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Reply to: Florida
May 14, 2018

Via Email and U.S. Mail

Jordan M. Heinz
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654

Re: ***Ryan Karnoski, et al. v. Donald J. Trump, et al., No. 2:17-cv-1297-MJP Non-Party Ronnie Floyd's Objections to Plaintiffs' Rule 45 Subpoena Duces Tecum***

Dear Mr. Heinz:

I represent non-party Ronnie W. Floyd ("Pastor Floyd") and am writing pursuant to Fed. R. Civ. P. 26 and 45 to provide you with his objections to Plaintiffs' Rule 45 Subpoena ("Subpoena"), which Plaintiffs issued in the above-referenced cause. As you know from my communication last week, I also represent non-parties Liberty Counsel, Inc. ("Liberty Counsel") and Family Research Council, Inc. ("FRC"), which served their objections to Plaintiffs' respective subpoenas in the above-referenced cause on Friday, May 11, 2018.

GENERAL OBJECTIONS

Pastor Floyd hereby incorporates by reference and adopts in full the General Objections served by non-parties Liberty Counsel and FRC, as if fully set forth herein. A copy of non-parties Liberty Counsel's and FRC's objections, served May 11, 2018, is attached hereto for your ready reference.

SPECIFIC OBJECTIONS

Pastor Floyd also incorporates by reference and adopts in full the Specific Objections served by non-parties Liberty Counsel and FRC, as if fully set forth herein. In addition, Pastor Floyd provides the following objections.

Document Request No. 1:
All Documents and Communications from the Relevant Period concerning any letter or correspondence sent to President Trump or Vice President Pence or the Trump Campaign by or on

behalf of the Evangelical Executive Advisory Board or members of the Evangelical Executive Advisory Board concerning military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general.

Pastor Floyd's Response to Request No. 1: As explained more fully in Liberty Counsel's and FRC's General Objections, which are incorporated herein, Pastor Floyd objects to this Request because it seeks information privileged under the First Amendment; violates his right to freedom of association, freedom of speech, and freedom to petition; violates his statutory rights under the Religious Freedom Restoration Act; violates the limitations imposed by Fed. R. Civ. P. 26; violates Plaintiffs' obligations under Fed. R. Civ. P. 45; imposes an unconscionable and undue burden on Pastor Floyd; seeks information more readily available through alternative channels, including the parties to this litigation; seeks irrelevant information; and fails to allow a reasonable time for compliance.

Pastor Floyd further objects to this request in that it purports to require Pastor Floyd to submit materials on behalf of the Evangelical Executive Advisory Board and all its members, which Pastor Floyd does not control and has no authority to mandate. The Subpoena is also improper because it seeks documents outside of Pastor Floyd's custody, possession or control.

Document Request No. 2:
All Documents and Communications from the Relevant Period between You and President Trump, the Executive Office of the President, the Trump Campaign, Vice President Pence, the Office of the Vice President, or the Department of Defense, concerning military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general.

Pastor Floyd's Response to Request No. 2: As explained more fully in Liberty Counsel's and FRC's General Objections, which are incorporated herein, Pastor Floyd objects to this Request because it seeks information privileged under the First Amendment; violates his right to freedom of association, freedom of speech, and freedom to petition; violates his statutory rights under the Religious Freedom Restoration Act; violates the limitations imposed by Fed. R. Civ. P. 26; violates Plaintiffs' obligations under Fed. R. Civ. P. 45; imposes an unconscionable and undue burden on Pastor Floyd; seeks information more readily available through alternative channels, including the parties to this litigation; seeks irrelevant information; and fails to allow a reasonable time for compliance

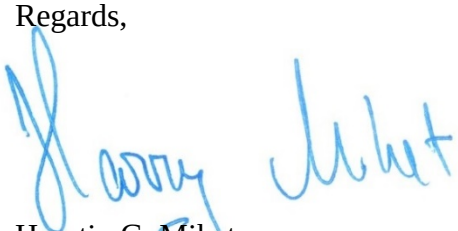
Document Request No. 3:
All Documents and Communications from the Relevant Period evidencing any Evangelical Executive Advisory Board materials provided by or to President Trump, the Executive Office of the President, the Trump Campaign, Vice President Pence, the Office of Vice President, or the Department of Defense, concerning military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general, including but not limited to notes, agendas, handouts, presentations, or invitations.

Pastor Floyd's Response to Document Request No. 3: As explained more fully in Liberty Counsel's and FRC's General Objections, which are incorporated herein, Pastor Floyd objects to

this Request because it seeks information privileged under the First Amendment; violates his right to freedom of association, freedom of speech, and freedom to petition; violates his statutory rights under the Religious Freedom Restoration Act; violates the limitations imposed by Fed. R. Civ. P. 26; violates Plaintiffs' obligations under Fed. R. Civ. P. 45; imposes an unconscionable and undue burden on Pastor Floyd; seeks information more readily available through alternative channels, including the parties to this litigation; seeks irrelevant information; and fails to allow a reasonable time for compliance.

Pastor Floyd further objects to this request in that it purports to require Pastor Floyd to submit materials on behalf of the Evangelical Executive Advisory Board and all its members, which Pastor Floyd does not control and has no authority to mandate. The Subpoena is also improper because it seeks documents outside of Pastor Floyd's custody, possession or control.

Regards,



Horatio G. Mihet
Chief Litigation Counsel
LIBERTY COUNSEL
Attorney for Pastor Ronnie W. Floyd

cc: **Via Electronic Mail**

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Via Email and U.S. Mail

Jordan M. Heinz
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654

Re: ***Ryan Karnoski, et al. v. Donald J. Trump, et al., No. 2:17-cv-1297-MJP***
Non-Parties Liberty Counsel, Inc.'s and Family Research Council, Inc.'s Objections to Plaintiffs' Rule 45 Subpoena Duces Tecum

Dear Mr. Heinz:

I represent non-parties Liberty Counsel, Inc. ("Liberty Counsel") and Family Research Council, Inc. ("FRC"), and am writing pursuant to Fed. R. Civ. P. 26 and 45 to provide you with their objections to Plaintiffs' Rule 45 Subpoena ("Subpoena"), which Liberty Counsel received on May 3, 2018 and FRC received on May 2, 2018.

GENERAL BACKGROUND ON LIBERTY COUNSEL AND FRC

LIBERTY COUNSEL

Liberty Counsel is a non-profit education, advocacy, and legal defense organization dedicated to advancing religious freedom, the sanctity of human life, and the preservation of marriage and family. Liberty Counsel is incorporated under the laws of the State of Florida and is recognized by the Internal Revenue Service as a non-profit, tax-exempt organization under 26 U.S.C. § 501(c)(3). Liberty Counsel is known nationally and internationally for its litigation, education, and public policy activities. Liberty Counsel has represented many clients in courtrooms across the globe, candidates and members of state and federal legislatures, state Supreme Court justices, candidates for judicial office, colleges and universities, local governments, public school boards, individuals, businesses, and churches.

Liberty Counsel attorneys are admitted to the United States Supreme Court, every federal circuit court of appeals, numerous federal district courts across the country, and are licensed to practice law in numerous states. Liberty Counsel and its attorneys have appeared before the United States Supreme Court, many state Supreme Courts, and many federal Circuit Courts of Appeal,

district courts, and lower state courts. Liberty Counsel attorneys have testified before United States congressional committees on public policy issues of national and international significance, including religious expression, religious liberty, speech, immigration, and employment discrimination. Liberty Counsel attorneys have also testified before many state legislatures and administrative agencies concerning matters of religious freedom, the sanctity of human life, and family values.

Liberty Counsel seeks to advance its mission by lawful means through litigation, education, and public policy advocacy throughout the country and around the world. As a non-profit charitable entity, Liberty Counsel's mission and purpose depend upon its First Amendment rights to speech, association, and to petition the government. Infringing such cherished liberties would run roughshod over Liberty Counsel's core First Amendment freedoms, diminish its effectiveness, chill its expression, and cause irreparable injury.

FRC

FRC is a Christian ministry, recognized as an I.R.C. § 501(c)(3) non-profit organization. FRC's mission is to advance faith, family, and freedom in public policy and the culture. FRC's vision is a culture in which all human life is valued, families flourish, and religious liberty thrives. Throughout its history, FRC has provided testimony before Congressional committees, provided reports and analysis to elected officials, amassed significant evidence for legal briefs on family issues, advocated for and helped secure appointments on government panels, and participated in countless media interviews and commentaries.

FRC is dedicated to equipping organizations, pastors, churches, and Christians nationwide in advocating for and advancing Christian principles. FRC believes that culture has reached a place where foundational institutions are endangered like never before, that the bedrock institution of marriage has been undermined, and that human life itself is being redefined. FRC engages with Christian leaders and elected official to stand strong for the foundational principles of this nation.

FRC maintains an active and extensive government affairs division for advancing Christian principles in all levels of government. FRC's government affairs division is respected throughout the nation as a force on Capitol Hill and in the Executive Branch. FRC provides evidence, insight, analysis, and advocacy to all leaders in all branches of government, and unapologetically does so from a Christian perspective.

GENERAL OBJECTIONS

I. PLAINTIFFS' SUBPOENA VIOLATES LIBERTY COUNSEL'S AND FRC'S CONSTITUTIONAL RIGHTS.

Liberty Counsel and FRC object to the Subpoena because it seeks information unquestionably privileged from disclosure under the First Amendment. It is axiomatic that Liberty Counsel and FRC have a fundamental First Amendment right to petition the government, to associate with like-minded individuals and organizations, and to engage in protected speech to advocate for their respective missions. These freedoms are protected against infringement from overzealous discovery requests. *See, e.g., Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C.

2002). Indeed, where First Amendment rights are at stake, "**the presumption is that speech and association are privileged**" from discovery requests. *Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538, 1541 (11th Cir. 1985) (emphasis added). The Subpoena violates these freedoms.

A. Plaintiffs' Subpoena Seeks Information Protected by the First Amendment Freedom of Association.

The Supreme Court has long recognized "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). Indeed, it is beyond dispute that "[t]he Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." *Id.* In light of this "indispensable" freedom, the First Amendment provides strong protection for organizations advocating their viewpoints and beliefs, and shields from disclosure certain information that may be critical to advancing their mission. As the High Court said decades ago, "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective restrain on freedom of association." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *see also Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538, 1541 (11th Cir. 1985) (same); *Int'l Union, United Auto., Aerospace, and Agriculture Implement Workers of Am. v. Nat'l Right to Work Legal Def. and Educ. Found., Inc.*, 590 F.2d 1139, 1152 (D.C. Cir. 1978) (same); *Int'l Action Ctr.*, 207 F.R.D. at 3 (same). The premise behind this protection is that there is a "vital relationship between freedom to associate and privacy in one's association." *NAACP*, 357 U.S. at 462. Additionally, this protection extends to organizations advocating for all manner of interests. *Id.* (noting that the right of association protects against disclosure of information and that it is "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters"); *see also Int'l Union*, 590 F.2d at 1152 (same). Indeed, "[i]n any First Amendment case it is the duty of the Court to ensure that a constitutionally permissible end, such as discovery, is not achieved in ways that unduly infringe the protected freedom at stake." *Adolph*, 777 F.2d at 1542.

Plaintiffs' Subpoena to Liberty Counsel and FRC violates this cherished privilege. Disclosure of information sought by Plaintiffs would diminish Liberty Counsel's and FRC's ability to effectively and efficiently advocate their respective views to the government. Indeed, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 460. Forcing Liberty Counsel and FRC to disclose communications that they may (or may not) have had with the government would necessarily require disclosure of individuals who have associated with these organizations. Such disclosure would infringe the "[i]nviolability of privacy in group association" which is "indispensable to preservation of freedom of association." *Id.* at 462.

Countless courts have refused to compel organizations from disclosing information related to their advocacy and goals. *See, e.g.*, *DeGregory v. Attorney General of N.H.*, 383 U.S. 825, 829 (1966) ("the First Amendment prevents use of the power to investigate enforced by the contempt power to probe at will and without relation to existing need"); *id.* at 830 (the First Amendment guarantees "that a person can speak or not, as he chooses, free of all government compulsion"); *id.* (holding that discovery inquiries seeking the associations and political activities of individuals

and organizations is prohibited under the First Amendment); *NAACP*, 357 U.S. at 466 (holding that a government order requiring disclosure of associational ties was an unconstitutional violation of the First Amendment); *AFL-CIO v. FEC*, 333 F.3d 168, 177 (D.C. Cir. 2003) ("the Supreme Court has concluded that extensive interference with political groups' internal operations and with their effectiveness does implicate significant First Amendment interests in associational autonomy."); *id.* (holding that invasive discovery procedures infringing on First Amendment interests "encourages political opponents to file charges against their competitors to serve the dual purpose of chilling the expressive efforts of their competitor and learning their political strategy so that it can be exploited to the complainant's advantage"); *Blumenthal v. Drudge*, 186 F.R.D. 236, 245 (D.D.C. 1999) (holding that discovery request for information on members and political activity "must be denied because the disclosure of the list might implicate the First Amendment right to association"); *Ealy v. Littlejohn*, 569 F.2d 219, 227 (5th Cir. 1978) (noting that it is improper to "invade protected First Amendment rights be forcing wholesale disclosure of names and organizational affiliations for a purpose that is not germane to the determination" of the litigation); *Rich v. City of Jacksonville*, No. 3:09-cv-454-J-34MCR, 2010 WL 4403095, *11 (M.D. Fla. Mar. 31, 2010) (noting that discovery "does not extend so far as to permit impingement on First Amendment rights on the 'mere suspicion that the information sought may constitute or lead to evidence of [unlawful] activity" (quoting *Pollard v. Roberts*, 283 F. Supp. 248, 257 (E.D. Ark. 1968)). Plaintiffs' Subpoena is equally violative of Liberty Counsel's and FRC's fundamental right to association under the First Amendment.

B. Plaintiffs' Subpoena Seeks Information Protected by the First Amendment Freedom of Speech.

It is equally indisputable that Liberty Counsel and FRC enjoy the fundamental right to engage in constitutionally protected expression. "Discussion of public issues [is] integral to the operation of the system of government established by the Constitution," which is why "[t]he First Amendment affords the broadest protection to such political expression 'to assure the unfettered interchange of ideas for bringing about of political and social changes desired by the people.'" *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (quoting *Roth v. United States*, 34 U.S. 476, 484 (1957)). Indeed, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of government affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). In fact, "advocacy of politically controversial viewpoint[s] is the essence of First Amendment expression." *McIntyre*, 514 U.S. at 347. That Liberty Counsel and FRC are corporate entities in no way diminishes the First Amendment protection afforded to their speech. *See Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (holding that political speech of non-profit and for-profit corporations is protected under the First Amendment).

Plaintiffs' Subpoena to Liberty Counsel and FRC seeks information privileged under the First Amendment. Where, as here, the protected advocacy of **non-parties** is threatened by invasive discovery requests, courts have often refused to order compliance. *See, e.g.*, *Wyoming v. U.S. Dep't of Agriculture*, 208 F.R.D. 449, 454-55 (D.D.C. 2002) (denying motion to compel non-party compliance with subpoena because it threatened to chill First Amendment speech activities); *Pebble Ltd. Partnership v. EPA*, 310 F.R.D. 575, 582 (D. Ak. 2015) (denying motion to compel non-party compliance with subpoena because the discovery sought "has the tendency to chill the free exercise of political speech and association which is protected by the First Amendment."); *In re Roberts*, 650 F. Supp. 159, 162 (N.D. Ga. 1987) (subpoena must be quashed where "compliance

with the subpoena will actually chill protected speech rights"). These courts understood that "it is crucial to remember that we are considering the essence of First Amendment freedoms—the freedom to protest policies to which one is opposed" and to "effectively convey [a] message" to the government. *Int'l Action Ctr.*, 207 F.R.D. at 2. Plaintiffs' Subpoena ignores the fact that the freedom of speech lies "at the foundation of a free government of free men." *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939). Liberty Counsel and FRC object to Plaintiffs' Subpoena as it seeks information protected by the broadest refuge the First Amendment has to offer.

C. Plaintiffs' Subpoena Seeks Information Protected by the First Amendment Right to Petition Government.

"The First Amendment protects the right of an individual to … petition his government for redress of grievances." *Smith v. Arkansas State Hwy. Emp., Local 1315*, 441 U.S. 463, 464 (1979). The right to petition is "one of the most precious of the liberties safeguarded by the Bill of Rights," *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967), and is "intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press." *Id.* Indeed, the right to petition the government "is implied by the very idea of a government, republican in form." *BE&K Const. Co. v. NLRB*, 536 U.S. 516, 525 (2002). The right to petition "extends to all departments of the Government," including the President, Vice President, Department of Defense, the courts, and all other government officials whom an individual or organization may choose to petition. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 612 (1972). Courts have refused to order compliance with subpoenas that seek information protected by the First Amendment right to petition the government. *See, e.g., Wyoming v. U.S. Dep't of Agriculture*, 208 F.R.D. 449, 455 (D.D.C. 2002) (denying motion to compel non-party to disclose communications with government officials because it would violate right to petition government).

Here, Liberty Counsel's and FRC's objection to Plaintiffs' Subpoena is two-fold. Plaintiffs' Subpoena would require Liberty Counsel and FRC to disclose (1) if either has petitioned the government at all, and (2) if either had petitioned the government on the issues pertinent to this litigation, the contents of all such petitions. The First Amendment right to petition would be hollow if an opponent of an organization's message or viewpoint could work a significant chill on its advocacy simply by demanding records related to petitioning activity. Indeed, such a fishing expedition would "encourage political opponents to file charges against their competitors to serve the dual purpose of chilling the expressive efforts of their competitor and learning their political strategy so that it can be exploited to the complainant's advantage." *AFL-CIO v. FEC*, 333 F.3d 168, 177 (D.C. Cir. 2003). But, as the D.C. Circuit has noted, the First Amendment prohibits such a broad discovery mechanism. Liberty Counsel and FRC therefore object to Plaintiffs' Subpoena.

II. PLAINTIFFS' SUBPOENA VIOLATES LIBERTY COUNSEL'S AND FRC'S STATUTORY RIGHTS UNDER THE RELIGIOUS FREEDOM RESTORATION ACT.

Liberty Counsel and FRC also object to Plaintiffs' Subpoena because it violates their statutory rights under the Religious Freedom Restoration Act ("RFRA"). RFRA prohibits the government from "substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). RFRA's protections are also

applicable to the religious exercise of corporate entities, such as Liberty Counsel and FRC. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014). Importantly, RFRA was intended to provide the broadest possible protection for religious exercise. 42 U.S.C. § 2000cc-3(g) (stating that the exercise of religion "shall be construed in favor of a broad protection of religious exercise, **to the maximum extent permitted** by the terms of this chapter and the Constitution." (emphasis added)); *see also Burwell*, 134 S. Ct. at 2767 ("RFRA was designed to provide very broad protection for religious liberty.").

RFRA's protections apply against all entities of the federal government, including compulsion from a federal district court. 42 U.S.C. § 2000bb-2 (defining government to include any "**branch**, department, agency, instrumentality, and official of the United States" (emphasis added)); *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) ("RFRA's mandate applies to **any** branch of the United States." (emphasis added)); *see also In re Grand Jury Empaneling Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999) (RFRA applies to compelled disclosure by federal court). Because Plaintiffs' Subpoena is issued by the federal district court in which the action is pending, *see* Fed. R. Civ. P. 45(a)(1)(A)(i) and (a)(2), it is therefore also subject to the dictates of RFRA and must withstand its rigorous scrutiny. The Subpoena must be supported by a compelling government interest and constitute the least restrictive means of achieving that interest. 42 U.S.C. § 2000b-1(b); *Burwell*, 134 S. Ct. at 2767. Plaintiffs' Subpoena cannot satisfy this demanding test.

First, Plaintiffs have no interest, much less a compelling interest, in forcing Liberty Counsel and FRC to sacrifice their constitutional rights so that Plaintiffs may obtain discovery that is readily available from the actual parties to their lawsuit. Indeed, the government has "no legitimate interest" in compelling the violation of constitutional rights. *See, e.g.*, *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006); *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) (same); *Nat'l Black Police Ass'n v. D.C. Bd. of Elections and Ethics*, 858 F. Supp. 251, 263 (D.D.C. 1994). On the contrary, the compelling interest here is in protecting Liberty Counsel's and FRC's constitutional rights. *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *Wollschlaeger v. Florida*, 814 F.3d 1159, 1201 (11th Cir. 2015), *rev'd on other grounds*, *Wollschlaeger v. Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc) (the state has a "compelling interest in protecting [constitutional] rights").

Second, even if Plaintiffs' Subpoena were supported by a compelling government interest, which it is not, it would still fail RFRA's demands because it is not the least restrictive means of obtaining the information sought. Plaintiffs seek constitutionally privileged information from Liberty Counsel and FRC, while Plaintiffs have multiple other avenues of obtaining that information from other entities, including the parties to Plaintiffs' lawsuit.

Plaintiffs' Subpoena seeks all communications between Liberty Counsel and FRC, on the one hand, and the President, Vice President, Executive Office of the President, Office of the Vice President, the United States Department of Defense, and the Trump Campaign, on the other hand. Yet, all of these latter entities are defendants in the instant litigation, and Plaintiffs may obtain the information they seek **from the defendants** without requiring the **non-parties** to surrender their constitutional rights to association, petition, and speech. There can be no question that forcing the parties to obtain information from existing parties in the suit is required where feasible, and dragging Liberty Counsel and FRC into court disputes to obtain constitutionally privileged information is unwarranted and unlawful. Plaintiffs' attempt to obtain constitutionally privileged

information from Liberty Counsel and FRC is precisely the type of maneuver rejected by courts across the nation. *See, e.g.*, *Wyoming v. U.S. Dep't of Agriculture*, 208 F.R.D. 449, 455 (D.D.C. 2002) (rejecting motion to compel non-party witness to divulge constitutionally protected information because "the plaintiffs can obtain the information needed . . . **from the federal defendants**" (emphasis added)).

In addition to civil discovery from parties to their pending lawsuit, Plaintiffs also have a statutory mechanism for obtaining the information they seek without requiring Liberty Counsel and FRC to surrender their constitutional and statutory rights. Under the Freedom of Information Act ("FOIA"), Plaintiffs could have obtained the information they seek from the various government agencies without filing a complaint in federal court. *See* 5 U.S.C. § 552; *see also Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (Executive Office of the President is subject to FOIA); *Yelder v. United States Dep't of Defense*, 577 F. Supp. 2d 342 (D.D.C. 2008) (Department of Defense is subject to FOIA); *Protect Democracy Project, Inc. v. United States Dep't of Defense*, 263 F. Supp. 3d 293 (D.D.C. 2017) (decisions relating to military policy and actions of public interest are subject to FOIA). Because Plaintiffs' Subpoena requests information that is available from alternative sources, it is not the least restrictive means of obtaining the information requested. Liberty Counsel and FRC therefore object to Plaintiffs' Subpoena as it violates their statutory rights under RFRA.

III. PLAINTIFFS' SUBPOENA VIOLATES THE FEDERAL RULES OF CIVIL PROCEDURE.

Plaintiffs' Subpoena also violates the federal rules of civil procedure in that it seeks irrelevant discovery more readily accessible from alternative sources and imposes an undue burden and expense on non-parties Liberty Counsel and FRC.

A. Plaintiffs' Subpoena Violates Rule 26's Limitation on Irrelevant Discovery More Readily Accessible from Alternative Sources.

Fed. R. Civ. P. 26 limits discovery to relevant matters that are "proportional to the needs of the case," considering *inter alia* "the parties' relative access to relevant information." Fed. R. Civ. P. 26(b)(1). The documents Plaintiffs seek from Liberty Counsel and FRC are both irrelevant to Plaintiffs' cause of action and are available by alternative mechanisms that do not infringe on Liberty Counsel's and FRC's constitutional and statutory rights.

First, Plaintiffs' Subpoena seeks information that is irrelevant to their cause of action. Where, as here, the government's motivations are at issue in litigation, discovery relating to the perspectives, viewpoints, or opinions of non-parties are irrelevant and therefore not discoverable. *See, e.g.*, *North Carolina Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005) (holding that the alleged animus or bias relevant to the litigation "is that of a *witness* or *party* in the case, **not of an unrelated non-party**" (bold emphasis added; italics original)); *Wyoming v. United States Dep't of Agriculture*, 208 F.R.D. 449, 454-455 (D.D.C. 2002) (where government is alleged to have violated the law, its actions are the only relevant information – not that of non-parties); *see also Williams v. Erickson*, No. 3:14-cv-1262-J-20JBT, 2015 WL 12866969, *2 (M.D. Fla. Sep. 17, 2015) (refusing to compel non-party to comply with a subpoena that related to the "completely irrelevant" materials allegedly implicating the non-party's alleged bias). Thus, Plaintiffs' attempt

to obtain information from Liberty Counsel and FRC related to their positions, advocacy, or viewpoint is irrelevant to the question of the legality of defendants' actions.

Second, as already discussed above, Plaintiffs' subpoena seeks information that is readily obtainable from existing **parties** in the case without resorting to compelling **non-parties** Liberty Counsel and FRC to produce information in violation of their constitutional rights. This, too, violates Rule 26. The D.C. Circuit has held numerous times that parties must exhaust all available alternatives prior to compelling non-parties to disclose privileged information in violation of their constitutional rights. *See, e.g.*, *Zerilli v. Smith*, 656 F.2d 705, 715 (D.C. Cir. 1981) (holding that parties have an inescapable obligation to exhaust all available alternatives with existing parties before seeking information from non-parties); *Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C. Cir. 1981), *vacated as moot on other grounds Smith v. Black Panther Party*, 458 U.S. 1118 (1982)[1] (same); *Int'l Union, UAW v. Nat'l Right to Work Legal Defense & Educ. Found., Inc.*, 590 F.2d 1139, 1152-53 (D.C. Cir. 1979) (denying discovery sought by a party because party failed to demonstrate that it could not obtain the requested information from alternative sources); *see also Wyoming*, 208 F.R.D. at 455.

B. Plaintiffs' Subpoena Violates Rule 45's Requirement that Parties Avoid Imposing Undue Burdens and Expenses on Non-Parties.

Liberty Counsel and FRC also object to Plaintiffs' Subpoena because it violates Plaintiffs' obligation under Fed. R. Civ. P. 45 to avoid imposing undue burden and expense on non-parties. Rule 45 requires that the party serving a subpoena "**must** take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(d)(1) (emphasis added). *See also*, *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 295 F.R.D. 517, 527 (N.D. Fla. 2013) (Rule 45 "imposes on the issuer of the subpoena an affirmative duty to avoid imposing undue burden or expense on the non-party."). The undue burden contemplated by Rule 45 is "determined by reference to factors" such as "relevance, the need of the party for the documents, [and] the breadth of the document request." *N.C. Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005); *see also Flatow v. Islamic Republic of Iran*, 196 F.R.D. 203, 206-07 (D.D.C. 2000) (same). In determining the undue burden, Liberty Counsel's and FRC's status as non-parties is also relevant. *N.C. Right to Life*, 231 F.R.D. at 51. Plaintiffs' Subpoena fails under all of these requirements.

Not only does Plaintiffs' Subpoena seek irrelevant information which is available from alternative sources, but the breadth of Plaintiffs' requested information is extraordinary and imposes an undue burden on Liberty Counsel and FRC. For example, Plaintiffs request all communications between Liberty Counsel and FRC, on the one hand, and the United States Department of Defense, on the other hand. Compliance with this request alone would require Liberty Counsel and FRC to expend significant resources to determine if they (or any of their agents) have contacted any individual employed by the Department of Defense, which is the largest of all government agencies and the nation's largest employer. *See* U.S. Department of Defense,

[1] Though it was vacated as moot, the D.C. Circuit continues to follow the reasoning of *Black Panther Party*. *See Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 n.6 (D.D.C. 2002) ("There is no suggestion in later case law in this circuit that [*Black Panther's*] reasoning or analysis has been rejected or abandoned by our Court of Appeals.")

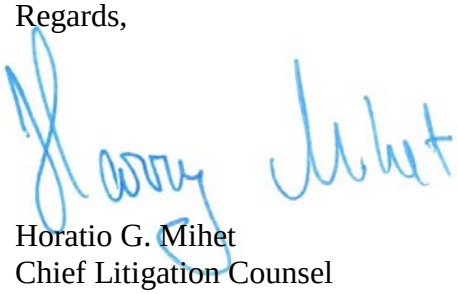
About the Department of Defense (DOD) (Jan. 27, 2017), *available at* https://www.defense.gov/About/ (last visited April 26, 2018). Thus, compliance with this one request would require Liberty Counsel and FRC to expend resources to determine if they (or any of their agents) had contacted **any one** of the 1.3 million members serving in active duty, 742,000 civilian personnel employed by the Department of Defense, or the 826,000 people otherwise employed by the Department of Defense. *Id.* All told, that would require Liberty Counsel and FRC to determine if they (or any of their agents) had contacted over 2,868,000 employees of the Department of Defense. This request is not proportional to the needs of the case, and it is an absurd request to make of a non-party.

SPECIFIC OBJECTIONS

Document Request No. 1:
All Documents and Communications from the Relevant Period between You and President Trump, the Executive Office of the President, the Trump Campaign, Vice President Pence, the Office of the Vice President, or the Department of Defense, concerning military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general.

Liberty Counsel and FRC Response to Request No. 1: As explained more fully in Liberty Counsel's and FRC's General Objections, which are incorporated herein, Liberty Counsel and FRC object to this Request because it seeks information privileged under the First Amendment; violates Liberty Counsel's and FRC's right to freedom of association, freedom of speech, and freedom to petition; violates Liberty Counsel's and FRC's statutory rights under the Religious Freedom Restoration Act; violates the limitations imposed by Fed. R. Civ. P. 26; violates Plaintiffs' obligations under Fed. R. Civ. P. 45; imposes an unconscionable and undue burden on Liberty Counsel and FRC; seeks information more readily available through alternative channels, including the parties to this litigation; seeks irrelevant information; and fails to allow a reasonable time for compliance.

Regards,



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cc: **Via Electronic Mail**

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