IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL 1, LLC, Appellant, vs. JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, Respondent.	Case No. **83214**

APPEAL

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

REPLY BRIEF

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INTRODUCTION

According to the U.S. Supreme Court, the structure of the FHFA violates the separation of powers and is therefore, unconstitutional. Under *Collins*,[1] 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 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.

The decision in *Collins* provided SFR with a constitutional mechanism for challenging this shift in policy. Because SFR can raise a structural constitutional question at any time, including at this juncture, SFR's argument is appropriate and not waived. Thus, the unconstitutional structure of the FHFA requires remand for consideration of damages caused by the actions of the Director. These damages would be pursued against JPMorgan Chase, as agent for Freddie Mac.

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[1] *Collins v. Yellen*, 594 U.S. __, 141 S. Ct. 1761, 1788-1789, 210 L.Ed.2d 432 (2021).

ARGUMENT

I. REMAND TO CONSIDER SFR'S DAMAGES FOR ACTIONS TAKEN BY THE DIRECTOR IS PROPER

The *Collins* opinion holding 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 void every action taken by the Director, it did find 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.[2]

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.[3] This includes the exact harm inflicted on SFR as a result of the Director's decision in late-2014/early-2015 to go against previous policies and practices of implicit consent to foreclosure under state super lien laws.[4] Prior to this significant shift in policy, the policy and practice of the FHFA as conservator was NOT to

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[2] *Collins*, 141 S. Ct. at 1788-1789.
[3] *Id.*
[4] https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx.

invalidate state property law through the use of 12 U.S.C. §4617(j)(3), but rather to consent to operation of state super lien laws. Specifically, NRS 116.3116 provides for a six-month super-priority lien rather than nine months for Fannie Mae and Freddie Mac. Consistent with this, both GSE guides recognize the lien priority of an Association lien like that in Nevada: "If applicable State law creates a lien priority over Freddie Mac's First Lien position for delinquent condominium/HOA or Cooperative Corporation assessments assessed pre-foreclosure, then Freddie Mac will reimburse the Servicer for its payment of regular assessments assessed pre-foreclosure…" [5] and "protect the priority of the mortgage lien and clear all liens for delinquent homeowners' association dues and condo assessments."[6] Fannie Mae's servicing guide also "required 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

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[5] *See* Freddie Mac Servicing Guide, Section 9701.01; Fannie Mae Servicing Guide Announcement SVC-2012-05.

[6] *See* 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) ("Letter"); *see also*, Press Release, https://www.warren.senate.gov/newsroom/press releases/massachusetts-congressional-delegation-urges-fhfa-to-delay-new-policy on-and-147super-lien-and-148-laws-affecting-homeowners-in-community associations at p. 2 (last accessed November 2, 2021) ("Press Release").

the priority of Fannie Mae's mortgage lien."[7] These loan servicer requirements are proof of the FHFA's intent for state super lien laws to operate, not be preempted. The expectation that the servicers would protect the priority of any of its liens provides the explanation for why the FHFA maintained a practice of actively hiding any interest in real property in the public record and did not implement a procedure to obtain consent. Simply put, the FHFA consented to the extinguishment of liens pursuant to state property law and put the ball in the court of the servicers to ensure that the priority of any of its liens was protected.

A. SFR has properly presented the issue of whether remand is necessary to determine compensable harm to SFR caused by the unconstitutional structure of the FHFA.

The recent *Collins* decision merely 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 had 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 there is now an existing U.S. Supreme Court case validating 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

[7] *See Fannie Mae* Guide.

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. At bottom, the U.S. Supreme Court in *Collins* makes it clear 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 remand for further proceedings regarding the compensable harm to SFR in this case.

B. Collins is wholly relevant to the claims and defenses in this case.

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 the FHFA does not nor did it ever consent—SFR would have been able to show it acquired the Property at foreclosure auction free and clear of the Deed of Trust. Throughout the relevant time period, the expectation was on Servicers to protect the priority pursuant to Fannie Mae's servicing guides. If Servicers failed to abide by the Guide with regard to protecting lien priority, the dispute was between Servicers and the GSE/FHFA—it would not have changed the outcome of the foreclosure sale. And, the guide and FHFA actions prior to the "shift in policy" (i.e., non-recording in GSE's names, not having a mechanism for consent) each show FHFA's policy was, in fact, to consent

to the operation of super lien statutes as expected. In other words, prior to statements issued and actions taken by the FHFA director, albeit prepared likely in response to litigation 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.

The FHFA's general policy of consent, and agreement to abide by local foreclosure law, is further evidenced by cases such as *Trademark Props. Of Mich., LLC v. Fed. Nat'l Mortg. Ass'n*.[8] There, a property owned by Fannie Mae through a deed of trust foreclosure was actually foreclosed upon by the homeowners association to which the property was subject, 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 the specter of §4617(j)(3) in that litigation, losing the property to foreclosure. This is just one example demonstrating the FHFA has, in fact, consented before. The expectation of anything more than consent during the relevant time frame is unrealistic, given the policy to keep any interest of the GSE and/or the 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 in this case and made in the heat of

[8] 308 Mich. App. 132, 863 N.W.2d 344 (Mich. App. 2014).

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 Servicers, like Chase or the prior servicer here, would protect the FHFA from loss of any lien as a result of a foreclosure under such state laws. At bottom, everything in the records indicate 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.

C. The FHFA Director's action caused harm to SFR—the extent of which to be determined on remand.

Simply put, but for the FHFA 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) 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 question here free and clear of the Deed of Trust. Chase puts a ton of effort in its answering brief into arguing whether or not SFR was damaged and to what extent, proposing that remand is inappropriate because SFR cannot prove a change in policy that caused damage. However, 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 in the instant matter. Rather, that is for the lower court to evaluate on remand. This is so because "[a]n appellate court is not particularly well-suited to make factual determinations in the first instance."[9] SFR does not have to prove its case here at the appellate court. 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 U.S. Supreme Court opened this door and SFR should be permitted to go in. *Collins* permits the remand and examples like the Warren letter lend full credibility to SFR's concerns about the director's actions. As another example, 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 Mel Watt, the Director immediately when he took office, rather than have to wait for the expiration of Mr. Watt's term, the additional two

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

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 Treasurystated: "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."[10]

In sum, 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, despite Chase's argument otherwise, the fact the FHFA and Freddie Mac are not parties does not make *Collins* irrelevant, nor does it require SFR to amend and add parties. Over SFR's objections, courts, including this Court and the Ninth Circuit, have overwhelmingly decided GSE's and their servicers stand in the shoes of FHFA for purposes of this litigation. Chase cannot now argue otherwise. Also, it is disingenuous for Chase, in this type of ongoing homeowners association foreclosure litigation, to complain prejudice would result from remanding the matter when it has repeatedly, throughout the history of this type of litigation, been permitted to bring claims on remand that were never argued below, or even on appeal, once certain case

[10] 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.

law suggested a new claim or changed the way a Court viewed an issue (i.e. 4617(j)(3), tender, homeowner payment, futility, etc.)—this 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. 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, this Court should remand so the district court can determine what damages were caused to SFR by the unconstitutional structure of HERA.

Dated this 4th day of April, 2022.

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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, doublespaced 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 13 pages long, and contains 2,280 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.

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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 4th day of April, 2022.

/s/ Karen L. Hanks
Karen L. Hanks, Esq.

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 4th day of April, 2022. Electronic service of the foregoing Reply Brief shall be made in accordance with the Master Service List.

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