UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RYAN KARNOSKI, *et al.*,

Plaintiffs, and

State of Washington,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official Capacity as President of the United States, *et al.*,

Defendants.

CASE NO. 2:17-CV-01297-MJP
WESTERN DISTRICT OF WASHINGTON

CASE NO. 2:18-MC-51013

HON. NANCY G. EDMUNDS
MAGISTRATE JUDGE ELIZABETH A. STAFFORD

NON-PARTY CENTER FOR MILITARY READINESS' (CMR) MOTION FOR A PROTECTIVE ORDER

Non-Party Center for Military Readiness ("CMR"), by and through undersigned counsel, pursuant to Rules 26 and 45 of the Federal Rules of Civil Procedure and the Local Rules of this Court, opposes Plaintiffs' Motion to Compel Discovery and moves the Court to issue a Protective Order denying Plaintiffs the right to review and inspect communications between CMR and various individuals with whom it has corresponded in internal private communications.

1. The discovery Plaintiffs seek is irrelevant and out of proportion to the needs of their case.

2. The discovery Plaintiffs seek infringes CMR's rights under the First Amendment to the Constitution of the United States.

3. The discovery Plaintiffs seek imposes an undue burden on CMR.

WHEREFORE, based on the foregoing and the accompanying brief, Non-party Center for Military Readiness respectfully requests that the Court issue an order denying Plaintiffs' Motion to Compel and issue a Protective Order.

Dated: July 17, 2018

Respectfully Submitted,

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**Pursuant to LR 83.20(i)(1)(D)(i)*

Attorneys for Center for Military Readiness

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NON-PARTY CENTER FOR MILITARY READINESS' (CMR) BRIEF IN RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY AND IN SUPPORT OF CMR'S MOTION FOR A PROTECTIVE ORDER

STATEMENT OF THE ISSUES

I. Whether Plaintiffs can compel discovery of non-party CMR's private, internal communications when the information they seek is not relevant to their underlying claims against the Defendants and the burden on CMR of production is out of proportion to Plaintiffs' needs?

II. Whether Plaintiffs can compel discovery of non-party CMR's private, internal communications when the breadth, scope, and intrusiveness of the discovery unreasonably infringes CMR's First Amendment rights?

III. Whether the subpoena Plaintiffs seek to enforce subjects CMR to an undue burden?

CONTROLLING AUTHORITY

Federal Rule of Civil Procedure 26

Federal Rule of Civil Procedure 45

Hawaii v. Trump, 138 S. Ct. 2392 (2018)

Citizens United v. FEC, 558 U.S. 310 (2010)

In Re Ohio Execution Protocol Litigation, 845 F.3d 231 (6th Cir. 2016)

Citizens Union of City of New York v. Attorney General of New York, 269 F. Supp. 3d 124 (S.D.N.Y. 2017)

Pulte Home Corp. v. Montgomery Cty, MD, No. GJH-14-3955, 2017 WL 1104670 (D. Md. March 24, 2017)

Lowe v. Vadlamudi, 2012 WL 3887177 (E.D. Mich., Sept. 7, 2012)

In Re Motor Fuel Temperature Sales Practices Litigation, 707 F. Supp. 2d 1145 (D. Kan. 2010)

BACKGROUND

Non-Party CMR is a private 501(c)(3) organization with no official or unofficial role in developing or implementing the policy Plaintiffs challenge. Yet, Plaintiffs demand to search through CMR's "communications" because they believe CMR harbors some animus toward transgenders,[1] that CMR communicated that animus to members of the Trump Administration, those Administration officials then relayed that animus to President Trump, who then relied upon that animus in issuing his July 26, 2017 tweets concerning service by transgendered people, and that the animus-laden tweets infected all subsequent policy considerations. Plaintiffs' premise is false and their argument rests upon circular reasoning. CMR does not harbor any animus, bigotry, or prejudice toward transgendered personnel and CMR has no insight, inside information, or evidence of President Trump's state of mind and motivation for his July 2017 tweets and his August 2017 memo. Donnelly Decl. at ¶¶ 4,17,22.

Prior to 2016, transgendered personnel were not eligible for military service. *DOD Instruction 6130.03, Medical Standards for Appointment, Enlistment, or Induction in the Military Services,* at 23, 25, 43 (Apr. 28, 2010) (https://api.ning.com/files/16b28SF0RUxOiElEOEtx8DNOpZDVvwiVDO*tRt*St

[1] Throughout the brief, CMR uses "transgender" and "transgendered" to refer to individuals who identify as transgender.

DfHbLzjUbtzoPEOZrzYn66PIg0dpfUw3sEObJ0rNZtdoKR5LrDewiD3/613003p.pdf) (last visited July 12, 2018). That changed on June 30, 2016, when then Secretary of Defense Ashton Carter issued *Directive-type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members"* (https://www.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf), (Last visited July 12, 2018). The policy changes applicable to transgenders who were currently serving were effective immediately. The accessions provisions were to take effect on July 1, 2017, after a new Commander-in-Chief was to assume office. On June 30, 2017, Secretary of Defense James Mattis postponed the new accession standards until January 1, 2018.

In a series of tweets in late July 2017, President Trump announced that the transgender policy imposed by his predecessor would be reversed. In August, the President issued a formal directive to the Secretary of Defense to return Department of Defense ("DoD") policies on service by transgendered personnel to the pre-2016 version "until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have . . . negative effects . . . [on military effectiveness, combat lethality, and unit cohesion]. https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security/ (last visited July 12, 2018). The President's memo gave the Secretary of Defense and the Secretary of Homeland

Security until February 21, 2018, to submit a plan "appropriate and consistent with military effectiveness and lethality, budgetary constraints, and applicable law." *Id.*

Four separate lawsuits were filed challenging President Trump's decision to return to the pre-2016 version of the policy.[2] On March 23, 2018, Secretary Mattis announced the result of the DoD study of the issue and announced a new policy. *Report and Recommendation on Service by Transgender Persons;(*https://partner-mco-archive.s3.amazonaws.com/client_files/1521898539.pdf) (last visited July 12, 2018).

ARGUMENT

I. Plaintiffs' Discovery is Beyond the Scope Permitted by Rule 26, Federal Rules of Civil Procedure.

The plain language of Fed. R. Civ. P. 26(b)(1), makes it clear that discovery is limited by (1) its relevance to a party's claim or defense; and (2) whether it is proportional to the needs of the case. Plaintiffs' discovery here fails both the relevance limitation and the proportionality limitation of Fed. R. Civ. P. 26(b)(1).

[2] *Karnoski, et al. v. Trump, et al.*, No. 2:17-CV-01297-MJP, (W.D. Wash., filed Aug. 8, 2017); *Doe, et al. v. Trump, et al.*, No. 17-CV-1597 (CKK), (D.D.C., filed Aug. 9, 2017); *Stone, et al. v. Trump, et al.*, No. 1:17-cv-02459-MJG (D. Md., filed Aug. 28, 2017); *Stockman, et al. v. Trump, et al.*, No. 17-CV-6516, (C.D. Ca. filed Sep. 5, 2017).

A. The Discovery Plaintiffs Seek is Irrelevant.

Plaintiffs claim that the President's tweets and memo repealing the Obama-era changes to the transgender policy and reinstating the policies as they existed prior to June 2016 deprived them of (1) Equal Protection, (2) Due Process, and (3) First Amendment rights. Plaintiffs' Motion at 2. Plaintiffs' theory of the relevance of CMR's communications with government officials is based on the false premise that CMR harbors "hostility" toward transgender people.[3] Pls.' Motion at 6. They then claim that "Defendants' consultation with outside groups well known to oppose equal treatment for transgender people is probative of Defendants' purpose. . ." in changing the policy. Pls.' Motion at 6. Thus, Plaintiffs' theory of relevance is premised upon the falsehood that CMR bears hostility toward those who identify as transgendered. Plaintiffs then assume that CMR communicated that hostility to government officials and that CMR's hostility was adopted by the key decision-

[3] The only "evidence" Plaintiffs offer of CMR's alleged hostility is an article posted on CMR's website that accurately predicted that the new transgender policies imposed by the Obama Administration would require compliance without regard for the personal, moral, and religious convictions of other members of the military. Recognizing the conflict between religious liberty and emerging rights of sexual minorities is not evidence of hostility, rather it is a recognition of reality. The clash between religious convictions and the rights of sexual minorities is a very real and current controversy. *See Masterpiece Cakeshop, LTD, v. Colorado Civil Rights Commission, et al.*, No. 16-111 Slip op. at 1-2, (June 4, 2018) (Kennedy, J.) ("The case presents difficult questions as to the proper reconciliation of at least two principles; . . . protect[ing] the rights and dignity of gay persons . . . [and] the right of all persons to exercise fundamental freedoms under the First Amendment.").

makers and motivated them to harm transgender people. Beginning with a false premise and tacking on several unsupported inferences does not establish relevance. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. The "fact" Plaintiffs wish to establish is CMR's animus toward transgendered people and then, through a series of unsupported assumptions assign that animus to President Trump and claim it motived his July 2017 tweet. Plaintiffs have failed to set out any coherent chain of supportable logical inferences that could lead from CMR's communications to the President's state of mind in July 2017 and in August 2017 when he issued his memorandum to the Secretary of Defense. Instead, they cite cases where, on the unique facts of those cases, courts allowed discovery from non-parties. Those cases fail to establish the relevance of the information Plaintiffs seek from CMR and illustrate why the discovery sought here is irrelevant and inappropriate.

Plaintiffs' reliance on *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) is misplaced. First, *Arlington Heights* says nothing about whether non-parties should be compelled to disclose their communications with government officials. Rather, the Court pointed to "contemporary statements by members of the decision-making body, minutes of its meetings, or reports" as evidence of racial animus. 429 U.S. at 268. "In some extraordinary instances the

members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." *Id*. *Arlington Heights* teaches that Plaintiffs seeking to prove animus underlying a government policy must look to the decision maker and his or her motivations, not the thoughts, ideas, or preferences of those who have no role or responsibility in either developing or implementing the policy. Neither the President, the Vice President, Secretary Mattis, nor any of their staff with responsibility for the transgender policy communicated with CMR and CMR did not communicate with any of them about the substance of the policy. Donnelly Decl. ¶ 5.

Romer v. Evans, 571 U.S. 620 (1996) is similarly unavailing. The *Romer* Court did not address whether rummaging through the files of private groups and individuals was permissible in seeking evidence to support an equal protection claim. In fact, the Court found the animus underlying the amendment in *Romer* was so obvious and so blatant that one could discern it simply by reading the language of the amendment itself: "the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." 571 U.S. at 632.

More germane to the viability of Plaintiffs' claim and their theory of the relevance of CMR's communications is the Court's recent decision in *Hawaii v. Trump*, No. 17-965, (June 26, 2018). Plaintiffs in *Hawaii v. Trump*, like Plaintiffs in

Karnoski v. Trump, claim that executive action was motivated by animus toward a specific group of people. To support their theory, the *Hawaii* Plaintiffs relied upon statements by Donald Trump made before and after his inauguration. *Hawaii v. Trump Slip Op. at* 27-28. Plaintiffs urged the Court to "probe the sincerity of the stated justifications for the policy by reference to extrinsic statements…." *Id.* at 29. While recognizing that statements *made by the decision-maker*, President Trump, could be considered in determining whether the entry restrictions were constitutional, *Id.* at 32, the policy itself would be subject to rational basis review and upheld "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* In applying the correct standard of review the Court noted that the common thread of policies failing rational basis scrutiny "has been that the laws at issue lack any purpose other than a 'bare…desire to harm a politically unpopular group.'" *Id.* at 33 *quoting Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

The application of *Hawaii v. Trump* to the relevancy of CMR's communications reveals that the probative value of the Plaintiffs' string of assumptions based on a false premise is non-existent. First, in *Hawaii v. Trump* Plaintiffs had numerous direct statements *from the President* which one could argue revealed his state of mind toward Muslims, generally, and from that state of mind infer nefarious motives in issuing the travel ban. In *Karnoski,* the Plaintiffs seek

evidence of a non-party's state of mind which they must then assume was not only grounded in hostility toward transgendered people, but was somehow communicated to the President, adopted by him, and formed the basis of his July 2017 tweet. CMR had no communications with President Trump and has no insight, evidence, or knowledge of his state of mind toward people who identify as transgendered. Donnelly Decl. ¶ 22.

Second, *Hawaii v. Trump* holds that "'when it comes to collecting evidence and drawing inferences' on questions of national security, 'the lack of competence on the part of the courts is marked.'" *Id.* at 31-32 (*quoting Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010)). What this means for Plaintiffs' theory of relevance in the matter before this court is that the probative value of CMR's communications to establish CMR's state of mind and from that to infer a nefarious motive on the part of the President is so tenuous and relies upon so many false and unsupported assumptions that it has no tendency to establish any fact, much less one of consequence, in light of the standard of review. *See United States v. Hall*, 653 F.2d 1002, 1005 (5th Cir. 1981) ("evidence must be probative of the proposition it is offered to prove [and] [w]hether a proposition is of consequence to the determination of the action is a question that is governed by the substantive law.").

Instructive on the relevancy of the sort of material sought here is *Citizens Union of City of New York v. Attorney General of New York*, 269 F. Supp. 3d 124

(S.D.N.Y. 2017), where Plaintiffs challenged a New York law that required political groups to disclose the identity of contributors and the amount of contributions. To prove the statute was motived by an improper purpose to stifle political action and participation, Plaintiffs sought discovery of pre-enactment and non-public documents and communications from the Governor, a non-party. In determining whether the information sought was relevant, the court noted that none of the documents indicate:

> [W]hether the Governor himself was a party to the communication [and] [a]s a result, there is no way for Plaintiffs to ascertain whether the Governor considered, or was even aware of, the factual material reflected in any . . . [of the documents]. Plaintiffs do not explain how they can credibly divine what factual information actually influenced the Governor's decisionmaking process simply by looking to the communications and work product of his staff.
>
> *Id*. at 147.

The court also noted that, "[a]bsent extrinsic evidence tending to show the relevance of a particular draft, production of these documents is likely to lead only to wasteful fishing expeditions. . . ." *Id*. at 148 (*quoting Grossman v. Schwartz*, 125 F.R.D. 376, 385 (S.D.N.Y. 1989)); *see also Alliance of Automobile Mfr. v. Jones*, 2013 WL 4838764, *4 (N.D. Fla. Sept. 11, 2013) (Discovery from non-parties denied because "questions of constitutionality . . . are not decided upon review of . . . a citizen's view of the law or the like."). The theory rejected by *Citizens Union of*

City of New York is the same theory relied upon by the Plaintiffs in this matter and it suffers from the same defects identified by the *Citizens Union* court.

In *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 2016 WL 5922315 (W.D. Tex. Oct. 22, 2016), another case wrongly relied upon by Plaintiffs, the non-parties from whom information was sought had an economic or commercial interest in the challenged statute. The non-parties subject to discovery had something personal to gain by lobbying the legislature to pass the statute in question and in opposing subsequent repeal efforts. CMR has no economic, commercial, personal, or pecuniary interest in the military's transgender policy. CMR has nothing to gain or lose regardless of the substance of the policy. CMR's only interest is in promoting sound national defense policies, an interest that is shared by all Americans. Donnelly Decl. ¶ 2.

Similarly, in *Baldus v. Brennan*, 2011 WL 6122542 (E.D. Wis. Dec. 8, 2011), the discovery was directed toward non-parties who were hired by the legislature and who had an official role in advising the legislature on the redistricting plan. While technically non-parties to the underlying litigation, they were officially involved in developing the challenged plan. CMR, on the other hand, had no role, official or otherwise, in the policy challenged in the present litigation. Donnelly Decl. ¶ 5-8.

Likewise, *Valle Del Sol v. Whitting*, 2013 WL 12098752 (D. Ariz. Dec. 11, 2013) does not support the discovery of communications from CMR. In *Valle Del*

Sol the Plaintiffs sought discovery directly from the legislators whose motives were in issue and learned that discovery was impossible because of a legislative policy that destroyed such communications after 90 days. Accordingly, Plaintiffs were left with no recourse but to seek the information from the non-party lobbying groups. Only after establishing that they could not get the information directly from the legislators because it no longer existed was discovery of non-party communication permitted. In the present case, there has been no showing that Defendants do not possess the categories of documents Plaintiffs seek. While CMR understands that Defendants have objected to production on various privilege grounds, those issues are still pending in the District Court and the District Judge has ample power to resolve any dispute among the parties. Fed. R. Civ. P. 37. If those issues are decided in Plaintiffs' favor, they can obtain the information directly from the Defendants without burdening CMR. If the privilege is upheld by the District Judge, Plaintiffs should not be able to circumvent the privilege by requiring a non-party to produce the information.

Jewish War Veterans of the U.S. of Am., Inc. v. Gates, 506 F. Supp. 2d 30 (D.D.C. 2007), is inapposite as well. In *Jewish War Veterans*, Plaintiffs challenged a federal statute that designated Mt. Soledad Veterans Memorial near San Diego, California, as a federal war memorial. The memorial consisted of a large cross atop Mt. Soledad. Plaintiffs challenged the designation of the memorial as a violation of

the Establishment Clause. Plaintiffs claimed the Supreme Court's test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which requires the reviewing court to determine, among other things, whether the challenged law has a "secular legislative purpose" was not met because the sponsoring Congressmen had a religious purpose in passing the legislation. 403 U.S. at 612. To meet their burden of showing the law did not have a secular purpose, Plaintiffs sought discovery from the three southern-Californian Congressmen who sponsored the legislation. The court reasoned that, since the non-parties from whom discovery was sought were the sponsors of the challenged legislation, their files and communications may be germane to the "secular purpose" of the *Lemon* test and denied their motion for a protective order. The difference between the non-parties in *Jewish War Veterans* and CMR is stark. In *Jewish War Veterans*, the non-parties from whom discovery was sought were the authors, drafters, and sponsors of the challenged legislation. They were official actors who played the major role in not only crafting the legislation but in securing its passage. Though technically non-parties to the litigation, they certainly possessed relevant information concerning the purpose behind the statute as well as the context in which it was created. CMR is none of those. Donnelly Decl. ¶ 5-8, 22. CMR had no role, official or otherwise, in the President's tweets or his August 25, 2017 memo. CMR was not an official actor in developing the policy challenged here. CMR was

not responsible for the policy nor involved in the development of the policy Plaintiffs challenge. *Id.*

Because CMR had no economic or personal pecuniary interest in the policy, played no role, official or otherwise, in the development of the policy, was not retained, hired, consulted, or asked to provide input into the President's decision to issue his tweets and August 25, 2017 memo, the discovery Plaintiffs seek from CMR is irrelevant and not discoverable under Rule 26(b)(1).

B. The Discovery Plaintiffs Seek is Out of Proportion to the Needs of the Case.

Conceding, for the sake of argument, that Plaintiffs can satisfy the relevance prong of Rule 26(b)(1), it does not end the inquiry. "Although a plaintiff should not be denied access to information necessary to establish her claim, neither may a plaintiff be permitted to go fishing and a trial court retains discretion to determine that a discovery request is too broad and oppressive." *In Re Ohio Execution Protocol Litigation*, 845 F.3d 231, 236 (6th Cir. 2016) (*quoting Surles v. Greyhound Lines, Inc*., 474 F.3d 288, 305 (6th Cir. 2007)); *see also Bredemus v. Intern. Paper Co.*, 252 F.R.D. 529, 533-534 (D. Minn. 2008) ("Therefore, notwithstanding the liberality of discovery, 'we will remain reluctant to allow any party to roam in the shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so,'" *quoting Archer Daniels Midland Co., v. Aon Risk Services Inc*., 187 F.R.D. 578, 589 (D. Minn. June

7, 1999) (some internal quotation marks omitted)). The proportionality factors of Fed. R. Civ. P. 26(b)(1) applicable here are, (1) the importance of the discovery to resolving the issues; (2) the parties' relative access to the information; (3) the relative resources available to the parties; and (4) the burden of discovery balanced against the likely benefit.

1. The Discovery Sought has no Importance to Resolving the Issues.

The discovery Plaintiffs seek from CMR has no bearing on the state of the mind of the President when he issued his July 2017 tweets and his August 2017 memo. Because Plaintiffs' theory of relevance begins with a false premise and relies upon unsupported inferences, it has no probative value and no importance to resolving the issues in the case. Plaintiffs could acquire every email, blog post, written letter, diary entry, newspaper editorial, Facebook "like," and a multitude of other manifestations of views of citizens all across this country and none of it would matter unless they could show that the decisionmaker relied upon the contents of those communications in formulating the policy. *See Alliance of Automobile Mfrs. v. Jone*s, 2013 WL 4838764, *4 (N.D. Fla. Sept. 11, 2013) (constitutionality of a law not determined by citizen's view of the law.). This factor weighs in favor of denying the discovery.

2. Plaintiffs Have Access to the State of Mind of President Trump Through the Tools of Party Discovery.

Another factor courts must consider in determining the proportionality prong is the parties' relative access to relevant information. Fed. R. Civ. P. 26(b)(1). President Trump and his principal advisors are all Defendants in this action. Additionally, the Plaintiffs have named the United States of America as a defendant, thus opening discovery to hundreds of thousands of government employees. If any evidence of the President's alleged animosity toward transgendered people exists, it would seem to exist first and foremost within the circle of Defendants.

Plaintiffs have the full panoply of discovery tools available to them under the Federal Rules of Civil Procedure to discover with whom President Trump consulted, what he considered, and what motivated his July 2017 tweets and his August 2017 memo. The fact that Defendants have raised privilege objections does not excuse Plaintiffs from employing the tools of party discovery before embarking on a fishing expedition through the private correspondence of a non-party who played no role and bore no responsibility for the policy they challenge. Through discovery tools available to all civil litigants, they can obtain the information they contend they need regarding the President's state of mind. Sanctions are available under Fed. R. Civ. P. 37 should Defendants unreasonably and unjustifiably refuse to cooperate.

This factor also weighs in favor of denying Plaintiffs the discovery they seek from CMR.

3. CMR Does Not Have the Resources to Expend on Supporting Plaintiffs' Litigation Against the President.

The next factor to consider in determining the proportionality prong of the scope of discovery is the parties' resources. Plaintiffs have unlimited resources to pursue this matter. They are represented by well-known and prosperous law firms with the backing of nationally known and well-funded organizations devoted to advancing the rights of sexual minorities. Additionally, Plaintiffs and their lawyers have joined forces and combined resources with Plaintiffs, lawyers, and advocacy organizations in the other three lawsuits challenging the same policy. Barsanti Decl. at ¶ 8.

CMR, on the other hand, is a one-person public policy 501(c)(3) organization dependent upon the voluntary donations of a limited number of faithful supporters. Donnelly Decl. ¶ 22. The limited time and resources of CMR are devoted to analyzing military personnel policies and evaluating whether they contribute to or hinder a strong national defense force capable of defeating a hostile enemy. Donnelly Decl. ¶ 2, 20.

The financial and time burdens this discovery imposes on CMR are excessive, unreasonable, and unjustifiable in light of the issue Plaintiffs seek to establish. Requiring CMR to spend its limited financial and personnel resources on this matter effectively prohibits it from performing the services for which the organization was formed. Donnelly Decl. ¶ 21. Plaintiffs' efforts to pull CMR into its litigation with

the President and to impose such a burden on CMR serves to punish CMR for its engagement on these issues and discourages others from communicating and cooperating with CMR. Donnelly Decl. ¶ 17. This factor also weighs against allowing Plaintiffs' discovery.

4. The Burden of Discovery Outweighs Any Benefits.

The final relevant factor in the proportionality prong also weighs against allowing the discovery. Because the information sought from CMR is so tangential to the issues in the case and because Plaintiffs' theory of relevance starts with a false premise and then relies upon unfounded and unsupported assumptions, the burden on CMR of producing this material outweighs any benefit to Plaintiffs in proving their claims.

CMR does not have the luxury to drop its other interests and projects and direct its efforts and limited financial resources to Plaintiffs' lawsuit. Donnelly Decl. ¶ 20. CMR did not sue Plaintiffs; CMR did not ask to be a part of this lawsuit; CMR has not conspired, colluded, or collaborated with anyone who was responsible for the President's tweets and his August 2017 memo. Donnelly Decl. ¶ 22. When placed in the context of CMR's lack of involvement in the challenged policy, the marginal, at best, probative value of CMR's communications to any issue in the case, the time and financial resources required to permit CMR to undertake an orderly and thorough review of any responsive communications to protect the legitimate

expectations of privacy with those in communication with CMR, and the sheer scope and breadth of the Plaintiffs' unreasonable demands for information, the burden this discovery places on CMR substantially outweighs any benefit the information sought may have on resolving the disputed issues in the case. Donnelly Decl. ¶ 20.

II. Plaintiffs' Subpoena Infringes CMR's First Amendment Rights.

The Constitution guarantees CMR a right to associate with others and to engage in activities protected by the First Amendment. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984); *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958). Limitations on free speech rights may not be imposed when there is a "reasonable probability" that it will "subject them to threats, harassment, or reprisals from either Government officials or private parties." *Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (internal quotation marks and citation omitted). Further, the speech sought in this case is political speech, which lies at the core of the First Amendment's speech protections. *E.g., Boos v. Barry*, 485 U.S. 312 (1988). "There is a qualified privilege against the discovery of information where compelled disclosure would likely chill associational rights." *Pulte Home Corp. v. Montgomery Cty, MD*, No. GJH-14-3955, 2017 WL 1104670 *3 (D. Md. March 24, 2017) (*citing NAACP v. Alabama*, 357 U.S. at 463-63).

In evaluating whether a particular discovery request infringes First Amendment rights, courts apply a two-part framework. First, the person asserting

the privilege must make a *prima facie* showing that compelled disclosure will deter membership, communication, or cooperation due to fears of threats, harassment, reprisal from government officials or private parties, or other actions that will affect a person's well-being, political activities, or economic interests. *In Re Motor Fuel Temperature Sales Practices Litigation*, 707 F. Supp. 2d 1145, 1151 (D. Kan. 2010). In making this showing, the person asserting the privilege "does not need to prove with certainty that disclosure will result in chilling; [i]nstead the party 'need only show that there is some probability that disclosure will lead' to a chilling effect." *Pulte Home Corp.*, 2017 WL 1104670 *4, *quoting Black Panther Party v. Smith*, 661 F.2d 1234, 1268 (D.C. Cir. 1981).

Once the *prima facie* showing of a chilling effect has been made, the burden shifts to the party seeking discovery "to prove that the information sought is of *crucial relevance* to its case; that the information is *actually needed to prove its claims*; that the information is *not available from an alternative source*; and that the request is the *least restrictive way to the obtain the information*." *Pulte Home Corp*. at *4 (*citing Grandbouche v. Clancy*, 825 F.2d 1463, 1466-67 (10th Cir. 1987)) (emphasis supplied). The court must then balance the substantiality of the First Amendment interests against the importance of the information to the case to determine whether the First Amendment rights should be overborne by the needs for the requested information. *Id.*

A. Allowing Plaintiffs' Discovery Would Chill CMR's First Amendment Rights.

CMR's rights of petition, association, and speech are chilled by the subpoena because it demands CMR to reveal both if it petitioned governmental officials on this issue and, assuming it did, the contents of the petition, as well as the identities of the people with whom it communicated. The disclosure creates a "reasonable probability"—that CMR will then be "subject … to threats, harassment, or reprisals from either Government officials or private parties." *See Citizens United*, 558 U.S. at 367 (internal quotation marks and citation omitted); Donnelly Decl. ¶ 15-17.

For CMR the threat of harassment is far from hypothetical. Websites already collect cherry-picked quotes regarding CMR's position on issues like those in this suit.[4] Given these risks of disclosure and the well-recognized decline in civil discourse in our culture, CMR is obviously burdened by the forced disclosure of the communications Plaintiffs seek. CMR must rely upon private and confidential communications in order to gather the information it needs to fulfill its purpose. Donnelly Decl. ¶ 15. Disclosure of CMR's communications would expose individuals who correspond with CMR to the risk of harassment and would discourage others from communicating with CMR. The price of joining forces with CMR would be a fear that communications thought to be private would be disclosed

[4] http://www.rightwingwatch.org/organizations/center-for-military-readiness/ (last visited July 12, 2018).

through the use of non-party discovery. That fear, of course, would dissuade all but the most courageous from communicating with CMR. Likewise, donors may fear donating to CMR, for fear that information they tell to CMR and their financial support of CMR will be exposed and harassment will follow. *See Citizens United*, 558 U.S. at 367. These risks are precisely the risks that *Pulte Home Corp.* and *In Re Motor Fuel Temperature Sales Litigation* identified as sufficient to meet the *prima facie* showing required under the qualified privilege framework.

CMR has met its *prima facie* showing that permitting the discovery Plaintiffs seek will chill CMR's First Amendment rights.

B. Plaintiffs Cannot Meet the Burden to Overcome CMR's First Amendment Rights.

1. The Materials Sought are not "Crucially Relevant" to Plaintiffs' Claims.

When faced with a First Amendment objection to discovery, the relevance standard is more exacting than the minimal showing of relevance under Rule 26(b)(1) and the information must go to the heart of the matter. *State of Wyoming v. United States of Dep't of Agric.*, 239 F. Supp. 2d 1219, 1241 (D. Wyo. 2002), *vacated as moot*, 414 F.3d 1207, 1241 (10th Cir. 2005). The information sought must be of "crucial relevance to. . .[Plaintiffs'] case . . . [and the Plaintiffs must establish] that the information is actually needed to prove its claims." *Pulte Home Corp.* at *4.

Plaintiffs cannot meet this burden. Mrs. Donnelly had no direct communication with the decision-makers in this matter and has no knowledge of the state of mind of the President. Donnelly Decl. ¶ 22. As argued above, Plaintiffs' chain of logical reasoning fails the low bar of relevance under Federal Rule of Evidence 401 and does not come close to meeting the more exacting standards of "crucial relevance" and going to the "heart of the matter" required when balancing the demand for discovery against First Amendment rights. This factor weighs in favor of denying the discovery.

2. The Information Sought is not *Actually Needed* to Prove Plaintiffs' Claims.

The second factor to consider is whether Plaintiffs *actually need* this information to prove their claims. The clear answer is "No."

According to their summary of the procedural posture of the case, the District Judge has determined the burden is on the "Defendants to show that the Ban was motivated by a compelling state interest, rather than based on illegitimate reasons such as prejudice or stereotype, or improper political considerations." Plaintiffs' Motion at 5. By convincing the trial court to apply strict scrutiny, Plaintiffs have succeeded in shifting the burden of proof to the Defendants and Plaintiffs do not have to prove the actual motivation of the President. Thus, the information sought from CMR is not "actually needed"—it's not needed at all—to prove Plaintiffs' claims. This factor weighs in favor of denying the discovery.

3. The Information is Available from Alternative Sources that Do Not Burden CMR.

As argued above, Plaintiffs have the full resources of the Federal Rules of Civil Procedure to obtain evidence they seek concerning the President's state of mind when he issued his July 2017 tweets and his August 2017 memo. This factor, too, weighs in favor of denying the discovery.

4. The Subpoena Plaintiffs Seek to Enforce is Not the Least Restrictive Way to Obtain the Information.

Imposing large financial and time burdens on CMR that will hinder its normal operations and force it to expend limited resources on matters outside its purpose is not the least restrictive way for Plaintiffs to obtain information they claim is relevant to their theory. First, CMR's information does not address or pertain to the point they wish to establish: the President's state of mind. Second, Mrs. Donnelly does not have personal knowledge of the President's state of mind. Third, CMR is not a party to this lawsuit. Fourth, in light of the points made above, it appears that the real purpose of the subpoena is not to advance Plaintiffs' case, but to harass, intimidate, and to divert CMR and its resources from its stated mission and purpose. This factor weighs in favor of denying the discovery.

III. Plaintiffs' Subpoena Imposes and Undue Burden and Expense on CMR and Should be Quashed Under Rule 45(d).

Rule 45(d)(1) of the Federal Rules of Civil Procedure instructs courts to enforce the issuing party's duty "to avoid imposing burden or expense on a person

subject to the subpoena." *See Lowe v. Vadlamudi,* 2012 WL 3887177, *2 (E.D. Mich., Sept. 7, 2012) (undue burden is determined by "relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed" and that "the status of a person as a non-party is a factor that weighs against disclosure") (*quoting American Elec. Power Co., Inc. v. United States,* 191 F.R.D. 132, 136 (S.D. Ohio 1999)); *see also Whole Woman's Health, et al., v. Texas Catholic Conference,* No. 18-50484 (5th Cir., July 15, 2018) *slip op* at 21-22 (Finding "undue burden" under Fed. R. Civ. P. 45(d) when "[t]he small or non-existent incremental 'need' for and 'relevance' of this discovery alone imposes a burden on [a non-party]. . . ."). Plaintiffs' subpoena subjects non-party CMR to an undue burden and expense and should be quashed. Fed. R. Civ. P. 45(d)(3).

The arguments set out in Part I as to the relevance and proportionality of this discovery to the legitimate needs of the case and the factors considered when balancing CMR's First Amendment rights against the burden the discovery imposes upon CMR set out in Part II apply with equal force to establish the undue burden under Fed. R. Civ. P. 45(d)(3). Accordingly, this Court should quash the subpoena and issue a Protective Order disallowing Plaintiffs' discovery.

CONCLUSION

For the foregoing reasons, CMR respectfully requests the Court deny the Motion to Compel and enter a Protective Order quashing the subpoena issued by the Plaintiffs.

Dated: July 17, 2018

Respectfully submitted,

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**Pursuant to LR 83.20(i)(1)(D)(i)*

Attorneys for Center for Military Readiness

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

THOMAS MORE LAW CENTER

/s/ Kate Oliveri
Kate Oliveri, Michigan Bar No. P79932

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RYAN KARNOSKI, *et al.*,

Plaintiffs, and

State of Washington,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official Capacity as President of the United States, *et al.*,

Defendants

CASE NO. 2:18-mc-51013

DECLARATION OF ELAINE DONNELLY IN SUPPORT OF NON-PARTY CENTER FOR MILITARY READINESS'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL COMPLIANCE WITH DISCOVERY AND IN SUPPORT OF CMR'S MOTION FOR PROTECTIVE ORDER

CASE NO. 2:17-CV-01297-MJP
WESTERN DISTRICT OF WASHINGTON

I, Elaine Donnelly, swear under penalty of perjury under the laws of the United States of America to the following:

1. I am over 18 years of age and competent to be a witness in this matter. I am making this Declaration based on facts within my personal knowledge. I provide this Declaration in support of non-party the Center for Military Readiness' (CMR)'s opposition to Plaintiffs' Motion to Compel Compliance with Discovery and in support of CMR's Motion for a Protective Order. I

am the President of the Center for Military Readiness, a 501(c)(3) organization that I founded in 1993.

2. CMR is an independent, non-partisan, public policy organization with a unique mission: reporting on and analyzing military/social issues. CMR promotes high standards and sound priorities in the making of military personnel policies and defends elements of military culture that are essential for morale and readiness in the All-Volunteer Force.

3. Defense Secretary Caspar Weinberger appointed me to the Defense Advisory Committee on Women in the Services (DACOWITS) for a three-year term (1984-1986). In 1992, President George H. W. Bush appointed me to the Presidential Commission on the Assignment of Women in the Armed Forces. Upon completion of my work on the Presidential Commission in 1993, I founded CMR to continue to promote and support a strong and effective military. I am the only full-time staff member, though my husband, Terry, provides invaluable assistance.

4. Contrary to the allegation in Plaintiffs' brief, CMR is not "hostile" towards people who identify as transgender. In fact, I have repeatedly urged that people who identify as transgender or suffer from gender dysphoria be treated with compassion, competent care, and honesty. Regarding individuals who identify as transgender or are diagnosed with gender

dysphoria, CMR's position is that military enlistment policies should be based on sound principles of readiness, unit cohesion, mission readiness, and combat lethality. Sound policies regarding eligibility to serve are necessary if the American military is to be trained, ready, and capable of defending the national interests of the United States against hostile forces. CMR has long maintained that equal opportunity is important, but if there is a conflict between career considerations and military necessity, the needs of the military and the nation must come first. Furthermore, sound personnel policies should be based on empirical evidence derived from actual experience, not sociological theories and misguided political goals. Decisions regarding force composition, readiness, training, enlistment/retention standards, medical requirements and a host of other factors, which determine overall suitability for military service, should be made by the Executive and Legislative Branches in the exercise of their Constitutional authority.

5. Regarding the transgender policy that is the subject of the underlying litigation, I was not consulted or asked to participate in any official or unofficial way in its development and implementation. Except for publicly published articles distributed in ways described below, I have not "communicated" (as that term is defined in Plaintiffs' subpoena) with

President Trump, Vice President Pence, Secretary Mattis, or other government officials who had responsibility for the development of the policy Plaintiffs are challenging.

6. I learned of President Trump's July 26, 2017, tweets through the news media. I was not consulted by anyone in the Trump Administration about the substance of the tweets before they were sent out, and I played no role whatsoever in their drafting.

7. Nor was I consulted or asked to provide input for the August 25, 2017, memo to the Secretary of Defense directing DoD to study the transgender issue and report back to the President. I was not aware of the contents of the August 2017 memo until it was made public and announced to the media.

8. I was not part of nor did I participate in the subsequent DoD study that resulted in the March 23, 2018, policy concerning service by people who identify as transgender or suffer from gender dysphoria. I learned of the March 23, 2018, policy when contacted by news media outlets asking for comments on the day it was announced. Because I was not involved, officially or unofficially, in the policy's development I was unable to provide an informed comment until I was able to read the materials for myself.

9. Over the course of CMR's 25-year existence, I have posted many documents on CMR's website, www.cmrlink.org, which report on and analyze various aspects of military personnel policies including the transgender policy. Those documents are available to anyone who wishes to access the website and Plaintiffs' counsel has been specifically referred to the website for information on CMR's position on the transgender policy. I have no record of who visits the website or who reads, downloads, or otherwise uses or relies upon the posted CMR articles and information. I have no personal knowledge of who, if anyone, within the Trump Administration with responsibility for the transgender policy may have read, considered, or relied upon CMR reports and analyses posted on the website, but I hope they did read them and found them helpful.

10. From time to time I send mass emails to approximately 3000 supporters who have generously supported CMR's efforts over the years. These emails usually include one or more links to recently-posted documents on the website and often include a fundraising appeal. There are no email addresses in that database that have a ".who" (White House), ". eop" (Executive Office of the President), ".ovp" (Office of the Vice President), or ".osd" (Office of the Secretary of Defense), domain extension. These

external email transmissions are designed to alert supporters of new materials posted on the website.

11. On occasion I also send mass emails to about 400 media outlets informing them of new materials on the website, providing comments about some recent event or development, or issuing a news release.

12. I also, from time to time, send emails with links to new materials on the website to email addresses associated with the House Armed Services Committee, the Senate Armed Services Committee, some congressional leaders, a few White House and Pentagon officials, plus organizational leaders and other interested parties. These mass emails also alert the recipients of new materials posted on the website or provide copies of publicly available articles that might be germane to a given issue.

13. The above distributions are communications of publicly available documents and information posted on CMR's website, news releases, or published articles from other sources. None of the mass mailings described above are retained in a "sent mail" folder capable of search and retrieval.

14. In addition to the above email distributions, I also correspond via email with various individuals on matters that are internal to CMR, which I consider private correspondence. These emails may be seeking information, sharing thoughts and ideas about evolving CMR policy positions, informing the

recipients of CMR's policy preferences, or similar matters. Included in this category of emails is correspondence related to my presence in Cleveland as a credentialed guest of the 2016 Republican National Platform Committee. As in previous years, Platform Committee members discussed matters important to military readiness as they constructed the platform for the 2016 presidential election. Military-related planks in the 2016 Platform were substantially the same as those in the 2012 Platform, and neither document addressed the transgender issue specifically. Some of the addressees in this category of emails work for the government in various capacities. Others worked for various candidates or campaigns, including the Trump campaign. With the possible exception of a Platform Committee staff member who subsequently joined the administration, to my knowledge, none of the people on this rather small list have had any direct or indirect responsibility for or involvement with the transgender policy that is the subject of the underlying litigation.

15. Public disclosure of the identity of private email correspondents would seriously impede CMR's ability to accomplish our purpose of reporting on and analyzing military personnel policies. Potential correspondents would be reluctant to communicate with me for fear that their comments or engagement with CMR might come to the attention of their superiors or

others who may not support CMR's goals. For example, in 1995, CMR exposed double standards that elevated risks in naval aviation training, and a pattern of politically-skewed decisions that led to the death of one of the first female pilots to be trained in tactical aviation, who died when she failed to properly execute a carrier landing. *See, Double Standards in Naval Aviation*, https://cmrlink.org/data/sites/85/CMRDocuments/CMRRPT09-0695.pdf (last visited July 9, 2018). CMR's reporting on practices that contributed to that tragedy embarrassed Navy officials and earned CMR the wrath of the Navy's leadership. Some Navy leaders were furious that someone with personal knowledge of unusual training evaluation practices contacted CMR on a confidential basis and provided training records that documented compromises in training practices, which led to this tragedy. Importantly, without being able to communicate on a confidential basis with a known active-duty source who had first-hand knowledge of compromises in training and evaluation practices for female trainees, CMR would not have been able to gather the facts and confirm what happened: In the rush to beat the Air Force in deploying female combat pilots, the Navy redefined qualification standards and sent a young female aviator to the fleet prematurely. Assigning priority to a politically-driven goal over the Navy's normal emphasis on competence and excellence in the hazardous field of

tactical aviation cost this young woman her life. (In this case, the source voluntarily revealed his identity to Navy officials. As a result, he received a career-ending letter of censure and was denied an already-approved promotion. even though a member of Congress informed the Secretary of the Navy in writing that the officer was recognized as a protected whistleblower.) This was not the only time that CMR has been approached by known but confidential sources with first-hand knowledge of questionable military/social policies that were putting lives and missions at risk.

16. From time to time I receive emails from active-duty and reserve servicemembers, reporting their personal experience with various military policies, programs, and activities. All of these personnel would fall within the very broad definition of employees of the Department of Defense as specified in Plaintiffs' subpoena. Their first-hand accounts of military policies in operation on the ground often differ from what other media and Department of Defense or military service public affairs officers are reporting. (CMR has been recognized as requesting media under Freedom of Information Act procedures.) Assurances of confidentiality are essential for CMR to perform our core mission: advocating for high, uncompromised standards and sound priorities in military/social policies. If the identity of

these known but confidential sources were revealed, they would be subject to the displeasure of their superiors and possible career penalties. As word spread that CMR was unable to keep the identity of sources in confidence, the flow of information would dry up as concerned soldiers, sailors, and airmen seek to avoid trouble.

17. Similarly, my correspondence with various members of any administration would be seriously hindered if the identities of those willing to engage with CMR were revealed. While CMR has never knowingly received or published classified information, it has received information that might embarrass high ranking officials and jeopardize careers if the source of the information were not kept confidential. Furthermore, in view of the erosion of reasoned and civil discourse in our culture, individuals who may sympathize with CMR's view that military policies should assign priority to combat effectiveness over the advancement of individual rights of sexual minorities are likely to become targets of harassment by those who do not share that philosophical premise. Recent reports of public harassment of Trump Administration officials have revealed a serious decline in our civil discourse. Just being associated with a topic of current controversy seems to trigger public harassment and the tactic seems intended to punish the individual and to warn him or her not to be identified in any way with the

controversial topic. This underscores the need to protect the privacy of those with whom CMR corresponds on sensitive and controversial matters, whether they are the providers of information or the recipients of information from CMR. The following examples of public harassment of government officials demonstrate an intent to chill and burden First Amendment rights of speech and association. The same tactics likely would be directed toward CMR's correspondents should their identities be revealed:

a. Homeland Security Employees Warned of Increased Threats Amid Immigration Uproar; *CBS News*, June 24, 2018, https://www.cbsnews.com/news/homeland-security-memo-today-increased-threats-2018-06-23/ last visited June 25, 2018.

b. Kirstjen Nielsen Is Confronted by Protesters at Mexican Restaurant: 'Shame!' https://www.nytimes.com/2018/06/20/us/kirstjen-nielsen-protesters-restaurant.html last visited July 12, 2018

c. Stephen Miller Called 'Fascist' by Protester at Mexican Restaurant. *The Hill*, June 21, 2018, http://thehill.com/homenews/news/393403-stephen-miller-called-fascist-by-protester-at-mexican-restaurant last visited June 25, 2018.

d. Maxine Waters Warns Trump Cabinet: Steel Yourself for More Public Confrontations. *Huffpost*, June 25, 2018. https://www.huffingtonpost.com/entry/maxine-waters-warns-cabinet-on-street-confrontation_us_5b305621e4b0040e27447208 last visited June 25, 2018.

e. Sarah Huckabee Sanders Was Kicked out of a Restaurant Because of Trump. *Huffpost*, June 23, 2018. https://www.huffingtonpost.com/entry/sarah-huckabee-sanders-got-

kicked-out-of-a-restaurant-because-of-trump_us_5b2e6ee4e4b0040e27434bdc last visited June 25, 2018.

f. Decapitated Animal Carcass Placed on DHS Official's Porch. *National Review*, June 25, 2018. https://www.nationalreview.com/news/dhs-official-animal-carcass-burned-decapitated-porch/ last visited June 25, 2018

g. Left-Wing Mob Targets Stephen Miller's D.C. Apartment—While He's Traveling With POTUS, *PJ Media*, June 26, 2018, https://pjmedia.com/trending/left-wing-mob-targets-stephen-millers-dc-apartment-while-hes-traveling-with-potus/ last visited June 26, 2018.

h. 14 Times Republican Officials Were Viciously Harassed, Threatened With Death, *The Federalist*, July 10, 2018, http://thefederalist.com/2018/07/10/14-times-republican-officials-viciously-harassed-threatened-death/ last visited July 12, 2018.

18. Over the period covered by Plaintiffs' subpoena, the Center for Military Readiness has published and/or posted a number of documents and information that address the military personnel policies of interest to CMR, and accurately set forth CMR's position on those issues. These are examples:

a. CMR 2016 Quadrennial Presidential Candidate Survey, which serves a dual educational purpose: providing to presidential candidates information on issues of concern to CMR, and informing voters of the various candidates' views. Then-candidate Trump did not respond to the survey:

http://cmrlink.org/data/sites/85/CMRDocuments/CMR2016-QPCS_Rev010516.pdf.

b. News release on the results of the above survey: https://www.cmrlink.org/data/Sites/85/CMRDocuments/NewsReleaseCMRSurvey021016.pdf

c. Report on elements of the 2016 Republic National Platform pertaining to military/social issues: https://www.cmrlink.org/issues/full/choosing-the-commanderinchief

d. Inauguration Message: CMR Hails Commander-in-Chief-Elect Donald J. Trump:

e. https://www.cmrlink.org/news-releases/full/cmr-hails-commanderinchiefelect-donald-j-trump-1

f. Conservative Action Project statement on military priorities: http://conservativeactionproject.com/restoring-americas-military-strength-military-readiness-or-transgender-politics/

g. Conservative Action Project statement on transgender litigation: https://cmrlink.org/data/sites/85/CMRDocuments/Transgender%20Memo%20Final%202-14-18.pdf

h. CMR Special Report: The President, Defense Department, and Military Services Should Revoke Problematic Social Policy

Directives and Instructions: https://cmrlink.org/data/sites/85/CMRDocuments/CMRSpecialReport-March2017.pdf

i. CMR Special Report: Trump Transgender Policy Promotes Military Readiness, Not Political Correctness, analyzing policies announced in March 2018: https://cmrlink.org/data/sites/85/CMRDocuments/CMRSR_TrumpTransgenderPolicyReport-041518A.pdf

19. To the extent that CMR's position on the service by people who identify as transgender or who have been diagnosed with gender dysphoria is germane to the President's state of mind when he tweeted in July 2017 or issued his August 2017 memo, Plaintiffs can discern CMR's position from the documents posted above and assume the President read, adopted, and acted upon them. That would be far cheaper, far less burdensome, far less intrusive, and far more protective of the privacy rights of CMR's correspondents than demanding CMR produce its internal emails in order to reach the same result: CMR's position on service by people who identify as transgender or have been diagnosed with gender dysphoria is not based on animus, bigotry, or a desire to harm a specific group of people.

Furthermore, CMR's position reveals nothing about the President's state of mind when he issued his tweets and memo.

20. However, to comply with the demands of the Plaintiffs' subpoena, CMR would have to retain a qualified technology vendor to search CMR's email software and computer files to identify every email and document that mentions "transgender" or "gender dysphoria" over the lengthy, open-ended time period specified in the subpoena. In response to an earlier subpoena in *Doe v. Trump*, which only covered the seven and one-half month period between Inauguration Day and September 1, 2017, a qualified technical company we consulted estimated there were more than 8GB of data to be searched. We were told that the cost for such a search would be $200 per GB of data plus $200 per hour of technician time on the project. The subpoena Plaintiffs' filed in this matter covers the period June 16, 2015, to the present, a period of more than 36 months, and broadens the pool of CMR's correspondents considerably. Thus, there would be substantially more data to search and far more emails to review. CMR is a small non-profit 501(c)(3) organization, dependent upon voluntary donations for support. We do not have resources or a budget to support Plaintiffs' litigation strategy.

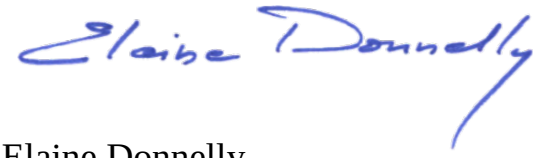
21. Once those emails are identified and retrieved by the technician, I would have to inspect the "to," "from," "cc," and "bcc" blocks to determine whether any person identified in the subpoena definitions was within the scope of the subpoena, and then read each email to determine whether it was responsive to the Plaintiffs' demands. If emails contained addressees both within and not within the definition provided by Plaintiffs' subpoena, I would have to manually redact the non-responsive addressees to protect their privacy. Similarly, if emails with individuals within the scope of Plaintiffs' demands addressed matters in addition to the transgender policy, I would have to manually redact the non-responsive matters to protect CMR's internal deliberations, ideas, and positions. Like most organizations, email is a primary means of communication. Compliance with Plaintiffs' demands would require considerable financial expense for which CMR has no budget, as well as untold hours diverted from normal CMR activities, in order to comply.

22. In summary, neither I, individually, nor CMR as an organization, had any responsibility or role, either officially or unofficially, in the development and implementation of President Trump's policy regarding service by people who identify as transgender or suffer from gender dysphoria. I have no insight, inside information, or evidence of President Trump's state of mind

or motivation for his July tweets and his August memo other than what can be surmised from publicly available information. CMR learned of the policy via media announcements along with the rest of the general public and was not privy to any inside information on the policy's development, approval, or implementation. My views on military personnel policy, generally, and the transgender policy, specifically, are as stated in the various posts linked above and several more that are easily available on the CMR website. While I hope that CMR's reports and analyses were considered by the decision-makers, I have no personal knowledge whether anyone in the administration with any responsibility for developing and implementing the transgender policy considered or relied upon any CMR articles, reports, or analyses of the policy that we posted or circulated either before or after its announcement.

Pursuant to 28 U.S.C. § 1746 I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 16, 2018



/s/ Elaine Donnelly
Elaine Donnelly