

No. 18-72159

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re DONALD J. TRUMP, *et al.*,
Petitioners.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; JAMES N. MATTIS, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN, Secretary of Homeland Security,
Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
Respondent,

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS; PHILLIP STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN; AMERICAN MILITARY PARTNER ASSOCIATION,
Real Parties in Interest-Plaintiffs,

STATE OF WASHINGTON,
Real Party in Interest-Intervenor Plaintiff.

**REPLY IN SUPPORT OF PETITION FOR
A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

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INTRODUCTION

Plaintiffs' opposition reads as if the Supreme Court has never held that mandamus is appropriate to preclude discovery demands on the White House that are far less intrusive than the order here, which requires the President both to produce a "document-by-document" privilege log for a sweeping array of White House documents and communications and to "expressly assert the presidential communications privilege," SA.6, so that the district court can "evaluate whether the privilege applies," Add.10. Although plaintiffs claim that *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), is "inapplicable" to requests for "privilege-log information," Ans.12, that case involved an order to "produce ... 'a privilege log,'" *In re Cheney*, 334 F.3d 1096, 1104 (D.C. Cir. 2003). And while plaintiffs insist that the President has a "threshold obligation to invoke the privilege and provide an adequate log," Ans.10, the Supreme Court stressed that there is "no support for the proposition that the Executive Branch 'shall bear the burden' of invoking executive privilege with sufficient specificity and of making particularized objections." *Cheney*, 542 U.S. at 388. To the contrary, requiring the President to make assertions of executive privilege "pushes to the fore difficult questions of separation of powers" that "should be avoided whenever possible." *Id.* at 389-90.

Plaintiffs' understanding of the deliberative process privilege is similarly untethered to the principles underlying that privilege. They try to excuse the district court's demand for wholesale disclosure of thousands of documents—many of which

have no apparent bearing on their claims—on the ground that disclosure is “unlikely” to chill agency deliberations, Ans.27, because “the decision to ban transgender persons from the military ... has already been made,” Ans.28-29. But the privilege *assumes* that a final decision will likely have been made, and exists to avoid the chilling effect of disclosure on future deliberations *generally*, reflecting “the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news.” *Department of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001).

For these reasons, the district court’s orders would constitute clear and significant error even if they were not intertwined with that court’s merits ruling, which will be addressed in the government’s pending preliminary-injunction appeal. Plaintiffs’ opposition confirms that the mandamus petition and the preliminary-injunction appeal are closely linked, yet offers little defense of the district court’s decision to forge ahead with extraordinary and highly intrusive discovery before this Court has even considered the critical premises underlying both orders. Instead, plaintiffs double down on the district court’s threshold errors, insisting that the requested discovery is “essential” to reveal whether deference to the military is appropriate. *E.g.*, Ans.14. The notion that the President and the Department of Defense must surrender their privileges to invoke the deference owed to military-policy decisions, however, cannot be reconciled with Supreme Court precedent.

ARGUMENT

A. Mandamus Relief Is Warranted Under *Cheney*.

1. Plaintiffs attempt to distinguish *Cheney* as a “narrow, fact-bound decision that did not establish a general rule for all cases where discovery is sought from the President.” Ans.11. That characterization, however, cannot be squared with the Supreme Court’s acknowledgment that “[i]n *no case* ... would a court be required to proceed against the president as against an ordinary individual,” and instruction that “[t]he high respect that is owed to the office of the Chief Executive ... is a matter that should inform the conduct of the *entire proceeding*, including the timing and scope of discovery.” 542 U.S. at 381-82, 385 (alterations in original; emphases added).

Nor do plaintiffs explain how *Cheney*’s unequivocal guidance permits the district court to command that the White House produce a privilege log for 9,000 documents “on a *document-by-document basis*” with “*specific*” privilege objections, Add.11, in which “President Trump must expressly assert the presidential communications privilege,” SA.6. These orders fly in the face of the Supreme Court’s admonition that there is “no support for the proposition that the Executive Branch ‘shall bear the burden’ of invoking executive privilege with sufficient specificity and of making particularized objections.” *Cheney*, 542 U.S. at 388. Insofar as the district court intended to order the President to not only log, but also produce, documents withheld under the deliberative process privilege, that intrusion is likewise foreclosed by *Cheney*.

In asserting that *Cheney* is “inapplicable” “at this juncture” because the present dispute is over “privilege-log information,” Ans.12, plaintiffs overlook the fact that *Cheney* involved the production of a privilege log. The district court in that case directed the Vice President and senior Executive Branch officials to “produce non-privileged documents and a privilege log” and to “invoke privileges with particularity.” *In re Cheney*, 334 F.3d 1096, 1104 (D.C. Cir. 2003) (quotation marks omitted). In dismissing the government’s mandamus petition, the D.C. Circuit explained that the government had “yet to assert a privilege in the district court” and had failed to “produce[] a privilege log.” *Id.* The Supreme Court vacated the judgment and remanded for reconsideration of the petition. *Cheney*, 542 U.S. at 392. In doing so, it made clear that courts must “explore other avenues” before “forcing the Executive to invoke privilege” in this manner, *id.* at 390, notwithstanding the dissent’s view that the government could simply produce a “privilege log” to allow the district court to examine those privilege claims, *id.* at 402-03 (Ginsburg, J.).

Plaintiffs are thus quite wrong to assert that the government has a “threshold obligation to invoke the privilege and provide an adequate log.” Ans.10. Rather than require a privilege log to “evaluate whether the privilege applies,” Add.10, a district court should avoid “the awkward position of evaluating the Executive’s claims of confidentiality and autonomy,” which “pushes to the fore difficult questions of separation of powers and checks and balances” and sets “coequal branches of the Government ... on a collision course,” *Cheney*, 542 U.S. at 389.

2. Plaintiffs are on no firmer ground in urging that *Cheney* turned on the assessment that the requests in that case were “overbroad” and that their requests here are comparatively circumscribed. Ans.11. To the contrary, *Cheney* held that mandamus was appropriate to address what the district court there considered to be “tightly-reined” discovery, 542 U.S. at 375, and plaintiffs offer no support for the assertion that their discovery demands constitute a lesser infringement than those in *Cheney*. Plaintiffs have issued sweeping requests, including, for example, all documents and communications relating to the President’s consultation with the military regarding “transgender military service”; all communications between the President or the Executive Office of the President and the Defense Department on broad topics such as “public policy regarding transgender people” and “transgender people in general”; and all documents and communications relating to both a 2017 memorandum and 2018 memorandum on military policy. Doc.246-2, at 2 (Reqs. for Prod. 6, 7); Doc.269-2, at 3 (Reqs. for Prod. 32, 34). Plaintiffs’ requests in effect seek the entirety of the President’s communications on military policy for transgender individuals.

Plaintiffs likewise insist that *United States v. Nixon*, 418 U.S. 683, 711 (1974), rather than *Cheney*, applies to all claims involving “constitutional dimension[s],” even in civil litigation, Ans.12; SA.5, but their efforts to blur the “distinction ... between criminal and civil proceedings” cannot be reconciled with either decision. *Cheney*, 542 U.S. at 384; *see Nixon*, 418 U.S. at 712 n.19 (expressly limiting decision to discovery in

“criminal trials”). And where, as here, plaintiffs issue overbroad discovery requests, “*Nixon* does not require the Executive Branch to bear the onus of critiquing the unacceptable discovery requests line by line.” *Cheney*, 542 U.S. at 388.

Plaintiffs also try to minimize the burdens of complying with the district court’s order by arguing that it merely requires the government to “supplement[]” the privilege log that it previously produced. Ans.16-17. But they fail to acknowledge that the court’s order would “require the creation of a *new* privilege log,” which “is expected to require at least twice as much time” as the prior two logs combined because it must “record[] the required information for approximately 9,000 individual entries instead of 66 categorical ones,” including “specific” details about each communication. Add.82-83 (emphasis added); Add.11. The Executive Branch need not bear this “line by line” burden. *Cheney*, 542 U.S. at 388.

3. Plaintiffs contend that the privilege log required by the district court would not reveal privileged information because details such as the author, recipient, and date of a communication are “basic, non-substantive information.” Ans.17-18; *see also* Add.11, SA.6 n.2. But there is no basis for plaintiffs’ purported distinction between the “substance of a communication[]” and “basic information such as who was involved in a communication or when it occurred.” Ans.18 (emphasis omitted). To the contrary, the presidential communications privilege protects not only the “actual advice” provided the President, but also “purely factual material” and “sources of information.” *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997). Both the

“President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions.” *Nixon*, 418 U.S. at 708.

Therefore, protecting the confidentiality of “sources of information” is necessary to “ensure that presidential decisionmaking is of the highest caliber, informed by honest advice and full knowledge.” *In re Sealed Case*, 121 F.3d at 750.

In any event, plaintiffs fail even under their own standard, because the supposedly “basic information” they seek would reveal the “substance” of the President’s deliberations. Ans.17-18 (emphasis omitted). As even the district court decision that plaintiffs invoke recognized, disclosing the identities of individuals may “reveal the substance of presidential deliberations.” *Citizens for Responsibility & Ethics in Wash. v. DHS*, 592 F. Supp. 2d 111, 119 (D.D.C. 2009) (*CREW*). Plaintiffs here seek information such as “the identities of the ‘Generals and military experts’” whom the President consulted on a particular issue, SA.6 n.2, because they wish to evaluate “President Trump’s decision-making process for the Ban—including the claim that it was adopted after consultation with ‘Generals and military experts,’” Ans.14. Plaintiffs desire this information precisely because it would “reveal the substance of presidential deliberations.” *CREW*, 592 F. Supp. 2d at 119. This important issue of executive privilege should not have been adjudicated by the district court in a footnote—particularly when *Cheney* does not require the President to produce a privilege log at all at this time.

4. The district court's order also constitutes clear error because the President is not a proper defendant in this litigation. Pet.27-28. As another district court recently recognized in related litigation, "[s]ound separation-of-power principles counsel the Court against granting" declaratory and injunctive relief against the President. *Doe v. Trump*, No. 17-cv-1597, 2018 WL 3736435, at *2-4 (D.D.C. Aug. 6, 2018) (citing, *inter alia*, *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992)). To avoid "constitutional confrontation between the two branches," the *Doe* court dismissed the President from the case, noting that "Plaintiffs can still obtain all of the relief they seek from the other Defendants." *Id.* at *3 (quoting *Cheney*, 542 U.S. at 389-90). As a result, the President was "not personally ... obligated to respond" to discovery requests directed to him "as a party in th[e] case." *Id.* at *4. Similarly, a magistrate judge recently stayed discovery directed to the President pending resolution of the motion to dismiss him as a party. *Stone v. Trump*, No. 17-cv-2459, 2018 WL 3866676, at *3-5 (D. Md. Aug. 14, 2018).

Plaintiffs do not meaningfully argue that President Trump is a proper defendant; instead, they claim that this issue is not before the Court. Ans.14-15. But this discovery dispute turns in part on the President's status as a party: Plaintiffs issued the discovery requests to "Defendants" in this case under the rules governing party discovery, *e.g.*, Doc.246-2, at 1, and the discovery order was expressly predicated on the President's status as "a party" to the dispute, Add.9; *see* Add.11 (citing rules applicable to party discovery). Even assuming *arguendo* that plaintiffs may pursue

third-party discovery of the President, *see Doe*, 2018 WL 3736435, at *4, they have yet to do so, and any dispute relating to such future discovery—including whether the district court “would still require an adequate log,” Ans.15—is purely hypothetical.

B. Mandamus Relief Is Warranted To Prevent The Wholesale Disclosure Of Military Deliberations.

Plaintiffs, like the district court, recognize (Ans.19-31) that determining whether the deliberative process privilege has been overcome requires the application of a multi-factor balancing test that considers whether a litigant’s “need for the materials and the need for accurate fact-finding override the government’s interest in non-disclosure.” *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (per curiam). In assessing a claim under the privilege, a court considers “1) the relevance of the evidence; 2) the availability of other evidence; 3) the government’s role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” *Id.*

This case involves thousands of deliberative documents created over the course of nearly two years and spanning two different administrations. They include documents from across the Department of Defense involving communications among officials at different levels at different times with respect to different decisions. Many of the documents involve decisions not even challenged by plaintiffs, such as deliberative documents preceding the Carter policy and Secretary Mattis’s decision to delay implementation of the Carter accession standards. Add.101-02. And the

documents include not only communications involving the Secretary of Defense and his closest aides, *id.*, but a host of lower-level communications throughout the Department. These documents are not susceptible to a one-size-fits-all analysis. *See In re United States*, 678 F. App'x 981, 987 (Fed. Cir. 2017) (noting “document-by-document” analysis required in assessing claims that the deliberative process privilege has been overcome).

Plaintiffs mistakenly think that it is dispositive that “Defendants themselves identified these documents as responsive” and that each is relevant to “deliberations concerning military service by transgender people.” Ans.24 n.5 (quoting SA.7). But the fact that a document in a broad sense is related to “deliberations concerning military service by transgender people” by someone at some time says little, if anything, about plaintiffs’ need for the document or their ability to obtain the information through other means. And even assuming that each of these thousands of documents is somehow relevant, that does not mean that they are all equally so. Indeed, plaintiffs do not have a single theory for why they need all of these documents, underscoring why the district court’s *en masse* analysis was entirely inappropriate. For example, plaintiffs contend that documents regarding the Carter policy—which they do not challenge—are somehow “directly relevant” to their “rebuttal” of what they view as the government’s stance. *Id.* But the district court neither addressed nor adopted that theory, and certainly did not weigh that purported need in balancing the interests at issue.

Plaintiffs also make little attempt to defend the district court's failure to address whether they could obtain the same or similar information through other channels. The court took no steps to determine whether any of the privileged information is available in other ways, asserting only that the "production of non-privileged documents and an administrative record do not obviate Plaintiffs' need for responsive documents concerning the deliberative process." Add.8. This blanket approach cannot be squared with *Warner*, which concluded that the parties seeking two memoranda prepared by the Federal Trade Commission had "little need for the memoranda," because ample additional information on "market structure and competitive effects" was already available. 742 F.2d at 1161-62. That concrete assessment of need and alternative availability for even two documents is worlds apart from the wholesale determination as to thousands of documents of varying relevance that plaintiffs urge here.

Alternatively, plaintiffs—who do not dispute that the government has already produced voluminous discovery in this case, *see* Ans.25—complain that the government has not explained how the reams of material disclosed affect their need for the materials at issue here, and fault the government for "speak[ing] generically about information produced in response to other requests on other topics." Ans.26. But the high level of generality of this dispute is a necessary corollary of the disregard for the *Warner* factors by plaintiffs and the district court. The government has repeatedly urged plaintiffs to "identify specific documents or ... at the very least,

specific categories of documents,” to enable application of the *Warner* factors to concrete disputes. Doc.267, at 1-2; *accord* Doc.245, at 4. In response, plaintiffs have insisted on taking a “threshold position” that “the privilege has no application in this case.” Doc.245, at 4. Plaintiffs cannot simultaneously complain that the government has been insufficiently specific about the availability of evidence through other sources while resisting the very discovery processes that would permit the government to identify, and the district court to consider, that information as to specific documents or categories of documents.

These errors are compounded by plaintiffs’ disregard for the government’s interest in confidential deliberations. The deliberative process privilege shields internal deliberations from disclosure because of “the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news,” thereby reducing the quality of agency decisions. *Department of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001). Accordingly, *Warner* requires weighing the chilling effects created by a potential disclosure against the other factors. 742 F.2d at 1161. As we previously explained (Pet.30-31), the district court erroneously dismissed the government’s interest in maintaining the confidentiality of deliberations.

Fundamentally misunderstanding the purpose of the deliberative process privilege, plaintiffs assert that there is “unlikely” to be a chilling effect from disclosure “because the government has already unveiled its conclusions and does not seek to

study them further.” *Ans.27; accord Ans.28-29*. But the question is not whether there will be a chilling effect on deliberations preceding a particular decision that has already been made. The question instead is whether the knowledge that internal deliberations will be indiscriminately disclosed will “chill[] frank discussion and deliberation *in the future* among those responsible for making governmental decisions.” *Warner*, 742 F.2d at 1162 (emphasis added). Materials covered by the privilege do not lose their protected character simply because the decision they precede has been made. Instead, the privilege is valuable precisely because “[p]remature release of material protected by the deliberative process privilege would have the effect of chilling current and future agency decisionmaking because agency officials ... would no longer have the assurance that their communications would remain protected,” and thus would “not feel as free to advance the frank and candid ideas and advice that help agencies make good decisions.” *National Sec. Archive v. CIA*, 752 F.3d 460, 464 (D.C. Cir. 2014). These concerns are all the more pronounced here given the highly charged nature of the dispute; as the Department’s declaration explains, “individuals will be much more likely to withhold their participation and honest views in the future,” where those who provide candid advice may be “subject to unfair accusations and opprobrium” stemming from “allegations of irrational discriminatory treatment,” causing irreparable harm to the Department’s “ability to obtain candid and honest input on any subject in the future.” *Add.106*.

Plaintiffs dispute the government's interest in confidentiality, claiming that rejecting the deliberative process privilege might "discourage[] government officials from recommending or adopting unconstitutional policies." Ans.27-28. But this privilege would be largely vitiated if the mere assertion of unconstitutional action were sufficient to effect its wholesale negation. Alternatively, plaintiffs suggest that a protective order could relieve some of the concerns regarding confidentiality. Ans.28. But the purpose of the privilege would be undermined if deliberative documents were subject to wholesale disclosure to litigants, even assuming that some sort of viable protective order could be crafted.

Finally, a proper application of the *Warner* balancing test does not impose an "unnecessary burden on the [district] court." Ans.29. Under proper procedures, plaintiffs would identify documents or categories of documents they believe are not properly subject to the privilege, or for which the privilege has been overcome; the parties would confer and attempt to narrow those disputes; and the district court would be called upon to resolve discrete disputes over defined documents or categories of documents. That process protects the relative interests involved where the privilege is asserted and accords with this Court's guidance.

C. Mandamus Relief Is Warranted Given This Court's Pending Consideration Of The Preliminary-Injunction Order

As explained in our petition (Pet.18-21), resolution of the government's appeal from the preliminary-injunction order may eliminate, or at least clarify, the purported

basis for the discovery. Plaintiffs do not dispute this. Indeed, they repeatedly emphasize that their requested discovery hinges on key premises of the district court’s preliminary-injunction order, such as its assumptions that strict scrutiny applies, that the 2018 policy is not a new policy, and that the military must prove that its process was sufficiently deliberative and independent to receive deference. Ans.2, 14, 21-23.

Each of those premises is clearly erroneous, yet they serve as the foundation for plaintiffs’ opposition. For example, plaintiffs insist that the requested discovery “is critical for heightened scrutiny” analysis, Ans.2, 14, 21-22, but the pending appeal will resolve whether “strict scrutiny” applies even though the 2018 policy—like the Carter policy before it—draws distinctions on the basis of a medical diagnosis (gender dysphoria) and a medical treatment (gender transition), and requires everyone without that diagnosis to meet the standards associated with their biological sex. *See* Gov’t Br. 20-24; Reply 3-4, 10-15.

Likewise, plaintiffs’ generalized assertions of need assume that deference to military-policy judgments hinges on “factual prerequisite[s]” regarding the military’s decisionmaking process. Ans.2; *see* Ans.14. Plaintiffs insist that “military deference” cannot apply unless the 2018 policy was “independently ‘decided by the appropriate military officials’ in ‘their considered professional judgment,’” and that the Secretary of Defense and other senior military officials cannot be taken at their word on this subject. Ans.21-22.

Neither the President nor the Defense Department, however, must sacrifice their privileges to secure the deference owed to decisions of military policy. The Supreme Court has repeatedly deferred to the judgments of political and military leaders in this area without ever suggesting that intrusive discovery would be necessary, even in the face of credible arguments for why deference would be inappropriate. In *Rostker v. Goldberg*, 453 U.S. 57 (1981), for example, the Court deferred to Congress’s decision to continue exempting women from having to register for the draft “even though the serious view of the Executive Branch, including the responsible military services, [was] to the contrary.” *Id.* at 83 (White, J., dissenting); *see id.* at 79 (majority) (acknowledging this fact). Likewise, in *Goldman v. Weinberger*, 475 U.S. 503 (1986), the Court did not question the evidence or deliberation behind the Air Force’s judgment that allowing exceptions to its mandatory uniform dress code for yarmulkes would threaten discipline, notwithstanding the plaintiff’s assertion that this judgment lacked “support from actual experience or a scientific study in the record” and was “contradicted by expert testimony,” *id.* at 509, and even though the record gave “reason to believe that the policy of strict enforcement against [him] had a retaliatory motive—he had worn his yarmulke while testifying on behalf of a defendant in a court-martial proceeding,” *id.* at 511 (Stevens, J., concurring); *see id.* at 504-05 (majority) (discussing this background).

There is no compelling reason why the military’s 2018 policy should be treated differently. If anything, there is even less justification for intrusive discovery here.

The military has already produced a memorandum from the Secretary of Defense setting forth his reasoning and an accompanying 44-page report, not to mention 30,000 additional documents. That plaintiffs baselessly accuse the Secretary of Defense and other senior military leaders of lying in those materials (and to this Court) is no reason to discount the military's thorough explanation for its policy. Still less is it a justification for laying bare the internal deliberations of those military officials and their Commander in Chief, particularly before the premises underlying such discovery have been subject to appellate review. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (upholding presidential proclamation without discovery notwithstanding accusation that "the results of the [underlying] multi-agency review were 'foreordained'"); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (noting that "inquiry into the mental processes of administrative decisionmakers is usually to be avoided" and is justified only on "a strong showing of bad faith or improper behavior"). And that is especially true given that plaintiffs' purported need for these materials is significantly undercut by Washington's decision to neither seek this discovery in the first place nor participate in the mandamus proceedings. If this information were truly as "essential" as plaintiffs contend, Ans.2, 14, one would expect their intervening co-plaintiff to at least attempt to obtain it.

CONCLUSION

This Court should grant the government's petition for writ of mandamus; vacate the orders of July 27 and August 20, 2018; and order the district court to grant the government's motion for a protective order and deny plaintiffs' motion to compel. Alternatively, and at a minimum, this Court should order the district court to stay all such discovery until the government's pending appeal is resolved.

Respectfully submitted,

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SEPTEMBER 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with the limit of Ninth Circuit Rule 21-2(c) and 32-3(2) because it totals 4,196 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this petition complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Tara S. Morrissey

TARA S. MORRISSEY

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via CM/ECF to counsel. The district court has been provided with a copy of this reply.

s/ Tara S. Morrissey

TARA S. MORRISSEY