No. 2017-104

In The United States Court of Appeals for the Federal Circuit

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In Re UNITED STATES OF AMERICA,

Petitioner.

ON PETITION FOR A WRIT OF MANDAMUS TO THE COURT OF FEDERAL CLAIMS (No. 1:13-cv-465C, Hon. Margaret M. Sweeney, J.)

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In re United States **v.** _____

Case No. 17-104

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☒ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

Fairholme Funds, Inc., et al. (see attachment)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
Fairholme Funds, Inc.	None	None
The Fairholme Fund	Fairholme Funds, Inc.	None
Acadia Insurance Company	None	W.R. Berkley Corporation
Admiral Indemnity Company	None	W.R. Berkley Corporation
Admiral Insurance Company	None	W.R. Berkley Corporation
Berkley Insurance Company	None	W.R. Berkley Corporation
(see attachment for additional parties)		

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Nov 3, 2016
Date

/s/ Charles J. Cooper
Signature of counsel

Please Note: All questions must be answered

Charles J. Cooper
Printed name of counsel

cc: _____

Reset Fields

Certificate of Interest – Additional Parties

Name of Parties, continued:

The Fairholme Fund, Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Continental Western Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, and Preferred Employers Insurance Company

1. Full Name of Party Represented by me	2. Name of Real Party in interest represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Berkley Regional Insurance Company	None	W.R. Berkley Corporation
Carolina Casualty Insurance Company	None	W.R. Berkley Corporation
Continental Western Insurance Company	None	W.R. Berkley Corporation
Midwest Employers Casualty Insurance Company	None	W.R. Berkley Corporation
Nautilus Insurance Company	None	W.R. Berkley Corporation
Preferred Employers Insurance Company	None	W.R. Berkley Corporation

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INTRODUCTION

The writ of mandamus is reserved for truly exceptional cases in which a trial court so far exceeds the bounds of its authority that its actions can be fairly described as "a clear abuse of discretion" or a judicial "usurpation of power." *In re TC Heartland LLC*, 821 F.3d 1338, 1341 (Fed. Cir. 2016). In resolving the parties' privilege dispute, the trial court appropriately applied discretion-laden, multi-factor balancing tests that the Government itself proposed. The Government now asks this Court to issue the writ because it does not agree with the balance struck by the trial court, which did not produce the Government's desired result. While we submit that the trial court resolved the issues before it correctly, its discretionary, fact-intensive ruling plainly does not warrant the extraordinary relief the Government requests.

By the end of this year the Government will have received $68 billion more in dividends from Fannie and Freddie than it invested in them, and this discovery dispute arises from the Government's efforts to hide from the trial court—as well as from the D.C. Circuit and other federal courts—evidence of its true rationale for actions that enabled it to reap those massive profits by usurping the property rights of the Companies' other shareholders. Since discovery was ordered in this case, the Government has exhibited a troubling pattern of using baseless assertions of privilege and other tactics to thwart or delay the production of essential, non-privileged evidence that contradicts the story the Government has told in this and other cases.

It was against this backdrop—and with intimate familiarity with the facts, legal issues, and proceedings in this case—that the trial court ordered the production of the 56 documents at issue. It was correct to do so.

The Government makes virtually no effort to contest the trial court's findings, made on a document-by-document basis after *in camera* review, that most of the documents withheld under the deliberative process privilege were neither deliberative nor predecisional. And even incorrectly assuming that all of those documents are covered by that qualified privilege, the trial court did not clearly abuse its discretion in determining that Plaintiffs made a showing of need sufficient to overcome the Government's privilege claims. The Government attempts to recast the trial court's exercise of discretion into a categorical legal error by mischaracterizing its document-by-document opinion, but the trial court appropriately weighed the parties' competing interests as directed by uniform precedent.

Although the Government withheld four of the documents at issue under the qualified presidential communications privilege, it never properly invoked that privilege, and the trial court did not clearly and indisputably err in concluding that Plaintiffs had made the showing necessary to overcome it. Discovery has uncovered evidence that White House officials were involved in the decision to expropriate Plaintiffs' property, and after reviewing the documents in question the trial court concluded that Plaintiffs' need for them is "paramount" and "overwhelming."

Finally, this Court has never recognized the qualified bank examination privilege despite overseeing two decades of *Winstar* litigation, and this is not an appropriate case for doing so. Fannie and Freddie are insurance companies, not banks, they lack the fundamental characteristics of banks that other courts have used to justify recognizing a common law bank examination privilege, and during conservatorship such a privilege serves no purpose at all. But even laying these arguments aside, the trial court correctly found that any qualified bank examination privilege was overcome because Plaintiffs' need for the documents outweighed the Government's interest in keeping them confidential.

Accordingly, the Government has not met its burden of proving extraordinary circumstances warranting mandamus. The petition should be promptly denied to avoid further delay in the Government's long-overdue production of the important evidence at issue here.

STATEMENT OF FACTS[1]

A. The Government Forces Fannie and Freddie Into Conservatorship and Subsequently Expropriates Plaintiffs' Stock.

Fannie and Freddie took a conservative approach to lending in the years lead-

[1] The factual claims in this Statement reflect Plaintiffs' current understanding of the relevant events, as informed by materials produced in discovery. To the extent there is any tension between these facts and statements in the complaint Plaintiffs filed in 2013, Plaintiffs plan to amend their complaint.

ing up to the 2008 financial crisis and thus were far better positioned than their competitors for adverse economic conditions. An analysis of the Companies' financial statements shows that throughout the crisis their income, retained reserves, and unencumbered assets were always more than sufficient to cover their debts and other expenses. The Government nevertheless placed Fannie and Freddie into conservatorship in September 2008, while permitting truly troubled financial institutions to remain under private control.

The Housing and Economic Recovery Act of 2008 authorized FHFA to act as the Companies' conservator under specified circumstances, and upon appointing itself conservator FHFA immediately entered into the Preferred Stock Purchase Agreements ("PSPAs") with Treasury. Under those agreements, Treasury committed to invest up to $100 billion in each company as necessary to assure that both would maintain a positive net worth as calculated under Generally Accepted Accounting Principles ("GAAP"). In return, Treasury received warrants to purchase 79.9% of the Companies' common stock at a nominal price, the senior preferred stock that is the focus of this litigation, and other consideration. The original terms of Treasury's senior preferred stock required the Companies to pay either a cash dividend equal to, on an annual basis, 10% of Treasury's total investment or a "payment-in-kind" dividend in additional senior preferred stock equal to 12% of Treasury's total investment. In the three years and eleven months that followed, the PSPAs

were amended twice to increase Treasury's maximum possible investment, but Treasury's dividend rights did not change.

Despite generating healthy cash flows and retaining substantial reserves and unencumbered assets, once the Companies were under FHFA's control they made two highly questionable accounting policy decisions that would dramatically reduce their net worth as calculated under GAAP, thereby causing them to make substantial draws on Treasury's PSPA funding commitment. First, both Companies assumed that they would *never* again generate taxable income. That assumption, although wholly implausible given the Companies' nature and actual performance, required them to write off their deferred tax assets—an entry on the Companies' balance sheets that reflects the fact that much of their income is taxed years before it can be recognized as income on their GAAP financial statements. From 2008 through 2011, this unjustifiable treatment of the Companies' deferred tax assets reduced their reported net worth by approximately $100 billion.

Second, the Companies deducted tens of billions of dollars from their reported net worth based on the assumption that default rates would precipitously increase for the mortgages they guarantee. Although default rates had increased during the crisis, the assumed rates were far out of proportion to anything the Companies or the Country ever actually experienced, and the resulting loan loss reserves—negative

entries on the Companies' balance sheets that reflect anticipated mortgage defaults—were several multiples larger than equivalent reserves recorded by other financial institutions that held far riskier portfolios of mortgages.

By the summer of 2012, the housing market was recovering, and the Companies began to generate substantial quarterly earnings. The accounting policies that had so greatly diminished their net worth as calculated under GAAP were increasingly difficult to defend. Recognizing that the Companies would soon be required by GAAP to reverse those decisions, thereby causing them to report comprehensive income offsetting their previous paper losses and far in excess of their dividend obligations to Treasury, the Government unilaterally amended the PSPAs for a third time. Under what the Government termed the "net worth sweep," the Companies would henceforth pay Treasury a quarterly dividend equal to their *entire reported net worth*, less a small and decreasing capital reserve that falls to zero at the end of 2017. The Net Worth Sweep entitles Treasury to *all* of the Companies' retained capital and future profits, thus making Treasury the Companies' sole equity holder and effectively expropriating the Fannie and Freddie stock held by private investors.

No doubt anticipating the legal challenges that would follow, the Government concocted the "death spiral" explanation for the Net Worth Sweep that it reiterates in its petition to this Court. According to this explanation, the Net Worth Sweep was

necessary to prevent the Companies from exhausting Treasury's financial commitment by borrowing from Treasury to pay 10% cash dividends on Treasury's senior preferred stock. This explanation ignores that the original terms of the PSPAs unambiguously enabled the Companies to pay those dividends "in kind" with additional preferred stock without drawing on Treasury's funding commitment. It is also impossible to reconcile the Government's death spiral theory with the timing of the Net Worth Sweep, coming just as the Companies began to report the largest profits in their history—profits that made the optional 10% cash dividend on Treasury's investment look small by comparison and that raise the question why the Government was forcing expensive financing on the Companies and not allowing them to pay the Government back.

The Net Worth Sweep has been immensely lucrative for the Government. Within just the first year that the Net Worth Sweep was in place, Treasury received $110 billion *more* in purported "dividends" from the Companies than it would have received under the prior arrangement. Those payments were driven in no small measure by the anticipated reversal of the earlier unjustified accounting decisions that had forced the Companies to draw on Treasury's funding commitment in the first place. To date, due to the Net Worth Sweep, Treasury has received a total of over $250 billion, $63 billion *more* than it invested in the Companies (and soon will receive an additional $5.3 billion based on earnings the Companies reported this

week), and the Government contends that it is still entitled to *all* net capital and profits the Companies will generate in the future.

B. Plaintiffs Sue the United States for a Taking, the Government Moves to Dismiss Based on Contested Factual Assertions, and the Parties Engage in Discovery.

Plaintiffs own shares of Fannie and Freddie stock, and they sued the United States for a taking in the Court of Federal Claims.[2]

The Government responded by filing a motion that, although styled as a motion to dismiss, asked the trial court to resolve numerous disputed factual issues in its favor. Among other things, the Government's motion argued that FHFA's entry into the Net Worth Sweep is not attributable to the United States because that agency purportedly was acting as an independent conservator, Defendant's Motion to Dismiss at 13, 15, *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl. Dec. 9, 2013), ECF No. 20 ("MTD"); that the goal of the Net Worth Sweep was saving the Companies from a "death spiral," *id.* at 9–10; that Plaintiffs' claims are not ripe because the Government has not made a final decision about how the conservatorships will end or whether the Net Worth Sweep will prevent Plaintiffs from participating in the Companies' future profits, *id.* at 39–41; and that Plaintiffs had no

[2] Plaintiff Berkley Insurance Company's ownership of shares of the Companies' stock predates the Net Worth Sweep. Thus, irrespective of whether such contemporaneous ownership of freely transferrable securities is required to bring this suit—a disputed question the trial court has not resolved—there is no dispute that at least one of the plaintiffs in this case has standing.

reasonable investment-backed expectations in their stock because the Companies were insolvent when they were placed into conservatorship prior to the Net Worth Sweep, *id.* at 36.

Disputing the factual premises that underlay nearly all of the Government's defenses and unable to respond fully because the most relevant evidence was in the Government's sole possession, Plaintiffs moved for discovery. The trial court granted Plaintiffs' motion after full briefing on February 26, 2014, ordering discovery into several topics, including: whether FHFA had acted as the United States and independently from Treasury when it entered the Net Worth Sweep; the Companies' future profitability and whether Plaintiffs would be allowed to participate in it; and whether Plaintiffs lacked a reasonable investment-backed expectation in their stock because the Companies were insolvent prior to the Net Worth Sweep. Order at 3–4, *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl. Feb. 26, 2014), ECF No. 32. The trial court granted the Government's request, however, for a protective order restricting review of all documents claimed by the Government to be "Protected Information." Invoking the order, the Government initially designated *all* of the roughly 48,000 documents it has produced—including a large volume of documents already in the public domain—as "Protected Information" that may only be accessed by a select group of attorneys.

In the wake of the trial court's order, the Government embarked on a strategy

of maximum delay. Although the trial court had authorized discovery in February 2014, the Government did not produce a single document for almost five months. And when the Government finally did begin producing documents, the great bulk of its productions were comprised of lengthy news compilations, public SEC filings, and other publicly available materials, much of which the Government produced in duplicate, in some instances dozens of times. In the months that followed, the trial court held nine status conferences to resolve discovery disputes and repeatedly extended the deadline for the Government to complete its document production on the basis of the Government's representations that it needed more time. And when Plaintiffs attempted to tee up the parties' disagreements over a number of privilege issues for the trial court's resolution in February 2015, the Government took the position that it was premature for the court to consider virtually all of the disputed issues until the Government had finished its document production. At last, in July 2015, the Government said that its document production was substantially complete, and it sent Plaintiffs privilege logs identifying approximately 12,000 documents it had withheld for privilege. The 12,000 documents on the Government's privilege logs represent roughly 20% of all documents the Government deemed responsive to Plaintiffs' requests.

Plaintiffs then told the Government that they intended to file a motion to compel, using a sample of 170 documents identified on the Government's privilege logs

to frame the parties' broader disputes over various privilege issues. The Government responded by withdrawing its privilege claims over 41 of the documents on Plaintiffs' list and further stated that many of the remaining items were preliminary drafts of the documents over which it was no longer claiming privilege. With the parties' dispute over that initial sample having narrowed, Plaintiffs sent the Government a second proposed sample of privilege log entries, this time identifying 88 documents. The Government ultimately withdrew its privilege claims over 19 of the documents on Plaintiffs' second list and in another instance provided Plaintiffs with the previously withheld final version of a draft that appeared on the list. A sample of 56 documents was submitted to the trial court for *in camera* review and resolution of the Government's privilege claims.

Most of the documents the Government turned over only after it became clear that Plaintiffs were about to file a motion to compel were clearly not privileged. Among other materials, the Government belatedly produced the text of a publicly delivered speech and email correspondence about the Net Worth Sweep between a White House official and third parties not affiliated with the federal government. Some of these materials are also among the most significant documents the Government has produced to date. These documents include:

- A document revealing that on May 29, 2012, three months before announcing the Net Worth Sweep, Treasury and its consultants discussed "[r]eturning the deferred tax asset to the GSE balance sheets," SAppx002—a step that, as previously explained, caused the Companies

to report tens of billions of dollars in profits that were promptly swept to Treasury under the Net Worth Sweep.

- A memo that lists specific subjects on which Treasury staff wanted detailed information from Fannie's and Freddie's highest ranking executives days before the Net Worth Sweep was announced. At the top of that list was "how quickly [the Companies] forecast *releasing credit reserves*." SAppx006 (emphasis added).

In sum, the trial court authorized Plaintiffs to take discovery after the Government filed a "motion to dismiss" that largely turned on disputed facts. Since that time, the trial court has carefully supervised discovery in this important case and worked to move it forward, despite the Government's repeated delays. And in a number of instances, the Government used baseless assertions of privilege to withhold key documents that were damaging to its case, only to abandon its privilege claims when threatened with a motion to compel.

C. The Trial Court Authorizes Plaintiffs To Use Discovery Materials To Correct the Government's Inaccurate Factual Representations in Related Litigation.

After filing their takings suit in the Court of Federal Claims, most of the Plaintiffs here sued FHFA and Treasury in the District Court for the District of Columbia, arguing that the Net Worth Sweep violated the Administrative Procedure Act and breached FHFA's contractual and fiduciary duties as conservator. A number of other shareholders have filed similar suits in the D.D.C. Although some of those other suits asserted takings claims under the Little Tucker Act, no such claims were brought by any of the Plaintiffs in this case.

In the district court, Treasury filed an administrative record and FHFA submitted what it called a "Document Compilation" that it said "reflect[s] the considerations and views FHFA as Conservator took into account in connection with execution of the [Net Worth Sweep]." Notice of Filing Document Compilation by Defendants FHFA and Edward DeMarco at 2, *Perry Capital LLC v. Lew*, No. 13-cv-1053 (D.D.C. Dec. 17, 2013), ECF No. 24. Partly on the strength of those evidentiary submissions, the district court later dismissed all of the plaintiffs' claims. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014).

After Plaintiffs had appealed to the D.C. Circuit, discovery in this case revealed that a number of the statements in the defendant agencies' submissions to the district court were highly misleading or, in some instances, outright false. For example, the centerpiece of FHFA's Document Compilation was a declaration from Mario Ugoletti, an FHFA official who was involved in the decision to impose the Net Worth Sweep. Mr. Ugoletti's sworn declaration, purportedly "based on personal knowledge of the facts," made the following assertion in support of the Government's "death spiral" rationale for the Net Worth Sweep: "neither the Conservator nor Treasury envisioned at the time of the [Net Worth Sweep] that Fannie Mae's valuation allowance on its deferred tax assets would be reversed in early 2013, resulting in a sudden and substantial increase in Fannie Mae's net worth." SAppx023–024. But discovery in this case revealed that Mr. Ugoletti had no basis for making

this assertion. When asked whether he had "an opinion on whether FHFA, as conservator, knew [on the eve of the Net Worth Sweep] that the deferred tax assets might be written back up in 2013," Mr. Ugoletti responded, "I don't know who else in FHFA or what they knew about the potential for that . . . . *I don't know what anybody else thought about it*." SAppx036 (emphasis added). And when asked "[d]o you know what Treasury thought about it," he responded, "*I do not*." *Id*.

For its part, a key document in Treasury's administrative record was a presentation dated June 13, 2012, including financial projections showing Fannie and Freddie likely needing to borrow money from Treasury to pay 10% cash dividends and predicting that imposition of the Net Worth Sweep would result in "no material difference" in "net cash returned to taxpayers." SAppx042, SAppx053–056, SAppx067. But discovery in this case revealed that notwithstanding their misleading date, these projections were actually prepared in November 2011 using data from September 2011. *Compare* SAppx053 *with* SAppx094; *compare* SAppx055 *with* SAppx149. Susan McFarland, Fannie's CFO at the time of the Net Worth Sweep, testified during her deposition that she had provided Treasury with more recent—and far more positive—projections just before the Net Worth Sweep was announced. SAppx192. Ms. McFarland also testified that she told senior Treasury officials eight days before the Net Worth Sweep that Fannie expected to recognize roughly $50 billion in additional profits in 2013 due to the GAAP-required write up of deferred

tax assets—a statement that proved to be remarkably accurate and that undermines Mr. Ugoletti's sworn assertion that the agencies did not anticipate the write up. SAppx186, SAppx192. None of this information, which appears to have played a critical role in the Government's decision to impose the Net Worth Sweep, was included in either agency's evidentiary submissions to the district court in *Perry Capital*.

Over the Government's objections, the trial court authorized Plaintiffs to file discovery materials, under seal, in the D.C. Circuit to correct material inaccuracies in the defendant agencies' district court filings. The trial court also allowed attorneys pursuing similar challenges to the Net Worth Sweep to file the same materials under seal in other courts. On the eve of oral argument in the D.C. Circuit, the trial court further authorized the public release of a select number of key documents so that they could be discussed in open court. The Government objected to the public release of this historical information—some of which was over eight years old—largely on the ground that it would embarrass agency officials responsible for the Net Worth Sweep. But it did not claim that any of those materials are privileged. In subsequent months, the Government has agreed to the public release of a number of additional pertinent documents produced in discovery.

D. Plaintiffs File Their Motion to Compel, and the Trial Court Grants Plaintiffs' Motion in Its Entirety.

Plaintiffs filed their motion to compel against the backdrop of the Government's repeated efforts to delay discovery, its use of indefensible privilege assertions to conceal documents that undermine its factual claims, and its attempts to prevent Plaintiffs from using the materials produced in this case to expose highly misleading, and in some instances, outright false Government submissions in related litigation.

Plaintiffs' motion to compel advanced a number of categorical legal arguments against the Government's privilege claims—arguments that provide alternative grounds on which this Court should deny the Government's petition. But the trial court largely concluded that it was unnecessary to reach these issues because Plaintiffs had made a sufficient showing of need to overcome the qualified deliberative process, presidential communications, and bank examination privileges that the Government asserted. Having closely supervised discovery for over two years, with intimate familiarity with both the facts of this case and the litigants, the trial court was uniquely well positioned to make that finding. And while the Government's petition criticizes the judicial craftsmanship of the trial court's opinion, it cannot deny that the trial court found in Plaintiffs' favor after undertaking a document-by-document *in camera* review of 56 documents spanning hundreds of pages.

Rather than complying with the trial court's interlocutory discovery order, the

Government petitioned this Court for mandamus.[3]

STANDARD OF REVIEW

A writ of mandamus is an extraordinary remedy appropriate only in exceptional circumstances, such as those amounting to a judicial "usurpation of power" or a "clear abuse of discretion." *In re TC Heartland LLC*, 821 F.3d 1338, 1341 (Fed. Cir. 2016). Three conditions must be satisfied before issuing the writ: (1) the petitioner has the burden to show his right to mandamus is "clear and indisputable"; (2) the petitioner must have no other adequate means to attain the relief he desires; and (3) the issuing court must be satisfied that the writ is appropriate under the circumstances. *Id.*

[3] Plaintiffs suspect that documents at issue here will bear on, and likely contradict, factual assertions made by the Government in *Perry Capital* and further demonstrate that Treasury's administrative record and FHFA's document compilation in that case are materially incomplete. The D.C. Circuit heard argument in *Perry Capital* in April 2016 and is likely to issue its opinion soon. By our count, only five of the over 300 cases argued during the D.C. Circuit's last term, which ran from September 2015 to May 2016, remain undecided. As a result, the Government's petition threatens to prevent Plaintiffs from seeking to bring any of these documents to the D.C. Circuit's attention even if the petition is denied.

ARGUMENT

I. The Government Has Not Met the High Standard Required for Mandamus.

A. The Government Cannot Show That It Has a Clear and Indisputable Right to Relief.

Absent from the Government's petition is a standard of review section or, indeed, virtually any reference to the governing legal standard apart from a passing acknowledgement that issuance of the writ is "extraordinary." Petition for a Writ of Mandamus to the United States Court of Federal Claims at 13 (Oct. 27, 2016), Doc. 1-2 ("Pet."). The Government's silence is not surprising, for its arguments do not come close to making the showing of a "clear and indisputable" right to relief that long-established precedent requires. *Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976).

A mandamus petitioner's right to relief is only "clear and indisputable" when a decision amounts to "a clear abuse of discretion or usurpation of judicial authority." *In re Queen's Univ. at Kingston*, 820 F.3d 1287, 1291 (Fed. Cir. 2016); *see also, e.g., Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). Accordingly, mandamus is usually inappropriate "even though on normal appeal, a court might find reversible error." *In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985); *see Kaufman v. Edelstein*, 539 F.2d 811, 817 (2d Cir. 1976) (Friendly, J.) ("[E]ven if the judge

was wrong, indeed very wrong . . . that is not enough." (omission in original) (quotation marks omitted)). Instead, the Government must demonstrate "more than what [a Court of Appeals] would typically consider to be an abuse of discretion." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009).

This demanding standard is sometimes relaxed in mandamus cases "to further supervisory or instructional goals where issues are unsettled and important" but unlikely to arise after final judgment. *Queen's University*, 820 F.3d at 1291; *see generally* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973) (tracing development of this practice). The Government misleadingly quotes from such cases to suggest that the writ provides a general mechanism for interlocutory appellate review "to prevent the wrongful exposure of privileged or confidential communications." Pet. 13 (quoting *In re United States*, 669 F.3d 1333, 1336 (Fed. Cir. 2012)). But in each of the Government's cases, the writ issued to give guidance to the lower courts on recurring, unsettled legal questions concerning the scope of evidentiary privileges. *See, e.g.*, *In re United States*, 669 F.3d 1333, 1337 (Fed. Cir. 2012) (issuing writ to decide "a matter of first impression for this or any court of appeals, and one that has created a split within the United States Court of Federal Claims").[4] Absent such a question, mandamus petitioners who object to

[4] *See also In re MSTG, Inc.*, 675 F.3d 1337, 1342 (Fed. Cir. 2012); *In re United States*, 321 F. App'x 953 (Fed. Cir. 2009); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1154 (9th Cir. 2009).

the compelled production of evidence that they believe is privileged are subject to the same extraordinarily high standard that applies in other mandamus cases—a standard that is necessary to prevent the Courts of Appeals from being flooded with challenges to trial court discovery rulings. *See, e.g.*, *In re Shelbyzme LLC*, 547 F. App'x 1001, 1002 (Fed. Cir. 2013); *Solazzi v. Premier Lab Supply, Inc.*, 17 F. App'x 956, 957 (Fed. Cir. 2001); *In re SmithKline Beecham Corp.*, 243 F.3d 565, 2000 WL 1717167, at *3–*4 (Fed. Cir. 2000) (table); *accord Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009) (observing that mandamus "do[es] not provide relief in every case" in which a trial court erroneously orders the production of privileged information).

The Government nowhere suggests that its petition presents an unsettled question of law that would justify advisory mandamus, and it plainly does not. In deciding the dispositive question whether Plaintiffs had made the necessary showing to overcome the three qualified privileges at issue here, the trial court deployed well-established multi-factor balancing tests that were entirely consistent with the position the Government took before the trial court. *See* U.S. Resp. in Opp'n to Pls.' Mot. to Compel Produc. of Certain Docs. Withheld for Priv. at 29, 36, *Fairholme Funds, Inc. v. United States*, No.13-465C (Fed. Cl. Feb. 19, 2016), ECF No. 301 ("U.S. Opp."). The Government's quarrel is not with the trial court's resolution of a recurring and difficult legal question but with how the trial court applied settled law

to the facts of this case and the specific documents it reviewed. Accordingly, to prevail the Government must make the extraordinary showing that the trial court's application of settled law to the facts amounted to "a clear abuse of discretion or usurpation of judicial authority." *Queen's University*, 820 F.3d at 1291.

B. Mandamus Is Not an Appropriate Vehicle for Second Guessing the Trial Court's Balancing of Competing Interests in Light of the Specific Facts of this Case.

The trial court's central holding that Plaintiffs made a sufficient showing of need to overcome the Government's qualified privileges is a particularly poor candidate for mandamus review. As the Government acknowledged before the trial court, for each of the privileges at issue the law tasks trial courts with "balancing (a) a litigant's need, against (b) the Government's interest in protecting privileged information." U.S. Opp. 29. Striking the proper balance required the trial court to weigh, among other considerations, the relevance of the evidence at issue, Plaintiffs' ability to access other sources of the same information, the seriousness of this litigation and the Government's role in it, and the degree to which disclosure would chill future decisionmakers. *In re Subpoena Served upon Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992) (hereinafter "*Fleet Bank*"); *see also In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997).

Even on direct appeal, the trial court's application of this balancing test would be reviewed only for abuse of discretion. *See Unigene Labs., Inc. v. Apotex, Inc.*,

655 F.3d 1352, 1358 (Fed. Cir. 2011); *In re Sealed Case*, 121 F.3d at 740. Discretionary rulings that require case-specific balancing of competing interests "are rarely appropriate for consideration in a mandamus petition." *In re Knight*, 81 F. App'x 314, 315 (Fed. Cir. 2003); *see also In re Resmed Ltd.*, 106 F.3d 424, 1996 WL 732288, at *2 (Fed. Cir. 1996) (table) (declining to issue writ to overturn trial court's ruling on privacy matter "involving the balancing of competing policy questions as applied to the facts of the case").

Mandamus is also a particularly inappropriate mechanism for reviewing the trial court's finding that the production of these documents is critical to Plaintiffs' ability to make their case. In view of the strong policy against "piecemeal interlocutory review other than as provided for by statutorily authorized appeals," courts must take care to guard against abuses of their mandamus power that would permit "review of a discovery order to serve in effect as a vehicle for interlocutory review of the underlying merits of the lawsuit." *Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305, 1309 (1977) (Rehnquist, J., in chambers); *accord In re Executive Office of the President*, 215 F.3d 20, 23 (D.C. Cir. 2000). Accordingly, the Court should decline the Government's invitation to opine at this stage about the extent to which Plaintiffs need particular documents to prove their case.

C. The Government's Concerns Can Be Addressed on Appeal from Final Judgment.

In addition to demonstrating a clear and irrebuttable right to relief, a mandamus petitioner must show that he has "no other adequate means to attain the relief he desires." *In re TC Heartland LLC*, 821 F.3d 1338, 1341 (Fed. Cir. 2016). The Government cannot satisfy that requirement because "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality" of evidentiary privileges. *Mohawk*, 558 U.S. at 109. To the extent that any documents over which the Government unsuccessfully claims privilege in the trial court are important to the ultimate disposition of Plaintiffs' claims, the Government can argue on appeal that the trial court erred in ordering them produced.

The Government contends that mandamus review is necessary, lest it be "compelled to disclose documents that are protected from disclosure by strong public policy." Pet. 13 (quotation marks omitted). But "asserting, as a general matter, that the privilege or immunity is irrevocably lost if the information is revealed," as the Government does here, "is not sufficient . . . ." *In re Lawson Software, Inc.*, 494 F. App'x 56, 58 (Fed. Cir. 2012).[5]

[5] *Mohawk* reserved the possibility that courts should be more willing to entertain immediate appeals of "rulings involving certain governmental privileges 'in light of their structural constitutional grounding under the separation of powers, relatively rare invocation, and unique importance to governmental functions.' " 558 U.S. at 113 n.4 (quoting Brief for the United States as *Amicus Curiae* at 28, *Mohawk*,

Moreover, the strict protective order the trial court issued at the Government's urging helps to further "mitigate the harmful effects caused by disclosure" of privileged information, thus making appeal an adequate alternative remedy. *In re Shelbyzme*, 547 F. App'x at 1002 n.*. Although the Government implies otherwise, no party with access to information covered by the protective order and produced by the Government has publicly disclosed such information without prior approval from either the trial court or the Government itself. And the Government does not claim privilege with respect to *any* of the information that has entered the public domain. The Government's attacks on the relevance of the protective order, which the Government requested in the first place to prevent inappropriate disclosure, thus lack merit.

II. The Trial Court's Deliberative Process Privilege Rulings Are Correct, and in All Events Do Not Constitute a Clear Abuse of Discretion or Judicial Usurpation of Power.

The Government's arguments with respect to the deliberative process privilege largely mischaracterize the trial court's opinion in an attempt to transform a series of highly contextual and case-specific judgments into a categorical legal error. This caricature does not provide a sound basis for ordering the trial court even to

No. 08-678 (U.S. July 13, 2009)). But there is little support for such a rule, which at most would apply to the four documents at issue here that the Government sought to withhold under the presidential communications privilege.

reconsider its decision, much less the radical relief the Government requests—"directing the trial court to deny plaintiffs' motion to compel." Pet. 30.

A. The Trial Court Did Not Clearly and Indisputably Err in Finding That the Government Failed To Meet Its Burden of Establishing That the Deliberative Process Privilege Applies.

For several reasons, this Court should decline to overturn the trial court's determination that none of the documents it reviewed are protected by the deliberative process privilege.

It was the Government's burden before the trial court to show that the documents at issue are both deliberative *and* predecisional. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). The petition is completely silent as to the trial court's holding that the Government failed to demonstrate that 34 of the documents in question are predecisional, and the Government has thus forfeited any challenge to that holding.[6]

With respect to the trial court's ruling that none of the documents are deliberative, the Government says that "[i]t is unclear what criteria the Court of Federal

[6] The trial court found that the Government failed to adduce sufficient evidence that the following documents submitted for *in camera* review are predecisional: 7, 14, 15, 16, 20, 22, 25, 28, 30–36, 38–56. Two of these documents postdate the Net Worth Sweep, and with respect to the others the Government failed to provide any evidence showing when they were created. The petition is also silent with respect to the trial court's ruling that the Government failed to "provide precise and certain reasons for maintaining the confidentiality" of Document 5. *See* Op. 29; *Walsky Constr. Co. v. United States*, 20 Cl. Ct. 317, 320 (1990).

Claims employed" in reaching that conclusion. Pet. 16. But page 14 of the trial court's opinion makes the standard it applied perfectly clear:

> A deliberative document is one that address[es] a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. In other words, deliberative documents are those that are "a part of the agency give-and-take of the deliberative process by which the decision itself is made."

Opinion and Order at 14, *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl. Oct. 3, 2016), ECF No. 340 ("Op.") (first quotation marks and first citation omitted) (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975)). That is the well-established test courts routinely apply when deciding whether a document is deliberative, and the Government has never argued for a different standard in this litigation.

While the Government obliquely suggests that the trial court was mistaken in its assessment that each of the documents at issue is not deliberative, it only offers specific argument with respect to seven documents (four of which the trial court also ruled are not predecisional or otherwise not covered by the privilege for other reasons). Plaintiffs do not have access to those documents and therefore are not in a position to refute directly the Government's characterizations of them, but it bears emphasis that purely factual information that would reveal nothing about the Government's deliberations is not privileged. *See In re United States*, 321 F. App'x at

960. And while the Government finds fault with the trial court for failing to "consider the context in which the documents were created," Pet. 18, it does little to describe that context or to explain how documents that did not appear to be deliberative upon the trial court's inspection in fact disclose details concerning policymakers' decision making process.

Quite apart from the trial court's reasoning, the petition should also be denied with respect to many, if not all, of the documents because the deliberative process privilege does not apply when "the Government's decision-making process and intent is the subject of the litigation." *Starr Int'l Co. v. United States*, No. 11-779C (Fed. Cl. Nov. 6, 2013), SAppx201; *In re Subpoena Duces Tecum Served on Office of Comptroller of the Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998) ("[T]he government's deliberative process privilege does not apply when a cause of action is directed at the government's intent.").

The Government put its intentions and motivations for imposing the Net Worth Sweep into controversy by arguing that FHFA's actions are not attributable to the United States. Under controlling precedent, whether FHFA should be considered the United States for purposes of the Tucker Act turns on an inherently fact-intensive inquiry into the nature and purpose of FHFA's actions. *See Slattery v. United States*, 583 F.3d 800, 827 (Fed. Cir. 2009), *reinstated after reh'g en banc*, 635 F.3d 1298 (2011) (en banc); *Auction Co. of America v. FDIC*, 132 F.3d 746, 750

n.1 (D.C. Cir. 1997); *see also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (United States may not "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form"). Accordingly, the deliberative process privilege does not shield evidence concerning the Government's motivations and intent for imposing the Net Worth Sweep.

The Government's assertion of the deliberative process privilege with respect to FHFA documents is also improper in this litigation in view of the Government's litigating position that FHFA is not the United States. It is the Government's burden to show that the deliberative process privilege applies, and only self-avowedly governmental actors may properly assert it. *See Sears, Roebuck & Co.*, 421 U.S. at 150. The Government cannot meet its burden while expressly disclaiming one of the privilege's elements—that the entity claiming the privilege is the Government.

B. The Government Cannot Show That the Trial Court Clearly Abused Its Discretion in Finding That Plaintiffs Made the Showing Necessary to Overcome the Qualified Deliberative Process Privilege.

The trial court expressly weighed the five factors that the Government itself argued are relevant to analyzing whether Plaintiffs have overcome the qualified deliberative process privilege:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Fleet Bank, 967 F.2d at 634 (*quoted in* Op. 15 and U.S. Opp. 29). At bottom, the Government's complaint is not that the trial court applied the wrong legal standard but simply that the balance the trial court struck did not produce the Government's desired result. This type of discretionary, fact-specific determination may not be overturned by writ of mandamus.

In any event, the trial court correctly balanced the relevant factors when it ruled that all the documents it reviewed must be produced. Plaintiffs made a strong showing of need for the documents at issue, and in assessing that need it is important to consider the overall context in which this privilege dispute arises: As previously discussed, the Government asserted the baseless "death spiral" narrative as its rationale for imposing the Net Worth Sweep and then used meritless privilege assertions to delay the production of documents that undermine that baseless narrative. Under these circumstances—and especially when reviewing a mandamus petition—any doubts about the importance of particular documents must be resolved in Plaintiffs' favor.

There can be no doubt, moreover, that Plaintiffs have a compelling need for documents that address the topics on which the trial court authorized discovery. Whether FHFA's actions are attributable to the United States turns in large part on its relationship with Treasury and the Government's reasons for imposing the Net Worth Sweep. And Plaintiffs cannot respond to the Government's ripeness argument

without a full and complete understanding of whether the Net Worth Sweep marked a final decision to eliminate the economic interests of private shareholders.

The trial court also gave appropriate weight to other factors that support the conclusion that Plaintiffs made the showing necessary to overcome the qualified privilege. The Government cannot deny that this case is important or that it is a litigant—two significant factors in the balancing analysis that both parties agreed should guide the trial court's exercise of its discretion. *See Fleet Bank*, 967 F.2d at 634.

Respecting the availability of the same information from other sources, another relevant factor, the Government made no attempt to demonstrate to the trial court that the specific information in the documents at issue is available from other sources. Incredibly, the Government now argues that the trial court erred by failing to review the "approximately 48,000 documents" it has produced to date as well as all "public sources" that could conceivably contain the same information. Pet. 22. That was not the trial court's responsibility, and the Government's failure to show in its petition, on a document-by-document basis, that the same information is available from other sources only further underscores that it is not.[7] Moreover, to the

[7] The Government argues that it produced the final version of a speech that provides the same relevant information that appears in a draft that the trial court ordered produced. Pet. 23. But this claim is impossible to assess without a copy of the final speech—something the Government did not provide to the trial court and that Plaintiffs did not have when they filed their motion.

extent the information in question were available from other sources, it is difficult to understand how it could nevertheless be privileged when it appears in the very documents the Government now seeks to withhold.

Finally, the Government accuses the trial court of "radically discounting the government's interests in confidentiality." Pet. 19. But while the Government implies that the trial court ruled that the protective order in this case would "eliminate any chill on the willingness of government officials to engage in open, frank discussion," *id.* at 20 (quotation marks omitted), the trial court did no such thing. Rather, consistent with the cases cited by the Government in its petition, the trial court merely ruled that "where the disclosure of information is subject to a protective order, the risk that such disclosure will have a chilling effect on future deliberations by government employees is *diminished*." Op. 15 (emphasis added). The trial court balanced that diminished interest against other factors that favored disclosure and correctly concluded that the documents should be produced.

Other considerations further support the conclusion that the Government's interest in confidentiality deserves relatively little weight. As discussed above, the Government has selectively disclosed details from its deliberations about the Net Worth Sweep to further its litigation strategy. Thus, despite withholding numerous financial projections from Plaintiffs under the deliberative process privilege, the Government's administrative record in the D.D.C. action publicly disclosed several

sets of internal Treasury financial projections that purport to show that the Net Worth Sweep was necessary to avert a "death spiral." *See* SAppx039.While discovery in this case has revealed that those projections are highly misleading, the important point here is that the Government selectively disclosed materials that it claims are privileged in order to strengthen its position in this and related litigation. With the Government having shown that it is more concerned about defending the Net Worth Sweep than chilling future agency deliberations, the public's interest in the confidentiality of agency deliberations deserves little weight.

III. The Government Has Failed To Establish a "Clear and Indisputable" Right to Relief from the Trial Court's Ruling on the Application of the Presidential Communications Privilege to Four Specific Documents.

The Government also asks this Court to review the trial court's ruling that Plaintiffs' need for four specific documents sufficed to overcome the Government's claim that the documents should be shielded from discovery by the presidential communications privilege. But the Government falls far short of establishing that the trial court's ruling was either a "usurpation of power" or a "clear abuse of discretion."

The Supreme Court has recognized a "presumptive privilege for Presidential communications." *United States v. Nixon*, 418 U.S. 683, 708 (1974). "[T]he privilege is limited to communications 'in performance of (a President's) responsibilities . . . of his office,' . . . and made 'in the process of shaping policies and making

decisions.' " *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 449 (1977) (quoting *United States v. Nixon*, 418 U.S. at 708, 711, 713). Although the Supreme Court has not extended this privilege beyond communications to and from the President, the D.C. Circuit has held that it also covers certain communications to and from key White House advisors and their staff—even if those communications are not shared with the President. *See In re Sealed Case*, 121 F.3d 729, 757 (D.C. Cir. 1997); *see also id*. at 751–52.[8]

The presidential communications privilege "should be construed as narrowly

[8] The D.C. Circuit's holding creates an anomaly by privileging the communications of ad hoc White House advisors over those of members of the cabinet, who are responsible under the Constitution for advising the President. *Compare* U.S. CONST. art. II, § 2, cl. 1 (President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices"), *with In re Sealed Case*, 121 F.3d at 752 (privilege does not extend to individuals "outside the White House in executive branch agencies"); *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108, 1120 (D.C. Cir. 2004) ("Nor can the . . . Attorney General be equated with the close presidential advisers discussed in *In re Sealed Case*."); *id*. at 1118–19, 1122–23. Based on the descriptions of the documents provided by the Government and the trial court, it is not evident that any of the specific documents at issue were shared with the President, and the Government has not represented that they were. This Court need not decide whether the privilege extends to such communications, however, because the trial court neither usurped authority nor clearly abused its discretion in concluding that Plaintiffs' need outweighs the privilege even if it does apply. *See Sun Oil Co. v. United States*, 514 F.2d 1020, 1025 (Ct. Cl. 1975) (assuming without deciding that the privilege might protect "two memos between presidential aides" as well as "two from his aides to the President" without discussing the differences between the two classes of communications but holding that the plaintiffs' need for the documents in that case overrode the privilege even if it applied).

as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected," and "should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President." *In re Sealed Case*, 121 F.3d at 752; *see also Nixon*, 418 U.S. at 710.[9] Furthermore, "[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets," the presidential communications privilege may be outweighed by "the legitimate needs of the judicial process." *Nixon*, 418 U.S. at 706, 707. Thus, "where a demonstrated need for documents sought is clearly sufficient, on balance, to override a claim of privilege, the documents must be produced." *Sun Oil Co. v. United States*, 514 F.2d 1020, 1024 (Ct. Cl. 1975); *see also In re Sealed Case*, 121 F.3d at 754.

The Government fails to establish a "clear and indisputable" right to relief from the trial court's ruling requiring disclosure of the four disputed documents for multiple reasons. *First*, the Government has failed properly to invoke the presidential communications privilege. In the trial court, the Government submitted a declaration of Nicholas L. McQuaid, Deputy White House Counsel, in which Mr.

[9] The Government has not represented that the Net Worth Sweep called for direct decisionmaking by the President, nor is it likely to do so, given that such a representation would eviscerate the arguments that it has advanced in the trial court—namely, that in agreeing to the Net Worth Sweep, FHFA acted solely as a conservator, and not the United States, and Treasury acted not in a sovereign capacity but solely in a commercial and proprietary role as a stockholder of Fannie and Freddie. MTD at 12–18, 26–28.

McQuaid purports to "assert the presidential communications privilege" "[o]n behalf of the Office of the President." Declaration of Nicholas L. McQuaid ¶ 4, *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl. June 10, 2016), ECF No. 333. The presidential communications privilege, however, must be asserted by the President himself. *See Center on Corporate Responsibility, Inc. v. Shultz*, 368 F. Supp. 863, 872–73 (D.D.C. 1973).[10] "A mere statement by Mr. [McQuaid] that he is authorized to advise the Court that the White House is claiming executive privilege is wholly insufficient to activate a formal claim of executive privilege." *Id*. at 873. Even construing Mr. McQuaid's declaration (charitably) to imply that the President had purported to delegate him authority to decide to invoke the privilege, such a delegation would be unavailing. Indeed, in *United States v. Burr*, 25 F. Cas. 187 (C.C. Va. 1807), Chief Justice Marshall, riding circuit, rejected an attempt by President Jefferson to delegate to a subordinate the decision whether to withhold as privileged part of a letter from a third party to the President that Aaron Burr believed would be helpful to his criminal defense. In response to the attempted delegation, Chief Justice Marshall ordered that the letter be disclosed in its entirety because

[10] *See also Nixon*, 418 U.S. at 688 (President Nixon filed a special appearance accompanied by a formal claim of privilege); *Sun Oil*, 514 F.2d at 1021 ("Formal Claim of Presidential Privilege, personally signed by Richard M. Nixon"); *In re Sealed Case*, 121 F.3d at 744 n.16 ("We need not decide whether the privilege must be invoked by the President personally, since the record indicates that President Clinton has done so here . . . ."); *cf. United States v. Reynolds*, 345 U.S. 1, 7–8 (1953).

"[t]he propriety of withholding [the letter] must be decided by [the President] himself, not by another for him." *Id*. at 192; *see also In re Sealed Case*, 121 F.3d at 738–39 & n.7. Because the President has not decided on the propriety of withholding the documents at issue here, the Government's claim of privilege must likewise be rejected.[11]

Second, the trial court's careful analysis of the Government's claim of privilege cannot be dismissed as a "usurpation of power" or a "clear abuse of discretion." The trial court carefully analyzed the relevant precedents and decided to apply "the presidential communications privilege standard articulated by the D.C. Circuit in *In re Sealed Case*," namely, "if the government establishes that the communications at issue qualify for the privilege, then the plaintiff must demonstrate why the evidence is important to its case and unavailable from another source." Op. 11; *see also id*. at 8–11, 49. This is the same standard that the Government relies on in its petition for

[11] The Government did not submit the McQuaid declaration until after briefing on Plaintiffs' motion to compel was completed. Defendant's Notice of Filing of Declaration, *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl. June 10, 2016), ECF No. 333. Accordingly, this issue was not addressed before the trial court. However, the Government was plainly on notice of Plaintiffs' position that the presidential communications privilege must be invoked by the President himself. *See* Redacted Appendix Vol. 1 to Plaintiffs' Motion to Compel at A028, *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl. Dec. 7, 2015), ECF No. 272-1.

mandamus. *See* Pet. 24.[12] The trial court next carefully reviewed the Government's declaration, giving the Government the benefit of the doubt with respect to deficiencies it identified in the declaration and the Government's briefing. *See* Op. 21 & n.12, 43–44 & n.18. The trial court then reviewed each disputed document *in camera*, and carefully catalogued its analysis and conclusions. *See id.* at 40–44, 49–50; *see also id*. at 47–48.

Based on its *in camera* review, its intimate familiarity with the legal issues in this case, and its insight into the existing evidentiary record gained from overseeing discovery for more than 30 months and holding nine hearings on various discovery issues, the trial court determined that the disputed documents contained evidence addressing "both the court's jurisdiction and the merits of the case," that Plaintiffs'

[12] After reciting the *In re Sealed Case* standard, the Government asserts that "[i]n the civil context, the standard plaintiffs must meet is higher." Pet. 24. The Government does not, however, articulate what that higher standard might be, though it cites *Cheney v. United States Dist. Court*, 542 U.S. 367 (2004), in support of its assertion. *Cheney*, however—which the trial court carefully analyzed at length, *see* Op. 8–10—did not evaluate a claim of privilege, let alone identify a specific test for doing so. And to the extent *Cheney* suggests that civil litigants may face a higher burden in overcoming the presidential communications privilege than was faced by the criminal defendant in *United States v. Nixon*, that suggestion is accommodated by the *In re Sealed Case* test, which appears considerably more rigorous than the test articulated by the Court in *Nixon*. *Compare Nixon*, 418 U.S. at 713 ("The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations *preliminarily shown to have some bearing* on the pending criminal cases." (emphasis added)), *with In re Sealed Case*, 121 F.3d at 754 (party seeking to overcome the privilege must demonstrate "that each discrete group of the subpoenaed materials likely contains important evidence" and "is not available with due diligence elsewhere").

need for the documents was "paramount" and "overwhelming, especially with respect to this subset of withheld documents," and that "there is no other source of evidence available to plaintiffs that would similarly inform their understanding of these issues." Op. 49. It accordingly concluded that Plaintiffs' specific need for these documents outweighed the Government's generalized interest in confidentiality and thus overcame the presidential communication privilege. While the Government disagrees with the particular balance struck by the trial court with respect to these four specific documents, such disagreement falls far short of establishing a "usurpation of power" or a "clear abuse of discretion."

Third, even setting aside the demanding standard that the Government must satisfy to obtain relief on a petition for mandamus, the trial court's conclusion that Plaintiffs' need for the documents in question outweighs the Government's generalized interest in privacy is plainly correct. Among other things, the Government has sought to dismiss Plaintiffs' takings claims for lack of jurisdiction on the grounds that FHFA, acting as conservator, cannot be considered the United States and that Plaintiffs' claims are not ripe because the Government might someday permit Fannie and Freddie to exit conservatorship and return some or all of Plaintiffs' investments. But as discussed above, under controlling precedent, whether FHFA should be considered the United States for purposes of the Tucker Act turns on an inherently fact-intensive inquiry into the nature and purpose of FHFA's actions. Evidence tending

to show either (i) that the Net Worth Sweep was conceived and directed by Treasury, the White House, or other parts of the Government rather than by FHFA or (ii) that the purpose of the Net Worth Sweep was not to stabilize Fannie and Freddie, restore them to solvency, and conserve and preserve their assets, but rather to expropriate those assets for the Government or further government objectives for reforming the housing market would plainly show that FHFA should be treated as the United States for purposes of this case and would also support Plaintiffs' takings claim on the merits. In addition, evidence tending to show that the Government has already decided that Fannie and Freddie will *never* be allowed to exit conservatorship and return to private ownership and that their private shareholders will *never* be permitted to obtain any return on their investments would foreclose the Government's ripeness arguments. Such evidence is plainly "important" and "directly relevant to issues that are expected to be central" to this case. *In re Sealed Case*, 121 F.3d at 754.

Controlling precedent of this Court's predecessor strongly supports this conclusion. In *Sun Oil*, the plaintiffs alleged that the Government's denial of their application to build an oil platform on property they had leased for oil and gas exploration both breached their lease and took their property rights without compensation. 514 F.2d at 1021. Plaintiffs sought "to ascertain through the discovery process who made the decision to deny their application to proceed with Platform Henry, and why

it was denied," *id.*, and the Court of Claims held that the plaintiffs' need for documents relating to these questions was "clearly sufficient, on balance, to override a claim of [presidential communications] privilege," *id*. at 1024. As the Court explained:

> We have, of course, not seen the documents. We do not know whether, as plaintiffs hope, they will show who refused the application for Platform Henry, or why it was refused. But, it is reasonably clear that they have a need to show the foregoing. These papers might well lead to the discovery of admissible evidence and are suggestively relevant to the subject matter of this action. Plaintiffs seem to believe that they will ultimately be able to prove that the President or someone on his White House staff turned their application down and did so for impermissible, extraneous, political, or other reasons which they think, if shown, would make their case. They are entitled to try to show this, and a generalized claim of privilege, assuming a former President can assert it, cannot prevail against the plaintiffs' need to develop the facts by resort to discovery.

Id. at 1025.

In addition, discovery obtained in this case to date has suggested both that the White House was involved in the decision to impose the Net Worth Sweep, *see, e.g.*, SAppx212 (deposition of Treasury official admitting to discussing the Net Worth Sweep with "[t]he White House"), and that the "death spiral" justification for the Net Worth Sweep advanced by the Government in its motion to dismiss and in other courts and public fora was at least misleading if not flatly false, *see, e.g.*, SAppx182, SAppx186 (testimony of Fannie CFO stating that she told Treasury just before the Net Worth Sweep was announced that she anticipated that her company would report

roughly $50 billion in profits in 2013 due to the recognition of deferred tax assets). In light of these circumstances, candid statements of White House officials relating to the Net Worth Sweep are uniquely important and "not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d at 754. Although the Government asserts that "many of the documents Treasury has produced contain information that would similarly inform the plaintiffs' understanding of the issues to which the privileged documents relate," Pet. 28, the very documents it cites as examples—two public speeches given by Treasury Officials and a document containing talking points and "Q&As" (presumably compiled by Treasury in preparation for the public announcement of the Net Worth Sweep)—only confirm Plaintiffs' position. In light of the apparent involvement of the White House and the Government's evident lack of candor in its public defense of the Net Worth Sweep, documents prepared *for public consumption* by *Treasury officials* are plainly an inadequate substitute for the candid communications of White House officials behind closed doors.

IV. Mandamus Is Not Appropriate with Respect to the Trial Court's Rejection of the Government's Assertions of the Bank Examination Privilege.

The bank examination privilege is a qualified evidentiary privilege recognized by some courts that shields examination reports and certain other non-factual communications between banks and their regulators. The Government has claimed the privilege with respect to over 2,000 FHFA documents, and the briefing before the trial court focused on eleven documents, grouped into four categories, that were

withheld in whole or part on the basis of that privilege. *See* Op. 22, 28, 31–32, 36 (identifying documents). Observing that this Court "has not had the occasion to address the viability of the bank examination privilege," *id.* at 17, the trial court decided to "extend the privilege's coverage to include communications between the FHFA and the Enterprises." *Id*. at 20. After reviewing the documents *in camera* and carefully weighing the factors governing the analysis of whether any qualified privilege should be overcome, however, the trial court determined that Plaintiffs' evidentiary need for the information in the documents outweighed the Government's interest in preventing production. *See id.* at 28, 31, 35, 37.

The Government's challenge to the trial court's decision fails. As an initial matter, although the Government complains generally about the trial court's analysis of the privilege, it discusses in its petition only "one set" of the four sets of withheld documents considered by the trial court. Pet. 29–30. With respect to the other three sets of documents, therefore, the Government has not adequately preserved any argument that the trial court erred in its application of the balancing test, much less sustained its burden of demonstrating a "clear and indisputable" right to the extraordinary relief it seeks. Further, the Government has not come close to establishing that the trial court's careful weighing of the settled criteria governing qualified privileges amounted to the type of clear abuse of discretion or usurpation of judicial authority required to support mandamus. And the Government's petition should also

be denied for a more fundamental reason: its failure to establish that any bank examination privilege should apply in this case.

A. This Court Should Not Recognize or Apply the Bank Examination Privilege in this Case.

Although this Court has never recognized the qualified bank examination privilege, the Government in its petition makes no effort to establish that the privilege should be recognized. It instead simply *assumes* the existence and applicability of the privilege, and devotes its entire argument to its attack on the trial court's analysis of whether any such qualified privilege has been overcome in the circumstances here. Pet. 28–30. But this approach ignores that courts are, quite properly, reluctant to exercise their authority under federal common law to create new evidentiary privileges, which invariably contravene the fundamental principle that "the public . . . has a right to every man's evidence." *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (omission in original) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). *See In re Queen's University at Kingston*, 820 F.3d 1287, 1294 (Fed. Cir. 2016) (court should act "with caution" given the "presumption against the recognition of new privileges").[13] Such reluctance is especially appropriate here, where there exist multiple compelling considerations counseling against recognition of the

[13] *See also Jaffee v. Redmond*, 518 U.S. 1, 9 (1996); *In re MSTG, Inc.*, 675 F.3d 1337, 1343 (Fed. Cir. 2012).

privilege.

1. The Government has not demonstrated why this Court should join the small handful of its sister Circuits that have recognized the bank examination privilege.[14] Those courts that have recognized the privilege have concluded that it is needed to protect the banking industry "by promoting and protecting the integrity of candid relations between banks and government regulatory agencies." *In re Bank One Sec. Litig.*, 209 F.R.D. 418, 426 (N.D. Ill. 2002). The privilege's rationale thus rests on the premise that the success of bank supervision depends on frank and candid communications between regulated banks and their regulators, communications that would be chilled if subjected to routine public disclosure in litigation. *See Fleet Bank*, 967 F.2d at 633–34; *Bankers Trust*, 61 F.3d at 471. But even leaving aside that there is reason to question the premise that modern bank examination truly involves the frank and informal exchange of views that proponents of the privilege assume, *see Wultz v. Bank of China, Ltd.*, 61 F. Supp. 3d 272, 291–93 (S.D.N.Y. 2013), there are ample reasons for this Court to doubt that a new privilege is required

[14] The only Circuits that arguably have recognized the privilege are the D.C., Sixth, and Tenth Circuits. Op. 17 n.9, citing *Fleet Bank*, 967 F.2d at 633–34, *In re Bankers Trust Co.*, 61 F.3d 465 (6th Cir. 1995), and *Martinez v. Rocky Mountain Bank*, 540 F. App'x 846 (10th Cir. 2013). And it appears that the Tenth Circuit in its unpublished *Martinez* decision simply assumed the existence of the qualified privilege before deciding that the privilege was overcome by the public's interest in access to judicial records. *See Martinez*, 540 F. App'x at 854.

to foster such candid communications. For one thing, the availability of such a privilege is unlikely to succeed in promoting open and honest communications by bank officers to their regulators if the *threat of federal criminal prosecution* has failed to do so. *See* 18 U.S.C. §§ 1001, 1005, 1007.

Moreover, recognition by this Court of a potentially sweeping new privilege is unwarranted in the absence of any explanation by the Government of why any legitimate concerns it may have cannot be adequately addressed by established privileges. In particular, since the deliberative process privilege is itself designed in part to facilitate the provision of candid advice and analyses by Government officials, it is incumbent upon the Government to demonstrate why *additional* privileges are necessary to achieve that objective.[15]

Finally, this Court has special reasons to be skeptical about the need for recognition of the privilege now asserted by the Government. Over the course of twenty-plus years, this Court (as well as the Court of Federal Claims), oversaw the adjudication of scores of so-called "*Winstar*-related" cases, nearly all of which involved

[15] For seven of the eleven documents for which the Government asserted the bank examination privilege, the Government also claimed the deliberative process privilege. *See* Op. 22, 28, 31–32. The remaining four documents were "risk assessment memoranda" prepared by FHFA. *Id.* at 36. Presumably, if these memoranda contained the types of predecisional analyses of sensitive information whose disclosure would chill the provision of candid advice by or to the agency, the Government would have claimed the deliberative process privilege with respect to these agency documents.

questions concerning the regulation, supervision, and examination of bank and thrift institutions. In nearly every such case, the Government produced examination reports and hundreds if not thousands of other documents discussing the examination and supervision of the institutions; many of those documents were later admitted into evidence or otherwise relied upon by the Court of Federal Claims and this Court.[16] In nearly every such case, bank and thrift examiners and regulatory officials were deposed about aspects of the examination and supervision of the institutions; indeed, in many such cases, those officials testified publicly at trial. We are aware of no *Winstar*-related case in which the Government contended, or any court concluded, that such document productions and depositions should not take place because they threatened to chill frank and candid communications between the banks and their regulators. Nor has anyone suggested, in the years since the *Winstar*-related litigation, that communications between the regulators and the regulated institutions have suffered because of such discovery and testimony.

2. Even if there might be some warrant for this Court to recognize the bank examination privilege as it has been developed by some other Courts of Appeals, that privilege should not be extended to FHFA documents concerning Fannie and

[16] *See, e.g.*, *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1384 (Fed. Cir. 2004) (discussing exam reports and other supervisory documents); *First Fed. Lincoln Bank v. United States*, 518 F.3d 1308, 1313 (Fed. Cir. 2008) (same); *Astoria Fed. Sav. & Loan Ass'n v. United States*, 568 F.3d 944, 948 (Fed. Cir. 2009) (same).

Freddie. Simply put, the bank examination privilege protects communications between *banks* and *banking* regulatory agencies, and Fannie and Freddie are not banks. They hold no bank charter of any kind, they do not retain customer deposits, and they do not otherwise conduct banking activities. Indeed, the Companies are actually *insurance* companies that guarantee mortgages against the risk of default. Communications involving insurance companies, broker-dealers, mutual funds, and other regulated non-bank participants in the financial markets are not covered by the bank examination privilege, and there is no reason to treat Fannie and Freddie differently than other such non-bank entities.[17]

In concluding that the bank examination privilege should be extended to FHFA, the trial court was "persuaded" by a district court decision that concluded that Fannie and Freddie are, in certain respects, similar to banks. *See* Op. 20 (citing *FHFA v. JPMorgan Chase & Co.*, 978 F. Supp. 2d 267, 272–77 (S.D.N.Y. 2013)). Because the *JPMorgan* court ignored or discounted meaningful differences between banks and thrifts, on the one hand, and Fannie and Freddie on the other, and because

[17] *See City of Sterling Heights Gen. Emps.' Ret. Sys. v. Prudential Fin., Inc.*, 2015 WL 1969368, at *4–*5 (D.N.J. Apr. 30, 2015) (declining to recognize a federal common law "insurance examination privilege" and observing that party claiming privilege had been unable to identify "any case in which a federal court recognized a common law privilege similar to the one urged here"); *see also, e.g.*, *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 239 F.R.D. 508, 514 n.5 (N.D. Ill. 2006); *In re Putnam Inv. Mgmt., LLC*, 2004 WL 885245, at *3–*4, SEC Release No. 614 (SEC Apr. 7, 2004); *Merchants Bank v. Vescio*, 205 B.R. 37, 42 (D. Vt. 1997).

that court failed to apprehend the Pandora's Box of privilege claims that its reasoning would open, this Court should not follow that court's lead.

Perhaps most significantly, banks make long-term loans using short-term deposits, and the resulting mismatch between assets and liabilities makes even healthy banks vulnerable to collapse when customers lose confidence and demand return of their deposits *en masse*. Worry about bank runs was a key consideration in the early decisions addressing the need for confidentiality of bank examination materials, *see Bank of America Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 103–04 (D.C. Cir. 1939), and it has no analogue where Fannie and Freddie are concerned.

To be sure, FHFA is charged with promoting public confidence in the Companies by examining the soundness of their investments and capital levels. But that fact does not make the Companies banks, any more than similar aspects of insurance regulation make the New York Life Insurance Company a bank. If accepted, the *JPMorgan Chase* court's reasoning would thus expand the bank examination privilege far beyond its accepted bounds and shield from the judicial truth-finding process a wide range of materials related to financial regulation that have never been understood to be privileged. Furthermore, unlike bank regulators, FHFA is required by law to regularly report to Congress on its comprehensive examinations of the Companies, and its reports are publicly available. *See* 12 U.S.C. § 4521(a); FHFA, Re-

ports and Plans, http://goo.gl/3p4XtQ (links to FHFA's Annual Report to Congress).[18]

3. In the event that this Court recognizes the bank examination privilege and concludes that FHFA examiners' communications with Fannie and Freddie may be shielded by the privilege during ordinary times, it should not further extend the privilege to materials created after September 6, 2008, when the Companies were placed into conservatorship. Any concern that the Companies might not be entirely forthcoming with FHFA evaporated when FHFA took them over. As conservator, FHFA has exercised complete control over the Companies. *See* 12 U.S.C. § 4617(b)(2)(A)–(D); *see also, e.g.*, Freddie Mac 2014 Annual Report at 20 (Form 10-K) (Feb. 19, 2015), http://goo.gl/Bdr9jo ("The Conservator continues to determine, and direct the efforts of the Board of Directors and management to address, the strategic direction

[18] In concluding that FHFA could invoke the bank examination privilege, the trial court also pointed to what it characterized as "Congress's explicit decision to codify the bank examination privilege in the [Freedom of Information Act ('FOIA')]." Op. 20. The trial court was referring to 12 U.S.C. § 4525, which extends a FOIA exemption for bank examination materials to certain of the Companies' submissions to FHFA. Op. 17–18. With respect, the trial court's reliance on this statute is misplaced. It is well settled that "the Freedom of Information Act creates no privileges," *Chamber of Commerce of United States v. Legal Aid Soc'y of Alameda Cty.*, 423 U.S. 1309, 1310 (1975), and Congress has in the past considered and rejected bills that would have entitled FHFA's predecessor to invoke the bank examination privilege, *see* Financial Services Antifraud Network Act of 2001, H.R. 1408, 107th Cong. (2001). Treatment of the Companies' documents under FOIA thus provides no support for permitting FHFA to withhold relevant examination materials during discovery.

for the company . . . [M]anagement frequently receives directions from FHFA on various matters involving day-to-day operations.").

Because evidentiary privileges suppress probative evidence, they must be extended "only as far as needed to effectuate their utilitarian purposes." *Evergreen Trading, LLC ex rel. Nussdorf v. United States*, 80 Fed. Cl. 122, 127 (2007); *see Ullmann v. United States*, 350 U.S. 422, 438–39 (1956) ("Once the reason for the privilege ceases, the privilege ceases."). With the Companies subject to FHFA's complete control and operating under management chosen by and avowedly beholden as fiduciaries only to FHFA, the concern that underlies the bank examination privilege—that privately run banks might not be forthcoming with their regulators—plainly does not apply here.[19]

B. There Is No Basis To Disturb the Trial Court's Application of the Privilege.

Finally, even if this Court were to hold that the bank examination privilege applies here, mandamus would still be inappropriate, as the Government has not

[19] The Government suggested in the trial court that courts have rejected this argument when made with respect to banks in receivership. But the only decision it cited to support this proposition is *Shoenmann v. FDIC*, which held the bank examination privilege inapplicable to certain information that *had already been produced* and that FDIC sought to keep under seal. *See* 2012 WL 2589891, at *4 (N.D. Cal. July 3, 2012). Any discussion in that decision regarding the applicability of the privilege to receiverships is therefore *dicta*.

demonstrated that the trial court was so derelict in weighing the various factors governing the application of the qualified privilege that its decision constituted "a clear abuse of discretion or usurpation of judicial authority." *Queen's University*, 820 F.3d at 1291. Because the factors at issue are essentially the same as the factors governing the analysis of whether the qualified deliberative process privilege should be overcome, *see Fleet Bank*, 967 F.2d at 634, we refer the Court to our previous discussion of those factors, as supplemented by a few additional observations.

Notwithstanding the Government's conclusory assertions to the contrary, Pet. 30, the documents at issue are not only relevant but appear to speak directly to the issues at the heart of this litigation. For example, as the Government concedes, Pet. 29–30, FHFA's "risk assessments" reveal FHFA's analysis of the Companies' financial situation in 2012, shortly before the Net Worth Sweep was consummated. Similarly, documents reflecting FHFA's September 2011 projections of the Companies' remaining Treasury funding commitment under certain FHFA stress scenarios, *see* Op. 31–32, speak to a key issue because according to the Government's "death spiral" narrative, it imposed the Net Worth Sweep out of concern that the Companies would otherwise exhaust Treasury's funding commitment. And documents bearing on FHFA's assessment of the Companies' deferred tax assets and financial outlook near the beginning of the conservatorships, *see* Op. 22, 28, are critical to this case because the decision to zero out Fannie's and Freddie's deferred tax assets and other

assets caused the bulk of the Companies' paper losses during the early years of conservatorship—losses that were subsequently offset by massive profits when the Companies, among other things, released the deferred tax asset reserves shortly after the Net Worth Sweep was imposed.

In short, the trial court determined in 2014, after considering and rejecting arguments similar to those that the Government makes now, that documents bearing on such matters as the parties' expectations concerning Fannie's and Freddie's future profitability, when and how the conservatorships might end, and whether FHFA acted as an agent and arm of the Treasury when it decided upon and implemented the Net Worth Sweep, were directly relevant to the resolution of the Government's own dispositive motion. The Government failed to challenge the trial court's determination at the time, and it should not be allowed to challenge that determination through the back door under the guise of an attack on the trial court's assessment of the relevance factor governing the application of the qualified privilege. All of these materials are highly relevant to this dispute, and there is no adequate evidentiary substitute for FHFA's assessments of these issues.[20]

[20] The Government suggests that Plaintiffs should be satisfied with information concerning the Companies' prospects that can be found in Treasury documents and FHFA's annual reports to Congress. Pet. 30. But because, as the Government has insisted throughout this litigation, FHFA officials played a unique role in the decision to impose the Net Worth Sweep, it is simply no answer for the Government to point to materials produced by a different agency. As to FHFA's annual

The remaining relevant factors also lend strong support to the order compelling disclosure of the documents. Billions of dollars are at stake in this case, and the Government has an obvious and substantial stake in the litigation. Moreover, the Government's motives for imposing the Net Worth Sweep have been called into serious question. *See Wultz,* 61 F. Supp. 3d at 290 (finding that risk of chilling effect if qualified privilege were overcome was outweighed given "seriousness of the litigation" where hundreds of millions of dollars were at stake, the lack of adequate substitutes for the information at issue, and the role of the Government in passing the statute creating the cause of action); *In re Subpoena Duces Tecum Served Upon Office of Comptroller of Currency,* 151 F.R.D. 1, 2 (D.D.C. 1992) (qualified privilege defeated where government's statements were allegedly "false and misleading").

Finally, any concern that disclosure of these materials might discourage banks from being forthcoming with their examiners in the future is greatly reduced by the

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reports, the Government does not claim that the information in those public reports is substantially identical to the information the Government seeks to withhold—of course, if the information were identical, the Government would not be able to credibly suggest that the disclosure of the withheld documents would cause it any cognizable harm—and Plaintiffs demonstrated before the trial court that many of the materials in the Government's possession contradict the public, made-for-litigation explanation for the Net Worth Sweep that Defendant has promoted in this Court and elsewhere. There is thus no adequate substitute for deliberative materials that would reveal Defendant's true reasons for imposing the Net Worth Sweep and its honest assessment of the Companies' future profitability.

fact that most of the materials at issue here were produced while the Companies were operating under conservatorship—an unusual scenario that greatly weakens the justification for the bank examination privilege and distinguishes this case from most cases in which bank examination materials are relevant. Moreover, while the Government continues to assert that the existence of the protective order provides "no answer" to the risk of a chilling effect, Pet. 29, its position is undermined by the numerous bank examination privilege decisions emphasizing the significant weight such protective orders should be given in the balancing test.[21] For this reason, the Government's supposed concerns about the chilling effect "public" disclosure of the materials in question might have, Pet. 29, largely misses the point.

In the final analysis, the bank examination privilege is not designed to shield Government actions like those at issue here from meaningful scrutiny.

> Even when asserted to protect deliberative material, the privilege may be overridden where necessary to promote the paramount interest of the Government in having justice done between litigants, or to shed light on alleged government malfeasance, or in other circumstances when the public's interest in effective government would be furthered by disclosure.

Fleet Bank, 967 F.2d at 634 (citations and quotation marks omitted). Those important interests are all directly implicated in this case, where Plaintiffs challenge

[21] *See, e.g.*, *Fleet Bank*, 967 F.2d at 634; *Bankers Trust*, 61 F.3d at 472; *Schreiber v. Society for Sav. Bancorp, Inc.*, 11 F.3d 217, 222 (D.C. Cir. 1993); *Merchants Bank*, 205 B.R. at 42. *See also Lundy v. Interfirst Corp.*, 105 F.R.D. 499, 502 (D.D.C. 1985).

the constitutionality of the Government's effort to effectively nationalize two of the most profitable, and critically important, private corporations in America and to transfer to itself tens if not hundreds of billions of dollars. If the balance of interests does not support disclosure here, it would be difficult to conceive of a situation in which disclosure would ever be warranted. Thus, even if it were somehow appropriate for this Court to perform its own *de novo* weighing of the relevant factors (it is not), it should reach the same conclusion as the trial court. It follows that, in the context of the extremely deferential standard of review that applies to the Government's petition, mandamus must be denied.

CONCLUSION

The Government's petition for a writ of mandamus should be denied.

Date: November 3, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2016, I caused a copy of the foregoing Response in Opposition to Petition for a Writ of Mandamus to be filed electronically via the Court's CM/ECF system. This filing was served electronically to Petitioner the United States by the Court's electronic filing system. Service was accomplished on the following by First Class U.S. Mail:

Michael Sammons
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/s/ Charles J. Cooper
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