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' 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.[1]

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,

[1] 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).[2]

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,'"

[2] 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.[3] Under these circumstances, FRC and Heritage cannot

[3] *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.[4]

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.

[4] *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.

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

April 30, 2018

Respectfully submitted,

/s/ Paul R.Q. Wolfson

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