

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

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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.

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

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL  
COMPLIANCE WITH SUBPOENAS DIRECTED TO NONPARTIES FAMILY  
RESEARCH COUNCIL AND HERITAGE FOUNDATION**

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Plaintiffs have sought narrowly tailored information from nonparties Family Research Council (“FRC”) and Heritage Foundation (“Heritage”) about their communications with Defendants concerning the President’s imposition, and Defendants’ implementation, of a ban on military service by transgender individuals. The subpoenas were limited to external communications between the government on the one hand and FRC and Heritage, respectively, on the other. They do not seek information about FRC’s and Heritage’s internal strategies. And they were made necessary only because Defendants, invoking the presidential communications privilege, have refused to produce to Plaintiffs—or even to this Court *in camera*—any information about communications between officials in the White House and third parties.

FRC and Heritage, joined by Defendants, make four arguments against enforcement of the subpoenas, all of which are without merit. *First*, FRC and Heritage argue that Plaintiffs should have exhausted other avenues to obtain the requested information, especially from Defendants. But Plaintiffs issued the third-party subpoenas because Defendants have refused to produce the information; any exhaustion requirement has therefore been satisfied. *Second*, FRC and Heritage argue that the requested information is not relevant to Plaintiffs’ case. But as courts have recognized, when a plaintiff challenges governmental action as predicated on an improper discriminatory motive, communications with nongovernmental third parties that sought to influence that action can be highly relevant to the case. *Third*, FRC and Heritage argue that enforcement of the subpoena would burden their rights under the First Amendment and the Religious Freedom Restoration Act (“RFRA”). But they have failed to show how their rights would in any way be affected by merely complying with a subpoena; both organizations, which participate widely in the public sphere, are already well known to oppose military service by transgender people, and Plaintiffs do not seek information that would disclose sensitive political

strategies or the names of supporters and donors not otherwise known to the public. *Finally*, the government argues that the subpoena is moot because, as time-limited, it seeks information related only to the initial announcement and implementation of the ban and not the subsequent February 22, 2018 Memorandum from Secretary Mattis to the President (“Mattis Memorandum”), recommending restrictions on service by transgender persons. That argument merely echoes meritless arguments that Defendants are making elsewhere, and should be rejected for the same reasons.<sup>1</sup>

#### **I. PLAINTIFFS HAVE SATISFIED ANY EXHAUSTION REQUIREMENT**

FRC and Heritage argue (at 3-6) that Plaintiffs were obligated to explore every other possible avenue to obtain the information they seek before issuing their subpoenas. That argument is almost entirely predicated on FRC’s and Heritage’s assertion that enforcement of the subpoena would implicate their First Amendment rights; Plaintiffs have explained why this is not so. *See* ECF No. 109, at 7-11; *see also infra*, pp. 6-8. But even if Plaintiffs were required to exhaust other remedies before turning to third-party subpoenas, they have done so. Plaintiffs requested the information directly from Defendants; Defendants refused to produce it, claimed the presidential communications privilege, and sought a protective order barring any discovery that would produce it. If Defendants were to produce the requested information about communications between the White House and external third parties, it would be unnecessary for FRC and Heritage to produce the same information; Plaintiffs are certainly willing to receive it directly from Defendants. But Defendants have adamantly refused to produce this information,

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<sup>1</sup> FRC and Heritage do not argue that responding to the subpoena would be unduly burdensome in terms of the financial or human resources needed to produce documents. In addition, FRC, Heritage, and Defendants do not argue that the presidential communications privilege (or any other governmental privilege) would cover documents or information in the possession of FRC or Heritage. Any such arguments are therefore waived.

and may well appeal or seek mandamus of any order directing them to do so. Plaintiffs therefore have nowhere else to turn to obtain the information.

The cases cited by FRC and Heritage do not require Plaintiffs to do anything more. In particular, Plaintiffs need not attempt to depose Defendants (or those under their supervision) to inquire about communications between White House officials and external third parties such as FRC and Heritage. Given Defendants' position that communications between the White House and external third parties are shielded by the presidential communications privilege, and that Plaintiffs should look elsewhere for that information, *see* ECF No. 89, at 37-38; ECF No. 93, at 23-24, it is evident that government counsel would invoke privilege at any such deposition and would refuse to allow a government witness to answer any questions about those communications. A deposition would thus be a waste of time and expense. The Federal Rules do not require such futile efforts.

Although the D.C. Circuit has observed that Rule 45 "requires district courts supervising discovery to be generally sensitive to the costs imposed on third parties," *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007), no decision immunizes third parties from discovery in the way that FRC and Heritage suggest. Some of their cited cases hold that, when a nonparty legitimately claims a First Amendment privilege against responding to a subpoena, the Court should consider whether the party sending the subpoena could have obtained the same information from the adverse parties in the litigation. *See Black Panther Party v. Smith*, 661 F.2d 1243, 1269 (D.C. Cir. 1981), *vacated*, 458 U.S. 1118 (1982); *Zerilli v. Smith*, 656 F.2d 705, 715 (D.C. Cir. 1981); *Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir. 1993); *Wyoming v. USDA*, 208 F.R.D. 449, 455 (D.D.C. 2002). But here, Plaintiffs have already attempted to obtain the information from Defendants, and Defendants have refused to produce it. In *Goldberg v. Amgen, Inc.*, 123 F.

Supp. 3d 9 (D.D.C. 2015), the court, presented with a reporter's privilege claim, ruled that the party seeking information from the journalist was obligated first to attempt to obtain the information from alternative sources, including the nonconfidential sources from whom the journalist had obtained his information. *See id.* at 18-19. Here, however, Plaintiffs have no source to explore other than Defendants and FRC and Heritage about their communications. Given the unavailability of any other avenue to obtain the information, it is appropriate for Plaintiffs to seek it from FRC and Heritage.

## II. THE INFORMATION PLAINTIFFS SEEK IS IMPORTANT TO THEIR CLAIMS

FRC and Heritage next argue (at 7-10) that communications between the government and external third parties are irrelevant to Plaintiffs' claim that *the government* has acted unconstitutionally in enacting a ban on transgender military service. But as Plaintiffs' motion demonstrated—and as FRC and Heritage acknowledge (at 9-10)—courts have ordered nonparties to produce their communications with governmental decisionmakers where a governmental action was challenged as unconstitutional. *See* ECF No. 109, at 5-6.

Such communications are important to this case in at least two ways. First, Defendants assert that the initial decision to ban transgender military service was made after the President consulted with “generals and military experts,” ECF No. at 61, at 14, and that the subsequent Mattis Memorandum was the product of an “independent” examination not dictated by the President, ECF No. 96, at 21. The communications at issue here may show that, contrary to Defendants' assertions, the transgender ban was in fact heavily influenced by outside groups that oppose civil rights for transgender people and that have advocated for barring transgender people from military service. Second, those communications may show what *Defendants*, as well as those under their supervision, were saying about transgender people who wish to serve in the military—and in particular that they were acting based not on objective assessments of

transgender individuals' ability to serve their country but on stereotypes, prejudice, or animus. *See Valle Del Sol v. Whiting*, 2013 WL 12098752, at \*3 (D. Ariz. Dec. 11, 2013) (legislators' communications with third parties were relevant to issue of legislature's discriminatory intent in enacting measure challenged under the Equal Protection Clause).<sup>2</sup>

FRC and Heritage rely on *Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc.*, 2007 WL 852521 (D. Kan. Mar. 16, 2007), but that case is entirely distinguishable. The plaintiff there, a hospital bringing a private antitrust suit against two other groups of hospitals, served a subpoena on the Kansas Hospital Association ("KHA"), seeking to explore KHA's members' efforts to forestall competition, including through participating in the legislative process. The lawsuit did not challenge legislation or other governmental action as unconstitutional. *See* Third Am. Compl., *Heartland Surgical*, No. 05-CV-2164 (D. Kan. June 7, 2006), 2006 WL 5709524. Moreover, the subpoena to KHA sought exactly what the subpoenas here do not seek: "production of ... 'evaluations of possible legislation and legislative strategy,'"

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<sup>2</sup> There is no basis to FRC's and Heritage's assertion that Plaintiffs have served the subpoenas based on unsupported speculation that those groups communicated with the government about the transgender ban. To the contrary, both public reporting and documents produced in this action indicate that FRC and Heritage each had written communications with Defendants, including the President, concerning transgender military service during the relevant time period. *See, e.g.*, Declaration of Kevin M. Lamb ("Lamb Decl."), Ex. A (correspondence between FRC and Defendants); ECF No. 91-9, at 5-6 (Defendants' privilege log indicating emails and documents to the White House from "outside third parties"); McLeary, *Pence Working to Reverse Pentagon's Transgender Policies*, Foreign Pol'y (July 25, 2017, 4:51 PM) (indicating that FRC, Heritage, and Vice President Pence were simultaneously supporting failed legislation to prohibit the use of tax money to provide transition-related medical treatment for transgender service members), <http://foreignpolicy.com/2017/07/25/pence-working-to-reverse-pentagons-transgender-policies>; Smith, *Trump's Reversal of Transgender Troop Policy Not Exclusively Because of Evangelicals, Johnnie Moore Says*, Christian Post (July 28, 2017, 1:01 PM) (reporting that FRC had direct communications with the President on military service by transgender individuals, including as the lead author of a letter to him on the subject), <https://www.christianpost.com/news/trumps-reversal-transgender-troop-policy-not-because-evangelicals-johnnie-moore-says-193590>.

2007 WL 852521, at \*4, and “internal associational activity,” *id.* at \*5. The court therefore found the requested materials to be of “minimal relevance.” *Id.* at \*6.

Here, by contrast, Plaintiffs are challenging governmental action as unconstitutional, and the requested external communications with the central governmental actors bear directly on the basis for that governmental action without prying into organizational secrets or confidences about strategy for political organizing. The subpoenas therefore satisfy the relevance standard of Rule 26, impose no undue burden on third parties, and satisfy any heightened standard that may be applicable in light of FRC’s and Heritage’s First Amendment objections.

### **III. NO FIRST AMENDMENT INTEREST IS IMPLICATED BY THE SUBPOENAS**

FRC and Heritage argue (at 10-15) that enforcement of the subpoena will abridge their First Amendment rights to speak, to petition, and to associate with others to advance their favored causes. They argue that, if they are forced to produce records documenting their advocacy against transgender military service, they will be subject to threats, harassment, or reprisals from the public, and other organizations will refuse to work with them in advancing their political objectives in the future.

But FRC and Heritage fail to inform the Court that both organizations play a highly public role in opposing the right of transgender people to service in the military. Their positions are not secret; featured prominently on their websites and in other media are opinion articles opposing transgender military service.<sup>3</sup> Under these circumstances, FRC and Heritage cannot

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<sup>3</sup> See, e.g., Sprigg, FRC, *Should Individuals Who Identify As Transgender Be Permitted To Serve In the Military?* (Sept. 2016), <https://www.frc.org/transgenderinthemilitary>; Spoer, Heritage, *Should Transgender Americans Be Allowed In The Military? Not So Fast* (Aug. 3, 2017), <https://www.heritage.org/defense/commentary/should-transgender-americans-be-allowed-the-military-not-so-fast-military>; *Heritage Analyst: Transgender Policy Supports Military Readiness* (Mar. 23, 2018), <https://www.heritage.org/press/heritage-analyst-transgender-policy-supports-military-readiness>; Anderson, *5 Good Reasons Why Transgender Accommodations Aren’t Compatible With Military Realities*, Daily Signal (July 26, 2017), <https://www.daily>

credibly claim that they are being dragged into the public debate over transgender military service against their will or that they will unexpectedly be exposed to the public as opponents of transgender military service. Those organizations have already willingly entered the public sphere on the issue of transgender military service and have assumed the role of leading advocates of one position in that debate. There is no reason to believe that disclosing communications showing that they directly urged the Administration to bar military service by transgender people—something they propose through the media on a regular basis—would expose them to harassment or retaliation. *See Citizens United v. FEC*, 558 U.S. 310, 370 (2010) (rejecting similar claim that disclosure would expose individuals to harassment or retaliation). Moreover, Plaintiffs are not seeking to discover the identities of supporters of or donors to either organization that are not otherwise generally known. To the extent any such information might appear in records responsive to the subpoena, and to the extent FRC or Heritage can credibly establish that disclosure of those identities would create a credible risk of retaliation or harassment, that information can be redacted.

Nor is there any substance to FRC's argument that its free exercise of religion protected under RFRA will be abridged by responding to a subpoena. As Plaintiffs have previously shown, RFRA does not apply to a situation like this, where one private party is seeking to enforce a subpoena directed at another private party. *See* ECF No. 109, at 13-16. FRC contends (at 18) that the D.C. Circuit "implied" that RFRA applies to private-party litigation in *EEOC v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996), but that is incorrect. That case involved a

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signal.com/2017/07/26/5-good-reasons-transgender-accommodations-arent-compatible-military-realities (article by Heritage fellow); Spoer, *Pentagon's new transgender policy: nuanced, sensitive, well-reasoned*, The Hill (Mar. 30, 2018), <http://thehill.com/opinion/national-security/381009-pentagons-new-transgender-policy-nuanced-sensitive-and-well> (article by director of Heritage's Center for National Defense).

claim of sex discrimination brought by both the EEOC and a private party after Catholic University denied a nun's application for tenure in its canon law department. The court of appeals concluded that RFRA provided Catholic University with a defense against application of Title VII in those circumstances. *See id.* at 468-470. The court of appeals did not discuss whether RFRA applies in private-party litigation, and there would have been no reason for it to do so, given that the litigation had been brought by the EEOC as well.<sup>4</sup>

In any event, FRC's argument based on RFRA fails for all the reasons that its arguments based on the First Amendment fail. Responding to a subpoena that would document FRC's external communications with governmental officials on an issue of public concern does not impede its free exercise of religion. FRC's effort (at 16) to analogize the subpoena to a demand that a church "disclose communications with potential converts" serves only to underscore the weakness of its argument. FRC has pointed to no reason to believe that its communications with Executive Branch officials were efforts at religious conversion. FRC's policy preferences may be grounded in sincere religious conviction, but it does not follow that its efforts to persuade government officials to adopt its policy preferences constitute the "exercise of religion" protected by RFRA. Moreover, FRC could have had no expectation that such communications would remain secret; any written communications would have to be preserved under the Freedom of Information Act or the Presidential Records Act.

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<sup>4</sup> *In re Young*, 141 F.3d 854 (8th Cir. 1998), also cited by FRC, appears to assume that RFRA applies to private-party litigation (there, a bankruptcy case), but that is not the holding of the case. Rather, the court of appeals held that RFRA is constitutional as applied to federal law, *see id.* at 856, without discussing any of the issues of statutory construction raised by the courts that have concluded that RFRA does not apply to private-party litigation, *see* ECF No. 109, at 13-14.

#### IV. THIS CONTROVERSY IS NOT MOOT

Finally, the government—but not FRC or Heritage—argues that the subpoenas Plaintiffs sent to FRC and Heritage are now irrelevant because those subpoenas sought communications between the government and external third parties between January 20, 2017, and September 1, 2017, and thus predated the Mattis Memorandum of February 22, 2018, and the President’s issuance of a new Memorandum on March 23, 2018. According to Defendants, these subpoenas have no relevance to this case because they purportedly concern only the President’s initial July 26, 2017 tweets announcing the ban and his subsequent August 25, 2017 Memorandum directing the Department of Defense to implement that ban. Defendants argue that those directives by the President have been entirely superseded by the Mattis Memorandum and the second Presidential Memorandum, and so any discovery related to the initial directives is now irrelevant.

The government’s arguments for cutting off discovery echo those in its Motion for Protective Order (ECF No. 97), which this Court denied on April 18, 2018. *See* ECF No. 114. As the Court explained in its order, a discovery motion is not the appropriate occasion to resolve the parties’ dispute over the relation between the President’s 2017 tweets and initial Memorandum and the subsequent Mattis Memorandum and the second Presidential Memorandum. *Id.* at 1. The Court’s denial of the protective order recognizes that, until that dispute is resolved, “[d]iscovery shall continue” (*id.* at 2) so that the parties can develop a full record bearing on this litigation.

In any event, the government’s contentions are without merit. As Plaintiffs explained in their opposition to Defendants’ unsuccessful motion for protective order, the current Department of Defense policy is an implementation of the President’s 2017 Memorandum banning military service by transgender people. *See generally* ECF No. 108. The President’s August 2017 Memorandum directed the Secretary of Defense to submit to the President, by February 21,

2018, “a plan for implementing” the policies and directives set out in the Memorandum—namely, a prohibition on military service by transgender persons. ECF No. 13-2, Ex. A § 3. Upon issuance of the President’s Memorandum, Secretary Mattis issued a statement saying that the Department had “received the [August 2017] Presidential Memorandum” and that it would “carry out the President’s policy direction.” *Id.* Ex. D. Secretary Mattis further stated that he would “provide [his] advice to the president concerning implementation of his policy direction” as directed by the 2017 Presidential Memorandum. *Id.* Two weeks later, Secretary Mattis again affirmed that the Department “will carry out the President’s policy and directives” and will “comply with the Presidential Memorandum.” ECF No. 45-1. In February 2018, the Department completed that process—on precisely the timeline directed by the President’s Memorandum—and submitted a plan to the President that would “implement” his directive. The March 23, 2018 implementation plan does not constitute a new or different policy; it is continuous with the President’s August 2017 directive, and it accomplishes the very goal the President intended, which Plaintiffs challenge here—a ban on transgender people serving their country.

Finally, as Defendants acknowledge in a footnote (at 3 n.1), Plaintiffs have served supplemental subpoenas on FRC and Heritage, seeking similar communications but with an effective date range of September 1, 2017 to the present. *See* Lamb Decl., Exs. B, C, D & E. FRC and Heritage have not yet answered those subpoenas, but Plaintiffs expect that both organizations will raise the same objections that they have raised to the initial subpoenas. Thus, unless Defendants agree to produce the information that Plaintiffs are seeking through the present date, or are ordered by this Court to produce that information and promptly and fully comply with that order, Plaintiffs will likely have to seek enforcement of those supplemental

subpoenas as well, and this Court will soon be presented with another controversy over the same legal issues. In these circumstances, it would waste the Court's and the parties' resources for the Court to decline to resolve the legal issues presented by the instant motion, only to face them again after the parties engage in a new round of briefing raising the same issues.

\* \* \*

For the reasons set forth above and in Plaintiffs' motion, FRC and Heritage should be ordered to comply with the subpoenas.

April 30, 2018

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

JANE DOE 2, JANE DOE 3, JANE DOE 4,  
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KIBBY, and DYLAN KOHERE,

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DONALD J. TRUMP, in his official capacity as  
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MATTIS, in his official capacity as Secretary of  
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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  
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STATES OF AMERICA,

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

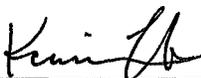
**DECLARATION OF KEVIN M. LAMB  
IN SUPPORT OF PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO  
COMPEL COMPLIANCE WITH SUBPOENAS DIRECTED TO NONPARTIES  
FAMILY RESEARCH COUNCIL AND HERITAGE FOUNDATION**

I, Kevin M. Lamb, hereby declare:

1. All facts set forth herein are based on my personal knowledge, and if called upon to testify as to the contents of this Declaration, I could and would do so.
2. I am an attorney with the law firm of Wilmer Cutler Pickering Hale and Dorr LLP, counsel for Plaintiffs in the above-captioned matter.
3. I provide this declaration in support of Plaintiffs' reply in support of their motion (ECF No. 109) to compel compliance with subpoenas directed to nonparties the Family Research Council and the Heritage Foundation.
4. Attached hereto as **Exhibit A** is a true and correct copy of correspondence, Bates-numbered USDOE00022181 through USDOE00022190, between the Family Research Council and Defendants, as produced by Defendants in this case.
5. Attached hereto as **Exhibit B** is a true and correct copy of Plaintiffs' notice of subpoena, dated April 11, 2017, directed to the Family Research Council.
6. Attached hereto as **Exhibit C** is a true and correct copy of Plaintiffs' notice of subpoena, dated April 11, 2017, directed to the Heritage Foundation.
7. Attached hereto as **Exhibit D** is a true and correct copy of Plaintiffs' proof of service of the April 11, 2017 subpoena directed to the Family Research Council.
8. Attached hereto as **Exhibit E** is a true and correct copy of Plaintiffs' proof of service of the April 11, 2017 subpoena directed to the Heritage Foundation.

I declare under pains of perjury that the foregoing is true and correct.

Dated: April 30, 2017  
Washington, D.C.

  
\_\_\_\_\_  
Kevin M. Lamb

# **Exhibit A**



ADVANCING FAITH, FAMILY AND FREEDOM

April 24, 2017

The Honorable James Mattis  
Secretary of Defense  
1400 Defense Pentagon  
Washington, DC 20301

Dear Secretary Mattis:

On February 27<sup>th</sup>, 2017, I wrote a letter on behalf of a group of concerned individuals and organizations to Chief of Naval Operations John Richardson. This letter expressed our concerns about the degradation of military readiness and combat effectiveness resulting from policies to be implemented in the coming months on transgender “transitioning” in the Navy. (You were copied on that letter.)

About a month later, I received the attached letter from Rear Admiral John B. Nowell, Jr. It is dismissive and unresponsive to any of the points that were raised in our letter.

We wrote with concerns about a policy that has the capacity to seriously degrade military readiness due to the many obligations that “transitioning” service members will impose on their commanders. Even a quick overview of the responsibilities these policies will impose makes it clear that those implementing these directives will lose significant amounts of time that need to be spent on command preparation and combat training. We are not aware of any way in which this policy will contribute to military readiness. In fact, we wonder how thoroughly this policy change was studied by the prior administration before its implementation. Therefore, it is critical that the costs and benefits of this policy to both patients and the Navy be reexamined in depth before its implementation.<sup>1</sup>

I hope that this time, we will receive a reasonable reply to the points we raised with Admiral Richardson over a month ago. Frankly, Admiral Nowell’s response was the sort

<sup>1</sup> On June 2, 2016, the Center for Medicare & Medicaid Services (“CMS”) issued Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (CAG-00446N) that says, “Currently, the local Medicare Administrative Contractors (MACs) determine coverage of gender reassignment surgery on an individual claim basis. The Centers for Medicare & Medicaid Services (CMS) proposes to continue this practice and not issue a National Coverage Determination (NCD) at this time on gender reassignment surgery for Medicare beneficiaries with gender dysphoria. Our review of the clinical evidence for gender reassignment surgery was inconclusive for the Medicare population at large. The low number of clinical studies specifically about Medicare beneficiaries’ health outcomes for gender reassignment surgery and small sample sizes inhibited our ability to create clinical appropriateness criteria for cohorts of Medicare beneficiaries.” <https://www.cms.gov/medicare-coverage-database/details/nca-proposed-decision-memo.aspx?NCAId=282>



of answer we would have expected to receive from the Obama Administration, not from one representing President Trump -- a leader who places a premium on promoting military readiness. We fear that this policy will turn our naval and marine officers into medical case workers expected to deal with extremely complex medical and psychological issues. Clearly, that will impinge on their war-fighting training and command responsibilities.

We look forward to your response.<sup>2</sup>

Sincerely,



LTG William Boykin, USA, Ret.  
Executive Vice President  
Family Research Council

Cc:

Admiral John Richardson  
Chief of Naval Operations  
2000 Navy Pentagon  
Washington, D.C. 20350-2000

---

<sup>2</sup> Please send your reply to: Lt. Gen. Jerry Boykin (USA-retired), Executive Vice-President, Family Research Council, 801 G Street, NW, Washington, DC 20001.



**DEPARTMENT OF THE NAVY**  
**OFFICE OF THE CHIEF OF NAVAL OPERATIONS**  
2000 NAVY PENTAGON  
WASHINGTON DC 20350-2000

Mr. Jerry Boykin (Lt Gen, Ret)  
Executive Vice-President  
Family Research Council  
801 G Street, Northwest  
Washington, DC 20001

Dear Mr. Boykin,

Thank you for your correspondence to the Chief of Naval Operations (CNO) regarding transgender military service. CNO's office forwarded your letter of February 27, 2017 to me for a response, as this inquiry falls under my authority.

The policy that provides the opportunity for transgender people to serve openly in the military was directed by the Department of Defense (DoD) for all of the military services on June 30, 2016 via Directive-Type Memorandum 16-005 and DoD Instruction 1300.28 as announced by then-Secretary of Defense Ashton Carter. Subsequently, then-Secretary of the Navy Ray Mabus published the Department of the Navy policy guidance on November 4, 2016 in SECNAV Instruction 1000.11. Based on this guidance, the Navy drafted a service policy and began implementing training in accordance with the timelines established in the overarching directives.

Thank you again for your correspondence.

Sincerely,

A handwritten signature in black ink, appearing to read "John B. Nowell, Jr.", with a stylized flourish at the end.

John B. Nowell, Jr.  
Rear Admiral, U.S. Navy  
Director, Military Personnel  
Plans and Policy Division (N13)



ADVANCING FAITH, FAMILY AND FREEDOM

February 27, 2017

Admiral John Richardson  
 Chief of Naval Operations  
 2000 Navy Pentagon  
 Washington, D.C. 20350-2000

Dear Admiral Richardson:

We, the undersigned individuals and organizations, write as a group concerned with matters of medical ethics, conscience, and religious freedom in the military services. In this instance, we write primarily to inform you of the harmful effects that the DOD's new policies on the inclusion of transgender persons in the services is having on force effectiveness and readiness.

At a time when there is widespread concern over the decline in military readiness in the U.S. armed forces,<sup>1</sup> our military has become involved in an extravagant social experiment involving individuals who will be unable to serve effectively for extended periods of time due to their need for medical and psychological care. The problems of readiness facing the armed forces are not merely based on deficiencies related to the numbers of ships, planes, and weaponry in our national arsenal. Poorly conceived and administered personnel policies also degrade the ability of the services, like the Navy, to function effectively when engaged in warfare.

One need only look back to the incident that took place on January 12, 2016 when Iran captured two American riverine craft in the Persian Gulf. The behavior of the crews after capture was far below expectations. It was clear that these sailors had little or no training in how to act in accordance with the Code of Military Conduct. Worse yet, they were commanded by a graduate of the U.S. Naval Academy (USNA). One would think that officers graduating from the USNA would have the finest and most thorough naval training, but it appears that other subjects are crowding out "the basics."

For example, it appears that the educational matters related to diversity training and transgender social experimentation are of rapidly increasing importance at the USNA. In early December 2016, the *Washington Free Beacon* reported that the U.S. Naval Academy would be offering 90-minute "Transgender 101" classes to both staff and midshipmen. Two Google employees, Kevin Perry and Marnie Florin, were scheduled to

<sup>1</sup> Andrew O'Reilly, *Fox News*, "Military Brass Sound Alarm about 'Insidious Decline' in Readiness" (Feb. 2, 2017) (<http://www.foxnews.com/politics/2017/02/09/military-brass-sound-alarm-about-insidious-decline-in-readiness.htm>).

conduct the classes. Florin was reported to be a “diversity consultant” who “identifies as gender neutral and goes by the pronouns ‘ze’ or ‘they.’”<sup>2</sup>

The Academy class was described as “optional.” However, “[m]idshipmen and staff who take the training course [got] the opportunity to display cards outside their door that show they are allies of the LGBT community.” This is how the Navy defines “voluntary.” Those who disagree with the policy will be shamed for not being LGBT “allies” that display an approval-signifying colored badge. It is obvious that actions like this divide the ranks of midshipmen and degrade morale.

Worse yet, the *Free Beacon* reports that all active duty sailors must complete transgender training by early 2017. To facilitate this, the Navy has issued a 30-page guidebook, “Transgender and Gender Transition: Commanding Officer’s Toolkit” of mind-numbing complexity. It “is intended as a supplement to the *Transgender Service in the U.S. Military: An Implementation Handbook*.” This DOD volume is 71-pages long and is even more complex than the Navy’s Toolkit.

After reviewing these documents, we are concerned that commanding officers would have no time to do anything other than shepherd their trans-patients through the Navy’s gender-transitioning facilitation vehicle. We received a letter from a known but confidential source in the naval service who asked us to let the command structure in Washington know about the damaging effects this policy change is having:

As part of the policy, CO’s must facilitate the requests of individuals for transgender treatment (surgery, cross-hormonal therapy, etc.).... Then once the service member is considered “stable” in their preferred gender, and their “gender marker” is changed in a DoD database, they must be accommodated in the berthing and bathroom facilities of their preferred gender regardless of whether they still possess their opposite sex anatomy! (And most are expected to do so). Given the close living quarters that most military members have to share, this is particularly distressing to many of us, especially women.

Merely assessing whether a sailor is “stable” would seem like the work of a psychiatrist – not a task that field commanders should have to face. These men and women serve to defend the United States from foreign enemies, not to act as medical case workers. They most certainly do not have the time or resources to do both. In addition, service members undergoing gender transition are non-deployable, and may be exempt from physical fitness and appearance standards. That has an undeniably deleterious effect on readiness.

We had anticipated that the arrival of a new administration would have stopped the release of any sweeping policy statements by the Navy. Such was not the case.

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<sup>2</sup> Elizabeth Harrington, *Washington Free Beacon*, “Naval Academy Hosting ‘Transgender 101’ Training for Midshipmen” (Dec. 7, 2016) (<http://freebeacon.com/issues/naval-academy-hosting-transgender-101-training-midshipmen>).

On February 5<sup>th</sup>, we read with some concern in the *Washington Times* that the Navy issued a major directive that contains “a ‘diversity road map’ that paves the way for a gender-diverse force of sailors and civilians who are protected against discrimination based on ‘gender identity’ or ‘sex stereotyping.’”<sup>3</sup> In fact, the document entitled “Department of the Navy: Diversity and Inclusion Roadmap” was issued on January 23, 2017 and announced an ambitious new vision to replace non-discrimination and the recognition of merit-based on performance with the amorphous “strategic imperative” of diversity that allows for quotas and political promotions.

Nothing could be more destructive to the Navy’s morale and long-term military effectiveness.

We believe it is long past the time for the Navy, and the Department of Defense, to step back from the edge of this ideological cliff.

Given the variety of grave military and geo-political threats posed to the United States and its allies, the Navy must cease immediately from continuing any controversial personnel mandates that cannot be shown to contribute positively to the readiness and combat effectiveness of our troops. We are also asking that you appropriately direct personnel to ensure that subordinates are not waylaid by the experimental policies of the previous administration.

We wish to work with you to guarantee the readiness of a Navy that is second to none in fighting prowess and respect for the religious freedoms of its officers, sailors, and marines. We look forward to your response.

Please send your reply to: Lt. Gen. Jerry Boykin (USA-retired), Executive Vice-President, Family Research Council, 801 G Street, NW, Washington, DC 20001.

Thank you for your attention to this matter.

Sincerely,

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<sup>3</sup> Rowan Scarborough, *Washington Times*, “Navy’s ‘Diversity Road Map’ Lays Foundation for Multiethnic Force Protected against Discrimination” (Feb. 5, 2017) (<http://www.washingtontimes.com/news/2017/feb/5/navy-releases-road-map-for-diverse-force-protected/>).



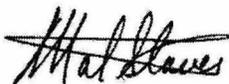
LTG William Boykin, USA, Ret.  
Executive Vice President  
Family Research Council



CH (COL) Ronald A. Crews, USAR, Ret.  
Executive Director  
Chaplain Alliance for Religious Liberty



CDR John B. Wells, NA, Ret.  
Executive Director  
Military-Veterans Advocacy, Inc.



Mathew Staver  
President and Chief Counsel  
Liberty Counsel



Richard Thompson  
President and Chief Counsel  
Thomas More Law Center



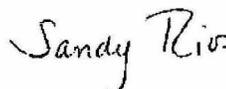
James Lyons, Jr., Admiral USN, Ret.  
President/CEO  
LION Associates, LLC



Tim Wildmon  
President  
American Family Association



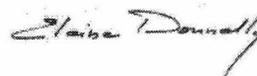
Gary L. Bauer  
President  
American Values



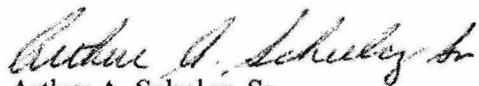
Sandy Rios  
Director of Governmental Affairs  
American Family Association



Mike Berry  
Senior Counsel, Director of Military Affairs  
First Liberty Institute



Elaine Donnelly  
President  
Center for Military Readiness



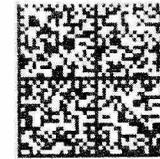
Arthur A. Schulez, Sr.  
Exec. Director & General Counsel  
International Conference of  
Evangelical Chaplain Endorsers

cc:

The Honorable James Mattis  
Secretary of Defense  
1400 Defense Pentagon  
Washington, DC 20301



**FAMILY RESEARCH COUNCIL**  
801 G STREET NW  
WASHINGTON, DC 20001



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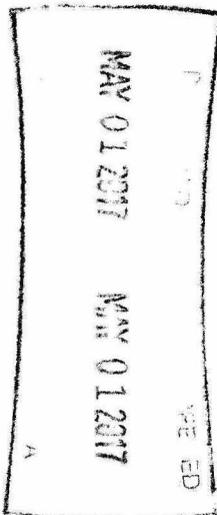
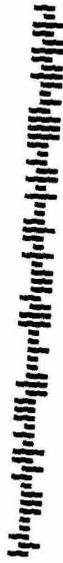
The Honorable James Mattis  
Secretary of Defense  
1400 Defense Pentagon  
Washington, DC 20301

2123858422521

May 02, 2017

MATTIS, JAMES N (SEC DEF)  
OSD1

ZIP 20301 - 1000



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OFFICE OF THE  
SECRETARY OF DEFENSE

# **Exhibit B**

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 Family Research Council. The documents to be produced are identified in Schedule A to the subpoena.

The subpoena provides that the Family Research Council produce the requested documents on or before April 25, 2018 to Foley Hoag, 1717 K St. N.W., Washington, D.C. 20006, or at an otherwise mutually agreeable time and/or location.

Dated: April 11, 2018

/s/ Daniel L. McFadden

## **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 September 1, 2017, to the present, 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 September 1, 2017, to the present, 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 September 1, 2017, to the present, 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 September 1, 2017, to the present, 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 September 1, 2017, to the present, 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.

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: 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

Table with 2 columns: Place (Foley Hoag LLP, 1717 K Street, NW, Washington, DC 20006) and Date and Time (04/25/2018 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: 04/11/2018

CLERK OF COURT

OR

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

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.

# **Exhibit C**

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

DOE, et al.,	)
	)
<i>Plaintiffs,</i>	)
	)
v.	)
	)
DONALD TRUMP, et al.,	)
	)
<i>Defendants.</i>	)

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

**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 April 25, 2018 to Foley Hoag, 1717 K St. N.W., Washington, D.C. 20006, or at an otherwise mutually agreeable time and/or location.

Dated: April 11, 2018

/s/ Daniel L. McFadden

## **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, Fellows, Senior Fellows, 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 September 1, 2017, to the present, 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 September 1, 2017, to the present, 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 September 1, 2017, to the present, 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 September 1, 2017, to the present, 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 September 1, 2017, to the present, 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.



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.

# **Exhibit D**

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DOE, et al.

Plaintiff

vs.

Case No: 17-cv-1597 (CKK)

Donald Trump, et al.

Defendant

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**AFFIDAVIT OF SERVICE**

I, Ambiko Wallace, a Private Process Server, being duly sworn, depose and say:

That I have been duly authorized to make service of the Notice of Subpoena and Subpoena Duces Tecum in the above entitled case.

That I am over the age of eighteen years and not a party to or otherwise interested in this action.

That on 04/13/2018 at 2:15 PM, I served Family Research Council with the Notice of Subpoena and Subpoena Duces Tecum at 801 G Street, NW, Washington, DC 20001 by serving Leo Johnson, Building Manager, authorized to accept service.

Leo Johnson is described herein as:

Gender: Male Race/Skin: Black Age: 44 Weight: 230 Height: 6'0" Hair: Black Glasses: No

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

4/16/18

Executed On



A handwritten signature in blue ink, appearing to read 'Ambiko Wallace', written over a horizontal line.

Ambiko Wallace

Client Ref Number: N/A  
Job #: 1543455

# 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: 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:  04/25/2018 5:00 pm
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**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:
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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: 04/11/2018

CLERK OF COURT

OR

*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., , 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).

# **Exhibit E**

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DOE, et al.

Plaintiff

vs.

Case No: 17-cv-1597 (CKK)

Donald Trump, et al.

Defendant

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**AFFIDAVIT OF SERVICE**

I, Mark A. Russell, Jr., a Private Process Server, being duly sworn, depose and say:

That I have been duly authorized to make service of the Notice of Subpoena and Subpoena Duces Tecum in the above entitled case.

That I am over the age of eighteen years and not a party to or otherwise interested in this action.

That on 04/12/2018 at 1:55 PM, I served The Heritage Foundation c/o CT Corporation System, Registered Agent with the Notice of Subpoena and Subpoena Duces Tecum at 1015 15th Street, NW, Suite 1000, Washington, DC 20005 by serving Francisco Hernandez, Client Service Representative, authorized to accept service.

Francisco Hernandez is described herein as:

Gender: Male Race/Skin: White Age: 30 Weight: 240 Height: 5'10" Hair: Black Glasses: Yes

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

4/16/18

Executed On



A handwritten signature in blue ink, appearing to read 'Mark A. Russell, Jr.', written over a horizontal line.

Mark A. Russell, Jr.

Client Ref Number: N/A  
Job #: 1543452

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  
1015 15th Street, NW, Suite 1000, Washington, DC 20005

(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:  04/25/2018 5:00 pm
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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:
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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: 04/11/2018

CLERK OF COURT

OR

/s/ Daniel McFadden

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.,, 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).