No. 18-______

**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.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AND EMERGENCY MOTION FOR STAY PENDING CONSIDERATION OF THE PETITION

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CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

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(2) Facts showing the existence and nature of the emergency

As set forth more fully in the petition, the district court on Friday, July 27, 2018, ordered the President to comply with an extraordinarily burdensome discovery order within ten days—*i.e.*, by Monday, August 6, 2018. The court ordered the President to comb through presidential communications and deliberations encompassing approximately 9,000 documents to produce a privilege log "on a document-by-document basis," without even requiring plaintiffs to show that relevant information is unavailable through other avenues, to limit the scope of their discovery, or to make a focused demonstration of need. Additionally, it ordered all government defendants to produce every document they withheld solely under the deliberative process privilege—well over 19,000 documents—thus revealing the military's internal deliberations regarding its policy on military service by transgender

individuals. In so doing, the district court has created extremely serious separation-of-powers concerns, imposed an extraordinary burden on the President and the military, and intruded on the government's decision-making process regarding military policies. And it has done all of this even though the government has already produced over 30,000 documents in discovery, including a complete administrative record, and has a fully briefed preliminary-injunction appeal on the merits pending in this Court, which, if successful, would eliminate the justification for much if not all of the requested discovery.

This Court's immediate correction is required. This Court should grant a stay pending consideration of the petition for a writ of mandamus as expeditiously as possible, as well as an administrative stay. We request that the Court act on the administrative stay request by August 2, so that the Solicitor General will have sufficient time to seek Supreme Court review if necessary.

(3) When and how counsel notified

Government counsel notified plaintiffs' counsel by e-mail of the government's intent to file this petition and stay motion. Service will be effected by electronic service through the CM/ECF system and e-mail. Plaintiffs' counsel Jordan M. Heinz (for the individual and organizational plaintiffs) and La Rond Baker (for the State of Washington) indicated that plaintiffs oppose the stay motion.

(4) Submissions to the district court

The government requested a protective order to stay discovery, Doc.225, which the district court denied, Add.13-15. The government requested a protective order to preclude discovery directed at the President and discovery of information concerning presidential communications and deliberations, Doc.268, which the district court denied, Add.1-12. The district court also granted plaintiffs' motion to compel discovery of documents withheld under the deliberative process privilege, which the government opposed. *Id.* The district court ordered the government to turn over all documents withheld solely under the deliberative process privilege within ten days and to produce revised, "document-by-document" privilege logs within ten days, including for "documents, communications, and other materials" withheld under the presidential communications privilege. Add.11. On July 31, 2018, the government moved for a stay in district court. Doc.300. That motion remains pending.

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INTRODUCTION AND SUMMARY

Pursuant to the All Writs Act, 28 U.S.C. § 1651, and Rule 21 of the Federal Rules of Appellate Procedure, the federal government respectfully asks this Court to issue a writ of mandamus directing the district court to vacate its order of July 27, 2018, grant the government's motion for a protective order (Doc.268), and deny plaintiffs' motion to compel (Doc.245)—or, at a minimum, to stay the discovery at issue in the July 27 order until the government's pending appeal in *Karnoski v. Trump*, No. 18-35347 (9th Cir.), is resolved.

The July 27 order requires the government within ten days—*i.e.*, by August 6—to make particularized, document-by-document objections of executive privilege for a sweeping array of White House documents and communications and to produce to plaintiffs every single document—over 19,000 documents—it has withheld solely under the deliberative process privilege. Because that order would impose extraordinary burdens on the government while this mandamus petition is pending—especially given the impractical ten-day deadline, which plaintiffs did not even request—we also respectfully ask that the Court grant, as expeditiously as possible, a stay of the district court's order pending its consideration of this petition, as well as an administrative stay pending its consideration of this stay request. Because the district court's order threatens such an extraordinary disruption of the operations of the Executive Branch, we request that the Court act on the administrative stay request by

August 2, so that the Solicitor General will have sufficient time to seek Supreme Court review if necessary.[1]

The district court's July 27 order plainly warrants an exercise of this Court's mandamus jurisdiction. By any measure, the order is extraordinary: (1) it requires the President, on a ten-day deadline, to produce a "document-by-document" privilege log making particularized objections to thousands of documents—including draft presidential memoranda, emails among presidential advisers, communications between the President and military leadership, and more—that have been withheld under the presidential communications privilege, and to do so in a manner that may require disclosure of privileged information; and (2) it orders the Department of Defense, on the same arbitrary timeline, to disclose every single document withheld solely under the deliberative process privilege, totaling over 19,000 documents—including sensitive communications to Secretary of Defense James Mattis and his personal notes on those communications—without any particularized showing of need.

The district court's order is all the more extraordinary because this Court is already poised to review the legal premises of the court's ruling, thereby potentially obviating the need for much, if not all, of the discovery at issue. As justification for

[1] The government has asked the district court for a stay pending this Court's review (Doc.301), and we will promptly inform the Court of any action on that motion.

the discovery required by the July 27 order, the district court cited the reasoning in its earlier April 13 order, which preliminarily enjoined a new military policy regarding service by transgender individuals and declared that the policy would be subject to strict scrutiny. The government's expedited appeal from that April 13 order is fully briefed and is scheduled to be argued to this Court on October 10 (if not sooner, as the government has a pending motion to further expedite the argument). *See Karnoski v. Trump*, No. 18-35347. That appeal presents for this Court's review several issues central to the district court's discovery ruling, and the Court's disposition of the appeal may demonstrate that the discovery is improper in whole or in part.

The district court offered no reason for imposing this massive burden (let alone on an impossible schedule) while its April 13 order is under review. Among other things, this Court's resolution of the government's appeal will clarify what policy is actually at issue in this litigation. Although plaintiffs' amended complaint challenges a policy allegedly announced by the President in a 2017 memorandum, the President revoked that memorandum in light of a new policy proposed by Secretary Mattis in March 2018. Despite that revocation, the district court refused to dissolve the preliminary injunction it entered against the President's 2017 memorandum and enjoined the military's new 2018 policy. The district court's discovery order is predicated on its facially erroneous assertion that the 2018 policy is not a "new policy" but "rather a plan to implement" the 2017 memorandum, Add.14, which the court claimed had not been "substantively rescind[ed] or revoke[d]," Add.27. But in March

2018, the President expressly "revoke[d] [his 2017] memorandum" and "any other directive" to allow Secretary Mattis to implement the military's proposed policy, Add.70, which was based on the military's professional, independent judgment, Add. 70, 72-74. The substantive terms of the 2018 policy, moreover, expressly draw classifications based on the medical diagnosis of gender dysphoria, not based on transgender status, Add.73-74, as the district court wrongly asserted, Add.4-5.

The government's pending appeal further explains the errors in the key premises underlying the district court's July 27 discovery order. If this Court agrees that the district court has erroneously focused its analysis on a now-revoked presidential memorandum, much of the justification for the discovery order will disappear, as there will be no need to obtain discovery from the President regarding his now-revoked memorandum. Moreover, because the 2018 policy draws classifications based on gender dysphoria, rather than transgender status, the policy is subject to rational-basis review—not strict scrutiny, as the district court concluded. Add.7-8, 39. Indeed, the Supreme Court has never applied strict scrutiny in similar circumstances, and instead has stressed that deference is owed to the military's judgment. Again, if this Court agrees, an essential premise of the court's extraordinary discovery order will fall away. *See* Add.7-8. Under rational-basis review, there is no basis to probe internal Presidential and military deliberations. *See Hawaii v. Trump*, 138 S. Ct. 2392, 2420 (2018). And because the district court has enjoined both

the rescinded 2017 memorandum and the current policy announced in March 2018, plaintiffs will suffer no injury by awaiting this Court's guidance on these questions.

The Supreme Court's decision in *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), leaves no doubt that the district court wrongly ordered intrusive and burdensome discovery from the White House under these circumstances. *Cheney* explains that mandamus is appropriate "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities," particularly when a court fails to "explore other avenues." *Id.* at. 382, 390. Nevertheless, the district court inexplicably declared that there was "no support" for the government's argument that the court should explore alternatives before requiring the President to assert executive privilege or respond to burdensome discovery requests. Add.10. Yet *Cheney* makes clear that there is, to the contrary, "no support" for the district court's approach of requiring the Executive Branch to "bear the burden" of "making particularized objections" to broad discovery requests—especially without even attempting to consider "other avenues." 542 U.S. at 388, 390.

The court's blanket order to the military to produce every single document withheld solely under the deliberative process—over 19,000 documents concerning military deliberations—is equally unsound. The court purported to analyze the relative interests in confidentiality and disclosure in a page and a half. Rather than explain why plaintiffs had demonstrated a need for any category or subcategory of documents, the court broadly declared that evidence concerning the military's

deliberations is "central to the litigation" because of "the searching judicial inquiry that strict scrutiny requires." Add.7. As explained, that critical assumption as to the appropriate standard of review is erroneous and currently on appeal. Moreover, 30,000 documents (totaling roughly 150,000 pages), including a complete administrative record, have already been produced.

Furthermore, the district court abdicated its duties in cursorily dispatching the military's interest in confidential deliberations. It rejected as "mere speculation" the military's concerns regarding the chilling effect on deliberations over "sensitive personnel and security matters" and the "direct negative impact to national security" from disclosure. Add.8. This reasoning is facially flawed given the sensitivity of the communications at issue, including those at the highest levels of the Department of Defense. The court could reach this incorrect conclusion only by issuing a sweeping categorical ruling, rather than performing a more particularized balancing inquiry.

In sum, the district court's order hinges on erroneous legal rulings that are already being reviewed by this Court and also threatens extraordinary intrusions that should not be permitted pending resolution of these issues. Independently, the court's disregard for the significant concerns raised by discovery requests to the President, and for the military's interest in confidential deliberations, warrants the exercise of mandamus authority. Because this order would impose enormous burdens on the government while this petition is pending—especially given the imminent (and impossible) ten-day deadline—we respectfully ask this Court to grant a stay of the

court's July 27 order pending the Court's disposition of this mandamus petition and an immediate administrative stay pending consideration of the stay motion.

STATEMENT

The factual and legal background of this litigation is set out in detail in the government's briefs in *Karnoski v. Trump*, No. 18-35347 (9th Cir.), which is currently set for oral argument on October 10. We summarize that background below as it relates to the district court's July 27 discovery order.

A. Background

1. In June 2016, then-Secretary of Defense Ashton Carter ordered the armed forces to revise their standards for accession into the military by transgender individuals, setting an implementation date of July 1, 2017. Doc.48-3. Longstanding military standards had presumptively barred transgender individuals from entering the military on the basis of transgender status. Doc.197, ex. 5, at 27, 48. The Carter policy altered these standards to turn on the medical diagnosis of "gender dysphoria," which involves a "clinically significant distress or impairment in social, occupational, or other important areas of functioning." Doc.224-2, at 12-13, 20. Under the Carter policy, a "history of gender dysphoria" was disqualifying unless a medical provider certified that the applicant had been stable for 18 months. Doc.48-3, attach., at 1. Similarly, a "history of medical treatment associated with gender transition" to address gender dysphoria—*e.g.*, hormone therapy, sex-reassignment surgery—was disqualifying absent 18 months of stability following the completion of treatment. *Id.*

While those who had transitioned could serve in their preferred gender, transgender individuals without a history of gender dysphoria could serve on the same terms as all others—*i.e.*, subject to the terms and conditions applicable to their biological sex. *Id.* at 1-2; Doc.224-2, at 4.

2. On June 30, 2017, the day before the Carter accession standards took effect, Secretary Mattis deferred their implementation until January 1, 2018, pending a five-month review of the issue. Doc.197, ex. 3.

On July 26, 2017, the President stated on Twitter that "[a]fter consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . . Transgender individuals to serve in any capacity." Add.77.

The President issued a memorandum in August 2017 calling for further study on this issue and directing the military to "return to the longstanding policy" on service by transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating [it] would not have . . . negative effects" on the military. Add.75. The President stressed, however, that the Secretary of Defense, in consultation with the Secretary of Homeland Security, could provide "a recommendation to the contrary that I find convincing" and "may advise me at any time, in writing, that a change to this policy is warranted." *Id.*

3. In February 2018, following an extensive review by a panel of experts, Secretary Mattis proposed a new policy that differed from both the Carter policy and

the longstanding policy addressed in the 2017 memorandum. Add.72-74. The Secretary recommended that the President "revoke" his 2017 memorandum, "thus allowing" the military to adopt the new policy. Add.74. In response, the President issued a memorandum on March 23, 2018, stating "I hereby revoke my [2017] memorandum . . . and any other directive I may have made with respect to military service by transgender individuals." Add.70.

The military's 2018 policy, like the Carter policy, does not operate on the basis of transgender status. *Both* policies allow transgender individuals without a history of gender dysphoria to serve, if they meet the standards associated with their biological sex. Add.74. And *both* policies restrict the ability of transgender individuals with a history of gender dysphoria to serve, though they differ as to the scope of the restrictions. Under the 2018 policy, individuals with a history of gender dysphoria may join the military if they can show 36 months of stability (as opposed to the Carter policy's 18 months) before applying and neither need nor have undergone gender transition. Add.73. Current servicemembers diagnosed with gender dysphoria may continue serving either in their preferred gender (if, under a reliance exemption, they received that diagnosis from a military medical provider while the Carter policy was in effect) or in their biological sex. *Id.*

B. Prior Proceedings

1. In August 2017, several individuals and organizations brought this constitutional challenge against the July 2017 Twitter announcement and the 2017

presidential memorandum, and they moved for a preliminary injunction. Docs.1, 30. The State of Washington intervened as a plaintiff. Doc.101.

In December 2017, the district court entered a preliminary injunction, enjoining the government "from taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement" on Twitter. Add.68. The parties filed cross-motions for summary judgment. Docs.129, 150, 194.

2. In March 2018, the government informed the district court that, at Secretary Mattis's request, the President had revoked the earlier 2017 presidential memorandum to allow the Secretary to implement his proposed new policy based on the advice of a panel of military experts, and accordingly moved to dissolve the preliminary injunction. Docs.213, 223. The motion explained that plaintiffs' challenge to the 2017 presidential memorandum was moot, that plaintiffs lacked standing to challenge the new policy, and they could not, in any event, demonstrate a likelihood of success on the merits of a challenge to the new policy. Doc.223.

Neither plaintiffs nor Washington amended their complaints to assert claims against the 2018 policy, but they nevertheless continued to urge the district court to grant summary judgment. Docs.227, 228. On April 13, 2018, the district court refused to dissolve the December 2017 injunction and instead extended it to enjoin the 2018 policy as well. Add.16-46.

The court held that plaintiffs' claims were not moot because the 2018 policy did not "substantively rescind or revoke" the 2017 presidential memorandum, but merely "implemented" its directives. Add.27. It held that strict scrutiny applies and directed the parties to "prepare for trial" on the questions of "whether, and to what extent, deference is owed" to the military and whether the challenged policy is constitutional. Add.45, 46. Although the court accepted the government's argument that the President cannot be subject to injunctive relief here, it held that the President could be subject to declaratory relief. Add.43-45.

3. The government appealed the district court's April 13 order. Briefing has been completed, and argument is currently scheduled for October 10, 2018 (and the government's motion to further expedite the argument is pending). *See Karnoski v. Trump*, No. 18-35347 (9th Cir.). Resolution of that appeal may effectively terminate the litigation or, at a minimum, sharply circumscribe its scope. The government's brief explains that the district court fundamentally erred in enjoining the 2018 policy on the basis of its earlier ruling with respect to the rescinded 2017 memorandum—the 2018 policy is manifestly not the same as the policy set forth in the 2017 memorandum. Gov't Br. 40-45. On the merits, plaintiffs cannot show that they are likely to succeed in a challenge to the 2018 policy, particularly in light of the deference afforded to professional military judgments. *Id.* at 19-40. Additionally, plaintiffs have failed to demonstrate irreparable harm resulting from that policy or standing to challenge it. *Id.* at 49-53.

C. Discovery

1. Notwithstanding the issuance of the 2018 policy and the pendency of the government's appeal in this Court, the district court has declared that discovery shall proceed. In light of the 2018 policy, the government moved to stay discovery pending resolution of its motion to dissolve the December 2017 preliminary injunction and any appeal. Doc.225. The court denied that motion and allowed discovery to proceed—discovery premised on the court's view that the March 2018 policy is simply an extension of the now-revoked 2017 policy, that strict scrutiny applies, and that principles of military deference depend on factual questions about the nature of the military's deliberative process. Add.13-15, 16-46. The court declared that "discovery related to President Trump is not 'irrelevant'" because the 2018 policy is not a "new policy" but "rather a plan to implement, with few exceptions, the directives of the 2017 Memorandum." Add.14. The court further stated that if the government "intend[s] to claim Executive privilege," it must "expressly make the claim" and "provide a privilege log" describing the privileged documents or communications without revealing information that is itself privileged. Add.15 (citing Fed. R. Civ. P. 26(b)(5)(i), (ii)).

2. Plaintiffs have served broad discovery requests on the government defendants, including the President. These requests include detailed interrogatories, requests for production of documents, and requests for admission directed to the defendants. Docs.246-1, 246-2, 246-3, 269-1, 269-2. To date, the government has

produced over 30,000 documents (corresponding to roughly 150,000 pages), including a complete administrative record, over the course of 16 document productions. In addition, plaintiffs are in a cross-use agreement with the plaintiffs in other cases, *see* Doc.183, and those other plaintiffs have deposed various military officials.

The discovery requests directed to defendants—including the President—purport to require cataloguing and disclosing the totality of the President's deliberations concerning his announcements in 2017 and 2018—including who was involved, when and how they were involved, and what advice was communicated to the President. For example, plaintiffs request:

- "All [d]ocuments and [c]ommunications" relating to "President Trump's consultation" with the military regarding "transgender military service." Doc.246-2, at 2 (Req. 7).

- "All [d]ocuments and [c]ommunications relating to" the 2017 presidential memorandum and the President's March 23, 2018 memorandum, including "all drafts." Doc.246-2, at 2 (Req. 6); Doc.269-2, at 3 (Req. 32).

- "[A]ll documents reviewed, considered, or relied upon in preparing" the President's March 23, 2018 memorandum. Doc.269-2, at 3 (Req. 32).

- "All [c]ommunications" between the President or the Executive Office of the President and the Department of Defense regarding "military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general." Doc.269-2, at 3 (Req. 34).

- Identification of "all individuals" with whom President Trump discussed "past, present, or potential future governmental policies on transgender military service." Doc.246-1, at 1-2 (Interrog. 4).

- An explanation of the "process [President Trump] used to formulate the Tweets [and] the Presidential Memorandum" and identification of "all sources of fact or opinion" that he "consulted [or] considered." Doc.246-1, at 2 (Interrog. 7).

The President did not provide substantive responses to plaintiffs' requests, and objected to plaintiffs' requests on several grounds, including the presidential communications privilege. *See* Docs.246-6, 246-7, 246-10, 279-1, 279-2, 279-3, 279-5, 279-6.

Plaintiffs also seek "[a]ll [d]ocuments and [c]ommunications" regarding the military's deliberative process. Secretary Mattis and the Department of Defense have substantively responded to Plaintiffs' requests, subject to privilege. *E.g.*, Docs.246-4, 246-5, 246-9. The Office of the Secretary of Defense withheld 19,770 documents solely on the basis of the deliberative process privilege. Add.101.

3. Following a dispute among the parties over issues of discovery directed to the President, the government moved for a protective order to preclude plaintiffs' discovery requests to the President. Doc.268. The government explained that plaintiffs' requests implicate the presidential communications privilege because they seek to "probe sensitive communications and deliberations related to [the President] and his advisors' formation of policy." *Id.* at 2-3. Relying on separation-of-powers principles, the government argued that discovery should not be directed to the President and that, in any event, the court should not force the President to formally invoke the presidential communications privilege at this juncture. *Id.* at 4-5, 9-12.

The government explained that plaintiffs must first exhaust other sources of non-privileged discovery and establish "a heightened, particularized need for the specific information or documents" by "at a minimum substantially narrow[ing] any requests directed at presidential deliberations." *Id.* at 1. The government provided plaintiffs with a privilege log for the President, *see* Doc.282; Add.80-81, 85-89, while explaining that under *Cheney*, it need not provide a log nor formally assert the privilege at this stage, Doc.268 at 8 n.3. The government later produced a supplemental privilege log, which covered a total of 9,000 documents grouped into 66 categories and which described the documents in a manner that avoided revealing privileged information. Add.81, 91-97. Each privilege log took at least ten White House staff members, including many attorneys, "hundreds of hours to complete." Add.81, 82.

4. Plaintiffs filed a separate motion to compel discovery withheld under the deliberative process privilege, noting that they had rejected the government's prior attempts "to resolve disputes about the deliberative process privilege on a document-by-document basis or based on a representative sample of documents." Doc.245, at 4. Instead, they argued that "the privilege has no application in this case." *Id.*

5. On July 27, 2018, the district court denied the government's motion for a protective order and granted plaintiffs' motion to compel. Add.1-12. The court briefly acknowledged that discovery against the President "involves 'special considerations,'" but nonetheless concluded that such discovery is permitted "where, as in this case, he is a party or has information relevant to the issues in dispute."

Add.9. It further ruled that the President has "failed to demonstrate that he need not invoke the presidential communications privilege" at this stage. Add.11. And it found "no support" for the government's argument that plaintiffs must exhaust other sources of non-privileged discovery, demonstrate a particularized need for the information, and narrow any discovery requests before the President must formally assert the privilege. Add.10.

The district court then ordered the government to "produce a privilege log identifying the documents, communications, and other materials they have withheld under the presidential communications privilege within 10 days." Add.11. And it made clear it deemed insufficient the privilege log previously submitted by the President, ordering the government to "produce revised privilege logs within 10 days" that "identify individual author(s) and recipient(s)" and "include *specific, non-boilerplate* privilege descriptions *on a document-by-document basis*." *Id.* "Only then," the court explained, "can the Court evaluate whether the privilege applies and if so, whether Plaintiffs have established a showing of need sufficient to overcome it." Add.10.

The court also ordered the government to produce, within ten days, all "documents that have been withheld solely under the deliberative process privilege." Add.11. Consistent with plaintiffs' refusal to consider the application of the privilege to documents or classes of documents, the court did not evaluate the applicability of the privilege with respect to any individual document or category of documents. Instead, after discussing the interests in disclosure and confidentiality in a page and a

half, the court ordered wholesale disclosure, declaring that evidence concerning the military's deliberations is "central to the litigation" because of "the searching judicial inquiry that strict scrutiny requires." Add.7. It dismissed out of hand the military's interest in confidentiality, declaring that concerns about the impact of blanket disclosure were "mere speculation." Add.8. And it gave no explanation for requiring compliance within ten days—a deadline that plaintiffs did not even request. Add.11.

ARGUMENT

I. This Court Should Exercise Its Mandamus Authority To Correct An Order That Disregards Established Separation-Of-Powers Principles, Imposes Intolerable Burdens On The Executive Branch, And Requires Disclosure Of Military Deliberations.

A. Mandamus Review Is Appropriate.

The Supreme Court in *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), made clear that mandamus is appropriate "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Id.* at. 382. Yet the district court here ordered a substantial intrusion on the Executive Branch without even asking whether "other avenues" are available. *Id.* at 390. Moreover, compliance with the order would impose an enormous burden on the Executive Branch. *See id.* at 382. The requirement to disclose over 19,000 documents withheld under the deliberative process privilege similarly intrudes on the internal deliberations of the military and imposes an extraordinary burden. Add.101-07.

The factors that typically inform this Court's exercise of its mandamus jurisdiction—whether the petitioner has "no other adequate means" of relief or will suffer harm that is not correctable on appeal, and whether the order is "clearly erroneous as a matter of law," reflects a frequent error or "persistent disregard of the federal rules," or raises "new and important problems"—confirm that mandamus is warranted. *Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977). These factors "serve as guidelines," and "[n]ot every factor need be present at once" or even "point in the same direction." *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010). Here, the government has "no other adequate means" to obtain relief from the district court's discovery demands. *Bauman*, 557 F.2d at 654. And the extraordinary burdens that these demands would impose on the President and the military—and the intrusion into their deliberations and consultations that would result—cannot be undone. *Id.* The district court's order is based on serious legal errors and cannot be reconciled with *Cheney*'s admonition that courts should be "mindful of the burdens imposed on the Executive Branch." 542 U.S. at 391; *see also* *Bauman*, 557 F.2d at 654-55.

B. The Discovery Order Is Premised On Issues That This Court Will Decide In The Government's Pending Appeal.

The premises of the July 27 order are set out in the district court's opinion and order of April 13. The government's appeal of that order is fully briefed and is currently scheduled for argument on October 10 (absent further expedition). *Karnoski*

v. Trump, No. 18-35347 (9th Cir.). The resolution of that appeal may eliminate the purported basis for the discovery and, at a minimum, will clarify the issues presented and the standard of review. The district court could not properly impose intrusive discovery obligations on the White House while this Court is reviewing the predicate of the discovery order, and the significant consequences of the court's error call for this Court's immediate exercise of its mandamus authority. *See In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam) (vacating denial of mandamus and recognizing that "the Government's threshold arguments . . . , if accepted, likely would eliminate the need for the District Court to examine" the requested materials).

Among other things, the disposition of the appeal will clarify which policy is properly the subject of the court's review. The government's briefs explain that the governing policy is that established by Secretary Mattis in 2018, and that the policy should be reviewed on its own terms, without regard to any rescinded presidential directives. *See* Gov't Br. 40-49; Reply Br. 2-10; *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (upholding presidential proclamation based solely on its text and the "review process" that supported it, without regard to previous executive orders or past statements by the President, or any discovery into that deliberative process).

By contrast, the district court's decision to allow "discovery related to President Trump" is premised on the mistaken assumption that the 2018 policy announced by Secretary Mattis is "not a 'new policy,' but rather a plan to implement . . . the directives of the 2017 Memorandum." Add.14. That is incorrect, and much of the

requested discovery has nothing to do with the new policy. The district court's theory rests on its view that the President did not "substantively rescind or revoke" his 2017 memorandum and statements, Add.27—a conclusion that inexplicably disregards the President's unambiguous action "revok[ing]" the 2017 memorandum and "any other directive . . . with respect to military service by transgender individuals." Add.70. It also overlooks the substantive terms of the 2018 policy, which draws classifications based on the medical condition of gender dysphoria, rather than on transgender status. *Compare* Add.73-74, *with* Add.4-5.

The pending appeal will address these and other errors infecting the court's conclusion that strict scrutiny applies. That view has shaped the district court's discovery orders, and it is the linchpin of the court's ruling requiring the wholesale production of documents subject to the deliberative process privilege. The government's briefs explain that this standard is inapplicable and that "great deference" is owed to "the professional judgment of military authorities," *Winter v. NRDC*, 555 U.S. 7, 24 (2008). *See* Gov't Br. 19-40; *see also Hawaii*, 138 S. Ct. at 2421 (emphasizing that courts "cannot substitute [their] own assessment for the Executive's predictive judgments" on matters of "national security").

In affording deference to military decisions, courts do not reexamine *de novo* the "timing and thoroughness" of military studies and deliberations. Add.41; *cf. Hawaii*, 138 S. Ct. at 2421 (rejecting attempt to discredit "the thoroughness of [a] multi-agency review" on the ground that the final government "report 'was a mere 17 pages'").

Rather, it is sufficient that such questions have been "decided by the appropriate military officials" in "their considered professional judgment." *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986); *see also Hawaii*, 138 S. Ct. at 2419-20 (observing that judicial "inquiry into matters of . . . national security is highly constrained," even when evaluating "a 'categorical' . . . classification that discriminate[s] on the basis of sex") (discussing *Fiallo v. Bell*, 430 U.S. 787 (1977)); *Rostker v. Goldberg*, 453 U.S. 57, 71-72 (1981) (recognizing the "deference due" to the political branches' "choices among alternatives" in military affairs, even when those choices involved facial "gender-based" classifications).

The district court offered no reason for authorizing intrusive discovery while this Court considers the basis of the discovery orders. Still less did it justify its ten-day time frame. Mandamus is clearly warranted.

C. Mandamus Would Be Warranted Even Absent The Pending Appeal.

1. The order imposing discovery obligations on the President is squarely foreclosed by *Cheney.*

Plaintiffs have imposed sweeping discovery obligations regarding the President's conduct and deliberations as Commander-in-Chief, implicating material that is plainly subject to executive privilege. They seek, for example, all documents and communications relating to the President's consultation with the military regarding "transgender military service"; all communications between the President and the Department of Defense on broad topics such as "public policy regarding

transgender people" and "transgender people in general"; "all drafts" of the President's memoranda; and all documents "reviewed, considered, or relied upon in preparing" the 2018 memorandum. Doc.246-2, at 2 (Req. for Prod. 6, 7); Doc.269-2, at 3 (Req. for Prod. 32, 34).

Without regard to the serious separation-of-powers concerns raised by these demands, the district court commanded the President to produce a detailed privilege log that requires the White House to identify and individually address each of the 9,000 documents encompassed by the expansive discovery requests. Add.11; Add.80, 82. The court declared that the privilege log previously submitted by the White House, which identified 66 categories of documents grouped in a manner intended to avoid revealing privileged information, was insufficient. Without even considering whether "other avenues" are available, *Cheney*, 542 U.S. at 390, the court instead demanded that the government identify presidential communications and deliberations "on a document-by-document basis"—and that it do so within ten days. Add.11. Such an order is plainly improper.

a. The district court made no attempt to reconcile its order with *Cheney* and the separation-of-powers principles underlying that decision. Unlike other civil litigants, the President comes to court with unique "constitutional responsibilities and status." *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982). The "high respect" owed to the President "should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Cheney*, 542 U.S. at 385 (quoting *Clinton v. Jones*, 520 U.S.

681, 707 (1997)). Litigation against the president does not proceed as it would "against an ordinary individual." *Id.* at 381-82 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (CC Va. 1807) (Marshall, C.J.)). Even assuming *arguendo* that some circumscribed discovery of the President could properly be permitted in extraordinary circumstances, the Court stressed, a court could countenance such intrusions only after assuring itself of the necessity of doing so. *See id.* at 389-90.

Cheney precludes the district court's license of wholesale—and unnecessary—discovery into the President's deliberations. Indeed, the Court reversed an order of the D.C. Circuit far less intrusive than the district court's order here. In *Cheney,* plaintiffs sought discovery from the Office of the Vice President as to the identities of participants in a presidential advisory group, in an effort to prove that the group included non-federal participants and was therefore subject to open-meeting and disclosure laws. 542 U.S. at 374. The district court rejected the government's efforts to narrow discovery, insisting that the Vice President must "winnow the discovery orders by asserting specific claims of privilege and making more particular objections." *Id.* at 389. The D.C. Circuit declined to address the merits of that ruling on mandamus review, even though "the scope of [the] requests [was] overly broad," and instructed that the Vice President "shall bear the burden of invoking executive privilege and filing objections to the discovery orders with detailed precision." *Id.* at 376-77.

The Supreme Court vacated the judgment of the court of appeals, declining to "require the Executive Branch to bear the onus of critiquing . . . unacceptable discovery requests line by line." *Cheney*, 542 U.S. at 388. Underscoring the separation-of-powers concerns at issue, the Court made clear that a court of appeals may invoke its mandamus authority "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Id.* at 382. The Court explained that discovery directed to the Office of the Vice President raised "special considerations" regarding "the Executive Branch's interests in maintaining the autonomy of its office," the "energetic performance" of the Commander-in-Chief's "constitutional responsibilities," and "[t]he high respect that is owed to the office of the Chief Executive." *Id.* at 382, 385 (alteration in original).

The Court explained 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" to broad discovery requests. *Cheney*, 542 U.S. at 388. "Executive privilege is an extraordinary assertion of power 'not to be lightly invoked,'" the Court continued, and once it is asserted, "coequal branches of the Government are set on a collision course" through adjudications of the privilege. *Id.* at 389. The Court explained that this "'constitutional confrontation between the two branches' should be avoided whenever possible," and it encouraged district courts to "explore other avenues" and consider "the choices available." *Id.* at 389-90.

A plaintiff, moreover, must "satisf[y] his burden of showing the propriety of the requests." *Cheney*, 542 U.S. at 388. The Court noted that even in a criminal case, a court must find a specific "need" for information that implicates presidential deliberations before it undertakes to balance the competing needs of the Executive Branch. *Id.* (discussing *Nixon v. United States*, 418 U.S. 683, 713 (1984)). When privileged material is sought in a civil case, the burden to overcome the privilege is even greater, as "the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions'" or "share the urgency or significance" of evidence in criminal prosecutions. *Id.* at 384.

b. Plaintiffs' requests are far more intrusive than those in *Cheney*, and they target not the Vice President, but the President himself. Nevertheless, the district court required the President to object to these requests "line-by-line," without even attempting to explore "other avenues." *Cheney*, 542 U.S. at 388, 390. This course is particularly improper where, as here, the government's pending appeal will clarify the issues presented and the governing standard of review, and may eliminate the purported basis for the discovery altogether. *See id.* at 390.

At the very least, the district court should have made some effort to narrow plaintiffs' broad discovery requests, consider the non-privileged discovery that is available, and ask whether plaintiffs have demonstrated a particularized need. *See Cheney*, 542 U.S. at 388-90. Instead, the court inexplicably declared that there was "no support" for the government's argument that such steps are required. Add.10. But

the Supreme Court in *Cheney* could not have been more clear: It is the district court's approach that has "no support." 542 U.S. at 388.

Moreover, the district court's order reflects no regard for "the burdens imposed on the Executive Branch." *Cheney*, 542 U.S. at 391. The burden of producing a highly specific, "document-by-document" privilege log in response to these broad requests would be extraordinary. Approximately 9,000 documents are at issue, and the White House has already provided a detailed privilege log for these documents that spans 66 categories of documents and describes the nature of the documents "without revealing information [that is] itself privileged." Fed. R. Civ. P. 26(b)(5)(A)(ii); *see* Add.80, 82. It took White House staffers and attorneys "hundreds of hours to complete" both the initial version of the privilege log and the supplemental log. Add.81, 82. The district court's order would require creation of a new, highly specific privilege log on a document-by-document basis—that is, a log with approximately 9,000 individual entries. Add.11, 80, 82. *Cheney* forecloses this "line-by-line" critique of privileged information and documents, which would plainly "interfer[e] with a coequal branch's ability to discharge its constitutional responsibilities." 542 U.S. at 388.

Quite apart from this wholly unwarranted burden, there is a significant risk that the court's order, which requires a highly specific privilege log, will itself require disclosure of privileged material. *See* Add.83 (noting that prior privilege log was designed to describe materials without disclosing privileged information). For

example, the district court specified that the log "must . . . identify individual author(s) and recipients," together with the date of each document or communication. Add.11. The presidential communications privilege, however, protects the President from being compelled to disclose the identities of the particular advisors from whom he sought advice on particular subjects, or the timing or sequence of those deliberations. The privilege is broad, protecting the "confidentiality of Presidential communications in performance of the President's responsibilities." *Nixon*, 418 U.S. at 711. It protects facts and "sources of information," as well as "documents or other materials that reflect presidential decisionmaking and deliberations." *In re Sealed Case*, 121 F.3d 729, 744, 750 (D.C. Cir. 1997). Disclosing the authors and recipients of communications and deliberations in formulating military policy would reveal the President's deliberative process in a field in which concerns about the "confidentiality of Presidential communications in performance of the President's responsibilities," *Nixon*, 418 U.S. at 711, are at their zenith. *See* Add.83.

c. The district court's order is erroneous for the additional reason that, because the ultimate injunctive and declaratory relief requested is not available against the President, he is not properly named as a party defendant for purposes of discovery. *See* Add.9 (noting that the President "is a party"). The Supreme Court has long held that it has "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *see also Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (plurality op.) (explaining that "injunctive relief

against the President himself is extraordinary"). Thus, even the district court recognized that injunctive relief against the President in this case is foreclosed. Add.43-45. The court erred, however, by failing to recognize (Add.43-45) that this principle likewise precludes claims for declaratory relief against the President. *See, e.g.*, *Franklin*, 505 U.S. at 827 (Scalia, J., concurring) ("[W]e cannot issue a declaratory judgment against the President."); *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) ("[S]imilar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment."); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("[C]ourts . . . have never submitted the President to declaratory relief.").

2. The district court impermissibly required wholesale disclosure of military deliberations.

Even apart from the pendency of the government's appeal, the Court would properly exercise mandamus review to correct the district court's ruling on the deliberative process privilege. In cursory fashion, that ruling compels disclosure of *all* documents that the government declined to produce solely on grounds of deliberative process privilege—over 19,000 documents from the Office of the Secretary of Defense alone—thereby ordering the blanket disclosure of military deliberations without discussing a single document or category of documents.

The deliberative process privilege is a subset of executive privilege and protects from disclosure documents "reflecting advisory opinions, recommendations and

deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). "[I]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny." *National Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

The privilege is qualified and may be overcome if 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 Communc'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.*

The district court purported to apply these factors to tens of thousands of documents in a page and a half, declaring that these considerations required disclosure of *all* documents withheld under the deliberative process privilege alone. Add.7-8. This approach was improper. Just as application of "the deliberative process privilege is . . . dependent upon the individual document and the role it plays in the administrative process," *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980), so too is the analysis undertaken in determining whether the privilege is overcome. The *Warner* factors reflect the need for granular consideration

of documents, as the precise balancing of those factors varies from document to document depending on their degree of relevance to plaintiffs' claims, the availability of other sources of evidence, and the chilling effect of disclosure on government deliberations. The district court's decision to conduct the *Warner* balancing en masse, rather than assessing specific documents or categories of documents, requires this Court's intervention.

The district court further erred both in its general negation of the government's interest in confidentiality and its all-inclusive assumption of plaintiffs' demonstrated need. Despite never questioning the deliberative nature of any of the documents, the court dismissed concerns regarding the impact of disclosure as "mere speculation." Add.8. It then declared that the government must identify "specific, credible risks which cannot be mitigated by the existing protective order in this case." *Id.* But it is unclear why the court disparaged the government's concerns as speculative, or what "specific" risks it believed would satisfy its standard. As the Supreme Court has explained, the deliberative process privilege exists because disclosure of deliberative documents chills the willingness of government officials to engage in "open, frank discussion between subordinate and chief concerning administrative action." *Mink*, 410 U.S. at 87. Those risks are heightened where, as here, the challenged action relates to military readiness and national security as well as implicates sensitive and controversial issues. And they are further exacerbated by the district court's sweeping order, which would indiscriminately expose every document remotely connected to

the deliberative process here. It is far from "speculative" to say that laying bare the entirety of a lengthy process of formulating multiple policies by military officials will have a substantial chilling effect on future internal deliberations, and the court's two-sentence dismissal of these consequences only illustrates its failure to grapple with the core concerns of the privilege.

The district court's reference to the protective order illustrates its fundamental misunderstanding of the importance of the privilege to government deliberations. It has never been thought that privileges, including the deliberative process privilege, are adequately protected by limiting disclosure to adversaries in litigation. A protective order neither eliminates the chilling effect created by disclosures of deliberative materials, nor justifies disregarding the government's interest in maintaining the documents' confidentiality. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1163-64 (9th Cir. 2009) (granting defendants' mandamus petition and overruling a district court's order compelling the defendants to produce documents whose disclosure threatened to "inhibit[] internal campaign communications that are essential to effective association and expression," while emphasizing that "[a] protective order limiting dissemination of this information will ameliorate but cannot eliminate these threatened harms").

The district court's radical discounting of the government's interest in confidentiality was compounded by its cursory consideration of plaintiffs' need. In considering a massive disclosure of military deliberations, the court was required to give serious consideration to plaintiffs' demonstrated need for the documents, judged

by reference to the voluminous information already in their possession. A general declaration that all documents relating to the military deliberations must be "relevant" is plainly inadequate. Add.7. Even a cursory review of the privilege logs should have given the court pause. Many of the documents involve high-level discussions within the Department of Defense, or even the Secretary's own handwritten notes—documents where the government's interest in confidentiality and the risk of chilling future deliberations are at their highest. *See* Add. 101-02 (noting examples of documents, including a draft memorandum to the President containing the Secretary's handwritten notes and a memorandum from the Undersecretary for Personnel and Readiness to the Deputy Secretary of Defense and Vice-Chairman of the Joint Chiefs of Staff). Moreover, although plaintiffs here challenge neither decision, some of the documents record deliberations preceding the Secretary's decision to defer implementation of the Carter policy, while others predate the formulation of the Carter policy in the first instance. *See id.* (noting as examples a June 28, 2017 memorandum from the Deputy Secretary to the Secretary and cover letter with the Secretary's handwritten notes, as well as pre-decisional documents prepared under Secretary Carter). The district court never explained the relevance of any of these documents, much less how the plaintiffs have made out the showing of need required to overcome the privilege.

The court's assumption that plaintiffs had demonstrated a need sufficient to outweigh the important interests in confidentiality is particularly striking because it

never asked plaintiffs to show why the discovery they have already obtained is inadequate. The government has produced over 30,000 documents totaling roughly 150,000 pages, including a complete administrative record, over the course of 16 document productions, and has responded to written interrogatories. In addition, plaintiffs in related litigation have deposed numerous military officials, and plaintiffs here may rely on those depositions. *See* Doc.183. Before contemplating an order of this kind, it was incumbent on the district court to ascertain that the discovery that plaintiffs have already received did not diminish or eliminate the need for one or more categories of the privileged documents.

II. This Court Should Grant A Stay Pending Review Of The Petition And An Immediate Administrative Stay.

This Court should also stay the district court's order pending its consideration of this petition and grant an administrative stay pending its consideration of the stay motion. This Court commonly grants stays pending disposition of a writ of mandamus, including in cases involving challenges to discovery orders. *See, e.g.*, Order, *In re United States of America*, No. 17-72917 (Oct. 24, 2017) (staying discovery and record supplementation); *Barton v. U.S. Dist. Court for Cent. Dist. of Cal.*, 410 F.3d 1104, 1106 (9th Cir. 2005); *Calderon v. U.S. Dist. Court for the N. Dist. of Cal.*, 98 F.3d 1102, 1104 (9th Cir. 1996). A stay is equally appropriate here.

A stay is required to prevent the violation of established separation-of-powers principles that will occur if the President is required to respond to plaintiffs' discovery

requests with a privilege log on a "document-by-document basis" that may require disclosure of privileged information, and to prevent disclosure of over 19,000 privileged communications regarding the military's deliberative process. Add.11. The burdens of attempting to comply with the district court's order are extraordinary. *See* Add.82-83, 102-04. The government accordingly asks that the Court issue, as expeditiously as possible, a stay of the district court's order pending its consideration of the mandamus petition, as well as an administrative stay pending its consideration of the stay motion. We respectfully ask that the Court rule on the administrative stay request by August 2, to allow the Solicitor General sufficient time to seek Supreme Court review if necessary.

No countervailing harm will result from granting a stay while this Court considers the government's petition. Plaintiffs already have obtained a preliminary injunction, and thus face no harm in the interim. Moreover, the district court has already ruled on the parties' cross-motions for summary judgment, and trial is not scheduled to begin until April 2019.

Finally, a stay is particularly appropriate given that the legal premises of the discovery ruling are currently on appeal to this Court, where argument is currently scheduled for October 10 (and may be expedited further).

CONCLUSION

For the foregoing reasons, this Court should grant an immediate administrative stay and grant a stay pending resolution of the petition for mandamus. Additionally,

this Court should grant the petition for writ of mandamus; vacate the order of July 27, 2018; and order the district court to grant the government's motion for a protective order (Doc.268) and deny plaintiffs' motion to compel (Doc.245)—or, at a minimum, to stay all such discovery until the government's pending appeal is resolved.

Respectfully submitted,

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AUGUST 2018

STATEMENT OF RELATED CASES

Petitioners are aware of one related appeal in this same matter, *Karnoski v. Trump*, No. 18-35347 (9th Cir), which raises issues closely related to those raised in this petition.

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the limit of Ninth Circuit Rule 21-2(c) and 32-3(2) because it totals 8,358 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 August 1, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via e-mail to the following counsel:

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The district court has been provided with a copy of this petition for writ of mandamus.

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