Case No. 77010

IN THE SUPREME COURT OF NEVADA

JP MORGAN CHASE BANK, National Association, a national association Appellant, vs. SFR INVESTMENTS POOL 1, LLC, Respondent.	Electronically Filed Jan 06 2021 02:03 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable JIM CROCKETT, District Judge
District Court Case No. A-13-692304-C

MOTION TO STAY ISSUANCE OF REMITTITUR

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This Court should stay issuance of remittitur for two reasons. First, the very issue decided in this case, whether a claim challenging an NRS 116 foreclosure sale based on HERA sounds in contract, is presently pending before the United States Supreme Court, on Petition for Certiorari from the Ninth Circuit Court of Appeals, in *SFR Investments Pool 1, LLC v. M&T Bank*, No. 20-908, docketed January 5, 2021. If the petition is granted, it could affect the decision in this case.

Additionally, the constitutionality of the FHFA's structure is presently before the U.S. Supreme Court in *Collins v. Mnuchin*, No. 19-422.[1] In *Collins*, the U.S. Supreme Court granted certiorari to decide whether the FHFA's single-director structure violates the Appointments Clause and, if so, whether certain actions taken by the agency, while unconstitutionally structured, must be set aside. Thus, *Collins* has the potential of holding the FHFA was unconstitutionally structured at the time of the conservatorship decision and call into question whether the conservatorship was validly imposed (and, if the conservatorship was not validly imposed, then the foreclosure bar should not have applied to this case).

In the ongoing merits briefing, the FHFA has conceded that its structure is unconstitutional in light of *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), which held the indistinguishable structure of the CFPB violated the Appointments Clause. *See Collins* Federal Parties Reply Br. 23-26. The *Collins* petitioners further argue

[1] Oral argument took place on December 9, 2020.

that in "a long line of cases, the U.S. Supreme Court has repeatedly set aside the past actions of federal officials who were unconstitutionally insulated from oversight by the President or who otherwise served in violation of the Constitution's structural provisions." *Collins* Petr. Br. 62; *see also id.* at 62-66 (discussing authorities). The Government resists vacatur of the agency action at issue in *Collins*, although largely for case-specific reasons. *Collins* Federal Parties Reply Br. Br. 28-40.

As the Solicitor General has written, a hold is appropriate where the Court's decision in a pending case "could affect the analysis of [the] question" presented by the petition or if "it is possible that the Court's resolution of the question presented in [the pending case] could have a bearing on the analysis of petitioner's argument," even if the cases do "not involve precisely the same question." *U.S. BIO 7, Yang v. United States*, No. 02-136. Here, the lower court found the Association foreclosure sale failed to extinguish the GSE's junior lien because the sale took place after FHFA put both regulated entities under conservatorship, thereby triggering the Foreclosure Bar.

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That SFR did not raise an Appointments Clause challenge below does not preclude it from raising the issue now. The U.S. Supreme Court has "expressly included Appointments Clause objections" in the category of "nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)). The U.S. Supreme Court has thus considered Appointment Clause challenges "despite the fact that [the challenge] had not been raised in the District Court or in the Court of Appeals." *Id.* at 879 (quoting *Glidden*, 370 U.S. at 536). In such cases, the "strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers" outweighs any "disruption to sound appellate process entailed by entertaining objections not raised below." *Ibid.*

Nevertheless, because there is no material difference between the structure of the FHFA and the CFPB, SFR had no basis to raise an Appointments Clause challenge in this case until the U.S. Supreme Court overturned the Ninth Circuit's decision in *Seila Law*. *See Collins* Federal Parties Reply Br. 3, 23-24 (FHFA conceding that its structure is indistinguishable from that of the CFPB for Appointments Clause purposes); *PHH Corp. v. CFPB*, 881 F.3d 75, 175-76 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (structure of FHFA "raises the same question we confront here" in Appointments Clause challenge to CFPB). The U.S. Supreme

Court, however, did not overrule *Seila Law* until June 29, 2020, long after briefing was completed by the parties. *Seila Law LLC*, *supra* (2020) (decided on June 29, 2020).

Accordingly, SFR asks this Court to stay issuance of remittitur until the U.S. Supreme Court decides the *M&T Bank* case and issues a decision in *Collins*. If the U.S. Supreme Court determines the claim does not sound in contract, then the holding in this case should be reversed. Even if the petition as to the statute of limitations is denied, this Court should still stay remittitur pending *Collins*. Should the U.S. Supreme Court rule the FHFA's structure was unconstitutional, then the parties should have the opportunity to submit briefing as to what effect this has on the present case.

DATED this 6th day of January, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on this 6th day of January, 2021. Electronic service of the foregoing Motion to Stay Issuance of Remittitur shall be made in accordance with the Master Service.

/s/ *Karen L. Hanks*
An employee of Kim Gilbert Ebron