

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 2, JANE DOE 3, JANE DOE 4,)
JANE DOE 5, JANE DOE 6, JANE DOE 7,)
JOHN DOE 1, JOHN DOE 2, REGAN V.)
KIBBY, and DYLAN KOHERE,)

Plaintiffs,)

v.)

DONALD J. TRUMP, in his official capacity as)
President of the United States; JAMES N.)
MATTIS, in his official capacity as Secretary of)
Defense; JOSEPH F. DUNFORD, JR., in his)
official capacity as Chairman of the Joint Chiefs)
of Staff; the UNITED STATES DEPARTMENT)
OF THE ARMY; MARK T. ESPER, in his)
official capacity as Secretary of the Army; the)
UNITED STATES DEPARTMENT OF THE)
NAVY; RICHARD V. SPENCER, in his official)
capacity as Secretary of the Navy; the UNITED)
STATES DEPARTMENT OF THE AIR)
FORCE; HEATHER A. WILSON, in her)
official capacity as Secretary of the Air Force;)
the UNITED STATES COAST GUARD;)
KIRSTJEN M. NIELSEN, in her official)
capacity as Secretary of Homeland Security; the)
DEFENSE HEALTH AGENCY; RAQUEL C.)
BONO, in her official capacity as Director of the)
Defense Health Agency; and the UNITED)
STATES OF AMERICA,)

Defendants.)

Civil Action No. 17-cv-1597 (CKK)

**PLAINTIFFS’ MOTION TO COMPEL COMPLIANCE WITH SUBPOENAS FOR
PRODUCTION OF DOCUMENTS DIRECTED TO NONPARTIES FAMILY
RESEARCH COUNCIL AND HERITAGE FOUNDATION**

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, and supported by the Memorandum and Declaration submitted herewith, Plaintiffs request that the Court compel third parties Family Research Council and Heritage Foundation to produce documents in compliance

with third-party subpoenas submitted on February 12, 2018. A proposed order is included with this motion.

April 6, 2018

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COMPLIANCE WITH SUBPOENAS FOR PRODUCTION OF DOCUMENTS
DIRECTED TO NONPARTIES FAMILY RESEARCH COUNCIL
AND HERITAGE FOUNDATION**

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U.S. Const. amend. I *passim*

INTRODUCTION

This motion to compel has been made necessary by the blanket refusal of nonparties Family Research Council (“FRC”) and Heritage Foundation (“Heritage”) to produce any documents in response to subpoenas. Those subpoenas request that FRC and Heritage produce records of their communications with Defendants and certain of their agents related to the ban on transgender military service that the President announced on July 26, 2017. The communications are directly relevant to Plaintiffs’ claims, because they are likely to illuminate the irregular process that led to the President’s abrupt announcement of the ban and to shed light on the reasons for the ban. Plaintiffs requested similar records directly from Defendants, but Defendants have also refused to produce them, arguing that the President is constitutionally immune from civil discovery requests and that (at a minimum) the presidential communications privilege covers the records.

FRC and Heritage have asserted that complying with the subpoena would violate their First Amendment rights, because it would “adversely affect the ability of [their] supporters to collectively advocate for policies ... for fear that exposure of their beliefs and communications will lead to threats, harassment, or reprisal.” Decl. of Lauren Milgroom, Ex. A at 3 (Heritage); *see id.* Ex. B at 2, 4-5 (FRC). Plaintiffs were careful, however, to limit the subpoenas to *external* communications between the two entities and Defendants; the subpoenas do *not* seek to inquire into their *internal* organization or political strategizing. In similar circumstances, courts have held that any First Amendment interest in resisting a subpoena is minimal and overcome where, as here, the records are important to a central issue in the litigation.

There is also no merit to FRC’s claim that compliance would violate its rights under the Religious Freedom Restoration Act (RFRA). RFRA does not apply to enforcement of a

subpoena issued by one private, nongovernmental party to another. In any event, compliance would not substantially burden FRC's exercise of religion and would advance the compelling interest in permitting Plaintiffs to prove their constitutional claims. Nor is there any more narrowly tailored alternative, given Defendants' refusal to comply with discovery requests seeking similar records.

Because Plaintiffs' requests are narrowly drawn to obtain only relevant material, because any burden of complying with those requests would be minimal, and because Plaintiffs' requests for external communications with Executive Branch officials do not implicate the First Amendment or RFRA, the Court should enforce the subpoenas.¹

BACKGROUND

On July 26, 2017, President Trump announced that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military." ECF No. 61, at 14. The President's announcement of the ban was followed by a Presidential Memorandum issued August 25, 2017, stating that effective March 23, 2018, the Armed Forces would no longer "permit[] transgender individuals to serve openly in the military," and no longer "authoriz[e] the use of the Department [of Defense's] resources to fund sex-reassignment surgical procedures." *Id.* at 15.

Plaintiffs, transgender individuals currently serving or planning to serve in the U.S. military, filed this lawsuit to challenge their exclusion from military service. On October 30, 2017, the Court granted Plaintiffs' motion for a preliminary injunction, ruling that Plaintiffs are likely to succeed on their claim that the ban violates Plaintiffs' rights to equal protection of the law. Among other things, the Court considered whether the ban was "motivated by an improper

¹ FRC and Heritage oppose this motion.

animus or purpose,” and found “support for Plaintiffs’ claim that the decision to exclude transgender individuals was not driven by genuine concerns[.]” ECF No. 61, at 68 (internal quotation omitted). The Court also considered whether deference was due to the President’s decision, and concluded that “all of the reasons proffered by the President for excluding transgender individuals from the military in this case were not merely unsupported, but were actually contradicted by the studies, conclusions and judgment of the military itself.” *Id.* at 67.

On December 15, 2017, Plaintiffs served Defendants with requests for production of documents, seeking, among other things, communications between Defendants and third parties related to the ban. *See* Milgroom Decl., Ex. C, Req. for Prods. 4, 6, 7, 17, 19, 20, 21. Defendants objected to and refused to comply with those requests, contending that the President is immune from civil discovery orders and that any records responsive to those requests are covered by, at a minimum, the presidential communications privilege. *See* Milgroom Decl., Exs. D, E, F. Defendants moved for a protective order, arguing that the President should not be required to respond to discovery requests. That issue is before the Court for decision. *See* ECF Nos. 89, 91, 93.

Stymied by Defendants’ refusal to produce those records, Plaintiffs served FRC and Heritage with the subpoenas at issue in this motion on February 12, 2018. *See* Milgroom Decl., Exs. G, H. The subpoenas are narrowly targeted and time-limited. They seek only external communications between January 20, 2017 and September 1, 2017 between those entities and the President, Vice President, their respective Executive Offices, and the Department of Defense “concerning military service by transgender people and/or any restriction of military service by transgender people.” Milgroom Decl., Ex. G at 5, Ex. H at 5.

On March 1, 2018, Heritage served Plaintiffs with objections and refused to produce any documents. *See* Milgroom Decl., Ex. A. FRC served similar objections on March 16, 2018. Milgroom Decl., Ex. B. Both entities contend that Plaintiffs' requests are unduly burdensome and irrelevant to this litigation, and that compliance would impinge on their First Amendment rights. FRC (but not Heritage) also asserts that compliance would violate its rights under RFRA. Plaintiffs met and conferred with counsel for FRC telephonically on March 28 and April 4, 2018, and with counsel for Heritage telephonically on March 29 and April 4, 2018, but the parties were unable to resolve or substantially narrow their differences.

ARGUMENT

A. The Requested Documents Are Directly Relevant To Test The Government's Claim For Deference And To Determine The True Purpose For The Ban

FRC and Heritage contend that records of their communications with Defendants about the ban on transgender military service are irrelevant because “[w]hat [they] did or did not communicate during [their] petitioning of the Government [supporting the ban] is not relevant to the President’s directive.” Milgroom Decl., Ex. A at 3-4 (Heritage); *see also* Ex. B at 8 (FRC). That argument is without merit. The records that Plaintiffs seek concern the process surrounding the President’s decision to ban transgender individuals from military service. That process is directly relevant to Plaintiffs’ equal protection claim, for at least two reasons.

First, Defendants have argued for deference to the President’s decision as one that was based on professional military judgment, including the advice that the President supposedly obtained from “Generals and military experts.” ECF No. 45, at 27-31. But as Plaintiffs have explained in their opposition to Defendant’s motion seeking to preclude discovery against the President, the circumstances surrounding the announcement of the ban strongly suggest that the President’s decision was *not* based on legitimate military judgments. *See* ECF No. 91, at 20. As

this Court has already concluded, the circumstances surrounding the ban “provide additional support for Plaintiffs’ claim that the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy.” ECF No. 61, at 68.²

Second, communications between Defendants and FRC and Heritage are likely to bear directly on whether the decision to adopt the ban was motivated by unconstitutional animus against transgender individuals. Evidence of Defendants’ consultation with outside groups well known to oppose civil rights for transgender people, including their service in the armed forces, is likely to be probative of Defendants’ purpose in banning transgender military service and in evaluating whether the ban can survive constitutional scrutiny under any level of review. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (explaining that the circumstances surrounding a policy’s enactment “may shed some light on the decisionmaker’s purposes” and “afford evidence that improper purposes are playing a role”); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (invalidating state law that was “inexplicable by anything but animus toward the class it affects”).

In similar circumstances—where governmental action has been challenged as based on an improper, unconstitutional purpose, and there was reason to believe that action was influenced by outside groups—courts have ordered non-parties to produce their external communications

² On February 22, 2018, the Secretary of Defense, following the President’s “direct[ion]” in his August 25 Memorandum, issued a further Memorandum to the President proposing to implement policies that would, with a few narrow exceptions, bar military service by most transgender individuals. ECF Nos. 96-1 at 1; 96-2. As Plaintiffs explained to the Court in a scheduling conference held on March 28, 2018, the Secretary of Defense’s February 22 Memorandum is an implementation of the President’s August 25, 2017 Memorandum directing the exclusion of transgender individuals from military service. Accordingly, the circumstances surrounding the President’s decision to ban transgender people from the military, announced on July 26 and August 25, 2017, remain highly relevant to this case.

with government decisionmakers. *See Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 2016 WL 5922315, at *5-6 (W.D. Tex. Oct. 11, 2016) (“lobbying communications” sent by “non-parties” to state decisionmaking body were relevant and discoverable in litigation under Equal Protection Clause and Dormant Commerce Clause challenging decision as motivated by discriminatory purpose); *Valle Del Sol v. Whiting*, 2013 WL 12098752, at *3 (D. Ariz. Dec. 11, 2013) (ordering non-party lobbying groups to comply with subpoenas seeking their communications with legislators because “evidence of those legislators’ intent in drafting and supporting” the challenged statute “[was] relevant” to plaintiffs’ equal protection claim); *see also Jewish War Veterans of the U.S. of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 37, 46, 49 (D.D.C. 2007) (non-party “lobbying” communications were relevant to show an “improper legislative purpose” and therefore discoverable, in Establishment Clause case turning on whether legislature acted with impermissible religious purpose); *Baldus v. Brennan*, 2011 WL 6122542, at *1 (E.D. Wis. Dec. 8, 2011) (non-party’s communications to legislature were relevant and discoverable in litigation challenging action under Voting Rights Act and Equal Protection Clause).

As those cases recognize, communications between policymakers and outside groups can be highly relevant when a governmental action is challenged as motivated by an unconstitutional purpose. That is exactly the situation here. The purpose of the Executive in adopting the transgender ban is squarely at issue in this case, and communications between the Executive and advocacy groups like FRC and Heritage about that ban are likely to illuminate its purpose. That is especially true in a case like this one, where the need to discover the communications arises precisely because the executive action at issue took place under circumstances that strongly suggest that the explanation given by the executive for its action is untrue. *See Wal-Mart*, 2016

WL 5922315 at *4-5 (stressing that communications between interest groups and public officials “can be relevant to determining the purpose or effect” of a law, notwithstanding what appears in the “public record,” and rejecting contrary argument as “naiveté”).

Finally, there is no merit to FRC’s and Heritage’s contentions that responding to the subpoena would be unduly burdensome because Plaintiffs should be able to obtain the same records directly from the Defendants.³ Plaintiffs are seeking the records at issue from FRC and Heritage precisely because Defendants have refused to produce them, asserting both constitutional immunity from discovery and privileges. Given Defendant’s legal position—which are they are likely to pursue on appeal even if rejected by this Court—Plaintiffs have no alternative but to seek the records from these third parties.

B. The First Amendment Does Not Immunize the Requested Documents From Discovery

FRC and Heritage assert that compliance with the subpoenas would burden their First Amendment rights to free speech, to association, and to petition the government. According to FRC, requiring it to produce records of its communications with Defendants about the transgender ban “might inhibit other groups and individuals from associating with FRC” and might chill donors from contributing to FRC. *See* Milgroom Decl., Ex. B, at 5-6. Similarly, Heritage asserts that “compelled disclosure will adversely affect the ability of Heritage and its supporters to collectively advocate” for their favored policies. *See* Milgroom Decl., Ex. A, at 3.

FRC and Heritage overlook that Plaintiffs have sought only *external* communications of those groups with the government. FRC and Heritage have minimal (if any) confidentiality interests in those communications; indeed, both groups argue that Plaintiffs could obtain the

³ FRC and Heritage have not argued that the time and cost involved in responding to the subpoenas would be prohibitive.

same records by serving document requests on Defendants or filing FOIA requests with the Government. As explained above, Defendants have blocked that avenue by refusing to produce similar records in response to Plaintiffs' document requests; but if, as FRC and Heritage maintain, the same records should be obtainable from another source through discovery or FOIA, then it is difficult to see how they have a constitutionally based privilege to refuse to produce the same records themselves. Plaintiffs do *not* seek internal documents that might even arguably implicate the concerns that FRC and Heritage raise, such as documents revealing the details of their internal political organizing or the names of their donors, supporters, and volunteers.

Given the narrow scope of Plaintiffs' document requests, FRC's and Heritage's First Amendment interest in resisting the subpoenas is minimal. Moreover, their unsupported speculation about the potential impact of production on First Amendment interests is insufficient; neither entity has pointed to concrete evidence suggesting that producing these external communications would lead to threats or reprisal against them or their supporters.⁴ Finally, Plaintiffs' interest in obtaining the information outweighs any slight effect on First Amendment interests that would follow from production. As explained above, the records Plaintiffs seek are central to the litigation, and because of Defendants' refusal to produce the information, cannot be obtained anywhere else.

1. Plaintiffs' Requests Do Not Implicate The First Amendment

FRC and Heritage rely on cases in which courts have recognized a qualified First Amendment privilege—principally rooted in the First Amendment right of expressive association—that protects advocacy organizations from disclosing confidential information that

⁴ Any individual privacy concerns that might be raised by information in the communications such as email or street addresses could be accommodated through appropriate redactions.

could lead to reprisals against them and chill their ability to organize. All of those decisions, however, are different from this case in one critical respect: In those cases, the information sought was *internal* to the group or its supporters, and was not shared with others—and particularly not with the government. *See NAACP v. Alabama*, 357 U.S. 449, 462-463 (1958) (internal membership lists); *AFL-CIO v. FEC*, 333 F.3d 168, 177 (D.C. Cir. 2003) (“confidential internal materials”); *see also Black Panther Party v. Smith*, 661 F.2d 1243, 1269-1270 (D.C. Cir. 1981) (applying privilege to internal membership lists), *judgment vacated on other grounds*, 458 U.S. 1118 (1982); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1165 n.12 (9th Cir. 2010) (privilege was “limited to *private, internal* ... communications” (emphasis in original)); *Grandeboche v. Clancy*, 825 F.2d 1463, 1465-1467 (10th Cir. 1987) (internal membership lists, internal mailing lists, and a list of the association’s convention attendees).

Those cases recognize that, in some circumstances when the government or a litigant seeks information about an advocacy group’s internal dealings, such as the names of its supporters or the details of its plans for political campaigns, compelled disclosure could hobble the group’s ability to organize to advance its cause. But none of those cases has held that communications *outside* the group and its supporters—and in particular, communications *to the government*—are entitled to the same First Amendment protection. When an advocacy organization lobbies the government for a policy that it supports, it is not entitled to the same protection of confidentiality that might shield its internal deliberations. Indeed, FRC and Heritage recognize that very point when they suggest that the records that Plaintiffs seek should be obtainable from the government under the Freedom of Information Act. *See Milgroom Decl.*, Ex. B at 8 (FRC); Ex. A at 4 (Heritage).

Courts have not shielded external communications like those between FRC and Heritage and the Executive Branch. In *Perry v. Schwarzenegger*, for instance, the Ninth Circuit “emphasize[d]” that the First Amendment privilege that FRC and Heritage invoke here “is limited to *private, internal* campaign communications,” and it refused to extend its application to “documents or messages conveyed to the electorate at large” or other external communications to “discrete groups of voters or individual voters for purposes such as persuasion, recruitment or motivation.” 591 F.3d at 1165 n.12 (emphasis in original). Other courts, following *Perry*, have found no (or limited) First Amendment protections in external communications. See *Wal-Mart*, 2016 WL 5922315, at *8 (privilege does not apply to third parties’ external “communications with public actors”); *Valle Del Sol*, 2013 WL 12098752, at *3 (First Amendment privilege “does not apply” because “the communications Plaintiffs seek are not internal communications, but rather communications between Movants and public officials”); see also *Pulte Home Corp. v. Montgomery Cty., Md.*, 2017 WL 1104670, at *10 (D. Md. Mar. 24, 2017) (distinguishing between disclosure of information “used to convince local government decisionmakers,” which “would not result in any chilling effect on the citizen groups’ First Amendment rights,” and other information that was held internally, which was more sensitive); *Dunnet Bay Constr. Co. v. Hannig*, 2011 WL 5417123, at *3 (C.D. Ill. Nov. 9, 2011) (concluding that First Amendment “protect[s] against the disclosure of the identity of members and the content of internal communications”).

FRC and Heritage invoke their First Amendment right to petition government, but “while citizens plainly have a right to ‘communicate with [public] officials on a matter of public concern,’ that does not mean they have a right to protect these communications from public view.” *Wal-Mart*, 2016 WL 5922315, at *7 (quoting *Valle Del Sol*, 2013 WL 12098752 at *3)

(alteration in original). Thus, courts have consistently upheld lobbying disclosure requirements, recognizing that disclosure of information about contacts with government officials does not abridge the right to petition the government. *See United States v. Harriss*, 347 U.S. 612, 620, 625 (1954) (upholding against First Amendment challenge requirement in former Federal Regulation of Lobbying Act to disclose “direct communication with members of Congress on pending or proposed federal legislation”); *see also National Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 7, 29 (D.C. Cir. 2009) (holding that lobbying disclosure requirement of Honest Leadership and Open Government Act did not impinge upon plaintiff’s First Amendment rights), *affirming* 549 F. Supp. 2d 33 (D.D.C. 2008) (Kollar-Kotelly, J.).

2. Plaintiffs’ Need for the Requested Documents Outweighs Any Purported First Amendment Concerns

Even if Plaintiffs’ requests did implicate the First Amendment, Plaintiffs’ need for the discovery would outweigh any potential impact on FRC’s and Heritage’s First Amendment rights. Where the First Amendment is potentially implicated by compelled disclosure, the court should “balance the burdens imposed” by the requested discovery “against the significance” of the materials sought. *AFL-CIO*, 333 F.3d at 176; *see also Perry*, 591 F.3d at 1161. To make that determination, the court should consider two questions: “1) can the information sought be discovered through alternative sources and has the party seeking disclosure made reasonable attempts to obtain the information elsewhere; and 2) does the information sought go to the heart of the lawsuit?” *UAW v. National Right to Work Legal Def. & Ed. Found., Inc.*, 590 F.2d 1139, 1152 (D.C. Cir. 1978); *see also United States v. Duke Energy Corp.*, 232 F.R.D. 1, 3 (D.D.C. 2005) (applying same test to deny motion to quash).

In this case, both sides of the balance favor disclosure. With respect to the first question, Plaintiffs have sought the communications in discovery requests directed to Defendants, but

Defendants have resisted and have asked the Court to enter a protective prohibiting any such discovery. *See supra*, p. 3. The resulting motion papers are now before this Court. Where, as here, a party “has pursued discovery from the individual defendants through the courts” and a third party “is in fact the best source of the information sought,” this factor “weigh[s] in favor” of production. *Duke Energy*, 232 F.R.D. at 3.

As to the second question, the information that Plaintiffs are seeking in these subpoenas indeed “goes to the heart” of this lawsuit. As explained above, the requested records are probative of the process surrounding the President’s decision to ban transgender military service, and are also directly relevant to whether the Executive Branch acted with an unconstitutional purpose in adopting that ban. *See supra*, pp. 4-7. Because the government has defended the President’s decision as the product of professional military advice and judgment, evidence to the contrary will tend to undermine Defendants’ claim for deference and establish that the ban was driven by animus rather than a legitimate military justification.

Other factors also tip the balance in favor of production. This is significant constitutional litigation affecting the fundamental rights of service members and the composition of our military. *See Perry*, 591 F.3d at 1161 (listing “the importance of the litigation” as a relevant balancing factor). Nor are there any “less intrusive means of obtaining” the communications, which, as discussed above, are “central[.]” to the litigation, than subpoenaing the individuals who sent and received the relevant communications. *Id.* And finally, any First Amendment interests at stake are minimal given that Plaintiffs seek only external communications with public officials. *Id.* (listing the “substantiality of the First Amendment interests at stake” as an additional factor). Whatever slight First Amendment interest FRC and Heritage might have in

resisting disclosure of their contacts with the government is therefore outweighed by Plaintiffs' compelling need for the information in this litigation.

C. The Religious Freedom Restoration Act Does Not Bar Enforcement Of The Subpoena Directed To The Family Research Council

FRC objects that enforcement of the subpoena would violate the Religious Freedom Restoration Act (RFRA), which in certain circumstances prohibits the federal government from substantially burdening a private party's exercise of religion. RFRA does not apply to this matter, however, because this litigation involves only claims by private-party plaintiffs. It does not involve any action taken against FRC by a federal government agency. Furthermore, even if RFRA applied here, FRC's rights under that statute would not be violated by requiring it to comply with the subpoena. FRC cannot establish a substantial burden on its religious beliefs, and even if it could, the federal judicial system's overriding interest in obtaining critical evidence in cases seeking vindication of vital constitutional rights is sufficiently compelling to justify enforcement of the subpoena, which is narrowly tailored to obtain only highly relevant information that Plaintiffs have been unable to obtain from other sources.

1. RFRA Does Not Apply To Enforcement Of A Federal Subpoena Directed By A Private Plaintiff To A Nonparty Witness In Litigation Involving No Government Action Against The Nonparty

RFRA provides that "Government shall not substantially burden a person's exercise of religion," 42 U.S.C. § 2000bb-1(a), unless application of the burden "is the least restrictive means of furthering [a] compelling governmental interest," *id.* § 2000bb-1(b)(2).

"[G]overnment" is defined in RFRA as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id.* § 2000bb-2(1).

RFRA was enacted in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that the Free Exercise Clause of the First Amendment to

the Constitution does not shield noncompliance with neutral laws of general applicability, *see id.* at 879, and was intended to restore the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), in cases involving government action that is alleged to infringe religious freedom.

RFRA has no application to the subpoena that Plaintiffs directed to FRC because RFRA applies only to an alleged infringement of religious freedom *by the federal government*. RFRA does not apply to action taken by a private party or a non-federal entity, even if the federal government is in some way involved in the dispute or federal law is at issue in the litigation. *See Village of Bensenville v. FAA*, 457 F.3d 52, 65 (D.C. Cir. 2006) (plan by a city to expand airport and make related land seizures, which allegedly burdened religious freedom, could not be attributed to federal agency where agency's only role was to approve plan for purposes of federal funding because "[t]he City—not the FAA—is the cause of any burden on religious exercise").

Thus, RFRA does not apply in cases where a private party sues another private party under federal law, and one party claims that application of the federal law to its conduct would violate RFRA. *See Listeck v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 736-737 (7th Cir. 2015) (RFRA does not apply in cases to which government is not a party); *General Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410-412 (6th Cir. 2010) (RFRA does not apply in federal trademark suit between private parties); *see also Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) (expressing doubt that RFRA would apply to private copyright suit).⁵

⁵ A panel of the Second Circuit, over the dissent of then-Judge Sotomayor, held that RFRA applied in a private lawsuit brought under the Age Discrimination in Employment Act. *See Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006); *but see id.* at 114 (Sotomayor, J., dissenting) ("RFRA by its terms does not apply to suits between private parties."). A subsequent panel of the Second Circuit expressed doubt about the correctness of *Hankins*. *See Rweyemamu v. Cote*, 520 F.3d 198, 203-204 & n.2 (2d Cir. 2008).

The reasoning in these cases makes clear that, even though the federal government is a party to this litigation, RFRA does not apply to this motion to compel. That is because no federal agency is seeking to compel or forbid any action by FRC. In determining whether RFRA applies, the Court must “begin[] by identifying the specific conduct of which the plaintiff complains.” *Village of Bensenville*, 457 F.3d at 64 (alteration in original) (internal quotation marks omitted). The only conduct that FRC challenges under RFRA is *Plaintiffs’* action in serving and seeking to enforce the subpoena. Although the federal government is separately involved in this litigation as a party adverse to the Plaintiffs, that is irrelevant to whether that subpoena should be enforced; neither the President nor any of the other Defendants have taken any action adverse to FRC. Indeed, in this litigation, the government is *defending* the constitutionality of the very policy that FRC urged it to enact. Nor can Plaintiffs’ action in enforcing the subpoena be attributed to the government; they are challenging the government’s action in this case, not acting under its direction.

The only governmental action about which FRC could possibly be complaining would be *this Court’s* entry of an order compelling compliance with the subpoena. But the structure of RFRA makes clear that it does not apply to the action of a federal court in adjudicating a controversy such as this one. RFRA provides that “Government may substantially burden a person’s exercise of religion only if *it demonstrates*” that doing so would be “the least restrictive means of furthering [a] compelling governmental interest.” 42 U.S.C. § 2000bb-1(b) (emphasis added). The statute further defines “demonstrates” to mean “meets the burdens of going forward with the evidence and of persuasion.” *Id.* § 2000bb-2(3). In our system of adjudication, a court enforcing a subpoena has no “burden of going forward.” The Court has no obligation to meet

any burden of production or persuasion as it administers discovery. Thus, no “demonstration” that enforcing the subpoena would be the least restrictive means is required.

Furthermore, as explained above, RFRA does not prevent courts from entering a judgment on the merits in a dispute between private parties. *See, e.g., General Conference Corp.*, 617 F.3d at 411. Since RFRA cannot prevent courts from exercising that fundamental judicial function, it also cannot prevent courts from taking the intermediate step of requiring responses to subpoenas issued by one private party to another private party.

2. Even If RFRA Applied, An Order Directing Compliance With The Subpoena Would Satisfy Its Requirements

Even if RFRA applied to this Court’s enforcement of a private plaintiff’s civil subpoena against a nonparty whose substantive rights are not at issue in the underlying litigation, such an order would easily satisfy RFRA’s requirements in this case. “A person who brings a challenge under RFRA bears the initial burden of proving that (1) the Government’s policy or action implicates her religious exercise, (2) the relevant religious exercise is grounded in a sincerely held religious belief, and (3) the policy or action substantially burdens that exercise.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 3d 77, 88 (D.D.C. 2017) (citing *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015)). If the person asserting a RFRA claim satisfies that burden, the burden shifts to the government to demonstrate that “application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb–1(b). FRC’s RFRA argument fails at both steps.

First, FRC has not shown that its attempts to influence military policy are themselves any form of religious exercise. But even if it is assumed that compliance with the subpoena implicates FRC’s religious exercise, and that this religious exercise is grounded in a sincerely

held religious belief, FRC cannot show that production of external communications with Executive Branch officials on matters of public policy would “substantially burden” that exercise. FRC identifies no specific religious belief or practice that it would be required to violate if it were to produce the narrow set of records that Plaintiffs are seeking. It offers only a general contention that production would violate its religious freedom by “(1) chilling its religiously-motivated advocacy, (2) jeopardizing its relationships with donors and other advocacy groups, and (3) hindering its right to petition the government.” Milgroom Decl., Ex. B at 2.

Such generalities are insufficient to support a claim of substantial burden. “A substantial burden exists when government action puts ‘substantial pressure on an adherent to modify his behavior and to violate his beliefs.’” *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)). “An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme.” *Id.* FRC does not explain how producing records of its external lobbying communications with the government in this matter would require it to modify its religious practices or violate its beliefs.

In *Kaemmerling*, the D.C. Circuit rejected a prisoner’s claim that the collection, analysis, and retention of his DNA would substantially burden his religious exercise. Like FRC’s vague claim that its religious exercise will be “chilled,” the prisoner based his claim of burden on his speculation that the collection of that information might expose him to harm in the future, such as “the potential that he could become an unwilling participant in future activities that violate his religious beliefs.” 553 F.3d at 678. The court held such speculative claims of future harm insufficient to establish a substantial burden. The court observed that the collection of his

information by the FBI “does not call for Kaemmerling to modify his religious behavior in any way—it involves no action or forbearance on his part, nor does it otherwise interfere with any religious act in which he engages.” *Id.* at 679.

The same is true here: FRC does not claim that the production of the communications at issue here would require it to violate any religious tenet or practice. Here, as in *Kaemmerling*, Plaintiffs’ requests for production of information “cannot be said to hamper [its] religious exercise because they do not ‘pressure [it] to modify [its] behavior and to violate [its] beliefs.’” *Id.* (quoting *Thomas*, 450 U.S. at 718); *see also Standing Rock*, 239 F. Supp. 3d at 91 (concluding that government’s grant of easement for Dakota Access pipeline did not create substantial burden because it “does not impose a sanction on the Tribe’s members for exercising their religious beliefs, nor does it pressure them to choose between religious exercise and the receipt of government benefits”).

Second, even if compliance with the subpoena would impose a substantial burden on FRC’s religious exercise, enforcement of the subpoena is the least restrictive means of furthering the government’s compelling interest in ensuring that courts have access to all the facts necessary to ensure fair and accurate adjudication of the cases before them, particularly when those cases involve fundamental constitutional rights of the highest order such as due process and equal protection. *See, e.g., In re Grand Jury Empaneling of Special Grand Jury*, 171 F.3d 826, 832 (3d Cir. 1999) (holding that government had compelling interest sufficient to compel witnesses to testify against their father despite RFRA objection because “the crimes that this grand jury is investigating are weighty and ... these witnesses are likely to possess substantial relevant information”); *cf. In re Grand Jury Proceedings of John Doe*, 842 F.2d 244, 248 (10th Cir. 1988) (holding that government’s “compelling interest in investigating offenses against the

criminal laws of the United States” outweighed the witness’s claimed free exercise rights to refuse to testify); *Port v. Heard*, 764 F.2d 423, 432 (5th Cir. 1985) (rejecting parents’ claim that the Free Exercise Clause entitled them to refuse testimony about their son since “the state’s interest in procuring every person’s testimony for the thorough investigation of the crime of homicide outweighs the Ports’ First Amendment claims”).

Although FRC claims that the subpoena is not the least restrictive means of furthering the government’s interest in obtaining the facts relevant to this proceeding, it offers no way in which the subpoena, which requests only communications with five government offices on one specific subject over a period of less than a year, could have been more narrowly crafted. The only alternative it proposes as less restrictive is that Plaintiffs obtain the communications at issue directly from Defendants. But as explained above, Plaintiffs have tried that avenue and have been stymied by Defendants’ refusal to comply with their discovery requests. Accordingly, there is no less restrictive alternative than to obtain these communications directly from third parties such as FRC, who have no basis to claim privilege over these materials.

CONCLUSION

The motion to compel compliance should be granted, and FRC and Heritage should be ordered to produce the records sought in the subpoenas.

April 6, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of April, 2018, a true and correct copy of the foregoing document was served by United States Mail and electronic mail upon the following individuals:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 2, JANE DOE 3, JANE DOE 4,)
JANE DOE 5, JANE DOE 6, JANE DOE 7,)
JOHN DOE 1, JOHN DOE 2, REGAN V.)
KIBBY, and DYLAN KOHERE,)

Plaintiffs,)

v.)

DONALD J. TRUMP, in his official capacity as)
President of the United States; JAMES N.)
MATTIS, in his official capacity as Secretary of)
Defense; JOSEPH F. DUNFORD, JR., in his)
official capacity as Chairman of the Joint Chiefs)
of Staff; the UNITED STATES DEPARTMENT)
OF THE ARMY; MARK T. ESPER, in his)
official capacity as Secretary of the Army; the)
UNITED STATES DEPARTMENT OF THE)
NAVY; RICHARD V. SPENCER, in his official)
capacity as Secretary of the Navy; the UNITED)
STATES DEPARTMENT OF THE AIR)
FORCE; HEATHER A. WILSON, in her)
official capacity as Secretary of the Air Force;)
the UNITED STATES COAST GUARD;)
KIRSTJEN M. NIELSEN, in her official)
capacity as Secretary of Homeland Security; the)
DEFENSE HEALTH AGENCY; RAQUEL C.)
BONO, in her official capacity as Director of the)
Defense Health Agency; and the UNITED)
STATES OF AMERICA,)

Defendants.)

Civil Action No. 17-cv-1597 (CKK)

DECLARATION OF LAUREN MILGROOM

1. I am an attorney at Foley Hoag LLP and counsel to Plaintiffs in this action. I make this declaration on the basis of personal knowledge, unless otherwise indicated.

2. Attached hereto as **Exhibit A** is a true and accurate copy of The Non-Party Heritage Foundation's Objections to Plaintiffs' Rule 45 Request for Production of Documents.

3. Attached hereto as **Exhibit B** is a true and accurate copy of Non-Party Family Research Council's Objections to Plaintiffs' Rule 45 Request for Production of Documents.

4. Attached hereto as **Exhibit C** is a true and accurate copy of Plaintiffs' First Set of Requests for Production to all Defendants.

5. Attached hereto as **Exhibit D** is a true and accurate copy of Defendants' Objections and Responses to Plaintiffs' First Set of Requests for Production to the Army.

6. Attached hereto as **Exhibit E** is a true and accurate copy of Defendants' Objections and Responses to Plaintiffs' First Set of Requests for Production to the Air Force.

7. Attached hereto as **Exhibit F** is a true and accurate copy of Defendants' Objections to Plaintiffs' First Set of Requests for Production to Defendant Donald J. Trump.

8. Attached hereto as **Exhibit G** is a true and accurate copy of Notice of Subpoena to the Family Research Council with attached subpoena.

9. Attached hereto as **Exhibit H** is a true and accurate copy of Notice of Subpoena to the Heritage Foundation with attached subpoena.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 6th day of April, 2018.



Lauren Milgroom

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOE, et al.,)	
Plaintiff,)	
)	
v.)	Civil Action No. 17-CV-1597 (CKK)
)	
DONALD J. TRUMP, et al,)	
Defendant.)	
)	

**NON-PARTY THE HERITAGE FOUNDATION’S OBJECTIONS TO
PLAINTIFFS’ RULE 45 REQUEST FOR PRODUCTION OF DOCUMENTS**

Non-party The Heritage Foundation (“Heritage”), by counsel, and pursuant to Rules 26 and 45 of the Federal Rules of Civil Procedure and the Local Rules of this Court, hereby objects to the document production requests set forth in the *subpoena duces tecum* issued by Plaintiffs Doe (“Plaintiffs”). Heritage reserves the right to raise additional objections as they appear warranted. These objections are based upon the best relevant information presently available to Heritage and are made without prejudice to the right of Heritage to provide additional or modified objections should better or further information or belief subsequently become available to Heritage.

GENERAL OBJECTIONS

Heritage objects to the *subpoena* as a whole on the grounds that it does not seek information relevant to any subject matter involved in the pending action and is not reasonably calculated to lead to the discovery of admissible evidence, but, instead, is intended to harass and oppress Heritage, to delve into privileged matters, and to create undue burden and expense for

Heritage in the conduct of its First Amendment-protected rights.

Plaintiffs have a responsibility to avoid imposing undue burden or expense on a nonparty subject to a subpoena. Fed. R. Civ. P. 45(d)(1). In assessing whether a burden is undue under Rule 45, a court will look at the factors articulated in Rule 26(b) of the Federal Rules of Civil Procedure. *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007). Rule 26 generally limits discovery to any nonprivileged matter that is relevant to any party's claim or defense and is proportional to the needs to the case. Fed. R. Civ. P. 26(b)(1).

In evaluating discovery requests of non-parties, one must consider the importance of the issues at stake in the action, 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. This *subpoena* fails on most of these factors.

First, Plaintiffs have requested documents privileged under the First Amendment. The United States Constitution guarantees a right to engage in activities which the First Amendment protects, including the right to petition the government, the right to associate, and the right of speech. The right to petition entitles citizens to communicate with their government officials to express ideas and concerns. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388-89 (2011). "[P]etitioning the government is equally central to First Amendment values." *State of Wyoming v. United States Dep't of Agric.*, 208 F.R.D. 449, 454 (D.D.C. 2002). This right incorporates the right to associate with others in a joint effort to convince the government to take particular actions. *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 525 (2002) (quoting *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 131 (1961)). These First Amendment protections

apply in the context of discovery as well because the compelled disclosure of affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation. *AFL-CIO v. FEC*, 333 F.3d 168, 175-76 (D.C. Cir. 2003) (citing *Buckley v. Valeo*, 424 U.S. 1, 64-68 (1976)); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958)). Turning over documents related to Heritage's communications with the Government would frustrate Heritage's ability to pursue its legislative goals by "revealing to their opponents 'activities, strategies and tactics.'" *AFL-CIO*, 333 F.3d at 177. The First Amendment provides a privilege against compelled disclosure of information through any mode of discovery where the intent or practical effect of enforcing it would chill the rights of speech, association, and petition. *NAACP v. Alabama*, 357 U.S. at 466.

This *subpoena* impermissibly penalizes and restrains the exercise of Heritage's right to petition the Government by requiring it to disclose communications to the Government. This compelled disclosure will adversely affect the ability of Heritage and its supporters to collectively advocate for policies by inducing Heritage and its supporters to withdraw support or cease petitioning the Government for fear that exposure of their beliefs and communications will lead to threats, harassment, or reprisal.

Second, the documents requested are completely irrelevant to the matter at hand. Plaintiffs do not and cannot express a legitimate basis for the requested documents, let alone assert a compelling need which is required to justify the infringement of Heritage's First Amendment rights. Heritage's petitioning of the Government has no relation to the subject of the lawsuit, namely, the constitutionality of a ban on transgender individuals serving in the military. What Heritage did or did not communicate during its petitioning of the Government is

not relevant to the President's directive, nor to any party's claim or defense in the lawsuit. These privileged documents are of minimal relevance at best because Heritage is not a party, and the documents relate only to Heritage's efforts and its views. A greater showing of relevance and need is required where First Amendment issues are at stake in order to give more protection to First Amendment values. *Austl. E. USA Shipping Conf. v. United States*, 537 F. Supp. 807, 810, 812 (D.C. Cir. 1982). When a claim of associational privilege is asserted, the relevance standard is more exacting than the minimal showing of relevance under Rule 26(b)(1), and the information must go to the heart of the matter. *State of Wyoming v. United States of Dep't of Agric.*, 239 F. Supp. 2d 1219, (D. Wyo. 2002), *vacated as moot*, 414 F.3d 1207, 1241 (10th Cir. 2005). The privileged documents have no bearing on the Plaintiffs' claims that the President's directive violated the Fifth Amendment or that the Government is estopped from rescinding rights given to the Plaintiffs. Furthermore, Heritage's position on transgender service in the military is already a matter of public record. That Heritage seeks to promote adoption of its public policies is likewise a matter of public record. These requests encroach so fundamentally on Heritage's protected rights, however, that objection is necessary. These privileged documents could be used to harass, threaten, and chill the petition, speech and associational rights of Heritage.

Third, Heritage objects to the *subpoena* because it is not proportional to the needs of the case and Plaintiffs could more easily obtain the documents sought hereunder through discovery on the Defendants or through requests filed under the Freedom of Information Act. Rule 26(b)(2) limits discovery if the discovery sought it "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less

expensive.” Even if the Plaintiffs cannot obtain the privileged documents from other sources, the information is not relevant and therefore, it is not necessary for the Plaintiffs to receive the information to continue to pursue their claims.

“[T]he right to petition [the government is] one of the most precious of the liberties safeguarded by the Bill of Rights” because “the right is implied by the very idea of a government, republican in form.” *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (internal quotation marks and alteration omitted); *see also United Mine Workers v. Ill. State Bar Ass’n*, 389 U.S. 217, 222 (1967) (holding the right to petition government is “among the most precious of the liberties safeguarded by the Bill of Rights”). Being forced to comply with the *subpoena* would chill and frustrate Heritage’s right to petition the Government.

Heritage objects to providing any documents covered by the attorney-client or work product privileges, or that are otherwise protected from disclosure under applicable privileges, immunities, laws or rules. Heritage also objects to producing any documentation identifying supporters or containing confidential information relating to any of its supporters on grounds of the First Amendment right to associate in private.

SPECIFIC OBJECTIONS AND RESPONSES TO DOCUMENT REQUESTS

Document Request 1

All documents containing communications from January 20, 2017, to September 1, 2017, between the Heritage Foundation and the President concerning military service by transgender people and/or any restriction of military service by transgender people.

Response to Document Request 1

Heritage objects to this request for all of the reasons set forth above in the General

Objections. This request is not proportional to the needs of the case because, among other reasons:

- The information requested is protected under the First Amendment;
- The information requested is neither relevant nor necessary to resolving the issues in the present action;
- The Plaintiffs have equal or similar access to the potentially relevant information, which it could obtain from the Defendants through discovery or by requesting the information under the Freedom of Information Act; and
- The burden or expense of the proposed discovery outweighs its likely benefit.

Heritage's position on transgender service in the military is already a matter of public record, nor is it any secret that Heritage seeks to promote adoption of its public policies.

Document Request 2.

All documents containing communications from January 20, 2017, to September 1, 2017, between the Heritage Foundation and the Vice President concerning military service by transgender people and/or any restriction of military service by transgender people.

Response to Document Request 2

Heritage objects to this request for all of the reasons set forth above in the General Objections. This request is not proportional to the needs of the case because, among other reasons:

- The information requested is protected under the First Amendment;
- The information requested is neither relevant nor necessary to resolving the issues in the present action;

- The Plaintiffs have equal or similar access to the potentially relevant information, which it could obtain from the Defendants through discovery or by requesting the information under the Freedom of Information Act; and
- The burden or expense of the proposed discovery outweighs its likely benefit.

Heritage's position on transgender service in the military is already a matter of public record, nor is it any secret that Heritage seeks to promote adoption of its public policies.

Document Request 3.

All documents containing communications from January 20, 2017, to September 1, 2017, between the Heritage Foundation and the Executive Office of the President concerning military service by transgender people and/or any restriction of military service by transgender people.

Response to Document Request 3

Heritage objects to this request for all of the reasons set forth above in the General Objections. This request is not proportional to the needs of the case because, among other reasons:

- The information requested is protected under the First Amendment;
- The information requested is neither relevant nor necessary to resolving the issues in the present action;
- The Plaintiffs have equal or similar access to the potentially relevant information, which it could obtain from the Defendants through discovery or by requesting the information under the Freedom of Information Act; and
- The burden or expense of the proposed discovery outweighs its likely benefit.

Heritage's position on transgender service in the military is already a matter of public record, nor

is it any secret that Heritage seeks to promote adoption of its public policies.

Document Request 4.

All documents containing communications from January 20, 2017, to September 1, 2017, between the Heritage Foundation and the Office of the Vice President concerning military service by transgender people and/or any restriction of military service by transgender people.

Response to Document Request 4

Heritage objects to this request for all of the reasons set forth above in the General Objections. This request is not proportional to the needs of the case because, among other reasons:

- The information requested is protected under the First Amendment;
- The information requested is neither relevant nor necessary to resolving the issues in the present action;
- The Plaintiffs have equal or similar access to the potentially relevant information, which it could obtain from the Defendants through discovery or by requesting the information under the Freedom of Information Act; and
- The burden or expense of the proposed discovery outweighs its likely benefit.

Heritage's position on transgender service in the military is already a matter of public record, nor is it any secret that Heritage seeks to promote adoption of its public policies.

Document Request 5

All documents containing communications from January 20, 2017, to September 1, 2017, between the Heritage Foundation and the Department of Defense concerning military service by transgender people and/or any restriction of military service by transgender people.

Response to Document Request 5

Heritage objects to this request for all of the reasons set forth above in the General Objections. This request is not proportional to the needs of the case because, among other reasons:

- The information requested is protected under the First Amendment;
- The information requested is neither relevant nor necessary to resolving the issues in the present action;
- The Plaintiffs have equal or similar access to the potentially relevant information, which it could obtain from the Defendants through discovery or by requesting the information under the Freedom of Information Act; and
- The burden or expense of the proposed discovery outweighs its likely benefit.

Heritage's position on transgender service in the military is already a matter of public record, nor is it any secret that Heritage seeks to promote adoption of its public policies.

Respectfully submitted,



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Attorney for Non-Party The Heritage
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2018, a copy of the foregoing **Non-Party The Heritage Foundation's Objections to Plaintiffs' Rule 45 Request for Production of Documents** was served by United States mail, first-class postage prepaid, and via electronic mail, on the following counsel of record in *Doe v. Trump*, Civil Action No. 17-CV-1597 (D.D.C. 2017):

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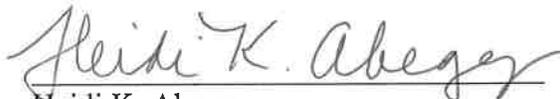

Heidi K. Abegg

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DOE 1, et al.

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants

Civil Action No. 17-CV-1597 (CKK)

**NON-PARTY FAMILY RESEARCH COUNCIL’S OBJECTIONS
TO PLAINTIFFS’ RULE 45 REQUEST
FOR PRODUCTION OF DOCUMENTS**

Non-party Family Research Council (“FRC”), pursuant to Rules 26 and 45 of the Federal Rules of Civil Procedure and the Local Rules of this Court, objects to the document production requests in the *subpoena duces tecum* issued by Plaintiffs Doe 1-5 (“Plaintiffs”). These objections may be modified as events warrant.

INTRODUCTION AND GENERAL OBJECTIONS

FRC is an explicitly Christian ministry. Designed to “advance faith, family, and freedom in public policy and the culture from a Christian worldview,” FRC advances Christian teachings as a non-profit religious corporation under Section 501(c)(3) of the Internal Revenue Code. For that and other reasons, FRC objects to this subpoena of any communications it may have had with the executive branch. Indeed, if FRC were compelled to comply with the subpoena, such an

order would conflict with FRC's statutory and constitutional rights. Moreover, the information is not relevant to any subject matter in the pending action and is not reasonably calculated to lead to the discovery of admissible evidence.

1. Religious Freedom Restoration Act

As with other religious groups, burdens placed on FRC by any entity of the federal government—including the district court here—are subject to the Religious Freedom Restoration Act (RFRA). *See, e.g.* 42 USCS § 2000bb-1; *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014). The subpoena, if enforced by the district court, would burden FRC's religious exercise by (1) chilling its religiously-motivated advocacy, (2) jeopardizing its relationships with donors and other advocacy groups, and (3) hindering its right to petition the government. *See generally* U.S. Const. Amend. I. Thus, before Plaintiffs can enforce a subpoena against FRC, they must demonstrate that the subpoena is the least restrictive means of achieving a compelling governmental interest. *E.g. In re Grand Jury Empaneling of the Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999). The compelling interest must be an interest in burdening a specific religious individual or group. *See, e.g., Hobby Lobby*, 134 S. Ct at 2767.

Given FRC's tangential (at best) relationship to this suit, Plaintiffs simply cannot show a compelling governmental interest in enforcing the subpoena. The Court lacks a compelling interest in forcing FRC to disclose any

communications with the Executive Branch. And a more general interest—in advancing a favored enlistment policy or Plaintiffs’ novel legal theories—is irrelevant here for two reasons. First, while *Plaintiffs* may have a compelling interest in certain policies and legal theories, the government does not, as its adverse position in this case demonstrates. Second, generally stated interests do not meet RFRA’s requirement that there must be a compelling interest as applied to the religious objector. Any compelling interest in advancing Plaintiffs’ policy preferences or legal theories does not imply a compelling interest in *enlisting FRC* to help Plaintiffs advance their cause.

Moreover, Plaintiffs have other means of seeking the information sought here—by discovery on the Defendants or through requests filed under the Freedom of Information Act. Plaintiffs thus cannot show that burdening FRC is the least restrictive means of obtaining the documents.

So too for any more general compelling interests: Plaintiffs cannot show that they must drag FRC to the courthouse to get relief against defendants; they have other means of proving their case. FRC cannot be compelled to comply with the subpoena.¹

¹ For similar reasons, the Free Exercise Clause would give FRC relief even in the absence of RFRA. *Cf., e.g. Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (targeting of religious groups violates Free Exercise Clause); *Employment Division v. Smith*, 494 U.S. 872, 881 (1990) (dicta suggesting enhanced scrutiny of free exercise claims when other constitutional rights implicated).

2. Right to Petition

The subpoena is also impermissible because it burdens FRC's First Amendment right to petition the government for redress of grievances. U.S. Const. Amend. I. The right to petition entitles citizens to communicate with their government officials to express ideas and concerns. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388-89 (2011). “[P]etitioning the government is [] central to First Amendment values.” *Wyoming v. United States Dep 't of Agric.*, 208 F.R.D. 449,454 (D.D.C. 2002).

FRC's right of petition is burdened by the subpoena because it is asking FRC to reveal both if it petitioned governmental officials on this issue and, assuming it did, the contents of the petition. This creates a “reasonable probability”—that FRC will then be “subject ... to threats, harassment, or reprisals from either Government officials or private parties,” which is impermissible. *See Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (Free Speech Clause) (internal quotation marks and citation omitted).

Indeed, for FRC, the threat of harassment is far from hypothetical. Websites already collect cherry-picked quotes regarding FRC's position on issues like those in this suit.² Not only does FRC receive hate mail and critiques on social media because of these quotes, but an FRC employee has been shot by

² See, e.g., Southern Policy Law Center, Family Research Council, <https://www.splcenter.org/fighting-hate/extremist-files/group/family-research-council>.

a man enraged by these websites.³ Given these risks of disclosure, FRC is obviously burdened by the forced disclosure of the communications sought by the subpoena. As Plaintiffs cannot show a compelling interest in disclosure or that they have pursued alternative methods of obtaining the requested materials, FRC cannot be compelled to comply with the subpoena.

3. Freedom of Association

In addition to burdening FRC's right to petition, the subpoena burdens FRC's freedom to associate with other individuals and groups. FRC has a right under the First Amendment to associate with others in a joint effort to convince the government to act. *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 525 (2002). When a claim of associational privilege is asserted, the relevance standard is more exacting than the minimal showing of relevance under Rule 26(b)(1), and the information must go to the heart of the matter. *State of Wyoming v. United States of Dep 't of Agric.*, 239 F. Supp. 2d 1219, (D. Wyo. 2002), *vacated as moot*, 414 F.3d 1207, 1241 (10th Cir. 2005).

In this case, forced disclosure of the subpoenaed documents might inhibit other groups and individuals from associating with FRC. The price of joining forces with FRC would be a fear that, the next time FRC's petitions and other

³ Carol Cratty, *25-year sentence in Family Research Council shooting*, CNN (Sep. 9, 2013) <https://www.cnn.com/2013/09/19/justice/dc-family-research-council-shooting/index.html>. While noting this threat, FRC acknowledges that almost all individuals who disagree with FRC's political positions will never attempt to harm FRC through acts of violence.

advocacy convinces a governmental body to change position, FRC will be subpoenaed and information about its allies will be revealed. Likewise, donors may fear donating to FRC, for fear that information they tell to FRC will be exposed. The First Amendment protects FRC for this reason as well. *See Citizens United v. FEC*, 558 U.S. at 367.

In short, as Plaintiffs cannot show a compelling interest in disclosure or that they have pursued alternative methods of obtaining the requested materials, FRC cannot be compelled to comply with the subpoena.

4. Freedom of Speech

Compliance with the subpoena would also burden FRC's free speech rights. As already explained, limitation on free speech rights may not be imposed when there is a "reasonable probability"—that a group will be "subject them to threats, harassment, or reprisals from either Government officials or private parties," which is impermissible. *Citizens United*, 558 U.S. at 367 (2010) (internal quotation marks and citation omitted). Further, the speech sought in this case is political speech, which lies at the core of the First Amendment's speech protections. *E.g. Boos v. Barry*, 485 U.S. 312 (1988).

Forcing FRC to disclose speech would have immediate harmful benefits. FRC faces a perpetual threat that private parties will cut off essential services because of its political views. Some groups that, like FRC, are labeled "hate groups" for resisting "modern" views on sexuality-related issues experience

boycotts.⁴ While FRC respects the rights of businesses to disassociate with mislabeled hate groups, it also seeks to protect itself from misquotation by compelled disclosure of its communications.⁵ For this reason as well, FRC cannot be compelled to comply with the subpoena.

5. Undue Burden and Irrelevancy

Plaintiffs have a responsibility to avoid imposing undue burden or expense on a nonparty subject to a subpoena. Fed. R. Civ. P. 45(d)(1). In assessing whether a burden is undue under Rule 45, a court looks at the factors articulated in Rule 26(b) of the Federal Rules of Civil Procedure. *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007). Rule 26 generally limits discovery to any nonprivileged matter that is relevant to any party's claim or defense and is proportional to the needs to the case. Fed. R. Civ. P. 26(b)(1).

In evaluating discovery requests of non-parties, the court must consider the importance of the issues at stake in the action, 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. This request for documents falls outside the scope of Rule 26.

⁴ See, e.g., Ruth Institute, *The Cost of Being Labeled a Hate Group*, (August 31, 2017) <http://www.ruthinstitute.org/press/ruth-institute-s-on-line-donation-processor-cuts-them-off-for-promoting-hate-violence-harassment->.

⁵ See SPLC, *supra* note 2 (cherry-picking FRC quotes)

First, the documents requested are irrelevant to the matter at hand. Plaintiffs do not and cannot express a legitimate need for the requested documents, let alone assert a compelling need—which is required to justify the infringement of FRC’s statutory and First Amendment rights.

FRC’s communications with the Government, if any, have no relation to the subject of the lawsuit, namely, the *constitutionality* of the President’s policy related to transgender individuals serving in the military. Any communications FRC may have had with the Government would not be relevant to the Plaintiffs’ constitutional and other claims in this case, nor are the requests reasonably calculated to lead to the discovery of relevant information.

Second, FRC also objects to the subpoena because it is not proportional to the needs of the case and Plaintiffs could easily seek the documents through discovery on the Defendants or through requests filed under the Freedom of Information Act. Rule 26(b)(2) limits discovery if it is “unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Even if Plaintiffs cannot obtain the privileged documents from other sources, the information is not relevant, and therefore it is not necessary for the Plaintiffs to receive the information to pursue their claims.

SPECIFIC OBJECTIONS AND RESPONSES TO REQUESTS

Document Request 1

All documents containing communications from January 20, 2017, to September 1, 2017, between the Family Research Council and the President concerning military service by transgender people and/or any restriction of military service by transgender people.

Response to Document Request 1

FRC objects to this request for the reasons set forth above in the General Objections.

This request also is not proportional to the needs of the case because:

- The information requested is protected under RFRA and the First Amendment;
- The information requested is neither relevant nor necessary to resolving the issues in the present action;
- The Plaintiffs have alternative access to the information, which they could easily seek from Defendants through discovery or a request under the Freedom of Information Act; and
- The burden or expense of the proposed discovery outweighs its likely benefit.

Document Request 2

All documents containing communications from January 20, 2017, to September 1, 2017, between the Family Research Council and the Vice President concerning military service by transgender people and/or any restriction of military service by transgender people.

Response to Document Request 2

FRC objects to this request for the reasons set forth above in the General Objections.

This request also is not proportional to the needs of the case:

- The information requested is protected under RFRA and the First Amendment;
- The information requested is neither relevant nor necessary to resolving the issues in the present action;
- The Plaintiffs have alternative access to the information, which they could easily seek from Defendants through discovery or a request under the Freedom of Information Act; and
- The burden or expense of the proposed discovery outweighs its likely benefit.

Document Request 3

All documents containing communications from January 20, 2017, to September 1, 2017, between the Family Research Council and the Executive Office of the President concerning military service by transgender people and/or any restriction of military service by transgender people.

Response to Document Request 3

FRC objects to this request for the reasons set forth above in the General Objections.

This request also is not proportional to the needs of the case because:

- The information requested is protected under RFRA and the First Amendment;
- The information requested is neither relevant nor necessary to resolving the issues in the present action;
- The Plaintiffs have alternative access to the information, which they could easily seek from Defendants through discovery or by a request under the Freedom of Information Act; and
- The burden or expense of the proposed discovery outweighs its likely benefit.

Document Request 4

All documents containing communications from January 20, 2017, to September 1, 2017, between the Family Research Council and the Office of the Vice President concerning military service by transgender people and/or any restriction of military service by transgender people.

Response to Document Request 4

FRC objects to this request for the reasons set forth above in the General Objections.

This request also is not proportional to the needs of the case because:

- The information requested is protected under RFRA and the First Amendment;
- The information requested is neither relevant nor necessary to resolving the issues in the present action;
- The Plaintiffs have alternative access to the information, which they could easily seek from Defendants through discovery or by a request under the Freedom of Information Act; and
- The burden or expense of the proposed discovery outweighs its likely benefit.

Document Request 5

All documents containing communications from January 20, 2017, to September 1, 2017, between the Family Research Council and the Department of Defense concerning military service by transgender people and/or any restriction of military service by transgender people.

Response to Document Request 5

FRC objects to this request for the reasons set forth above in the General Objections.

This request also is not proportional to the needs of the case because:

- The information requested is protected under RFRA and the First Amendment;
- The information requested is neither relevant nor necessary to resolving the issues in the present action;
- The Plaintiffs have alternative access to the information, which they could easily seek from Defendants through discovery or by a request under the Freedom of Information Act; and
- The burden or expense of the proposed discovery outweighs its likely benefit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2018, a copy of the foregoing Non-Party The Family Research Counsel's Objections to Plaintiffs' Rule 45 Request for Production of Documents was served by United States mail, first-class postage prepaid, and via electronic mail, on the following counsel of record in *Doe v. Trump*, Civil Action No. 17-CV-1597 (D.D.C. 2017):

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/s/ Gene C. Schaerr

Gene C. Schaerr
Counsel for Non-Party
Family Research Council

EXHIBIT C

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 1, JANE DOE 2, JANE DOE 3,
JANE DOE 4, JANE DOE 5, JOHN DOE 1,
REGAN V. KIBBY, and DYLAN KOHERE,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States; JAMES N.
MATTIS, in his official capacity as Secretary of
Defense; JOSEPH F. DUNFORD, JR., in his
official capacity as Chairman of the Joint Chiefs
of Staff; the UNITED STATES DEPARTMENT
OF THE ARMY; MARK T. ESPER, in his
official capacity as Secretary of the Army; the
UNITED STATES DEPARTMENT OF THE
NAVY; RICHARD V. SPENCER, in his official
capacity as Secretary of the Navy; the UNITED
STATES DEPARTMENT OF THE AIR
FORCE; HEATHER A. WILSON, in her
official capacity as Secretary of the Air Force;
the UNITED STATES COAST GUARD;
KIRSTJEN NIELSEN, in her official capacity as
Secretary of Homeland Security; the DEFENSE
HEALTH AGENCY; RAQUEL C. BONO, in
her official capacity as Director of the Defense
Health Agency; and the UNITED STATES OF
AMERICA,

Defendants.¹

Civil Action No. 17-cv-1597 (CKK)

**PLAINTIFFS' FIRST SET OF REQUESTS
FOR PRODUCTION TO ALL DEFENDANTS**

¹ Mark T. Esper has been substituted as the Secretary of the Army and Kirstjen Nielsen has been substituted as the Secretary of the Department of Homeland Security pursuant to Federal Rule of Civil Procedure 25(d).

Pursuant to Federal Rules of Civil Procedure 26 and 34, Plaintiffs Jane Doe Nos. 1 – 5, John Doe No. 1, Regan V. Kibby and Dylan Kohere hereby request that Defendants produce for inspection and copying the documents and things set forth in the Requests for Production (“Requests”) below at the offices of Wilmer Cutler Pickering Hale and Dorr LLP, 1875 Pennsylvania Ave. NW, Washington, DC 20006, within 30 days from the date of service hereof, in accordance with Rule 34, the Local Rules of this Court, the Court’s Scheduling and Procedures Order (ECF No. 71), and the Definitions set forth below.

DEFINITIONS

1. The term “Individual Defendants” shall refer to Defendants Donald J. Trump, James N. Mattis, Joseph F. Dunford, Jr., Mark T. Esper, Richard V. Spencer, Heather A. Wilson, Kirstjen Nielsen, and Raquel C. Bono.
2. The “Accessions Readiness Memorandum” shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled “Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services,” dated May 8, 2017.
3. The “Accessions Deferral Memorandum” shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled “Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services,” dated June 30, 2017.
4. The “DoD Initiative” shall refer to the request by the Department of Defense, responded to by John Doe 1, seeking to obtain information relating to transgender servicemembers.
5. The “Twitter Statement” shall refer to the statement issued by President Trump on twitter on July 26, 2017 that: “After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to

serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]”

6. The “Presidential Memorandum” shall refer to the memorandum issued by President Trump on August 25, 2017 titled “Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security.”

7. The “Interim Guidance” shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled “Memorandum: Military Service of Transgender Individuals – Interim Guidance,” dated September 14, 2017.

8. “Service Branch” shall refer to any of the United States Army, the United States Marine Corps, the United States Navy, the United States Air Force, or the United States Coast Guard.

9. “CCC” shall refer to the Office of the Under Secretary of Defense for Personnel & Readiness Central Coordination Cell or any Central Coordination Cell organized within any Service Branch.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: All documents identified in the responses to Plaintiffs’ interrogatories.

REQUEST FOR PRODUCTION NO. 2: All documents on which Defendants intend to rely in support of any motion for summary judgment or intend to introduce as evidence in any trial in this matter.

REQUEST FOR PRODUCTION NO. 3: All documents reflecting or memorializing any oral communication identified in the responses to Plaintiffs’ interrogatories.

REQUEST FOR PRODUCTION NO. 4: Any documents constituting, summarizing, reflecting, or evidencing communications from, to, between, or among any of the Individual Defendants between July 26, 2017 and the present concerning: (a) the Twitter Statement; (b) the implementation of the Twitter Statement; (c) the drafting, contents, meaning, implications, or implementation of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Interim Guidance, or the Presidential Memorandum; or (d) military service or accessions of transgender people.

REQUEST FOR PRODUCTION NO. 5: All agendas or minutes for any meetings attended by any of the Individual Defendants between July 26, 2017 and the present concerning: (a) the Twitter Statement; (b) the implementation of the Twitter Statement; (c) the drafting, contents, meaning, implications, or implementation of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Interim Guidance, or the Presidential Memorandum; or (d) military service or accessions of transgender people.

REQUEST FOR PRODUCTION NO. 6: All documents concerning military service by transgender people provided to President Trump before July 26, 2017.

REQUEST FOR PRODUCTION NO. 7: All documents constituting, summarizing, reflecting, or evidencing communications between any member of the United States Congress (or staff member acting on his/her behalf) and President Trump or any individual within the Executive Office of the President concerning military service by transgender people between January 20, 2017 and July 26, 2017.

REQUEST FOR PRODUCTION NO. 8: Any documents generated by the Department of Defense or any Service Branch between June 30, 2016 and the present concerning the effect of open service by transgender persons on unit cohesion, readiness, or lethality.

REQUEST FOR PRODUCTION NO. 9: Any documents generated between June 30, 2016 and July 26, 2017 estimating costs by month or year incurred as a result of military service by transgender persons.

REQUEST FOR PRODUCTION NO. 10: All documents generated by or for any Service Branch(s) constituting or evidencing training sessions or training materials on the provision of health care to transgender servicemembers or servicemembers with gender dysphoria, including but not limited to, any Marine Corps training that occurred in 2016 and any tri-service training in 2016.

REQUEST FOR PRODUCTION NO. 11: Any documents constituting proposed amendments to Department of Defense Instruction 1300.28 issued in October 2016.

REQUEST FOR PRODUCTION NO. 12: Any documents constituting or evidencing any request for information, assessments, or evaluations of military service of transgender persons or of accessions by transgender persons sent by the Department of Defense between June 30, 2016 and the present to any Service Branch, and any documents constituting or evidencing any response to any such request.

REQUEST FOR PRODUCTION NO. 13: Any documents constituting or evidencing the DoD Initiative, including any requests for information, any reports of information, any summary of reports, and any de-identified reports relating to any service member.

REQUEST FOR PRODUCTION NO. 14: Any documents constituting, evidencing, reflecting, or discussing any request made by the Department of Defense to any Service Branch between June 30, 2016 and the present concerning the effect of open service by transgender persons on unit cohesion, readiness, or lethality.

REQUEST FOR PRODUCTION NO. 15: Any documents generated by the Department of Defense or any Service Branch between January 20, 2017 and the present discussing draft or planned policies, practices, or procedures for accessions of transgender applicants into military service, including any documents discussing the possible deferment of the date for beginning accessions of transgender applicants into military service.

REQUEST FOR PRODUCTION NO. 16: All non-final drafts of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance.

REQUEST FOR PRODUCTION NO. 17: All documents relied on by President Trump or any other person who participated in the drafting of the Presidential Memorandum to form the “judgment” that “the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments’ longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.”

REQUEST FOR PRODUCTION NO. 18: Documents sufficient to show the amount of “DoD or DHS resources” used to “fund sex reassignment surgical procedures for military personnel” before August 25, 2017.

REQUEST FOR PRODUCTION NO. 19: All documents relied on by any person in connection with the drafting of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance.

REQUEST FOR PRODUCTION NO. 20: Any documents constituting, reflecting, or evidencing communications on or after September 14, 2017 between any Defendant and any member of the “panel of experts” or among the “panel of experts” concerning service, inclusion,

or exclusion of transgender people from military service, including, without limitation, any emails, meeting agendas, or meeting minutes.

REQUEST FOR PRODUCTION NO. 21: Any documents provided to, considered by, or generated by the “panel of experts” referenced in the Interim Guidance.

REQUEST FOR PRODUCTION NO. 22: Any documents constituting, describing, reflecting, or evidencing any “appropriate evidence and information” referred to in the Interim Guidance.

REQUEST FOR PRODUCTION NO. 23: All documents specifically concerning each individual Plaintiff, including: (a) any comprehensive service records; (b) any documents evaluating or discussing the training, readiness, lethality, skills, promotion, or discipline of any Plaintiff; (c) any documents estimating, summarizing, or commenting upon costs spent to train any Plaintiff, including, without limitation, tuition bills from colleges or universities; (d) any documents commenting upon, observing, or assessing any Plaintiff’s integration into their unit; (e) any documents estimating, summarizing, or commenting upon estimates of the total cost of medical treatment for gender dysphoria for any Plaintiff; (f) any documents estimating, summarizing, or commenting upon estimates of the total cost of medical treatment for any Plaintiff for any condition other than gender dysphoria; and (g) any documents commenting upon, observing, or assessing cohesion of any unit in which any Plaintiff has served since June 30, 2016.

REQUEST FOR PRODUCTION NO. 24: Any documents constituting, reflecting, or evidencing any communications from or to a CCC, including between or among a CCC and any Individual Defendant or Service Branch, concerning the Interim Guidance or military service or accessions of transgender people, including any agenda or minutes of any meetings of or with a

CCC concerning or discussing the Interim Guidance or military service or accessions of transgender people.

REQUEST FOR PRODUCTION NO. 25: Any documents provided to, considered or generated by the CCC concerning the military service or accession of transgender persons.

December 15, 2017

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on December 15, 2017 by e-mail upon the following:

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Counsel for Defendants

/s/ Daniel L. McFadden
Daniel L. McFadden

EXHIBIT D

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 1 <i>et al.</i> ,)	
)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 17-cv-1597 (CKK)
)	
)	
DONALD J. TRUMP <i>et al.</i>)	
)	
)	
Defendants.)	

**DEFENDANTS’ OBJECTIONS AND RESPONSES TO PLAINTIFFS’
FIRST SET OF REQUESTS FOR PRODUCTION TO THE ARMY**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs’ First Set of Requests for Production to the Army, served December 15, 2017.¹ In presenting these responses and objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground. Defendants will complete production of all responsive, non-privileged documents in the possession, custody, and control of the Army by January 26, 2018, as per the agreed discovery schedule proposed by Defendants via email on January 11, 2018 and agreed to by Plaintiffs on January 12, 2018. ESI will be produced in TIF format.

¹ Defendants note that these objections and responses are limited to the Army and that Defendants will produce further objections and responses for other Defendants, as per the agreement between the parties.

Objections to Definitions

1. Defendants object to Plaintiffs' Definition 4 (of "DoD Initiative") to the extent that it is vague, not confined to any specific time period, and presumes that DoD had a formal "initiative" to solicit information. Defendants will construe this term to refer to March 1, 2017 – October 1, 2017 and search accordingly.

Specific Objections and Responses to Requests for Production

RFP No. 1:

All documents identified in the responses to Plaintiffs' interrogatories.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 2:

All documents on which Defendants intend to rely in support of any motion for summary judgment or intend to introduce as evidence in any trial in this matter.

Objections:

Defendants object to this RFP as premature because (a) discovery is ongoing; (b) Federal Rule of Civil Procedure 26(a)(3) provides the requirements for disclosure of exhibit lists prior to trial; and (c) Defendants will provide their summary judgment exhibits upon filing of any summary judgment motion.

RFP No. 3:

All documents reflecting or memorializing any oral communication identified in the responses to Plaintiffs' interrogatories.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 4:

Any documents constituting, summarizing, reflecting, or evidencing communications from, to, between, or among any of the Individual Defendants between July 26, 2017 and the

present concerning: (a) the Twitter Statement; (b) the implementation of the Twitter Statement; (c) the drafting, contents, meaning, implications, or implementation of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Interim Guidance, or the Presidential Memorandum; or (d) military service or accessions of transgender people.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 5:

All agendas or minutes for any meetings attended by any of the Individual Defendants between July 26, 2017 and the present concerning: (a) the Twitter Statement; (b) the implementation of the Twitter Statement; (c) the drafting, contents, meaning, implications, or implementation of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Interim Guidance, or the Presidential Memorandum; or (d) military service or accessions of transgender people.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants further object on the grounds that “the implementation of the Twitter Statement” is vague and not defined. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties’ agreement.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army’s possession, custody, and control.

RFP No. 6:

All documents concerning military service by transgender people provided to President Trump before July 26, 2017.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "[a]ll documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, "concerning" is undefined by Plaintiffs and could be construed to apply to documents with mere peripheral connections to the claims and defenses in this case.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 7:

All documents constituting, summarizing, reflecting, or evidencing communications between any member of the United States Congress (or staff member acting on his/her behalf) and President Trump or any individual within the Executive Office of the President concerning military service by transgender people between January 20, 2017 and July 26, 2017.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation;

or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

The Army has not located any responsive documents.

RFP No. 8:

Any documents generated by the Department of Defense or any Service Branch between June 30, 2016 and the present concerning the effect of open service by transgender persons on unit cohesion, readiness, or lethality.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "any documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 9:

Any documents generated between June 30, 2016 and July 26, 2017 estimating costs by month or year incurred as a result of military service by transgender persons.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 10:

All documents generated by or for any Service Branch(s) constituting or evidencing training sessions or training materials on the provision of health care to transgender servicemembers or servicemembers with gender dysphoria, including but not limited to, any Marine Corps training that occurred in 2016 and any tri-service training in 2016.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement. Defendants further object to the extent that the terms "provision of health care" and "training materials" are vague and undefined.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 11:

Any documents constituting proposed amendments to Department of Defense Instruction 1300.28 issued in October 2016.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

RFP No. 12:

Any documents constituting or evidencing any request for information, assessments, or evaluations of military service of transgender persons or of accessions by transgender persons sent by the Department of Defense between June 30, 2016 and the present to any Service Branch, and any documents constituting or evidencing any response to any such request.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the references to "any documents" and "any requests" purport to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 13:

Any documents constituting or evidencing the DoD Initiative, including any requests for information, any reports of information, any summary of reports, and any de-identified reports relating to any service member.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Defendants further object on the grounds that this request is overbroad, burdensome, and disproportionate to the needs of the case, as Plaintiffs' Definition of the term "DoD Initiative" is vague, not confined to any specific time period, and presumes that DoD had a formal "initiative" to solicit information. Defendants further object to the extent that the term "de-identified" is vague and undefined.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 14:

Any documents constituting, evidencing, reflecting, or discussing any request made by the Department of Defense to any Service Branch between June 30, 2016 and the present

concerning the effect of open service by transgender persons on unit cohesion, readiness, or lethality.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 15:

Any documents generated by the Department of Defense or any Service Branch between January 20, 2017 and the present discussing draft or planned policies, practices, or procedures for accessions of transgender applicants into military service, including any documents discussing the possible deferment of the date for beginning accessions of transgender applicants into military service.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which

would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 16:

All non-final drafts of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

RFP No. 17:

All documents relied on by President Trump or any other person who participated in the drafting of the Presidential Memorandum to form the "judgment" that "the previous

Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources."

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

The Army has not located any responsive documents.

RFP No. 18:

Documents sufficient to show the amount of "DoD or DHS resources" used to "fund sex reassignment surgical procedures for military personnel" before August 25, 2017.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has

been withheld and the basis for any withholdings, by the date specified in the parties' agreement. Defendants further object to the extent that "sufficient to show" is vague and undefined.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 19:

All documents relied on by any person in connection with the drafting of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "[a]ll documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, the phrase “any person” is problematic to the extent that it could be construed to apply to individuals with mere peripheral involvement, as the identity of such individuals is not relevant, such individuals are unlikely to have relevant information, and identifying all such individuals would be excessively burdensome and disproportionate to the needs of the case. Similarly, “relied on” and “in connection with” are vague and undefined by Plaintiffs and could be construed to apply to documents with mere peripheral connections to the claims and defenses in this case.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army’s possession, custody, and control.

RFP No. 20:

Any documents constituting, reflecting, or evidencing communications on or after September 14, 2017 between any Defendant and any member of the “panel of experts” or among the “panel of experts” concerning service, inclusion, or exclusion of transgender people from military service, including, without limitation, any emails, meeting agendas, or meeting minutes.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 21:

Any documents provided to, considered by, or generated by the "panel of experts" referenced in the Interim Guidance.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 22:

Any documents constituting, describing, reflecting, or evidencing any "appropriate evidence and information" referred to in the Interim Guidance.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 23:

All documents specifically concerning each individual Plaintiff, including: (a) any comprehensive service records; (b) any documents evaluating or discussing the training, readiness, lethality, skills, promotion, or discipline of any Plaintiff; (c) any documents estimating, summarizing, or commenting upon costs spent to train any Plaintiff, including, without limitation, tuition bills from colleges or universities; (d) any documents commenting upon, observing, or assessing any Plaintiff's integration into their unit; (e) any documents estimating, summarizing, or commenting upon estimates of the total cost of medical treatment for gender dysphoria for any Plaintiff; (f) any documents estimating, summarizing, or commenting upon estimates of the total cost of medical treatment for any Plaintiff for any condition other than gender dysphoria; and (g) any documents commenting upon, observing, or assessing cohesion of any unit in which any Plaintiff has served since June 30, 2016.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 24:

Any documents constituting, reflecting, or evidencing any communications from or to a CCC, including between or among a CCC and any Individual Defendant or Service Branch, concerning the Interim Guidance or military service or accessions of transgender people, including any agenda or minutes of any meetings of or with a CCC concerning or discussing the Interim Guidance or military service or accessions of transgender people.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this

litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

RFP No. 25:

Any documents provided to, considered or generated by the CCC concerning the military service or accession of transgender persons.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Army will produce any non-privileged documents responsive to this RFP in the Army's possession, custody, and control.

Dated: January 19, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
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CERTIFICATE OF SERVICE

I hereby certify that, on January 19, 2018, a copy of the document above was served by email on the following:

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/s/ Ryan Parker
RYAN B. PARKER
Senior Trial Counsel
U.S. Department of Justice

EXHIBIT E

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 1 <i>et al.</i> ,)	
)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 17-cv-1597 (CKK)
)	
)	
DONALD J. TRUMP <i>et al.</i>)	
)	
)	
Defendants.)	

**DEFENDANTS’ OBJECTIONS AND RESPONSES TO PLAINTIFFS’
FIRST SET OF REQUESTS FOR PRODUCTION TO THE AIR FORCE**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs’ First Set of Requests for Production to the Air Force, served December 15, 2017.¹ In presenting these responses and objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground. Defendants will complete production of all responsive, non-privileged documents in the possession, custody, and control of the Air Force by January 26, 2018, as per the agreed discovery schedule proposed by Defendants via email on January 11, 2018 and agreed to by Plaintiffs on January 12, 2018. ESI will be produced in TIF format.

¹ Defendants note that these objections and responses are limited to the Air Force and that Defendants will produce further objections and responses for other Defendants, as per the agreement between the parties.

Objections to Definitions

1. Defendants object to Plaintiffs' Definition 4 (of "DoD Initiative") to the extent that it is vague, not confined to any specific time period, and presumes that DoD had a formal "initiative" to solicit information. Defendants will construe this term to refer to March 1, 2017 – October 1, 2017 and search accordingly.

Specific Objections and Responses to Requests for Production

RFP No. 1:

All documents identified in the responses to Plaintiffs' interrogatories.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 2:

All documents on which Defendants intend to rely in support of any motion for summary judgment or intend to introduce as evidence in any trial in this matter.

Objections:

Defendants object to this RFP as premature because (a) discovery is ongoing; (b) Federal Rule of Civil Procedure 26(a)(3) provides the requirements for disclosure of exhibit lists prior to trial; and (c) Defendants will provide their summary judgment exhibits upon filing of any summary judgment motion.

RFP No. 3:

All documents reflecting or memorializing any oral communication identified in the responses to Plaintiffs' interrogatories.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 4:

Any documents constituting, summarizing, reflecting, or evidencing communications from, to, between, or among any of the Individual Defendants between July 26, 2017 and the

present concerning: (a) the Twitter Statement; (b) the implementation of the Twitter Statement; (c) the drafting, contents, meaning, implications, or implementation of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Interim Guidance, or the Presidential Memorandum; or (d) military service or accessions of transgender people.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 5:

All agendas or minutes for any meetings attended by any of the Individual Defendants between July 26, 2017 and the present concerning: (a) the Twitter Statement; (b) the implementation of the Twitter Statement; (c) the drafting, contents, meaning, implications, or implementation of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Interim Guidance, or the Presidential Memorandum; or (d) military service or accessions of transgender people.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants further object on the grounds that “the implementation of the Twitter Statement” is vague and not defined. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties’ agreement.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force’s possession, custody, and control.

RFP No. 6:

All documents concerning military service by transgender people provided to President Trump before July 26, 2017.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “[a]ll documents” purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, “concerning” is undefined by Plaintiffs and could be construed to apply to documents with mere peripheral connections to the claims and defenses in this case.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 7:

All documents constituting, summarizing, reflecting, or evidencing communications between any member of the United States Congress (or staff member acting on his/her behalf) and President Trump or any individual within the Executive Office of the President concerning military service by transgender people between January 20, 2017 and July 26, 2017.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation;

or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

The Air Force has not located any responsive documents.

RFP No. 8:

Any documents generated by the Department of Defense or any Service Branch between June 30, 2016 and the present concerning the effect of open service by transgender persons on unit cohesion, readiness, or lethality.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "any documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 9:

Any documents generated between June 30, 2016 and July 26, 2017 estimating costs by month or year incurred as a result of military service by transgender persons.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 10:

All documents generated by or for any Service Branch(s) constituting or evidencing training sessions or training materials on the provision of health care to transgender servicemembers or servicemembers with gender dysphoria, including but not limited to, any Marine Corps training that occurred in 2016 and any tri-service training in 2016.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement. Defendants further object to the extent that the terms "provision of health care" and "training materials" are vague and undefined.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 11:

Any documents constituting proposed amendments to Department of Defense Instruction 1300.28 issued in October 2016.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

RFP No. 12:

Any documents constituting or evidencing any request for information, assessments, or evaluations of military service of transgender persons or of accessions by transgender persons sent by the Department of Defense between June 30, 2016 and the present to any Service Branch, and any documents constituting or evidencing any response to any such request.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the references to "any documents" and "any requests" purport to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 13:

Any documents constituting or evidencing the DoD Initiative, including any requests for information, any reports of information, any summary of reports, and any de-identified reports relating to any service member.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Defendants further object on the grounds that this request is overbroad, burdensome, and disproportionate to the needs of the case, as Plaintiffs' Definition of the term "DoD Initiative" is vague, not confined to any specific time period, and presumes that DoD had a formal "initiative" to solicit information. Defendants further object to the extent that the term "de-identified" is vague and undefined.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 14:

Any documents constituting, evidencing, reflecting, or discussing any request made by the Department of Defense to any Service Branch between June 30, 2016 and the present

concerning the effect of open service by transgender persons on unit cohesion, readiness, or lethality.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 15:

Any documents generated by the Department of Defense or any Service Branch between January 20, 2017 and the present discussing draft or planned policies, practices, or procedures for accessions of transgender applicants into military service, including any documents discussing the possible deferment of the date for beginning accessions of transgender applicants into military service.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which

would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 16:

All non-final drafts of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

RFP No. 17:

All documents relied on by President Trump or any other person who participated in the drafting of the Presidential Memorandum to form the "judgment" that "the previous

Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources."

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

The Air Force has not located any responsive documents.

RFP No. 18:

Documents sufficient to show the amount of "DoD or DHS resources" used to "fund sex reassignment surgical procedures for military personnel" before August 25, 2017.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has

been withheld and the basis for any withholdings, by the date specified in the parties' agreement. Defendants further object to the extent that "sufficient to show" is vague and undefined.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 19:

All documents relied on by any person in connection with the drafting of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "[a]ll documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, the phrase “any person” is problematic to the extent that it could be construed to apply to individuals with mere peripheral involvement, as the identity of such individuals is not relevant, such individuals are unlikely to have relevant information, and identifying all such individuals would be excessively burdensome and disproportionate to the needs of the case. Similarly, “relied on” and “in connection with” are vague and undefined by Plaintiffs and could be construed to apply to documents with mere peripheral connections to the claims and defenses in this case.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force’s possession, custody, and control.

RFP No. 20:

Any documents constituting, reflecting, or evidencing communications on or after September 14, 2017 between any Defendant and any member of the “panel of experts” or among the “panel of experts” concerning service, inclusion, or exclusion of transgender people from military service, including, without limitation, any emails, meeting agendas, or meeting minutes.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 21:

Any documents provided to, considered by, or generated by the "panel of experts" referenced in the Interim Guidance.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 22:

Any documents constituting, describing, reflecting, or evidencing any "appropriate evidence and information" referred to in the Interim Guidance.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 23:

All documents specifically concerning each individual Plaintiff, including: (a) any comprehensive service records; (b) any documents evaluating or discussing the training, readiness, lethality, skills, promotion, or discipline of any Plaintiff; (c) any documents estimating, summarizing, or commenting upon costs spent to train any Plaintiff, including, without limitation, tuition bills from colleges or universities; (d) any documents commenting upon, observing, or assessing any Plaintiff's integration into their unit; (e) any documents estimating, summarizing, or commenting upon estimates of the total cost of medical treatment for gender dysphoria for any Plaintiff; (f) any documents estimating, summarizing, or commenting upon estimates of the total cost of medical treatment for any Plaintiff for any condition other than gender dysphoria; and (g) any documents commenting upon, observing, or assessing cohesion of any unit in which any Plaintiff has served since June 30, 2016.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Because of the limited amount of information provided by Plaintiffs' counsel, the Air Force has been unable to identify Plaintiff Jane Doe 5.

RFP No. 24:

Any documents constituting, reflecting, or evidencing any communications from or to a CCC, including between or among a CCC and any Individual Defendant or Service Branch, concerning the Interim Guidance or military service or accessions of transgender people, including any agenda or minutes of any meetings of or with a CCC concerning or discussing the Interim Guidance or military service or accessions of transgender people.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this

litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

RFP No. 25:

Any documents provided to, considered or generated by the CCC concerning the military service or accession of transgender persons.

Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation. Defendants will provide a privilege log identifying the specific information that has been withheld and the basis for any withholdings, by the date specified in the parties' agreement.

Response:

Subject to and without waiving the above objections, the Air Force will produce any non-privileged documents responsive to this RFP in the Air Force's possession, custody, and control.

Dated: January 19, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 19, 2018, a copy of the document above was served by email on the following:

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U.S. Department of Justice

EXHIBIT F

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 1 <i>et al.</i> ,)	
)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 17-cv-1597 (CKK)
)	
)	
DONALD J. TRUMP <i>et al.</i> ,)	
)	
)	
Defendants.)	

**DEFENDANTS’ OBJECTIONS TO PLAINTIFFS’ FIRST SET OF REQUESTS FOR
PRODUCTION TO DEFENDANT DONALD J. TRUMP**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs’ First Set of Requests for Production to Defendant Donald J. Trump, served December 15, 2017.¹ In presenting these responses and objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objection to Definitions

The President objects to Plaintiffs’ Definition 4 (of “DoD Initiative”) to the extent that it is vague, not confined to any specific time period, and presumes that DoD had a formal “initiative” to solicit information.

¹ These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections and responses for other Defendants, as per the agreement between the parties.

General Objection to All Requests for Production

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. The Supreme Court has held that it has “no jurisdiction of a bill to enjoin the President in the performance of his official duties.” *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *id.* at 500 (“The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department.”). A plurality of the Court later reiterated this principle in *Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992). The plurality in *Franklin* found it “extraordinary” that the district court in that case had issued an injunction against the President and two other government officials. *Id.* at 802, 806. “At the threshold,” it said, “the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees’ injuries were nonetheless redressable.” *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is “a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history”). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827

(“Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President’s performance of executive functions”). The lower courts have often applied this settled principle. *See e.g., Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) (“similar considerations regarding a court’s power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment”); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (“With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.”) (citations omitted). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was “not a routine discovery dispute.” 542 U.S. 367, 385 (2004). The Court emphasized that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 385. The Supreme Court “has held, on more than one occasion, that ‘[t]he highest respect that is owed to the office of the Chief Executive ... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.’” *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive’s “constitutional responsibilities and status [are] factors counseling judicial deference and

restraint” in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government’s mandamus petition to vacate the district court’s discovery orders, holding that the government officials, “to guard against intrusion into the President’s prerogatives, must first assert privilege.” 542 U.S. at 375–76. In vacating the D.C. Circuit’s decision, the Supreme Court described as “anything but appropriate” the “overly broad discovery requests” directed to the Vice President and other senior officials, which were “unbounded in scope,” and asked for “everything under the sky.” *Id.* at 387–88 (“The Government [] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored.”). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court’s actions in permitting discovery against the Vice President and other senior officials constituted “an unwarranted impairment of another branch in the performance of its constitutional duties.” *Id.* at 390. It rejected the D.C. Circuit’s “mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections.” *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing with the President that “it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents” and deciding to narrow, on its own, the scope of the discovery directed to the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*. 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney*

instructive, reiterating the *Cheney* Court’s view that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted).

In light of these compelling separation of powers concerns, the Court should, at a minimum, require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. Indeed, on February 21, 2018—a mere two weeks from now—the Secretary of Defense is expected to submit an implementation plan to the President, which could narrow, if not completely eliminate, any purported reason for such broad discovery directed to the President. Military policy concerning transgender persons will be set forth in that plan, and any discovery, if permitted at all, into the basis for that policy should be directed at DoD in the first instance at that time. This timeline alone weighs heavily in favor of not subjecting the sitting President to discovery.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The “presumptive privilege” that attaches to presidential communications is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege’s “constitutional origins”). The privilege is broad, protecting the “confidentiality of Presidential communications in performance of the President’s responsibilities.” *United States v. Nixon*, 418 U.S. at 711. *See also In re Sealed Case*, 121 F.3d at 744 (“The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and

deliberations.”). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege “covers final and post-decisional material as well as pre-deliberative ones.” *In re Sealed Case*, 121 F.3d at 745.

Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is “more difficult to surmount” than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. A party seeking otherwise privileged presidential material must demonstrate a “focused demonstration of need.” *Id.*; *See also Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Courts will balance “the public interests served by protecting the President’s confidentiality in a particular context with those furthered by requiring disclosure.” *In re Sealed Case*, 121 F.3d at 753. To meet this heavy burden of “specific need” in a criminal matter, the party seeking the privileged material must first demonstrate “that each discrete group of the subpoenaed materials likely contains important evidence”—that is, evidence “directly relevant to issues that are expected to be central to the trial,” and not evidence that is “only tangentially relevant or would relate to side issues.” *Id.* at 753–55. The party seeking the discovery must also show “that this evidence is not available with due diligence elsewhere”—that is, notwithstanding other sources of information, the privileged documents are “still needed.” *Id.* (explaining that this standard reflects the Supreme Court’s “insistence that privileged presidential communications should not be treated as just another source of information”).

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because “the right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions’” as a request for information in a criminal case. *Cheney*, 542 U.S. at

384 (quoting *United States v. Nixon*, 418 U.S. at 713); *see also Am. Historical Ass'n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that “while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch’s essential functions, the same could not be said of document requests in the civil context”); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (“[T]he sufficiency of the Committee’s showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee’s functions.”) (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged (including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege. Based on the foregoing objections, the President will not produce privileged or non-privileged documents and information that have been identified as potentially responsive.

Specific Objections to Requests for Production

RFP No. 1:

All documents identified in the responses to Plaintiffs' interrogatories.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 2:

All documents on which Defendants intend to rely in support of any motion for summary judgment or intend to introduce as evidence in any trial in this matter.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP as premature because (a) discovery is ongoing; (b) Federal Rule of Civil Procedure 26(a)(3) provides the requirements for disclosure of exhibit lists prior to trial; and (c) Defendants will provide their summary judgment exhibits upon filing of any summary judgment motion.

The President will not produce any documents responsive to this RFP.

RFP No. 3:

All documents reflecting or memorializing any oral communication identified in the responses to Plaintiffs' interrogatories.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 4:

Any documents constituting, summarizing, reflecting, or evidencing communications from, to, between, or among any of the Individual Defendants between July 26, 2017 and the present concerning: (a) the Twitter Statement; (b) the implementation of the Twitter Statement; (c) the drafting, contents, meaning, implications, or implementation of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Interim Guidance, or the Presidential Memorandum; or (d) military service or accessions of transgender people.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President will not produce any documents responsive to this RFP.

RFP No. 5:

All agendas or minutes for any meetings attended by any of the Individual Defendants between July 26, 2017 and the present concerning: (a) the Twitter Statement; (b) the implementation of the Twitter Statement; (c) the drafting, contents, meaning, implications, or implementation of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Interim Guidance, or the Presidential Memorandum; or (d) military service or accessions of transgender people.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President also objects on the grounds that "the implementation of the Twitter Statement" is vague and not defined.

The President will not produce any documents responsive to this RFP.

RFP No. 6:

All documents concerning military service by transgender people provided to President Trump before July 26, 2017.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President also objects to the scope of this RFP on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "[a]ll documents" purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant. Additionally, "concerning" is undefined by Plaintiffs and could be construed to apply to documents with mere peripheral connections to the claims and defenses in this case.

The President will not produce any documents responsive to this RFP.

RFP No. 7:

All documents constituting, summarizing, reflecting, or evidencing communications between any member of the United States Congress (or staff member acting on his/her behalf) and President Trump or any individual within the Executive Office of the President concerning military service by transgender people between January 20, 2017 and July 26, 2017.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (c) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President will not produce any documents responsive to this RFP.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of documents or information in this case based on the Speech or Debate Clause.

RFP No. 8:

Any documents generated by the Department of Defense or any Service Branch between June 30, 2016 and the present concerning the effect of open service by transgender persons on unit cohesion, readiness, or lethality.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the broad category of “[a]ny documents” referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President also objects to the scope of this RFP on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the

reference to “any documents” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 9:

Any documents generated between June 30, 2016 and July 26, 2017 estimating costs by month or year incurred as a result of military service by transgender persons.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the broad category of “[a]ny documents” referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 10:

All documents generated by or for any Service Branch(s) constituting or evidencing training sessions or training materials on the provision of health care to transgender servicemembers or servicemembers with gender dysphoria, including but not limited to, any Marine Corps training that occurred in 2016 and any tri-service training in 2016.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD and/or the Service Branch(es), as the broad category of "[a]ll documents" referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not

party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President also objects to the extent that the terms "provision of health care" and "training materials" are vague and undefined.

The President will not produce any documents responsive to this RFP.

RFP No. 11:

Any documents constituting proposed amendments to Department of Defense Instruction 1300.28 issued in October 2016.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not

party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 12:

Any documents constituting or evidencing any request for information, assessments, or evaluations of military service of transgender persons or of accessions by transgender persons sent by the Department of Defense between June 30, 2016 and the present to any Service Branch, and any documents constituting or evidencing any response to any such request.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to the DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material

the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President further objects to the scope of this RFP on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the references to "any documents" and "any requests" purport to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 13:

Any documents constituting or evidencing the DoD Initiative, including any requests for information, any reports of information, any summary of reports, and any de-identified reports relating to any service member.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The

President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President also objects on the grounds that Plaintiffs' Definition of the term "DoD Initiative" is vague, not confined to any specific time period, and presumes that DoD had a formal "initiative" to solicit information. The President further objects to the extent that the term "de-identified" is vague and undefined.

The President will not produce any documents responsive to this RFP.

RFP No. 14:

Any documents constituting, evidencing, reflecting, or discussing any request made by the Department of Defense to any Service Branch between June 30, 2016 and the present concerning the effect of open service by transgender persons on unit cohesion, readiness, or lethality.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD and/or the Service Branch(es), as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President will not produce any documents responsive to this RFP.

RFP No. 15:

Any documents generated by the Department of Defense or any Service Branch between January 20, 2017 and the present discussing draft or planned policies, practices, or procedures for accessions of transgender applicants into military service, including any documents

discussing the possible deferment of the date for beginning accessions of transgender applicants into military service.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD and/or the Service Branch(es), as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President will not produce any documents responsive to this RFP.

RFP No. 16:

All non-final drafts of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. On its face, this request requests only draft materials that are inherently deliberative and privileged. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 17:

All documents relied on by President Trump or any other person who participated in the drafting of the Presidential Memorandum to form the "judgment" that "the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments'

longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.”

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 18:

Documents sufficient to show the amount of “DoD or DHS resources” used to “fund sex reassignment surgical procedures for military personnel” before August 25, 2017.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD and/or DHS, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President also objects to the extent that "sufficient to show" is vague and undefined.

The President will not produce any documents responsive to this RFP.

RFP No. 19:

All documents relied on by any person in connection with the drafting of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President also objects to the scope of this RFP on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "[a]ll documents" purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant. Additionally, the phrase "any person" is problematic to the extent that it could be construed to apply to individuals with mere peripheral involvement, as the identity of such individuals is not relevant, such individuals are unlikely to have relevant information, and identifying all such individuals would be excessively burdensome and disproportionate to the needs of the case. Similarly, "relied on" and "in connection with" are vague and undefined by Plaintiffs and could be construed to apply to documents with mere peripheral connections to the claims and defenses in this case.

The President will not produce any documents responsive to this RFP.

RFP No. 20:

Any documents constituting, reflecting, or evidencing communications on or after September 14, 2017 between any Defendant and any member of the “panel of experts” or among the “panel of experts” concerning service, inclusion, or exclusion of transgender people from military service, including, without limitation, any emails, meeting agendas, or meeting minutes.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 21:

Any documents provided to, considered by, or generated by the “panel of experts” referenced in the Interim Guidance.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President will not produce any documents responsive to this RFP.

RFP No. 22:

Any documents constituting, describing, reflecting, or evidencing any “appropriate evidence and information” referred to in the Interim Guidance.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President will not produce any documents responsive to this RFP.

RFP No. 23:

All documents specifically concerning each individual Plaintiff, including: (a) any comprehensive service records; (b) any documents evaluating or discussing the training, readiness, lethality, skills, promotion, or discipline of any Plaintiff; (c) any documents estimating, summarizing, or commenting upon costs spent to train any Plaintiff, including, without limitation, tuition bills from colleges or universities; (d) any documents commenting upon, observing, or assessing any Plaintiff's integration into their unit; (e) any documents estimating, summarizing, or commenting upon estimates of the total cost of medical treatment for gender dysphoria for any Plaintiff; (f) any documents estimating, summarizing, or commenting upon estimates of the total cost of medical treatment for any Plaintiff for any condition other than gender dysphoria; and (g) any documents commenting upon, observing, or assessing cohesion of any unit in which any Plaintiff has served since June 30, 2016.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the

disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President will not produce any documents responsive to this RFP.

RFP No. 24:

Any documents constituting, reflecting, or evidencing any communications from or to a CCC, including between or among a CCC and any Individual Defendant or Service Branch, concerning the Interim Guidance or military service or accessions of transgender people, including any agenda or minutes of any meetings of or with a CCC concerning or discussing the Interim Guidance or military service or accessions of transgender people.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President will not produce any documents responsive to this RFP.

RFP No. 25:

Any documents provided to, considered or generated by the CCC concerning the military service or accession of transgender persons.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's November 28, 2017 Scheduling and Procedures Order [Dkt. 71], which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents. The President will not produce any documents responsive to this RFP.

Dated: February 6, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Ryan B. Parker

RYAN B. PARKER
ANDREW E. CARMICHAEL
United States Department of Justice
Civil Division, Federal Programs
Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on February 6, 2018, a copy of the document above was served by email on the following:

Alan E. Schoenfeld
WILMER CUTLER PICKERING
HALE & DORR LLP
7 World Trade Center
250 Greenwich St.
New York, New York 10007
Telephone: 212-230-8800
Fax: 212-230-8888
Email: Alan.Schoenfeld@wilmerhale.com

Claire Laporte
FOLEY HOAG LLP
155 Seaport Blvd.
Boston, Massachusetts 02210
Telephone: 617-832-1000
Fax: 617-832-7000
Email: CLL@foleyhoag.com

/s/ Ryan Parker
RYAN B. PARKER
Senior Trial Counsel
U.S. Department of Justice

EXHIBIT G

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 1, JANE DOE 2, JANE DOE 3,
JANE DOE 4, JANE DOE 5, JOHN DOE 1,
REGAN V. KIBBY, and DYLAN KOHERE,

Plaintiffs,

v.

Civil Action No. 17-cv-1597 (CKK)

DONALD J. TRUMP, in his official capacity as
President of the United States; JAMES N.
MATTIS, in his official capacity as Secretary of
Defense; JOSEPH F. DUNFORD, JR., in his
official capacity as Chairman of the Joint Chiefs
of Staff; the UNITED STATES DEPARTMENT
OF THE ARMY; MARK T. ESPER, in his
official capacity as Secretary of the Army; the
UNITED STATES DEPARTMENT OF THE
NAVY; RICHARD V. SPENCER, in his official
capacity as Secretary of the Navy; the UNITED
STATES DEPARTMENT OF THE AIR
FORCE; HEATHER A. WILSON, in her
official capacity as Secretary of the Air Force;
the UNITED STATES COAST GUARD;
KIRSTJEN NIELSEN, in her official capacity as
Secretary of Homeland Security; the DEFENSE
HEALTH AGENCY; RAQUEL C. BONO, in
her official capacity as Director of the Defense
Health Agency; and the UNITED STATES OF
AMERICA,

Defendants.

NOTICE OF SUBPOENA

PLEASE TAKE NOTICE that pursuant to Rule 45 of the Federal Rules of Civil
Procedure, the subpoena attached as Exhibit 1 will be served on the Family Research Council.

February 8, 2018

/s/ Daniel L. McFadden

Claire Laporte (*pro hac vice*)
Matthew E. Miller (*pro hac vice*)
Daniel L. McFadden (*pro hac vice*)
Kathleen M. Brill (*pro hac vice*)
Michael J. Licker (*pro hac vice*)
Rachel C. Hutchinson (*pro hac vice*)
Lauren Godles Milgroom
FOLEY HOAG LLP
155 Seaport Blvd.
Boston, Massachusetts 02210
Telephone: 617-832-1000
Fax: 617-832-7000

Jennifer Levi (*pro hac vice*)
Mary Bonauto (*pro hac vice*)
GLBTQ LEGAL ADVOCATES & DEFENDERS
30 Winter St., Ste. 800
Boston, Massachusetts 02108
Telephone: 617-426-1350
Fax: 617-426-3594

Shannon P. Minter (*pro hac vice*)
Amy Whelan (*pro hac vice*)
Christopher F. Stoll (*pro hac vice*)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market St., Ste. 370
San Francisco, California 94102
Telephone: 415-392-6257
Fax: 415-392-8442

Paul R.Q. Wolfson (D.C. Bar No. 414759)
Kevin M. Lamb (D.C. Bar No. 1030783)
WILMER CUTLER PICKERING
HALE & DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
Telephone: 202-663-6000
Fax: 202-663-6363

Alan E. Schoenfeld (*pro hac vice*)
WILMER CUTLER PICKERING
HALE & DORR LLP
7 World Trade Center
250 Greenwich St.
New York, New York 10007
Telephone: 212-230-8800
Fax: 212-230-8888

Christopher R. Looney (*pro hac vice*)
Harriet Hoder (*pro hac vice*)
Adam M. Cambier (*pro hac vice*)
WILMER CUTLER PICKERING
HALE & DORR LLP
60 State Street
Boston, Massachusetts 02109
Telephone: 617-526-6000
Fax: 617-526-5000

Nancy Lynn Schroeder (*pro hac vice*)
WILMER CUTLER PICKERING
HALE & DORR LLP
350 S. Grand Ave., Ste. 2100
Los Angeles, California 90071
Telephone: 213-443-5300
Fax: 213-443-5400

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was served on February 8, 2018 by e-mail upon the following:

RYAN B. PARKER
United States Department of Justice
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov
Counsel for Defendants

/s/ Daniel L. McFadden
Daniel L. McFadden

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the
District of Columbia

DOE, et al.,)	Civil Action No. 17-cv-1597 (CKK)
<i>Plaintiff</i>)	
v.)	
DONALD TRUMP, et al.,)	
<i>Defendant</i>)	

**SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION**

To: Family Research Council
800 G Street NW, Washington, DC 20001
(Name of person to whom this subpoena is directed)

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:
SEE ATTACHED SCHEDULE A

Place: Foley Hoag LLP 1717 K Street, NW Washington, DC 20006	Date and Time: 02/23/2018 5:00 pm
--	--

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:
--------	----------------

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 02/08/2018

CLERK OF COURT

OR  /LM

Attorney's signature

Signature of Clerk or Deputy Clerk

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs,
DOE, et al., , who issues or requests this subpoena, are:
Daniel McFadden, 155 Seaport Blvd. Boston, MA 02210, dmcfadden@foleyhoag.com, 617-832-1000

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 17-cv-1597 (CKK)

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____.

I served the subpoena by delivering a copy to the named person as follows: _____
_____ on *(date)* _____; or

I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____ *Server's signature*

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) *Contempt.*

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

SCHEDULE A TO SUBPOENA TO THE FAMILY RESEARCH COUNCIL

The document requests below are served subject to all instructions and definitions set forth in Rules 26, 34, and 45 of the Federal Rules of Civil Procedure, as well as to the instructions and definitions set forth below.

INSTRUCTIONS

1. Any responsive document in electronic form shall be produced in electronic form, including, without limitation, originals and all copies of email; output resulting from the use of any software program, including word processing documents, spreadsheets, database files, charts, graphs, and outlines; image files in any format; PDF files; and all other electronic files or file fragments, regardless of the media on which they are stored and regardless whether the data resides in an active file, deleted file, or file fragments.

2. All documents electronically produced shall be provided in a file format that can be read by a computer configured to process ADOBE ACROBAT®, Microsoft Word®, or Microsoft Excel® formatted files, when possible. Should a document not be capable of being produced in one of these file formats (or in a standard image format), identify the software application, including the version number and trade name, that can be used to open such document.

DEFINITIONS

1. “Family Research Council” shall mean Family Research Council and shall include all present or former employees, officers, agents, and representatives thereof, including without limitation Lieutenant General (Retired) William G. Boykin.

2. “President Trump” and the “President” means Donald J. Trump, the President of the United States.

3. “Vice President Pence” and the “Vice President” means Michael R. Pence, the Vice President of the United States.

4. The “Executive Office of the President” means the Executive Office of the President and all officers and employees thereof, including, but not limited to, the President’s Chief of Staff and his office, the Advisors, Senior Advisors, Chief Strategists, and Counselors to the President and their offices, the Assistant to the President for National Security Affairs (also known as the National Security Advisor) and his office, the White House Counsel and his office, and all officers and employees of the National Security Council.

5. The “Office of the Vice President” means the Office of the Vice President, including, without limitation, the Vice President’s Chief of Staff and his office, the Advisors, Assistants, and Deputy Assistants to the Vice President and their offices, and the National Security Advisor to the Vice President and her office.

6. The “Department of Defense” means the Department of Defense and all officers and employees thereof, including, but not limited to, the Secretary of Defense, the Deputy Secretary of Defense, any Undersecretary of Defense, any Assistant Secretary of Defense, any Deputy Assistant Secretary of Defense, the Chairman and Vice Chairman of the Joint Chiefs of Staff, and all employees and officers of the Office of the Secretary of Defense, the Department of the Navy, the Department of the Army, and Department of the Air Force.

7. “Communication” means that transmittal of information in the form of facts, ideas, statements, inquiries, or otherwise.

8. “Documents” means any writing, drawing, graph, chart, or other data or data compilation, including letters, e-mails, facsimiles, correspondence, notes, memoranda, reports,

and any other communications fixed in a tangible medium, including but not limited to material stored electronically or electromagnetically.

DOCUMENT REQUESTS

1. All documents containing communications from January 20, 2017, to September 1, 2017, between the Family Research Council and the President concerning military service by transgender people and/or any restriction of military service by transgender people.

2. All documents containing communications from January 20, 2017, to September 1, 2017, between the Family Research Council and the Vice President concerning military service by transgender people and/or any restriction of military service by transgender people.

3. All documents containing communications from January 20, 2017, to September 1, 2017, between the Family Research Council and the Executive Office of the President concerning military service by transgender people and/or any restriction of military service by transgender people.

4. All documents containing communications from January 20, 2017, to September 1, 2017, between the Family Research Council and the Office of the Vice President concerning military service by transgender people and/or any restriction of military service by transgender people.

5. All documents containing communications from January 20, 2017, to September 1, 2017, between the Family Research Council and the Department of Defense concerning military service by transgender people and/or any restriction of military service by transgender people.

EXHIBIT H

**IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

_____)	
DOE, et al.,)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	Civil Action No. 17-cv-1597 (CKK)
)	
DONALD TRUMP, et al.,)	
)	
<i>Defendants.</i>)	
_____)	

NOTICE OF SUBPOENA

Please take note that Plaintiffs Doe et al. will serve the attached subpoena on the Heritage Foundation. The documents to be produced are identified in Schedule A to the subpoena.

The subpoena provides that the Heritage Foundation produce the requested documents on or before February 27, 2018 to Foley Hoag, 1717 K St. N.W., Washington, D.C. 20006, or at an otherwise mutually agreeable time and/or location.

Dated: February 12, 2018

/s/ Daniel L. McFadden

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the
District of Columbia

DOE, et al.,

Plaintiff

v.

DONALD TRUMP, et al.,

Defendant

Civil Action No. 17-cv-1597 (CKK)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: The Heritage Foundation
214 Massachusetts Ave. NE, Washington, DC 20002

(Name of person to whom this subpoena is directed)

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: SEE ATTACHED SCHEDULE A

Table with 2 columns: Place (Foley Hoag LLP, 1717 K Street, NW, Washington, DC 20006) and Date and Time (02/27/2018 5:00 pm)

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Table with 2 columns: Place and Date and Time (empty)

The following provisions of Fed. R. Civ. P. 45 are attached - Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 02/12/2018

CLERK OF COURT

OR

Handwritten signature of attorney

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiffs, DOE, et al., Daniel McFadden, 155 Seaport Blvd. Boston, MA 02210, dmcfadden@foleyhoag.com, 617-832-1000, who issues or requests this subpoena, are:

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of \$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

SCHEDULE A TO SUBPOENA TO THE HERITAGE FOUNDATION

The document requests below are served subject to all instructions and definitions set forth in Rules 26, 34, and 45 of the Federal Rules of Civil Procedure, as well as to the instructions and definitions set forth below.

INSTRUCTIONS

1. Any responsive document in electronic form shall be produced in electronic form, including, without limitation, originals and all copies of email; output resulting from the use of any software program, including word processing documents, spreadsheets, database files, charts, graphs, and outlines; image files in any format; PDF files; and all other electronic files or file fragments, regardless of the media on which they are stored and regardless whether the data resides in an active file, deleted file, or file fragments.

2. All documents electronically produced shall be provided in a file format that can be read by a computer configured to process ADOBE ACROBAT®, Microsoft Word®, or Microsoft Excel® formatted files, when possible. Should a document not be capable of being produced in one of these file formats (or in a standard image format), identify the software application, including the version number and trade name, that can be used to open such document.

DEFINITIONS

1. “Heritage Foundation” shall mean Heritage Foundation and shall include all present or former employees, officers, agents, and representatives thereof.

2. “President Trump” and the “President” means Donald J. Trump, the President of the United States.

3. “Vice President Pence” and the “Vice President” means Michael R. Pence, the Vice President of the United States.

4. The “Executive Office of the President” means the Executive Office of the President and all officers and employs thereof, including, but not limited to, the President’s Chief of Staff and his office, the Advisors, Senior Advisors, Chief Strategists, and Counselors to the President and their offices, the Assistant to the President for National Security Affairs (also known as the National Security Advisor) and his office, the White House Counsel and his office, and all officers and employees of the National Security Council.

5. The “Office of the Vice President” means the Office of the Vice President, including, without limitation, the Vice President’s Chief of Staff and his office, the Advisors, Assistants, and Deputy Assistants to the Vice President and their offices, and the National Security Advisor to the Vice President and her office.

6. The “Department of Defense” means the Department of Defense and all officers and employees thereof, including, but not limited to, the Secretary of Defense, the Deputy Secretary of Defense, any Undersecretary of Defense, any Assistant Secretary of Defense, any Deputy Assistant Secretary of Defense, the Chairman and Vice Chairman of the Joint Chiefs of Staff, and all employees and officers of the Office of the Secretary of Defense, the Department of the Navy, the Department of the Army, and Department of the Air Force.

7. “Communication” means that transmittal of information in the form of facts, ideas, statements, inquiries, or otherwise.

8. “Documents” means any writing, drawing, graph, chart, or other data or data compilation, including letters, e-mails, facsimiles, correspondence, notes, memoranda, reports,

and any other communications fixed in a tangible medium, including but not limited to material stored electronically or electromagnetically.

DOCUMENT REQUESTS

1. All documents containing communications from January 20, 2017, to September 1, 2017, between the Heritage Foundation and the President concerning military service by transgender people and/or any restriction of military service by transgender people.
2. All documents containing communications from January 20, 2017, to September 1, 2017, between the Heritage Foundation and the Vice President concerning military service by transgender people and/or any restriction of military service by transgender people.
3. All documents containing communications from January 20, 2017, to September 1, 2017, between the Heritage Foundation and the Executive Office of the President concerning military service by transgender people and/or any restriction of military service by transgender people.
4. All documents containing communications from January 20, 2017, to September 1, 2017, between the Heritage Foundation and the Office of the Vice President concerning military service by transgender people and/or any restriction of military service by transgender people.
5. All documents containing communications from January 20, 2017, to September 1, 2017, between the Heritage Foundation and the Department of Defense concerning military service by transgender people and/or any restriction of military service by transgender people.