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 OPPOSITION TO MOTION FOR SUMMARY AFFIRMANCE

CHANTEL M. SCHIMMING, 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This Court should deny the Bank's motion and consider this appeal on the merits after full briefing. According to the Supreme Court of the United States, the structure of the FHFA violates the separation of powers and is therefore, unconstitutional.[1] 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, with the Court powerless to stop the sale due to its expansive statutory powers.[2] This is the same FHFA that would have been divested of these expansive, emergency powers as conservator of the GSEs at the beginning of 2017 but for the unconstitutional structure of HERA.[3]

---

[1] *Collins* v. *Yellen*, 594 U.S. __, 141 S. Ct. 176, 210 L.Ed.2d 432 (2021), issued after the opening brief was filed in this case.

[2] *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), 27:57-29:00 (counsel for respondent explaining the practical ramifications of FHFA's argument on Nevadans with loans backed by Fannie Mae or Freddie Mac.)

[3] *See* November 11, 2021 Letter from former President Trump to Senator Rand Paul, available at https://assets.realclear.com/files/2021/11/1921_trump_letter_to_rand_paul.pdf. SFR became aware of this letter after it was filed in *Collins v. Yellen*, No. 17-20364, Fifth Circuit Court of Appeals on November 30, 2021 (confirming that former President Trump would have removed the Director and

Public policy dictates that, due to the expansive statutory powers held by FHFA under HERA, this Court should not gloss over harmful FHFA actions, including maintaining a policy of actively hiding its purported interests from the public while at the same time changing from a long-standing position of implied consent and holding its loan servicers accountable for failing to follow GSE guidelines, to a retroactive policy of non-consent when the loan servicers failed to protect the security interest as required.

Because Chase has been deemed to stand in the shoes of the FHFA for purposes of this litigation by this Court, SFR should be allowed to seek damages against Chase or to add the FHFA to the litigation as a necessary party. The FHFA has already appeared in this case—albeit five and a half years into the litigation and after the conservatorship would have ended—to add new arguments not previously raised to the previous appeal. At a minimum SFR will be able to show that the Director's decision to maintain a policy of hiding FHFA's interest for as long as possible (in this case over three years after the Association sale, despite claiming an interest well before it took place) caused damage to SFR in the form of years of expensive litigation that could have been avoided all-together.

SFR can raise a structural constitutional question at any time, this argument

---

replaced him with a new director who would dissolve the conservatorship at the beginning of his Administration.).

at this juncture is appropriate and is not waived. Because the FHFA has such expansive powers, the decisions made under an unconstitutional structure should be closely scrutinized and not decided summarily. SFR should have the opportunity to fully brief these important issues.

ARGUMENT

I. SUMMARY AFFIRMANCE IS NOT APPROPRIATE HERE

Chase relies primarily on this Court's decision to summarily affirm the district court's decision in [*Law*] *v. Whitmer*, 477 P.3d 1124 (Nev. 2020), suggesting that the affirmance was due to a rejection of an attempt to introduce new arguments on appeal. Motion, p.2. What Chase ignores is that *both* appellant and appellee in the *Law* case agreed that the case should be decided only days after the appeal was filed since the case dealt with an election-related issue. Similarly, the other cases cited by Chase related to ballot issues and/or injunctive relief in which the parties appear to acknowledge or requested an expedited decision. Motion, p.2, fn. 1. As explained further below, raising this issue at an earlier stage than the motion to stay filed by SFR in the previous appeal would have been futile due to controlling precedent before that time. It is disingenuous for Chase to argue that SFR should not be able to raise this important issue after new rulings by the United States Supreme Court, particularly because the last appeal in this case was decided based on arguments not raised below. Chase's motion should be denied.

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.[4] "[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."[5]

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."[6] 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."[7] In such cases, the "strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers" outweighs any

---

[4] *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).

[5] *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142–43 (1967).

[6] *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)).

[7] *Id.* at 879 (quoting *Glidden*, 370 U.S. at 536).

"disruption to sound appellate process entailed by entertaining objections not raised below."[8]

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.[9] 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."[10]

In a related context, this Court has also understood *Freytag* to address waiver of "constitutionally based structural protection," not simply Appointments Clause challenges.[11] 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

---

[8] *Id.*

[9] 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.").

[10] *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); *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).

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

preserving separation of powers.[12] 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."[13]

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."[14]

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 the previous appeals. Prior to that decision, the Supreme Court had repeatedly upheld the constitutionality of independent agencies.[15] It was only in *Seila Law* that the Court held for the first time that an independent agency

---

[12] *See* 501 U.S. at 880.
[13] *Hardy*, 125 Nev. at 299.
[14] *June Medical Svcs LLC v. Russo*, 140 S.Ct. 2103, 2175 (2020) (Gorsuch, J., dissenting).
[15] *See id*. at 2198-2200.

headed by a *single* director removable only for cause violated constitutional separation of powers.[16] In so doing, the Court overruled Ninth Circuit precedent that had previously upheld the materially indistinguishable structure of the Consumer Finance Protection Board.[17] 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.

Last 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.[18] 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

---

[16] *See id*. at 2200-07.
[17] *See CFPB v. Seila Law LLC*, 923 F.3d 680 (9th Cir. 2019), *overruled by Seila Law*, 140 S. Ct. at 2183.
[18] *Carr v. Saul*, 141 S.Ct. 1352 (2021)

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 a few months ago, 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.[19] Because FHFA was granted nearly unchecked powers to "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 FHFA DIRECTOR'S ACTION CAUSED HARM TO SFR—THE EXTENT OF WHICH SHOULD BE DETERMINED ON REMAND.

But for the Director's abrupt change in the FHFA's general policy to consent to the operation of state super lien laws—including NRS 116.3116(2)—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 the Property free

[19] *See* fn. 2, supra.

and clear of the Deed of Trust. Alternatively, SFR could have avoided buying the Property in the first place or not wasted years of expensive litigation while FHFA's purported interest continued to be hidden.

It is not for this Court to evaluate the evidence to the existence of and the extent of damages to SFR as a result of the Director. Rather, that is for the lower court to evaluate on remand.[20] 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.

It is well known that former President Trump would have removed the GSEs from conservatorship, effectively making it impossible for Chase to claim to be acting on its behalf for at least the last five years of this litigation.[21]

What former President Obama would have done if he had been able to remove the Director of the FHFA, particularly given Senator Warren's stated concerns, has not been as widely publicized. At bottom, further discovery is needed to unveil

[20] *Ryan's Express v. Amador Stage Lines*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012).
[21] *See* fn.3, supra

whether 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. FHFA's and/or Freddie Mac's current status as non-parties is inconsequential because the courts have overwhelmingly decided that their presence in these cases is unnecessary—over SFR's objections, courts have found that servicers stand in the shoes of the FHFA for purposes of this litigation.

Chase argues that summary affirmance is appropriate because SFR does not have a specific claim for damages. However, SFR's prayer for relief in its 2014 answer and counterclaim requests attorneys fees and costs as well as any other relief that the Court may deem just and proper. The *Collins* decision makes it clear that rather than voiding every action taken under the unconstitutional structure, the just and proper remedy is allowing remand to determine damages. The Bank's motion should be denied, and the appeal should be considered on the merits after full briefing.

CONCLUSION

The motion for summary affirmance should be denied, and the appeal should be considered on the merits with SFR having a chance fully address Chase's arguments in a reply brief.

DATED this 12th day of January, 2022.

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 12th day of January, 2022, I filed the foregoing **APPELLANT'S OPPOSITION TO MOTION FOR SUMMARY AFFIRMANCE**, 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:	Jan 12 2022 05:17 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