

**CASE No. 82078**  
IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC,  
A NEVADA LIMITED LIABILITY  
COMPANY,

Appellant,

vs.

NATIONSTAR MORTGAGE, LLC, A  
Delaware Limited Liability Company,

Respondent.

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Elizabeth A. Brown  
Clerk of Supreme Court

**APPEAL**

From the Eighth Judicial District Court, Clark County  
The Honorable MARY KAY HOLTHUS, District Judge  
District Court Case No. A-13-684715-C

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**MOTION TO STAY APPEAL**

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Appellant SFR Investments Pool 1, LLC (“SFR”) respectfully requests that this Court stay the instant appeal 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 (“*M&T Bank*”), docketed January 5, 2021. The petition not only challenged the holding in the case but requested the petition be held pending a decision by the U.S. Supreme Court in *Collins v. Mnuchin*, No. 19-422.<sup>1 2</sup> If the petition is granted, it could affect the merits decision in this case. While

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<sup>1</sup> Oral argument took place on December 9, 2020.

<sup>2</sup> The Ninth Circuit has begun staying cases pending the U.S. Supreme Court’s resolution in *Collins*. See *Federal Housing Finance Agency; et al. v. GR Investments, LLC; et al.*, Case No. 20-16317, DktEntry 15, issued February 10, 2021 and *Federal National Mortgage Association v. Southern Highlands Community Association*, Case No. 20-16585, DktEntry 15, issued February 11, 2021. Several cases before the U.S. District Court in Nevada have also been stayed pending the U.S. Supreme Court’s resolution in *M&T Bank*. See, e.g., *Ditech Financial, LLC v. SFR Investments Pool 1, LLC, et al.*, Case No. 2:17-cv-01772-RFB-PAL, U.S. District Court, District of Nevada, DktEntry 118, issued February 25, 2021 and *Bank of America, N.A. v. Hidden Canyon Owners Association, et al.*, U.S. District Court, District of Nevada, Case No. 2:16-cv-02764-RFB-GWF, DktEntry 91, issued February 25, 2021. SFR anticipates opposition stating that the orders at the 9th Circuit were issued by a clerk and not a motions panel, and that motions to reconsider those orders have been filed. SFR notes that in the reconsideration motions, the opposing parties neglected to tell the Court of Appeals that, after the stay orders were entered but before the reconsideration motions, the U.S. Supreme Court issued orders to the Solicitor General and Freddie Mac to file answers to the *M&T Bank* Petition. See text immediately following this footnote. The response to the motion for reconsideration has been filed in the Ninth Circuit in both cases.

United States and Federal Home Loan Mortgage Corporation originally waived response in *M&T Bank*, on February 18, 2021, the United States Supreme Court has requested a response from them, indicating an increased likelihood of a decision on the merits. Or, it may indicate a question regarding the application of *Collins* to this and other cases involving 12 U.S.C. § 4617(j)(3). Similarly, SFR and Bourne Valley Court Trust filed a joint petition from the Ninth Circuit decisions in those cases, No. 20-907.<sup>3</sup> That petition challenged both the merits decisions and requested a hold pending *Collins*. While this case was scheduled for the February 26, 2021 Conference, on February 23, the Court rescheduled it, without providing a new date as of yet.

*Collins* raised the issue of the constitutionality of the FHFA's structure. There, 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

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<sup>3</sup> *SFR Investments Pool 1, LLC v. Federal Home Loan Mortgage Corporation, et al.*, joint petition from the following orders: *Federal Housing Finance Agency, et al v. SFR Investments Pool 1, LLC*, No. 19-15910, 810 Fed. Appx. 589 (9th Cir. June 25, 2020) (memorandum) and *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, No. 19-15253, 810 Fed. Appx. 492 (9th Cir. June 9, 2020) (memorandum).

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 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 it took place after FHFA put both regulated entities under conservatorship, thus triggering the Foreclosure Bar.

*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).

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 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 in the proceedings below. *Seila Law LLC, supra* (decided June 29, 2020).

Accordingly, SFR asks this Court to stay the instant appeal 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 the instant case should be reversed. Even if the petition as to the statute of limitations is denied, this Court should still stay remittitur pending *Collins*. The Ninth Circuit has begun staying cases similar to this one pending the Supreme Court’s decision in *Collins* and this Court should do the same.<sup>4</sup> Should the U.S.

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<sup>4</sup> See n.2, *supra*.

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: MARCH 11, 2021.

**KIM GILBERT EBRON**

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**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on this 11th day of March, 2021. Electronic service of the foregoing **MOTION TO STAY APPEAL** shall be made in accordance with the Master Service List.

DATED: March 11, 2021.

/s/ Alexander Loglia  
An employee of Kim Gilbert Ebron