you said some are
9 overseas as well.

10 MR. PERKOWSKI: Right.

11 THE COURT: I assume there are military bases, like,
12 I suspect you have some in Germany?

13 MR. PERKOWSKI: That's correct, Your Honor.

14 THE COURT: All right.

15 MR. PERKOWSKI: Some of them cover a wide
16 geographical area, so it may be that some of the meetings are
17 not all in person, but all of the chapters do have in-person
18 meetings.

19 THE COURT: All right.

20 MR. PERKOWSKI: And then there are forums as well,
21 like the HIV-positive forum, and those are issue based. They
22 operate like chapters, but they are issue based, and the
23 participation in those forums also guides the organization in
24 terms of what the membership is experiencing and what the needs
25 are.

1 THE COURT: All right.

2 MR. PERKOWSKI: Okay?

3 THE COURT: Yep. Thank you. That helps.

4 MR. PERKOWSKI: Thank you, Your Honor.

5 THE COURT: All right, I'll hear from the United
6 States. Again, I think -- I'm sorry, I'll let you go back up
7 there. I did have some more questions for you.

8 As I said before, going now to the direct injury,
9 because that's where I think we actually started --

10 MR. PERKOWSKI: Yes.

11 THE COURT: -- can you be more specific as to
12 specific matters that had to be turned down because of the
13 distraction that this litigation has caused?

14 MR. PERKOWSKI: Just based on my own work, Your
15 Honor.

16 THE COURT: Right.

17 MR. PERKOWSKI: We don't turn down work. We sort of
18 prioritize. So there are some programs that we've wanted to
19 focus on, and because of my own time with this, not just with
20 this litigation but with the other services that we provide to
21 servicemembers living with HIV that they experience because of
22 these policies.

23 So, you know, the policies we're challenging don't
24 have to do with court martials and that sort of thing, but we
25 do assist servicemembers with administrative separation, with

1 issues they're experiencing in terms of achieving career goals,
2 like Nick Harrison.

3 One of the airmen who's participated in the
4 preliminary injunction, Q.S., he was near separation right
5 before the time of the hearing on the preliminary injunction,
6 and I wrote his appeal, for example, to his command to try to
7 delay his separation.

8 It's those sort of things that we as an organization
9 have focused on rather than programming such as an HIV 101
10 program that we want to push out to our partners and also the
11 publication of educational guides that would assist our members
12 in navigating their service.

13 THE COURT: And so were this HIV policy not in
14 effect, your resources would be going to these other programs?

15 MR. PERKOWSKI: Yes, Your Honor.

16 THE COURT: All right.

17 All right, the government needs to tell me why that's
18 not sufficient evidence that this organization is being
19 directly and negatively affected by the existence of this
20 policy and the need for them to come into court and address the
21 policy.

22 MS. CUTRI-KOHART: Your Honor, this is a textbook
23 case of self-inflicted harm. Their purpose is advocacy,
24 including for HIV-positive servicemembers, and that they have
25 self-prioritized litigation over educational programs is an

1 internal decision to them. It doesn't rise to the level of
2 experiencing a direct harm from a government policy.

3 I direct the Court to look at *Lane v. Holder*, which
4 was a gun rights advocacy organization that had pretty much the
5 same situation. They had to redirect education resources to
6 litigation resources because of government policy, and the
7 Fourth Circuit said that was a self-inflicted internal priority
8 choice and not the type of direct injury that the *Havens Realty*
9 Supreme Court decision contemplated.

10 THE COURT: All right. Do you want to respond to
11 that?

12 MR. PERKOWSKI: Thank you, Your Honor, yes. In *Lane*,
13 it was a little different. The Second Amendment Foundation was
14 the organization in *Lane*, and in that case, all it alleged was
15 a drain on its resources because it decided to devote to
16 researching the impact of the challenged -- a challenged
17 statute before enforcement.

18 Here we are -- the drain on our resources is not just
19 the litigation but assisting the servicemembers on other issues
20 that arise because of these challenged policies, as I explained
21 in response to Your Honor's prior questioning.

22 THE COURT: All right. Well, what I'm going to do in
23 this case, I'm going to do two things. I'm not ruling today
24 from the bench. I'm going to go back and review the record one
25 more time. I'm not convinced yet that I have all the

1 information that I want in order to be able to make a final
2 decision.

3 I know for certain that I'd like more specific data
4 from OutServe. In particular, you know, for 2017 and 2018 in
5 particular, I'd like to know, you know, have a better sense as
6 to your contribution base and this crossover between those who
7 contribute money and then go the extra step to signing up for
8 membership, for what loosely, and I recognize it's a technical
9 term in the law, but for further involvement, we'll put it that
10 way, with OutServe.

11 The other thing I don't have a clear feeling for
12 right now so I guess I'll ask you to step back one more time,
13 what is the mechanism by which one signs up, for example, for a
14 chapter? If I want to become a chapter member, what would I
15 do?

16 MR. PERKOWSKI: There's a couple different ways. All
17 of the chapters are listed on our website, so you could go
18 there and send an e-mail to that chapter leader.

19 THE COURT: But what do I do on that? Do I just say,
20 hello, I'm Leonie Brinkema. I'd like to become a member of
21 your chapter? Is that all, and then I'm a member
22 automatically?

23 MR. PERKOWSKI: Well, no. Most of the time, it's I
24 recently PCS'd, I was permanent change of station from Point A
25 to Point B. I'm new here. I want to be involved in the

1 chapter.

2 And then once you -- you know, somebody will respond
3 to you and put you in contact with the person who organizes
4 that chapter's activity, and then you become a member.

5 THE COURT: But how, how do I identify myself as
6 being eligible? I thought you just said right now that the
7 only people who could become members are members of the subset.

8 MR. PERKOWSKI: Well, I mean, in the deposition of
9 Mr. Blevins, he says we do not inquire about the sexual
10 orientation of our membership.

11 THE COURT: So, frankly, then anyone could do it.

12 MR. PERKOWSKI: Anyone could, Your Honor, yes.

13 THE COURT: Doesn't that to some degree defeat your
14 argument that this is a membership organization?

15 MR. PERKOWSKI: I don't believe it does, Your Honor.
16 There are several cases we cited in our briefs where the
17 membership definition does not have to be exact or even capable
18 of easy definition, especially for advocacy organizations like
19 OutServe. We serve a population, and that population is our
20 membership. Some of the disability, for example, where the
21 advocacy organization is doing work for a defined set of the
22 community --

23 THE COURT: Well, let's look at that group for a
24 second. I mean, it's been pointed out that there in some cases
25 are actually statutes or legislation that creates sort of these

1 special categories for mentally disabled or mentally ill,
2 because that is perceived as a very vulnerable to some degree
3 helpless population for which advocacy is very important, and
4 many of the members cannot advocate for themselves.

5 Now, your subset, while it's clearly an identifiable
6 group and it's been a group that's been marginalized for some
7 time and has had various issues with problems, you know, in the
8 general society, but the members are certainly capable of
9 representing themselves, they're not like, you know, a severely
10 mentally disabled person.

11 So can you adequately point to that, that very
12 specific, narrow group of maybe what we call a looser
13 definition of what membership requirements are needed to apply
14 to your group?

15 MR. PERKOWSKI: I think the analogy is perfectly
16 appropriate, Your Honor. Our members have capacity, if that's
17 what you mean, unlike certain disabled populations, right?

18 THE COURT: Right.

19 MR. PERKOWSKI: But that does not mean that they can
20 do the work that we do. They cannot roam the halls of
21 Congress. Anthony Blevins is on, on the Hill today advocating
22 for our membership.

23 Most of them -- most of our members do not know the
24 legal ins and outs of the things that affect their career, and
25 therefore, they need us to do that for them.

1 THE COURT: But wouldn't that affect almost any
2 non-lawyer citizen? I mean, the average person also can't just
3 roam the halls of Congress and advocate for him- or herself,
4 whereas a person who's severely mentally disabled simply can't
5 do it at all, whereas that's their -- that's the infirmity that
6 prevents them from being able to do it. For everybody else,
7 it's the lack of knowledge or the lack of access, and so that,
8 to me, would not necessarily differentiate your group from any
9 other group.

10 MR. PERKOWSKI: I agree with that conclusion, Your
11 Honor, but I'm also saying that there's no required line
12 drawing that would limit those cases only to the situations
13 involving incapacitated humans. So the advocate organizations
14 exist to serve populations, and those populations are capable
15 of definition, the way that we have, and requiring more would
16 essentially make these organizations like OutServe incapable of
17 being organizational plaintiffs if the requirements are too
18 strict.

19 THE COURT: All right.

20 MR. PERKOWSKI: Thank you.

21 THE COURT: I'm going to let you know what we're
22 going to -- how we're going to go on from here. I may very
23 well require some additional formal discovery because I'm --
24 what I'm hearing, though, from OutServe is that you really
25 don't have the ability to do cross-referencing so that I would

1 have some sense as to how many people who've contributed have
2 also gone the extra step of joining a chapter, joining the
3 Military Advisory Council, or, you know, requesting to get on
4 your listserve, etc.

5 Are you able to do that, or are you not able to do
6 that?

7 MR. PERKOWSKI: We will do our best, Your Honor.

8 THE COURT: All right. Then I'm going to keep this
9 record open. I'm going to give the parties 30 additional days
10 for any further discovery along the lines either of, to support
11 the position that there would be standing based upon the
12 concept of being, you know, an association or a traditional
13 kind of voluntary association or fundamental equivalence, or
14 the direct injury, all right? I want to make sure that I've
15 gotten more specific information.

16 At the end of that 30-day period, if there's no
17 further discovery that's come up, no further information, then
18 I'll decide this case on the record I've got. If you've been
19 able to develop more evidence -- and that means I'm leaving it
20 to you-all to work out how you want to do that, whether the
21 government wants any -- to file any additional requests,
22 whether you just want to volunteer, in other words, expand the
23 discovery you've provided, which the rules do permit.

24 If nothing else has come in, then just -- both sides
25 advise the Court, and we'll decide it on the record we've got

1 plus what I've heard today.

2 If additional information comes in, then I will give
3 each side an additional seven days to do a supplemental brief
4 focusing on the new information, all right? You don't have to
5 repeat what you've already written. I'll give each side seven
6 days to respond to that, so that's -- and then I'm not going to
7 hear reply briefs. That will give me what I think I need as an
8 absolutely full record.

9 So I will tell OutServe right now that I, you know,
10 the Court needs to be very confident that it does have subject
11 matter jurisdiction, that you have the necessary standing to
12 proceed in this case, and although that issue can be raised at
13 any point in the litigation, it's better to have it resolved
14 now. So I want to make sure I have as much information as is
15 possibly available out there, all right?

16 Thank you. We'll recess court until 11:00.

17 (Which were all the proceedings
18 had at this time.)

19

20 CERTIFICATE OF THE REPORTER

21 I certify that the foregoing is a correct transcript of
22 the record of proceedings in the above-entitled matter.

23

24

25

/s/
Anneliese J. Thomson