Case No. 83214

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company,

Appellant,

vs.

JPMORGAN CHASE BANK, N.A.,

Respondent(s).

APPEAL

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

APPELLANT'S OPENING BRIEF

JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593

DIANA S. EBRON, ESQ.
Nevada Bar No. 10580

KIM GILBERT EBRON
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

Appellant, SFR Investments Pool 1, LLC, is a privately held limited liability company and there is no publicly held company that owns 10% or more of SFR Investments Pool 1, LLC's stock.

In district court, SFR Investments Pool 1, LLC ("SFR") was represented by Howard C. Kim, Esq., Jacqueline A. Gilbert, Esq., Diana S. Ebron, Esq., Karen L. Hanks, Esq., and Caryn R. Schiffman, Esq. of Kim Gilbert Ebron. Jacqueline A. Gilbert, Esq. and Diana S. Ebron, Esq. represent SFR on appeal.

DATED this 30th day of November, 2021.

KIM GILBERT EBRON

/s/Diana S. Ebron
DIANA S. EBRON, ESQ.
Nevada Bar No. 10580
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Attorneys for Appellant,
SFR Investments Pool 1, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 3A. The Judgment on remand per instructions from the Nevada Supreme Court in Case No. 77010 (12AA_2738.) was entered on June 9, 2021 and disposed of all claims remaining following remand.[1] SFR timely appealed on July 9, 2021. (12AA_2753.)

ROUTING STATEMENT

This appeal is presumptively retained by the Nevada Supreme Court because it raises questions of statewide public importance.[2] Further, this case should remain with the Nevada Supreme Court pursuant to NRAP 17 (a)(13)-(14), because it raises issues of first impression.

On Wednesday, June 23, 2021, the Supreme Court of the United States issued its opinion in *Collins v. Yellen*,[3] determining that the FHFA's structure as set forth in HERA violates the separation of powers and is therefore, unconstitutional. The U.S. Supreme Court remanded to determine what remedy was available under the

[1] The prior district court Findings of Fact and Conclusions of law from August 15, 2018 was vacated and the matter remanded with instructions to enter judgment in favor of Chase in the Opinion issued by this Court on October 29, 2020 in Case No. 77010 (11AA_2591).

[2] *See* NRAP 17(a)(2).

[3] *Collins v. Yellen*, Case No. 19-422, 594 U.S. __ (2021).

constitutional claim. This Court must decide whether remand is appropriate to determine damages to SFR caused by the unconstitutional structure of the FHFA.

ISSUES PRESENTED FOR REVIEW

1. Whether this Court should remand for further proceedings to determine compensable harm to SFR caused by the unconstitutional structure of the FHFA?

STATEMENT OF THE CASE

This is a quiet title action arising from a foreclosure sale under NRS Chapter 116. The subject property is located at 3263 Morning Springs Drive, Henderson, Nevada, 89074 (the "Property"). SFR was the highest bidder at the foreclosure sale. On November 27, 2013, Chase brought claims against SFR quiet title and declaratory relief. (1AA_0001-0008.) The original complaint did not mention 12 U.S.C. §4617(j)(3). (*Id.*) SFR counterclaimed for Declaratory Relief/Quiet Title and Injunctive Relief. (1AA_027-0038.)

On March 9, 2016, Chase filed an amended complaint claiming to have been servicing the loan associated with the Property at the time of the sale on behalf of the Freddie Mac. (1AA_0174-0177.)

The district court originally entered summary judgment in favor of SFR on August 23, 2016 (6AA_1332-1342.), and Chase appealed. (6AA_1343.) After the parties stipulated to vacate the August 23, 2016, summary judgment and remand for the purpose of deciding specific issues related to 12 U.S.C. §4617(j)(3), the matter was remanded to the district court accordingly.

Upon remand, both parties moved for summary judgment and SFR moved to strike documents not disclosed in any discovery period. (6AA_1391-9AA_2143.) The district court ultimately found that Chase adequately demonstrated that Freddie

Mac owned the loan at the time of the foreclosure sale but that a three-year statute of limitations applied, and Chase's claims were therefore untimely. (10AA_2175-2181.) Summary judgment was entered in favor of SFR on August 15, 2018. (*Id.*) The Bank again appealed and filed an opening brief containing multiple arguments raised for the first time on appeal or raised in its reply in support of its summary judgment motion. (10AA_2191-2271.) For the first time in over five and a half years of litigation, and after arguing that its loan servicers adequately represent its interests such that they should have standing to raise 12 U.S.C. §4617(j)(3) on their behalf, the Federal Housing Finance Agency ("FHFA") appeared in the litigation and filed a brief of amicus curiae, raising new issues not argued below. (10AA_2272-2299.)

Ultimately, on October 29, 2020, this Court concluded that the district court erred in applying a three-year statute of limitations period based mainly on arguments raised for the first time on appeal. (11AA_2591-2604.) Specifically, this Court determined Chase's claims seeking to enforce the Federal Foreclosure Bar are best characterized as sounding in contract and are therefore governed by a six-year statute of limitations. (*Id.*) Thus, this Court held Chase's action was timely filed. (*Id.*) This Court further concluded that because Chase demonstrated that Freddie Mac owned the loan at the time of the foreclosure sale, the matter was to be remanded for the district court to enter judgment in favor of Chase such that the

Federal Foreclosure Bar prevented the foreclosure sale from extinguishing the deed of trust, and SFR therefore took the property subject to that deed of trust. (*Id.*)

SFR filed a petition for rehearing in which, among other things, SFR requested a stay pending *Collins v. Yellin*, 19-422, the case in which it would later hold that the structure of the FHFA was unconstitutional and its anticipated Petition for Certiorari from the Ninth Circuit opinion, *M&T Bank v. SFR Invs. Pool 1, LLC*, 963 F.3d 854 (9th Cir. 2020), relied on in this Court's October 2020 opinion. The petition for rehearing was denied.

On December 9, 2020, the Supreme Court of the United States heard oral argument on *Collins v. Yellin*, 19-422, the case in which it would later hold that the structure of the FHFA was unconstitutional. On January 6, 2021, SFR formally moved to stay remittitur pending a decision on *Collins* and SFR's then-pending 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. (11AA_2605-2611.) Chase opposed, arguing *Collins* did not support a stay because the issues were waived and had no bearing on this case. (11AA_2613-2626.) In its reply, without an opinion from the United States Supreme Court to analyze and to provide the Court with specific applicability to the instant case, SFR was only able to argue the propriety of considering the issue and the potential applicability. (11AA_2628-2634.)

The Court ultimately granted SFR's motion to stay remittitur based on the petition for certiorari in *SFR Investments Pool 1, LLC v. M&T Bank*. (12AA_2732-2734.)

Following remittitur on the second appeal, the district court, as directed by this Court, entered Judgment as directed by this Court, vacating the August 15, 2018 Findings of Fact and Conclusions of Law in favor of SFR and entering judgment in favor of Chase. (12AA_2738.) The Judgment in favor of chase was entered and filed on June 9, 2021. (*Id.*)

Since entry of that judgment, the United States Supreme Court issued its opinion in *Collins v. Yellin*, 19-422 (June 23, 2021), determining that the FHFA's structure as set forth in HERA violates the separation of powers and is therefore, unconstitutional. The *Collins* Court remanded to determine what remedy was available under the constitutional claim. This Court must decide whether remand is appropriate to determine damages to SFR caused by the unconstitutional structure of the FHFA.

Decisions that harmed SFR were made by the FHFA Director while serving under an unconstitutional statute. Thus, regardless of the finding by this Court and the resulting Judgment entered in the district court, this case must still be remanded for further proceedings to evaluate the damages, or harm, the unconstitutional structure caused SFR.

STATEMENT OF FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

SFR purchased the subject Property as the highest bidder at the May 1, 2013 public foreclosure auction held on behalf of Pebble Canyon Homeowners Association (the "Association") pursuant to NRS 116. At no time before the sale was Freddie Mac named as a beneficiary on the subject Deed of Trust. When SFR purchased the Property, Freddie Mac was not the named beneficiary of the deed of trust. FHFA is conservator for Freddie Mac and Fannie Mae ("GSEs"). Before the Association sale, SFR was involved in litigation with Fannie Mae who did *not* argue that 12 U.S.C. 4617(j)(3) automatically prevented extinguishment of a Deed of Trust.[4] In late 2014/2015, the Director of the FHFA issued statements regarding decision not to consent to the operation of Nevada's superpriority lien laws.[5] The statements were made for the purposes of litigation and specifically referenced litigation.

At that point, SFR was still wholly unaware of FHFA's purported interest in the Property due to the public records and Chase, claiming it held the note and deed of trust in its Complaint.[6] It was not until 2016, over 3 years after the Association

[4] *See* Nevada Supreme Court Case No. 68495 and 64254.
[5] https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx (last accessed November 5, 2021).
[6] (1AA_0001.)

sale, that Freddie Mac, FHFA or 12 U.S.C. §4617(j)(3) were mentioned in this litigation.[7] Once Chase raised 12 U.S.C. §4617(j)(3), SFR argued issues regarding the FHFA's history of implied consent before the Director's decision to issue the statements, as well as the constitutionality of HERA, specifically as applied to FHFA's hidden interests, lack of a process to learn of FHFA's interest, lack of a procedure to request consent and lack of a procedure for a post-deprivation remedy.[8]

On June 23, 2021, the United States Supreme Court held that the structure of the FHFA violates the separation of powers and is unconstitutional.[9]

SUMMARY OF ARGUMENT

According to the Supreme Court of the United States, the structure of the FHFA violates the separation of powers and is therefore, unconstitutional.[10] This is the same FHFA that essentially told this Court it can foreclose on the real property of any Nevadan, even if not in default, leaving Nevada courts powerless to stop the sale due to its expansive statutory powers.[11] As set forth in United States Supreme

---

[7] (1AA_0053.)
[8] (9AA-2143-2147.)
[9] *Collins* v. *Yellen*, 594 U.S. __, 141 S. Ct. 176, 210 L.Ed.2d 432 (2021).
[10] *Collins* v. *Yellen*, 594 U.S. __, 141 S. Ct. 176, 210 L.Ed.2d 432 (2021).
[11] *See* November 4, 2021 Oral Argument in *FHFA v. Dist Ct. (Westland Liberty Village, LLC)*, Case No. 82666, https://nvcourts.gov/Supreme/Arguments/Recordings/82666_FED__HOUS__FIN__AGENCY_VS__DIST__CT__(WESTLAND_LIBERTY_VILLAGE,_LLC)/, at 4:20-6:36 (FHFA counsel explaining court have no power to enjoin FHFA or Fannie Mae), 10:10-10:44 (FHFA counsel confirming he is asking Court to grant a writ petition finding the district court

Court precedent, the issue of structural unconstitutionality may be raised at any time.

Under *Collins*, decisions made by the director under this unconstitutional structure, such as the decision to significantly change the prior policy of consent to the operation of state super lien laws while maintaining a policy of hiding the potential application of 12 U.S.C. §4617(j)(3) without any means to obtain consent even if the purported interest were not hidden.

SFR has long maintained that the sudden change in position by the FHFA, long after most of these foreclosures had occurred, indicating the FHFA does not and has never consented, is contrary to the provisions in the relevant guides and contradictory to the actions taken by the FHFA during the relevant time periods. *Collins* validates what SFR has been arguing to varying degrees all along—the FHFA's director improperly implemented a new policy of non-consent to the operation of state super lien laws with statements issued after many of the affected foreclosures, including this one, had taken place. *Collins* simply provides the support for SFR to present the structural constitutional question.

Because SFR can raise a structural constitutional question at any time, including this argument at this juncture is appropriate and is not waived. Because

---

exceeded its jurisdiction in granting an injunction of a foreclosure despite FHFA not being a party and the argument not being presented to the district court), 27:57-29:00 (counsel for respondent explaining the practical ramifications of FHFA's argument on Nevadans with loans backed by Fannie Mae or Freddie Mac.)

the FHFA has such expansive powers, the decisions made under an unconstitutional structure should be closely scrutinized and not skipped over. The Court should remand for consideration of damages caused by actions of the Director.

STANDARD OF REVIEW

This Court reviews "summary judgment de novo, without deference to the findings of the lower court."[12]

ARGUMENT

Remand to consider SFR's damages for actions taken by the Director of the FHFA is proper here because the *Collins* opinion calls into question every decision made by the director of the FHFA. This includes the FHFA's significant shift in policy to invalidate state property law through the use o12 U.S.C. §4617(j)(3) while maintaining a policy of keeping any FHFA interest a secret and failing to provide any mechanism to request consent even if sought.

I. FHFA'S STRUCTURE IS UNCONSTITUTIONAL

The *Collins* opinion that the FHFA's structure as set forth in HERA violates the separation of powers, and is therefore unconstitutional, calls into question every decision made by the Director of the FHFA. While the U.S. Supreme Court did not

[12] *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

void **every** action taken by the Director under the unconstitutional structure, it did find that the parties may be entitled to retrospective relief. It explained,

> Although an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment), it is still possible for an unconstitutional provision to inflict compensable harm.[13]

In *Collins*, the U.S. Supreme Court remanded for the district court to consider any remedy for compensable harm inflicted by the unconstitutional provision in HERA.[14] The same remedy is appropriate here for SFR.

II. CLAIMS REGARDING THE UNCONSTITUTIONAL STRUCTURE OF FHFA CAN BE CONSIDERED AT ANY TIME

As set forth in United States Supreme Court precedent, the issue of structural unconstitutionality may be raised at any time.[15] "[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."[16]

---

[13] *Collins,* 141 S. Ct. at 1788-1789.
[14] *Id*.
[15] *Carr v. Saul*, 141 S.Ct. 1352 (2021)(holding a structural constitutional challenge may be raised for the first time on appeal); *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)). The Supreme Court of the United States, "has held that even truly forfeited or waived arguments may be entertained when structural concerns or third-party rights are at issue." *June Med. Servs. L. L. C. v. Russo*, 140 S.Ct. 2103, 207 L.Ed.2d 566 (2020)(citing *Freytag* with approval).
[16] *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142–43 (1967).

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."[17] 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."[18] 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."[19]

The *Freytag* court 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.[20] 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."[21]

---

[17] *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)).
[18] *Id.* at 879 (quoting *Glidden*, 370 U.S. at 536).
[19] *Id.*
[20] 501 U.S. at 879 (quoting *Gliddden Co. v. Zdanok*, 370 U.S. at 536. (Harlan, J., announcing the judgment of the Court) (emphasis added)); *id*. at 878 ("The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political.").
[21] *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

In a related context, this Court has also understood *Freytag* to address waiver of "constitutionally based structural protection," not simply Appointments Clause challenges.[22] In *Freytag*, after refusing to find the litigant's constitutional challenge waived, the Court went on to hold 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 founded in the importance of preserving separation of powers.[23] 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."[24]

For present purposes, the important point is that 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. Justice Gorsuch thus recently described *Freytag* as holding that "forfeited or waived arguments may be entertained when structural concerns" – not Appointments Clause Claims – "are at issue."[25]

Appeals); *see also Kuretski v. C.I.R.*, 755 F.3d 929, 936-37 (D.C. Cir. 2014) (applying same rule to case challenging President's power to remove members of the Tax Court).

[22] *Commission on Ethics v. Hardy*, 125 Nev. 285, 299 (2009)

[23] *See* 501 U.S. at 880.

[24] *Hardy*, 125 Nev. at 299.

[25] *June Medical Svcs LLC v. Russo*, 140 S.Ct. 2103, 2175 (2020) (Gorsuch, J., dissenting).

Additionally, raising this challenge at an earlier stage would have been futile, given that the basis of the challenge to the FHFA's structure arose only last summer with the Supreme Court's decision in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (decided on June 29, 2020), well after the close of discovery, summary judgment briefing, and appellate briefing. Prior to that decision, the Supreme Court had repeatedly upheld the constitutionality of independent agencies.[26] It was only in *Seila Law* that the Court held for the first time that an independent agency headed by a *single* director removable only for cause violated constitutional separation of powers.[27] In so doing, the Court overruled Ninth Circuit precedent that had previously upheld the materially indistinguishable structure of the Consumer Finance Protection Board.[28] Further, without the *Collins* opinion explaining a party has standing to conduct discovery into compensable damages caused by decisions of the FHFA's director, any previous argument regarding the applicability of *Collins* in this case could not be complete. As such, any claim related to the issues in *Collins* would have been futile to raise previously, including at the district court where it was given instructions by this Court to enter judgment in favor of Chase.

---

[26] *See id*. at 2198-2200.
[27] *See id*. at 2200-07.
[28] *See CFPB v. Seila Law LLC*, 923 F.3d 680 (9th Cir. 2019), *overruled by Seila Law*, 140 S. Ct. at 2183.

Earlier this year in *Carr v. Saul*, in addition to reaffirming that a structural constitutional challenge may be raised on appeal, the United States Supreme Court also reaffirmed that a constitutional claim is not waived if it would have futile to raise it previously.[29] Thus, SFR raising the unconstitutional structure of the FHFA is proper at this juncture.

Moreover, this Court should consider this issue now because the actions of the unconstitutionally structured FHFA should be closely scrutinized. It is a government agency, acting as conservator of Fannie Mae and Freddie Mac for what was meant to be a limited time based on an emergency, a crisis. To assist the country with this emergency, the FHFA was granted expansive powers in HERA, including 12 U.S.C. 4617(j)(3). At oral argument in another case earlier this month, the FHFA essentially told this Court it can foreclose on the real property of any Nevadan, even if not in default, leaving Nevada courts powerless to stop the sale due to its expansive statutory powers.[30] Because FHFA was granted nearly unchecked powers to

---

[29] *Carr v. Saul*, 141 S.Ct. 1352 (2021)

[30] *See* November 4, 2021 Oral Argument in *FHFA v. Dist Ct. (Westland Liberty Village, LLC)*, Case No. 82666, https://nvcourts.gov/Supreme/Arguments/Recordings/82666_FED__HOUS__FIN__AGENCY_VS__DIST__CT__(WESTLAND_LIBERTY_VILLAGE,_LLC)/, at 4:20-6:36 (FHFA counsel explaining court have no power to enjoin FHFA or Fannie Mae), 10:10-10:44 (FHFA counsel confirming he is asking Court to grant a writ petition finding the district court exceeded its jurisdiction in granting an injunction of a foreclosure despite FHFA not being a party and the argument not being presented to the district court), 27:57-

"preserve and conserve," this Court should not take lightly the FHFA's unconstitutional structure and any compensable damages the decisions of the Director may have caused in Nevada. Both public policy and U.S. Supreme Court precedent support this Court vacating judgment and remanding for further proceedings regarding compensable damages.

III. THE DIRECTOR'S DECISION TO SIGNIFICANTLY SHIFT POLICY REGARDING CONSENT WHILE MAINTAINING A POLICY TO HIDE ITS INVOLVEMENT IN LOANS AND FAILING TO CREATE A PROCEDURE TO REQUEST CONSENT CAUSED COMPENSABLE DAMAGES TO SFR

But for the unconstitutional actions taken by the Director—namely the significant shift in FHFA policy from generally consenting to foreclosure under state super lien laws, to the Director issuing a blanket statement that the FHFA does not nor did it ever consent[31]—SFR would have been able to show it acquired the Property at foreclosure auction free and clear of the deed of trust or it would not have purchased the Property in the first place, thus avoiding years of litigation. Throughout the relevant time period, the expectation was on servicers to protect the priority pursuant to Fannie Mae's servicing guides.[32] If servicers did not do what

29:00 (counsel for respondent explaining the practical ramifications of FHFA's argument on Nevadans with loans backed by Fannie Mae or Freddie Mac.)

[31] https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx (last accessed November 5, 2021).

[32] Fannie Mae Servicing Guide Announcement SVC-2012-05, https://singlefamily.fanniemae.com/media/19006/display (last accessed November 5, 2021) (requiring

they were required to do under the guide with regard to protecting lien priority, the dispute is between servicers and the FHFA—it should not change the outcome of the foreclosure sale. And, the guide and FHFA's actions prior to the "shift in policy" (*i.e.*, non-recording in Freddie Mac's/Fannie Mae's name,[33] hiding purported interest in pending litigation as long as possible,[34] not having a mechanism for consent) each show that FHFA policy was, in fact, to consent to operation of super lien statutes as expected. In other words, prior to more recent statements issued and actions taken by the FHFA director—albeit prepared likely in response to litigation

---

that its loan servicers must "protect the priority of the mortgage lien and[] clear all liens for delinquent homeowners' association dues and condo assessments."); *id*. ("require[ing] servicers to advance funds when the servicer is notified by [a community association] that the borrower is 60 days delinquent in the payment of assessments or charges levied by the association if necessary to protect the priority of Fannie Mae's mortgage lien."); *see also*, May 12, 2016 Letter to Mel Watts, FHFA Director, from Senator Elizabeth Warren and other Members of Congress, https://www.warren.senate.gov/files/documents/2016-5-12_MA_delegation_ltr_to_FHFA.pdf (last accessed November 2, 2021 at p. 2 (expressing concern over Director's decision to implement this new policy to run over state super priority laws with §4617(j)(3) in Nevada and across the nation, and recognizing the FHFA's "significant shift in policy" with widespread impact).

[33] Here, Freddie Mac was not named as a beneficiary of the deed of trust in any public document.

[34] *See*, *e.g.*, Nevada Supreme Court Case No. 81315 (purported Fannie Mae servicer filed two complaints with no mention of Fannie Mae, FHFA, or §4617(j)(3), first mentioning the statute four years after the sale in an amended complaint in the second case); *see also* Nevada Supreme Court Case Nos. 68495 and 64254 and District Court Case Nos. A-13-691253-C and A-12-672799-C (SFR suit against Fannie Mae and servicer/beneficiary where they never even raised §4617(j)(3)).

and arguably now deemed unconstitutional—the FHFA's general policy was to consent to foreclosure and extinguishment of liens such as those provided for in Nevada law.

FHFA's general policy of consent and to agree to abide by local foreclosure law is further evidenced by cases such as *Trademark Properties*.[35] There, a property owned by Fannie Mae through a deed of trust foreclosure was later foreclosed upon by a homeowners association based on a delinquent assessment lien. If §4617(j)(3) applies to a deed of trust, it certainly applies to actual physically owned property of the agency. Yet, Fannie Mae did not even raise §4617(j)(3), losing the property to foreclosure. This is just one example among many demonstrating the FHFA has, in fact, impliedly consented before. The expectation of anything more than implied consent during the relevant time frame is unrealistic, given the policy to keep any interest of Fannie Mae and/or FHFA secret and providing no mechanism to request and/or obtain consent.

But for the blanket statement issued by the Director—long after the relevant time period here and made in the heat of litigation—that the FHFA does not nor has it ever given consent, there is no reason to doubt the existence of the FHFA's consent to state super lien and association foreclosure laws and the FHFA's expectation that

[35] *Trademark Props. of Mich., LLC v. Fed. Nat'l Mortg. Ass'n*, 308 Mich. App. 132, 863 N.W.2d 344 (Mich. App. 2014).

servicers, like Wells Fargo/Nationstar, would protect the FHFA from loss of any lien as a result of a foreclosure under such state laws. At bottom, the records indicates the onus was on servicers to take whatever action was necessary to protect the FHFA—the recorded interest in their name, the fact that they were the ones with all the knowledge and ability to protect any FHFA interests—and the servicers failed. The FHFA's problem is with the servicers, and SFR should not be penalized by an arguably unconstitutional shift in policy that occurred directly as a result of servicers' failure to do what they were contracted to do.

IV. SFR HAS PROPERLY PRESENTED BEFORE THIS COURT THE ISSUE OF WHETHER REMAND IS NECESSARY FOR FURTHER PROCEEDINGS TO DETERMINE COMPENSABLE HARM TO SFR CAUSED BY THE UNCONSTITUTIONAL STRUCTURE OF THE FHFA.

The recent United States Supreme Court decision in *Collins* provided the power behind an argument SFR has already made repeatedly—the FHFA did not have a policy of non-consent to the operation of state super lien laws, but rather a policy of consent backed up by its guidelines and recording policies and practices. The backdrop of this argument is not new. What is new is the fact that there is now an existing Supreme Court case that validates what SFR has been arguing all along—the FHFA's director improperly implemented a new policy of non-consent to the operation of state super lien laws with statements issued after many of the affected foreclosures, including this one, had taken place. The *Collins* opinion simply

provides the support for SFR to present the structural constitutional question—something it is permitted to do at any time.[36] The Supreme Court of the United States, "has held that even truly forfeited or waived arguments may be entertained when structural concerns or third-party rights are at issue."[37]

At bottom, the Supreme Court of the United States in *Collins* makes it clear that decisions and actions taken by the Director of the FHFA under its unconstitutional structure are called into question. While every action is not automatically void, the unconstitutional provision can give rise to compensable harm. Accordingly, this Court should vacate judgment and remand for further proceedings regarding the compensable harm to SFR in this case.

V. THE FHFA DIRECTOR'S ACTION CAUSED HARM TO SFR—THE EXTENT OF WHICH SHOULD BE DETERMINED ON REMAND.

SFR's harm did not result from the automatic operation of a federal statute. It arose from a FHFA director's decision. If the Court finds § 4617(j)(3) applies, SFR requests remand for an opportunity to provide and have the district court evaluate the evidence as to the existence of and extent of damages to SFR as a result of the Director's actions herein. But for the FHFA director's abrupt change in the FHFA's

[36] *Carr v. Saul*, 141 S.Ct. 1352 (2021)(holding a structural constitutional challenge may be raised for the first time on appeal); *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)).
[37] *June Med. Servs. L. L. C. v. Russo*, 140 S.Ct. 2103, 207 L.Ed.2d 566 (2020).

general policy to consent to the operation of state super lien laws—including NRS 116.3116(2) that provides for extinguishment of a first lien if the superpriority portion of an Association lien is not satisfied prior to an Association foreclosure sale on a property—consent for the operation of state super lien laws would have continued. In the end, with the general consent provided by the FHFA and its expectation under its guide that servicers would protect the priority of its liens, SFR would have acquired the Property in issue here free and clear of the Deed of Trust.

Just as the banks in this ongoing homeowners association foreclosure litigation have repeatedly been permitted to bring claims that were never argued once certain case law suggested a new claim or changed the way a Court viewed an issue (i.e. §4617(j)(3), tender, homeowner payment, futility, etc.), after losing on a prior issue (i.e. constitutionality of the statutes), there is no reason to restrict SFR from similarly raising the *Collins* issue here.

Just like the *Collins* shareholders, SFR should be able to go back on remand and develop the case as it relates to the actions of the director and the potential damages caused to SFR as a result of those actions. The United States Supreme Court opened this door and SFR should be permitted to go in. *Collins* permits the remand and the Warren letter lends full credibility to SFR's concerns about the Director's actions. Further, it was well known that President Trump planned to privatize the GSEs and take them out of the control of FHFA's conservatorship. Perhaps if he had

had the opportunity to replace the Director immediately when he took office, rather than have to wait for the expiration of Mr. Watt's term, the additional two years would have given his chosen director time to put into place the necessary policies to privatize the GSEs and make HERA unavailable to them for this litigation.

For example, as President Trump's nominee for Secretary of the Treasury stated: "We've got to get Fannie and Freddie out of government ownership. It makes no sense that these are owned by the government and have been controlled by the government for as long as they have."[38]

But these are things to be fleshed out during additional briefing and discovery into the issues. What the Bank cannot do is say SFR suffered no harm, or cannot prove harm. In fact, the question remains as to whose burden it is; SFR's to show it would not have been harmed under a constitutional make-up of the Agency or the Bank's to show nothing would have changed? SFR is simply requesting this Court to order additional briefing on the issues and them in the first instance. At bottom, further discovery is needed to unveil whether or not the director would have been removed and replaced with one that would not have changed course on the consent to foreclosure and acceptance of state lien laws. And, it does not matter that the FHFA and/or Freddie Mac are not currently a party to the case because the courts

[38] *Mnuchin: Get Fannie Mae, Freddie Mac out of government ownership*, FOX BUSINESS NEWS, at 00:06 to 00:16 (Nov. 30, 2016), https://bit.ly/3iKDZUc.

have overwhelmingly decided that their presence in these cases is unnecessary—over SFR's objections, courts have found that GSE's and their servicers, such as Wells Fargo/Nationstar here, stand in the shoes of the FHFA for purposes of this litigation. The appropriate resolution would be to remand for the lower court to hear argument on the full impact of *Collins* and the potential harm caused to SFR as a result of the Director's actions.

CONCLUSION

For the reasons set forth above, the district court's judgment should be vacated and the matter remanded for further development and briefing regarding what damages were caused to SFR by the unconstitutional structure of HERA.

DATED this 30th day of November, 2021.

KIM GILBERT EBRON

/s/Diana S. Ebron
DIANA S. EBRON, ESQ.
Nevada Bar No. 10580
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Attorneys for Appellant,
SFR Investments Pool 1, LLC

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 21 pages long, and contains 5059 words.
3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

…

…

4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 30th day of November, 2021.

KIM GILBERT EBRON

/s/Diana S. Ebron
DIANA S. EBRON, ESQ.
Nevada Bar No. 10580
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Attorneys for Appellant,
SFR Investments Pool 1, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2021, I filed the foregoing **OPENING BRIEF FOR SFR INVESTMENTS POOL 1, LLC and APPELLANT APPENDICIES VOLUMES 1-12**, which shall be served in accordance with the Master Service List found on the Court's eFlex system as follows:

Master Service List

Docket Number and Case Title:	83214 - SFR INVS. POOL 1, LLC VS. JPMORGAN CHASE BANK, NAT'L ASS'N
Case Category	Civil Appeal
Information current as of:	Nov 30 2021 03:06 p.m.

Electronic notification will be sent to the following:

Jacqueline Gilbert
Matthew Lamb
Joel Tasca
Chantel Schimming
Diana Ebron

/s/ *Diana S. Ebron*
an employee of Kim Gilbert Ebron