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.

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Elizabeth A. Brown
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APPEAL

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

REPLY IN SUPPORT OF MOTION TO STAY ISSUANCE OF REMITTITUR

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A. SFR Satisfies the Standard Under NRAP 41(b)(3).

NRAP 41(b)(3) does not state anywhere that the petition for certiorari must be filed in the specific case; it addresses a petition generally. While ordinarily the petition will be filed for the specific case, in the realm of HOA litigation, it would be unnecessarily redundant. Before this Court issued its decision here, SFR had already filed its Petition for Certiorari from the Ninth Circuit in *SFR Investments Pool 1, LLC v. M&T Bank*, No. 20-908, docketed January 5, 2021. That Petition challenges the statute of limitations issue, and therefore, it cannot be disputed that if the Petition is granted, it could affect the decision in this case. Thus, a stay is warranted.

B. The Merits of SFR's Petition are Not Before this Court.

Nowhere does NRAP 41(b)(3) provide the Court may deny a stay based on the merits of a petition. Instead, it states, "the stay shall continue until final disposition by the Supreme Court of the United States." NRAP 41(b)(3)(B). Thus, the merits of SFR's Petition are not before this Court, nor are they a condition precedent to granting a stay.

C. *Collins* Does Have Bearing on the Present Case.

Neither of Appellant's arguments regarding Collins have merit. *First*, while Appellant argues SFR waived any argument related to the issues in *Collins*, it acknowledges the Supreme Court's decision in *Freytag v. C.I.R.*, , allowed a party

to raise an Appointments Clause challenge for the first time in the Supreme Court because it fell "in the category of nonjurisdicitional structural constitutional objections that could be considered on appeal whether or not ruled upon below." 501 U.S. 868, 878-79 (1991) Further, *Freytag* did not apply a ruole specific to Appointment Clause claims, but instead invoked invoked a non-waiver principle founded in the "strong interest of the federal judiciary in maintaining the *constitutional plan of separation of power*," of which the Appointment Clause is but one part. 501 U.S. at 879 (quoting *Gliddden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (emphasis added)); *id*. at 878 ("The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political.").

Accordingly, the case on which *Freytag* relied was not an Appointments Clause decision, but one involving another aspect of the "constitutional plan of separation of powers." *Glidden*, 370 U.S. at 536 (finding no waiver of separation-of-powers challenge to lack of tenure protections for judges of Court of Claims and Court of Customs Appeals. In a related context, this Court also understands *Freytag* addresses waiver of "constitutionally based structural protection," not just Appointments Clause challenges. *Commission on Ethics v. Hardy*, 125 Nev. 285, 299 (2009).[1] Justice Gorsuch recently described *Freytag* as holding that "forfeited

[1] In *Freytag*, after rejecting waiver of the constitutional challenge, the Court held the Executive Branch's acquiescence in the alleged Appointment Clause violation did not deprive the Court of the power to reach the question either, for the same reasons

or waived arguments may be entertained when structural concerns" – not Appointments Clause Claims – "are at issue." *June Medical Svcs LLC v. Russo*, 140 S.Ct. 2103, 2175 (2020) (Gorsuch, J., dissenting).

In addition, Appellant does not contend raising this challenge at an earlier stage would have been anything but futile, given the basis of this challenge to the FHFA's structure arose only last summer with the June 29, 2020 decision in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). *See, e.g.*, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142–43 (1967) ("[T]he mere failure to interpose [a constitutional] defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground."). Before then, the Supreme Court had repeatedly upheld the constitutionality of independent agencies. *See id*. at 2198-2200. It was only in *Seila Law* that the Supreme Court held for the first time an independent agency headed by a *single* director removable only for cause violated constitutional separation of powers, overruling the Ninth Circuit's precedent upholding the same structure of the Consumer Finance Protection Board. *See id*. at 2200-07; id. at 2197.

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founded in the importance of preserving separation of powers. *See* 501 U.S. at 880. In *Hardy*, this Court relied on that passage to hold that "constitutionally based structural protections cannot be waived by either the legislative or executive branch."). Put simply, this Court correctly viewed *Freytag* as addressing waiver of claims based on the "structural protections" of the Constitution's separation-of-powers regime generally, not the Appointments Clause specifically.

Second, SFR does not argue *Collins* will completely dispose of this lawsuit, rather that *Collins* may call into substantial doubt the validity of the HERA claim in this case, making final relief premature. The FHFA has conceded the FHFA's structure is unconstitutional so it is likely the Court will find them so. *Collins* Federal Parties Reply Br. 23-26. The question is whether the challenged actions are ultra vires, and "must be set aside." *Collins* Petr. Br. 65. If the Court agrees, its decision will have direct implications here, where the claim depends entirely on the Federal Foreclosure Bar, which applies only on conservatorship, a decision the statute leaves to the "discretion of the Director." 12 U.S.C. § 4617(a)(2). If the Net Worth Sweep is invalid due to the unconstitutional structure, it will also draw into serious question the validity of the conservatorship which, if ultra vires, destroys the FFB claim here.

Other arguments are unconvincing, such as lack of standing which is irreconcilable with SFR should have brought the challenge when the conservatorship was imposed, five years before the foreclosure sale and eight years before Appellant invoked the FFB. SFR is obviously and directly injured by the conservatorship decision, which triggered the FFB claim relied on to deprive SFR of valuable property rights. Nothing in HERA restricts an injured party from challenging the conservatorship decision, or sets a time limit to raise such a defense to the FFB. *See* Op. 8 (citing 12 U.S.C. § 4617(a)(5)). SFR is challenging the applicability of the FFB, which *Appellant* sought to use. Finally, the Court will necessarily address the

issue of the acting vs. appointed FHFA director in *Collins*. *See Collins*, Fed. Resps. Reply Br. 31-37; *but see Collins* Petr. Reply Br. 11-18 (arguing to the contrary). *Collins* may impact the foundation of Appellant's HERA claim, which is reason enough to stay pending the decision in *Collins* and disposition of SFR's pending Petition in *M&T Bank*. Appellant can then argue why *Collins* decision should not affect this case, and this Court can consider them with the benefit of what the Supreme Court has actually decided (rather than what Appellant claims the U.S. Supreme Court *should* decide).

The delay would not last long. *Collins* was argued in December and will be decided end of June, latest. Barring multiple extensions, the SFR Petition will be resolved by March or April. Denying a stay, could lead to pointless further litigation, forcing SFR to seek certiorari from this Court's decision to ask the Supreme Court to vacate and remand for reconsideration in light of *Collins*.

DATED this 20th day of January, 2021.

KIM GILBERT EBRON

/s/ Karen L. Hanks
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on this 20th day of January, 2021. Electronic service of the foregoing Reply in Support of 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