IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

In re UNITED STATES OF AMERICA, Petitioner.	No. 17-104 [Fed. Cl. No. 13-465C]

REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF FEDERAL CLAIMS

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INTRODUCTION AND SUMMARY

Plaintiffs declare that "[t]he Government nowhere suggests that its petition presents an unsettled question of law that would justify advisory mandamus." Op. 20. To that extent they are quite right. There are no unsettled questions of law here: the trial court's error is plain, and its analysis diverges from settled legal principles.

We showed in our petition that the trial court's uniform rejection of the deliberative process and presidential communications privileges is founded on an indefensible analysis. For every deliberative document, the court first declared that the document was not deliberative on its face, even though its deliberative character was often self-evident, and was, in all cases, explained by the government's declarations. The court then declared, in each case, that plaintiffs had overcome the privilege without requiring them to demonstrate why their need for the documents outweighed the government's interest in protecting the documents. In applying a rote formula, the court did not explain why any particular document bears in any substantial way on the supposedly limited "jurisdictional" inquiries that are the purported basis of the years-long discovery, during which the government produced more than 500,000 pages of records. The court never explained why the information contained in the privileged materials was not already available to plaintiffs from other sources.

The court then dismissed the government's interest underlying the deliberative process privilege on the ground that any chilling of future deliberations was "highly unlikely, given the protective order that is already in place in this case," Appx54; *see*

also, e.g. Appx27, Appx63, Appx72. As discussed in our petition, the trial court's assumption that wholesale discovery of the kind authorized here would not chill the decisionmaking process would be wholly unwarranted even if the court had, in fact, restricted access to the documents to plaintiffs for exclusive use in this litigation. But, as plaintiffs readily acknowledge, they have used the documents obtained pursuant to the protective order in other cases, and the court has allowed entities other than plaintiffs to have access to those documents. Indeed, as recently as October 24, 2016, plaintiffs sought leave to file an amicus brief in a district court case, trumpeting that they are "currently taking discovery in [their] suit challenging the Net Worth Sweep in the Court of Federal Claims, and that discovery has yielded a wealth of evidence . . . . Counsel for the Plaintiffs in this case have access to the materials produced in the Court of Federal Claims." *Roberts v. FHFA,* No. 16-2107, Dkt. 50-1, at 1 (N.D. Ill. Oct. 24, 2016).

Plaintiffs make no bones about their desire to obtain deliberative documents at the heart of executive privilege, unabashedly declaring that they seek "candid communications" by government officials from "behind closed doors." Op. 41. Plaintiffs identify no respect in which these documents are not deliberative; they do not explain how the Court of Federal Claims could properly ignore the government's declarations; and they do not explain why they could not obtain (or have not already obtained) the information they seek from other sources. Indeed, their 17-pages of purported facts make plain that they have already obtained ample information

concerning the Third Amendment. And plaintiffs do not explain how the court's "protective order" obviates the chill resulting from compelled disclosure of privileged documents.

Plaintiffs ask this Court to overlook these errors on the theory that the deliberative process privilege is inapplicable, a theory that formed no part of the trial court's analysis. Their argument reduces to the contention that the relationship between Treasury and Federal Housing Finance Agency (FHFA) involves questions of "intent" that vitiate the privilege. As discussed below, these contentions are without support in law or logic.

The errors besetting plaintiffs' analysis are crystallized in their discussion of the presidential communications privilege. Like the trial court, plaintiffs do not explain why their need for the documents is "paramount" or, indeed, how the documents relate to their takings claim at all. And, insofar as the documents have any material bearing on plaintiffs' claim, plaintiffs do not explain why that information was not available elsewhere through the exercise of due diligence. Plaintiffs argue, without support, that it was necessary for the President to assert the privilege personally. In other words, in plaintiffs' inverted understanding of the privilege, whenever litigants seek documents involving communications to and among presidential aides in formulating policy advice, the President of the United States must pause his other activities and enter the trenches of litigation. But plaintiffs, for their part, need make

no effort at all to demonstrate that the information they seek cannot be obtained from other non-privileged sources.

Plaintiffs similarly fail to come to grips with the trial court's cursory treatment of the bank examination privilege. Instead, they argue, for the first time, that the privilege does not exist, a contention that is waived and at odds with the views of every circuit to have considered the issue.

What is most revealing about plaintiffs' lengthy opposition is what is missing: in 55 pages, plaintiffs make virtually no attempt to explain to this Court why they need the documents at issue or how any of those documents—or the twelve thousand over which the government has also asserted privileges—add in any material way to the information already in their possession. The trial court's error is clear and significant, and warrants the exercise of this Court's mandamus authority.

ARGUMENT

I. The Trial Court Committed Clear Error In Uniformly Rejecting the Deliberative Process Privilege.

A. Plaintiffs make little effort to defend the trial court's methodology in rejecting the government's assertion of the deliberative process privilege.

In each case, the court first found the privilege inapplicable because the document's "deliberative nature [was] not apparent on [its] face." *See*, *e.g.*, Appx26, Appx30, Appx34. As the government explained in its petition, that standard was neither legally correct nor factually accurate, and plaintiffs do not attempt to defend

it.[1] Plaintiffs mistakenly urge (Op. 27) that the government has done "little to describe [the] context [for the privilege assertion] or explain how [the] documents . . . disclose details concerning policymakers' decision making process." But the government submitted detailed declarations to the trial court, and plaintiffs provide no explanation for their assertion, which does not survive even cursory scrutiny of those declarations.

1. The trial court not only misunderstood the deliberative nature of the documents but further declared that disclosure would, in any event, have no chilling effect because it had previously issued a protective order. Faced with this indefensible reasoning, plaintiffs suggest (Op. 31) that the trial court did not discount the government's interest entirely, but rather concluded that the interest was "diminished" in light of the court's protective order.

That is plainly not the case. For each deliberative document, the court unvaryingly concluded that it was "highly unlikely" that disclosure of the document under the protective order would have a chilling effect on government deliberations. Appx54; *see also, e.g.* Appx27, Appx63, Appx72. The government's interest was thus "diminished" to the point of irrelevance.

[1] As plaintiffs note (Op. 26), the government identified seven documents in their petition that exemplify the fundamental flaws in the trial court's approach to the deliberative process privilege. The trial court applied the same flawed approach to all documents over which the government asserted the privilege, and the government's arguments apply with equal force to all documents at issue.

Plaintiffs cannot, of course, dispute that even a rigorously enforced protective order does not eliminate the harm to the government that results from the compelled disclosure of privileged documents. Plaintiffs cite no case in which a protective order has been thought to adequately address the interests protected by a privilege designed to insure that government officials will not be chilled by operating in a fishbowl. *See* Op. 31-32; *cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1163-64 (9th Cir. 2009) ("A protective order limiting dissemination . . . will ameliorate but cannot eliminate these threatened harms.").

As for the protective order itself, it is immaterial whether it would appear on its face to be "strict," or whether the 85 people with access to the documents have not "publicly disclosed such information *without prior approv*al." Op. 24 (emphasis added). As plaintiffs acknowledge, the court has repeatedly allowed access to protected material by third parties, including any individual who files a related lawsuit in any court, *see* Dkt. 279 (Dec. 18, 2015), and has even authorized, over the government's objection, the public disclosure of documents previously covered by the order. *Id.*; Dkt. 313 (April 13, 2016). And, as noted, the court has repeatedly allowed plaintiffs themselves to file documents subject to the order in other litigation. Given this history, there is no basis for plaintiffs' assertion that the protection afforded by the order would "mak[e] appeal [after final judgment] an adequate alternative remedy." Op. 24. Plaintiffs' aggressive use in other litigation of the documents that they obtained here renders this argument particularly hollow.

2. With respect to their own interest in the documents, plaintiffs offer only the most generalized assertions and never explain how any document adds even incrementally to the analysis of the issues before the court. Plaintiffs simply assert that they "have a compelling need for documents that address the topics on which the trial court authorized discovery." Op. 29. In weighing the parties' interests in a privilege analysis, however, it is not sufficient to note that a party has a general interest in obtaining information relevant to its claims. It is necessary to consider a party's need for particular documents, and to assess that interest against the competing interests embodied in the privilege. Under the analysis adopted by the trial court, and vigorously endorsed by plaintiffs, it is enough to conclude that a document is "related to" the broad subjects on which the court authorized discovery, *see, e.g.*, Appx47, and to then dismiss the interests protected by the privilege on the basis of a protective order.

Requiring the trial court to determine plaintiffs' particularized need and assess the government's interests at stake does not, as plaintiffs urge, amount to an improper consideration of the merits on an interlocutory appeal. Op. 22. Although plaintiffs spend many pages setting out their view of the case, the government asks only that the trial court be required to apply established legal standards in considering the privileges at issue.

If the trial court had applied the proper standards, it would have been plain that plaintiffs have demonstrated no need, much less a substantial need, for any of the

documents at issue. Plaintiffs state their interest at the highest possible level of generality. They declare, for example, that they "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." Op. 29-30. But plaintiffs nowhere assert that the thousands of documents and dozens of hours of deposition testimony they have already obtained do not sufficiently address the topics on which the trial court authorized discovery. Indeed, plaintiffs' lengthy recitation of their view of the facts underscores that they already have numerous sources of information regarding the topics on which they sought discovery, a point they have emphasized in other litigation. *See Roberts v. FHFA,* No. 16-2107, Dkt. 50-1, at 1 (N.D. Ill. Oct. 24, 2016) (informing the district court "that discovery [in this case] has yielded a wealth of evidence").

Contrary to plaintiffs' contention (Op. 48), the government does not bear the burden of demonstrating that the information plaintiffs seek was available from other sources. It is the party seeking privileged information that must demonstrate that the information they seek cannot be obtained elsewhere. *See Marriott Int'l Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (overcoming the deliberative

process privilege requires "a showing of compelling need" by the moving party); *Estes v. United States*, No. 13-1011C, 2016 WL 4919997, at *3 (Fed. Cl. Sept. 15, 2016) ("[I]n a given case, the privilege may be overcome if the moving party demonstrates that its evidentiary need for the documents outweighs the harm that disclosure would cause the non-moving party."). Plaintiffs made no attempt to make that showing in their motion to compel, and they now mistakenly assert that it "was not the trial court's responsibility" to determine whether such a showing had been made. Op. 30. The problem is precisely that the trial court did not undertake the inquiry that was required.

In any event, even accepting plaintiffs' sweeping valuation of their "compelling need" for information on the issues they identify, most of the documents they seek have no bearing on those issues.[2] As the government noted in its petition (Pet. 22), many of the documents do not even mention—let alone discuss in detail—the Third Amendment, Treasury's relationship with FHFA, or the lifespan of the

[2] Plaintiffs describe Treasury's stated rationale for entering into the Third Amendment—that it ended the adverse draws-to-pay-dividends cycle that the original purchase agreements had created—as "baseless," "misleading," and "false." Op. 29, 40. Even assuming the issue were relevant to this suit, Treasury's rationale is fully supported by the extensive administrative record it submitted in *Perry Capital v. Lew*, by the testimony of Treasury and FHFA officials in this case, by the extensive discovery materials the government produced in this litigation, and, indeed, by the very documents plaintiffs now seek, *see, e.g.*, UST00389662, at 6. There has been no "lack of candor" on the government's part. Op. 41.

conservatorships. And to the extent they do discuss those issues, the documents are of no help to plaintiffs.[3]

B. Unable to mount a plausible defense of the trial court's reasoning, plaintiffs argue (Op. 27) that the deliberative process privilege is simply inapplicable because the government's "intent is the subject of the litigation." Op. 27 (internal quotation marks omitted). Plaintiffs' characterization of the issue as one of "intent" entails attenuated reasoning. They note that that the government "argu[ed] that FHFA's actions are not attributable to the United States." Op. 27. They then assert that whether FHFA is the United States turns on the "nature and purpose" of FHFA's actions, and, therefore, FHFA's "purpose" in enacting the Third Amendment is relevant. *Id.*

"Intent" is not the appropriate test for determining whether FHFA was acting as the United States when it entered into the Third Amendment. *See Slattery v. United States*, 583 F.3d 800, 827 (Fed. Cir. 2009) (whether the FDIC is the government when it acts a receiver depends on the "context of the [plaintiffs'] claim," not on the FDIC's reasons for taking a particular action). And it is certainly not the case that plaintiffs'

[3] Plaintiffs mistakenly suggest that the government's decision to disclose some documents notwithstanding their privileged nature undermines the privilege claims here. The question, instead, is why those disclosures, together with the thousands of other pages turned over to plaintiffs, are insufficient to allow consideration of dispositive motions. As with their other assertions, plaintiffs provide no basis for their assertion that the government has "selectively disclosed details from its deliberations . . . to further its litigation strategy." Op. 31.

suit is "is *directed* at the government's intent." *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). Were relevance of the government's intent alone enough to negate the privilege, the privilege would be rendered largely inapplicable, since the government's predecisional deliberations can typically be framed in terms of "intent." *See Landry v. FDIC*, 204 F.3d 1125, 1136 (D.C. Cir. 2004) (explaining limited nature of holding in *In re Subpoena*, 145 F.3d at 1424).

In any event, few, if any, of the documents shed light on "the nature and purpose of FHFA's actions" with respect to the Third Amendment. Treasury's internal deliberations have no bearing on the issue of whether FHFA was acting as its agent. That issue is more properly resolved through analysis of communications *between* Treasury and FHFA, and the government disclosed documents detailing such communications. *See, e.g.,* Documents FHFA00025815, UST00060055, UST00504231. Indeed, in their motion to compel, plaintiffs argued that only four documents were relevant to the questions of the government's intent. *See* Dkt. 272, at 13, 22.

Finally, plaintiffs urge that the United States should not be permitted to assert the privilege on behalf of FHFA as to the FHFA documents at issue because of "the Government's litigating position that FHFA is not the United States." Op. 28. FHFA is, of course, a government agency, and plaintiffs apparently do not dispute that FHFA acts as the United States when the agency acts as the Enterprises' regulator.

Although FHFA is not the United States when it acts as conservator, it is well established that an entity may be deemed to be the Government for one purpose but not another. *See, e.g.*, *Hall v. Am. Nat'l Red Cross*, 86 F.3d 919, 922-23 (9th Cir. 1996). And even when FHFA's employees are performing conservatorship-related functions, they remain "government personnel," employed by an agency of the Government. *Cf. Stevens v. FDIC*, No. 11-CV-00841, 2011 WL 3925087, at *3 & n.3 (C.D. Cal. Aug. 25, 2011) ("Although the FDIC as receiver steps into the shoes of the failed bank . . . this does not make the FDIC as a whole any less a government agency.") (citations and internal quotation marks omitted). Nothing in the Housing and Economic Recovery Act (HERA) suggests that conservatorship strips FHFA of the protections of the deliberative process (or bank examination) privileges that apply to government agencies. And courts have permitted the FDIC and Resolution Trust Corporation ("RTC") to assert the deliberative process privilege in their capacities as conservator and receiver. *See Romacorp, Inc. v. Prescient, Inc.*, No. 10-22872-Civ., 2011 WL 2312563, at *3 (S.D. Fla. June 8, 2011) (allowing the FDIC to assert the deliberative process privilege, which the FDIC asserted "as a governmental agency *and its receivership capacity*" (emphasis added)); *Resolution Trust Corp. v. Commerce Partners*, 132 F.R.D. 443, 447-48 (W.D. La. 1990) (deliberative process privilege bars "discovery relative to the propriety of the RTC's decisions" in its capacity as conservator).

II. The Government Has Demonstrated an Indisputable Right to Relief with Respect to the Trial Court's Uniform Rejection of the Presidential Communications Privilege.

A. Plaintiffs' defense of the trial court's order requiring disclosure of documents protected by the presidential communications privilege epitomizes their disregard for the important policies reflected in the privileges that they cavalierly dismiss. They fail to engage with the issues presented in the government's petition, rely on conclusory assertions of their alleged need for the documents, join the trial court in disregarding the constitutional issues at stake, and raise arguments that did not form the basis of the trial court's order.[4]

The trial court concluded that three of the four documents over which the government asserted the presidential communications privilege were not covered by the privilege at all, declaring that it could not "independently verify" the authors and recipients of the documents or the title of one of the participants in an email chain. *See* Pet. 24-26. Plaintiffs do not defend that approach. Nor do they attempt to justify the trial court's inexplicable failure to credit the government's declaration setting forth the bases for the assertion of the privilege. Instead, plaintiffs oddly claim that the trial

[4] Plaintiffs acknowledge that the Supreme Court has left open the question of whether the courts should be more "willing to entertain immediate appeals of 'rulings involving certain government privileges "in light of their structural constitutional ground under separation of powers, relatively rare invocation, and unique importance to governmental functions," and that documents protected under the presidential communications privilege would fall into this category. Op. 23 n.5 (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 n.4 (2009).

court gave the government's declarant "the benefit of the doubt." Op. 37. The meaning of this assertion is unclear. Had the trial court given the government's declarant "the benefit of the doubt," it would not have held the privilege inapplicable on the ground that it could not "independently verify" the truth of the declarant's statements. *See* Appx49 (concluding that the government "has not met its burden of establishing that Documents 15, 17, and 19 are protected by the presidential communications privilege").

Most fundamentally, plaintiffs fail to recognize the serious constitutional interests at stake in a decision to compel the disclosure of these documents. As explained in our petition (Pet. 23-24), a "presumptive privilege" exists for presidential communications. *United States v. Nixon,* 418 U.S. 683, 708 (1974). That privilege is not designed to avoid "embarrass[ment]" (Op. 15), as plaintiffs suggest, but, rather, is "inextricably rooted in the separation of powers under the Constitution," and "necessary to guarantee the candor of presidential advisers and to provide [a] President and those who assist him . . . [with] free[dom] to explore alternatives in the process of shaping policies and making decisions." *Id.* at 708. These interests may not lightly be tossed aside.

Plaintiffs' claim (Op. 37) that the trial court "carefully catalogued its analysis and conclusions" cannot be squared with the trial court's order. Rather than apply the rigorous standard required to overcome the presidential communications privilege, *see* Pet. 24, the trial court found that the plaintiffs' interest in the documents was

"paramount" and "overwhelming" merely because the documents "pertained to" relevant discovery issues in ways that the court did not elaborate. Appx49.

Plaintiffs cannot remedy the deficiencies in the court's analysis and their own showing with the bald assertion (Op. 38-39) that the trial court was "plainly correct" in concluding that they had established an "overwhelming" need for the four presidential communications documents. Plaintiffs do not dispute that a party seeking documents protected by the presidential communications privilege "should be prepared to detail" its efforts "to determine whether sufficient evidence can be obtained elsewhere" and must explain why the "evidence is not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997). Yet, in neither their motion to compel nor in their response to the government's mandamus petition do plaintiffs attempt any such showing.

Indeed, plaintiffs make little effort to explain how the requested documents could possibly illuminate the issues on which they are purportedly seeking discovery. Plaintiffs state that the documents protected by the presidential communications privilege will shed light on "the nature and purpose of FHFA's actions," and whether "the Government has already decided that Fannie and Freddie will *never* be allowed to exit conservatorship." Op. 39. But, as the government explained in its petition, Pet. 26-27, the documents over which the government asserted the presidential communications privilege concern sensitive policy discussions of ongoing housing reform initiatives and approaches. Three of the four documents do not even mention

the purchase agreements, the relationship between FHFA and Treasury, the possibility of a Third Amendment, or the lifespan of the conservatorship. The remaining document (UST00521902) mentions the possibility of a Third Amendment, but that document provides no insight into FHFA's intent or the expected length of the conservatorship.

The Court of Claims' decision in *Sun Oil Co. v. United States*, 514 F.2d 1020 (Ct. Cl. 1975), provides no support for plaintiffs' position here. The question in *Sun Oil* was whether a former president could assert the presidential communications privilege; the Office of the President did not assert privilege over the documents. *Id.* at 1022. The case thus turned on the privileges that may be asserted by a private party, and, in that context, the Court applied a standard far less rigorous than that required under *Nixon* and *In re Sealed Case* when the Office of the President invokes the privilege. Compare *Sun Oil*, 514 F.2d at 1025 (to overcome privilege, plaintiffs need only show that privileged documents "might well lead to the discovery of admissible evidence and are suggestively relevant to the subject matter of th[e] action") with *In re Sealed Case*, 121 F.3d at 755 (to overcome presidential communications privilege, evidence "must be directly relevant to issues that are expected to be central to the trial" and plaintiffs must show that the evidence is "not available with due diligence elsewhere").

B. Unable to support the trial court's decision on its own terms, plaintiffs launch an attack on the invocation of the privilege. Plaintiffs urge that the presidential

communications privilege does not apply in this case because the privilege was not invoked by the President himself. As plaintiffs acknowledge, the Court of Federal Claims did not address this issue. Op. 36 n.11.

No court of appeals has held that the President must personally invoke the privilege in civil discovery. The privilege is an institutional governmental privilege, *see Dellums v. Powell,* 561 F.2d 242, 247 n.14 (D.C. Cir. 1977) (the privilege "inhere[es] in the institution of the Presidency"), that may be invoked by a Deputy Counsel to the President on behalf of the Office of the President. Plaintiffs' claim that the President must personally invoke the presidential communications privilege in every discovery dispute runs headlong into the Supreme Court's admonition that "the Executive's 'constitutional responsibilities and status . . . counsel[] judicial deference and restraint' in the conduct of litigation against it." *Cheney v. United States District Court*, 542 U.S. 367, 385 (2004) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982). There is no constitutional or practical reason for this Court to take the extraordinary step of requiring the President to be the official who asserts this privilege. *See Cheney*, 542 U.S. at 389-90 ("[C]onstitutional confrontation[s] between the [Executive and Judicial] branches should be avoided whenever possible.").

Although the President may choose personally to invoke the privilege, as past Presidents have done in response to criminal trials and grand jury subpoenas, *see Untied States v. Nixon*, 418 U.S. 683, 688-89 (1974); *Nixon v. Sirica*, 487 F.2d 700, 705

(D.C. Cir. 1973), there is no constitutional requirement that he do so, at least in civil litigation.[5]

Recognizing "the singular importance of the President's duties," and the potential for the "diversion of his energies by concern with private lawsuits," the Supreme Court has concluded that the President's involvement in private lawsuits for official acts "would raise unique risks to the effective functioning of government." *Fitzgerald*, 457 U.S. at 751. Similarly, the Supreme Court has on numerous occasions "found the problem of time and energy distraction a critically important consideration" militating in favor of grants of immunity, or special protective procedures such as interlocutory appeals for executive, legislative, and judicial officers. *See Clinton v. Jones*, 520 U.S. 681, 720-21 (1997) (Breyer, J., concurring) (collecting cases). Such concerns similarly militate against a judicially imposed requirement that the President personally assert the presidential communications privilege. Indeed, this case demonstrates the consequences that follow from requiring personal assertion of the privilege in the context of massive discovery requests that sweep in White House communications with little or marginal relevance to the claim at issue.

By asserting the privilege, moreover, Mr. McQuaid assumed the same role as that which may be done by a responsible official within an agency who, although not

[5] The Supreme Court has recognized that "requests for information for use in a civil suit" are of lesser importance than "the need for information in the criminal context." *See Cheney*, 542 U.S. at 383-84.

head of the department, invokes the deliberative process privilege. In analyzing invocation of the deliberative process privilege, this Court has required that the invoking official have "expertise in the nature of the privilege claim and documents at issue." *Marriott*, 437 F.3d at 1308.

In this case, Mr. McQuaid not only had direct knowledge about what interests are threatened by a particular disclosure and how much harm to those interests is likely but also, in his capacity of advising the President, was aware of the competing interests and public policies which the presidential communications privilege implicates.[6] For the above reasons, this Court should hold that the President need not personally invoke the privilege.

III. The Court of Federal Claims Correctly Recognized the Existence of a Bank Examination Privilege and that Privilege Applies to the Enterprises.

A. As explained in the government's mandamus petition, the bank examination privilege protects communications between banks and their examiners and "arises out of the practical need for openness and honesty between bank examiners and the banks they regulate, and is intended to protect the integrity of the regulatory process by privileging such communications." *Wultz v. Bank of China Ltd.*, 61 F. Supp. 3d 272,

[6] We do not take plaintiffs to advance the argument that the materials here are not privileged because the declarations do not state that they were provided to the President. *See* Op. 33 & n. 8. This was not the basis of the trial court's holding, nor did the trial court suggest that this played any role in its determination of whether the documents were protected by the presidential communications privilege.

281-82 (S.D.N.Y. 2013). As they do with respect to the deliberative process and presidential communications privilege, plaintiffs fail to engage with the arguments presented in the government's petition, and instead urge arguments the trial court either did not consider or affirmatively rejected.

Plaintiffs' arguments with respect to specific documents are unavailing. For example, plaintiffs urge that the FHFA risk assessments covered by the privilege reveal "FHFA's analysis of the Companies' financial situation in 2012" and urge that these documents are central because they speak to the reason for adoption of the Third Amendment. Op. 51. But plaintiffs do not dispute that information on FHFA's understanding of the companies' financial situation in 2012 is available in FHFA's reports to Congress, in the Enterprises' public SEC filings, and in the documents produced by the Enterprises and FHFA in this litigation. *See* Op. 52 n.20. Although plaintiffs suggest that the documents over which the government has asserted the bank examination privilege would contradict the government's sworn public filings (Op. 51-52), plaintiffs offer no basis for that serious accusation.

Plaintiffs' assertion that their case depends upon FHFA's financial analyses from 2008 is similarly unavailing (and six of the eleven FHFA documents at issue date from August to October 2008). Plaintiffs' Taking Claim concerns the Third Amendment to the original stock purchase agreements. Treasury and FHFA agreed to the Third Amendment in August 2012, four years after the documents plaintiffs seek were generated. It is unclear how analyses FHFA undertook in 2008 have any bearing

on the nature and purpose of an action it took many years later. Nor is it clear how these analyses would help plaintiffs establish that FHFA was Treasury's agent at the time of the Third Amendment in 2012. Neither plaintiffs nor the trial court provide the required explanation.

2. For the first time on appeal, plaintiffs argue that the bank examination privilege should not be recognized in any manner. Op. 44. That argument was waived. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("[I]t is the general rule ... that a federal appellate court does not consider an issue not passed upon below."). Moreover, as plaintiffs concede, every circuit to consider the question has concluded that the privilege applies. Op. 44, n.14. Plaintiffs provide no persuasive reason for this Court to create an inter-circuit conflict.

In arguing that recognition of the bank examination privilege is unnecessary, plaintiffs urge that the deliberative process privilege would protect the same information, an ironic suggestion in light of plaintiffs' understanding of the deliberative process privilege. Op. 45 & n.15. In any case, the two privileges protect different interests. The deliberative process privilege protects communications forming the basis of agency decisions, rather than the back and forth inherent in the bank regulation process. Nor does plaintiffs' reliance on the "*Winstar*-cases" advance their claim. Op. 46. "Conveying certain documents that a privilege may protect does not waive an entity's right to ever claim the privilege." *FHFA v. JPMorgan Chase & Co.*, 978 F. Supp. 2d 267, 276 (S.D.N.Y. 2013). And, in any event, the interests at stake

in the *Winstar* cases were different: at the time of the lawsuits, many of the thrifts were closed and liquidated, and thus privilege issues were less pressing.

Plaintiffs are on no firmer footing in arguing that the bank examination privilege should not extend to FHFA's regulation of the Enterprises. Op. 46-47. In *FHFA v. JPMorgan Chase*, the only published decision addressing the issue, the United States District Court for the Southern District of New York rejected the arguments advanced by plaintiffs and held that FHFA may assert the bank examination privilege. 978 F. Supp. 2d at 273-74. The court explained that the bank examination privilege encompasses two objectives: (1) ensuring candor in communications between regulated entities and the regulator, thereby promoting effective supervision, and (2) maintaining public confidence in financial institutions. *JPMorgan*, 978 F. Supp. 2d at 273. Plaintiffs attack the second of these objectives, contending that the privilege should only have application where "bank runs" are a concern. Op. 48. But there is no reason to adopt such a crabbed view of the importance of public confidence in enormous financial institutions. As the *JPMorgan* court recognized, FHFA's regulation of the Enterprises is profoundly important to the United States economy, much more than any single bank or credit union. *JPMorgan*, 978 F. Supp. 2d at 273 ("Given that 'in 2008 the [Enterprise]s financed about 40% of all American mortgages and owed debt in excess of $5.3 trillion, their failure would be catastrophic for the American economy in a way that, with few exceptions, the failure of a single bank or credit union would not be.'") (citation omitted). Because of their significant market share,

the United States economy and housing markets necessarily depend on the public's confidence in the Enterprises. There is no reason to believe, as plaintiffs suggest (Op. 48), that the floodgates will open if the bank examination privilege is applied to the Enterprises.

Plaintiffs also suggest that the Enterprises are insurance companies, rather than banks. Op. 47. But "[bank] activities overlap considerably with [Enterprise] core mortgage activities." *JPMorgan*, 978 F. Supp. 2d at 275. FHFA's supervision of the Enterprises is virtually identical to—and clearly modeled on—federal bank regulators' supervision of banks, not state regulators' supervision of insurance companies. *See id.* at 274. FHFA is charged with, among other things, ensuring the Enterprises' "maintenance of adequate capital and internal controls," 12 U.S.C. § 4513(a)(1)(B)(i), and has the duty to "foster liquid, efficient, competitive, and resilient national housing finance markets." *Id.* § 4513(a)(1)(B)(ii). These mandates overlap considerably with those of federal banking regulators. *See JPMorgan*, 978 F. Supp. 2d at 274 (comparing FHFA's statutory duties with the FDIC's statutory duties). Indeed, Congress virtually duplicated the examination regime applicable to banks when it designed the examination regime for the Enterprises. *See, e.g.*, 12 U.S.C. § 4517(a) (FHFA must conduct annual examinations of financial condition of the Enterprises); *id.* § 4517(c) (FHFA Director has the same authority as various bank regulators); *id.* § 4517(e) ("The Director and each examiner shall have the same authority and each examiner shall be subject to the same disclosures, prohibition, obligations, and penalties as are

applicable to the examiners employed by the Federal Reserve Banks"). Thus, "it accords with 'reason and experience' for courts to permit FHFA the same common law privilege tool available to the banks to accomplish its mandate." *JPMorgan*, 978 F. Supp. 2d at 275 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996)).

There is also no merit to plaintiffs' argument that FHFA's annual reports to Congress eliminate the rationale for the privilege. Op. 48-49. Pursuant to 12 U.S.C. § 4521(a), FHFA must make a "[g]eneral report" to Congress with "a description of the actions taken [by FHFA]," and "the results and conclusions of the annual examinations of the regulated entities." *JPMorgan*, 978 F. Supp. 2d at 276. This does not alter the chilling effect felt on important, individual communications, and many bank regulators issue similar public reports. *Id.*

Plaintiffs are on likewise incorrect in asserting that the privilege should not extend to materials created after September 6, 2008, when the Enterprises were placed in conservatorship. Op. 49. FHFA's role as regulator and conservator are distinct. FHFA asserts the bank examination privilege only with respect to documents created pursuant to its supervisory and regulatory activities, not documents created as conservator.

Plaintiffs make the unsupported assertion that "[a]ny concern that the [Enterprises] might not be entirely forthcoming with FHFA evaporated when FHFA took them over." Op. 49. But, as plaintiffs acknowledge, one of the motivating rationales for the privilege is to protect public confidence in public institutions.

Conservatorship has no effect on this objective, which is all the more important when financial entities of the Enterprises' size are placed into conservatorship. Nor has any court accepted the proposition that because a financial institution has an obligation to produce particular information, there can be no question of candor between the bank and its regulators. For example, bank employees are generally obligated by law to provide bank examiners with requested information, *e.g.*, 12 U.S.C. § 161(a), but their regulators unquestionably may assert the bank examination privilege.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of mandamus directing the trial court to deny plaintiffs' motion to compel.

Respectfully submitted,

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NOVEMBER 2016

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation contained in this Court's order of November 4, 2016. This brief contains 6,238 words.

s/ Gerard Sinzdak
GERARD SINZDAK

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2016, I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system to:

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