No. 20-908

IN THE
Supreme Court of the United States

SFR INVESTMENTS POOL 1, LLC,
Petitioner,

v.

M&T BANK; FEDERAL HOME LOAN MORTGAGE CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS FEDERAL HOME LOAN MORTGAGE CORPORATION AND M&T BANK

Nathan F. Smith*
MALCOLM CISNEROS
2112 Business Center Drive
Irvine, CA 92612
(949) 252-9400

**Counsel of Record for M&T Bank*

Matthew A. Fitzgerald*
John H. Maddock, III
Sarah B. Boehm
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
(804) 775-4716
mfitzgerald@mcguirewoods.com

**Counsel of Record for Federal Home Loan Mortgage Corporation*

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CORPORATE DISCLOSURE STATEMENT

Freddie Mac hereby states that it is a government-sponsored enterprise chartered by the United States Congress, does not have parent corporations, and is currently under conservatorship under the direction of the Federal Housing Finance Agency. According to SEC filings, no publicly held corporation owns more than 10% of Freddie Mac's common (voting) stock.

M&T Bank discloses that it is a publicly traded company (NYSE: MTB). M&T Bank has no parent company and no publicly held company owns more than 10% of M&T Bank's stock.

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INTRODUCTION

This is a quiet-title action. Petitioner acquired real property in Nevada through a foreclosure sale. At the time, Respondent Freddie Mac owned a deed of trust encumbering the property. Petitioner, relying on state law, contends that the foreclosure extinguished Freddie Mac's interest, leaving Petitioner with clean title.

But Freddie Mac has at all relevant times operated under conservatorship of the Federal Housing Finance Agency (FHFA or the Agency), and a federal statute protects conservatorship property from extinguishment by "foreclosure[] or sale." 12 U.S.C. § 4617(j)(3) (the Federal Foreclosure Bar). Respondents established that the Federal Foreclosure Bar preserved Freddie Mac's deed of trust.

The sole issue presented to the court of appeals was whether a time-bar provision in the conservatorship statute—*id.* at § 4617(b)(12)(A) (the Limitations Provision)—prevented Respondents from asserting the Federal Foreclosure Bar. The court of appeals held that it did not. Petitioner asks this Court to review that decision on the merits and vacate it.

A statutory provision unrelated to the Federal Foreclosure Bar and the Limitations Provision, and which no party cited below, protects FHFA's Director from removal without cause. 12 U.S.C. § 4512(b)(2) (the Removal Provision). In *Collins v. Yellen*, No. 19-422, other parties contend the Removal Provision is unconstitutional on separation-of-powers grounds. On that basis they ask the Court to invalidate a contract the Agency made as Conservator. Unlike *Collins*, this case involves the default application of a statute, not a challenge to any affirmative act of the Conservator. Petitioner also asks this Court—apparently as an alternative to merits review on the limitations question, although the petition is not clear—to hold the petition pending issuance of a decision in *Collins*, and then, assuming the *Collins* decision is germane, to grant the petition here, vacate the Ninth Circuit's decision, and remand the case.

Collins is exceedingly unlikely to affect this case. Petitioner—apparently recognizing that this case is unlike *Collins* in that no specific act of the Conservator is challenged—posits that *Collins* may require FHFA's "conservatorship[s] of Fannie Mae and Freddie Mac [to] be set aside" in their entirety. Pet. i. That is wrong.

Petitioner is in no position to assert that the conservatorships are constitutionally infirm. Petitioner failed to preserve that argument below, and this Court should not excuse the failure. Petitioner would not prevail on the substance of argument anyway. The removal provision did not apply to the official acting as FHFA's Director when the Agency placed Fannie Mae into conservatorship. Regardless, the time to challenge the 2008 decision to place the Enterprises into conservatorships has long since passed.

In any event, it is exceedingly unlikely that the Court would invalidate the conservatorships in their entirety in *Collins* or in this case. No party in *Collins* has requested that relief, which would be unprecedented.

As a purely practical matter, voiding the nearly 13-year-old conservatorships in their entirety would be virtually impossible. Even if it were feasible to rescind the countless business decisions the Conservator has made and to unwind the millions of transactions the conservatorships have entered, that would be so disruptive as to virtually guarantee disaster.

Petitioner's other question—whether the Ninth Circuit applied the Limitations Provision correctly—is equally unworthy of this Court's attention. Petitioner, who was a party to a case in which the Nevada Supreme Court decided the same issue the same way last November, does not seriously contend there is any split in authority, and there is none. Indeed, Petitioner apparently did not consider the Nevada decision significant enough to seek this Court's review.

Nor does the issue involve an important question of federal law. Petitioner musters up a parade of horribles, arguing that the integrity of state property and tort law, as well as Nevada's state sovereignty, are in great jeopardy. Pet. at 9-10. Evidently the Nevada Supreme Court thought otherwise, as it reached the exact same conclusion as the Ninth Circuit, without articulating any concerns about the integrity of state law or state sovereignty.

At bottom, the decision is uncontroversial and correct on the merits. The petition articulates no plausible basis for certiorari, and none exists.

STATEMENT OF THE CASE

Congress chartered the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal National Mortgage Association (Fannie Mae and, together with Freddie Mac, the Enterprises) to stabilize and support the nationwide residential-mortgage market. *See Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 556 (2017); *City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1114 (9th Cir. 2014).

The Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654, established FHFA as the Enterprises' regulator, authorized FHFA to place the Enterprises into conservatorships, and defined the powers the Agency would have in its separate capacity as Conservator if, as regulator, it placed a "regulated entity" into conservatorship. 12 U.S.C. 4617(a). In September 2008, FHFA placed the Enterprises into conservatorships, where they remain today. *See Town of Babylon v. FHFA*, 699 F.3d 221, 227 (2d Cir. 2012).

HERA provides that during a conservatorship, FHFA succeeds to "all rights, titles, powers, and privileges" of the entity in conservatorship "with respect to [its] assets," making all Enterprise assets "property of the Agency." 12 U.S.C. § 4617(b)(2)(A) and (j)(2). The Federal Foreclosure Bar states that "[n]o property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency." It protects those assets from extinguishment by, among other things, any state-law foreclosure procedure. *Id.* § 4617(j)(3).

HERA also contains a limitations provision applicable to "any action brought by the Agency as conservator or receiver." *Id.* § 4617(b)(12). Although the provision covers "any" action, it states the applicable limitations periods in terms of whether an action sounds in contract or tort:

> (i) in the case of any contract claim, the longer of—
> (I) the 6-year period beginning on the date on which the claim accrues; or
> (II) the period applicable under State law; and
> (ii) in the case of any tort claim, the longer of—
> (I) the 3-year period beginning on the date on which the claim accrues; or
> (II) the period applicable under State law.

Id. § 4617(b)(12)(A).

This case is a quiet-title action. The parties dispute whether a security interest—known as a deed of trust under Nevada law, and equivalent to a mortgage—survived an HOA's foreclosure for unpaid assessments. Pet. App. 4a.

Under Nevada law, a properly conducted foreclosure on such a lien extinguishes first-recorded security interests in the property. *See* Nev. Rev. Stat. § 116.3116(2); *SFR Invs. Pool 1 v. U.S. Bank, N.A.*, 334 P.3d 408, 419 (Nev. 2014) (en banc). But the Federal Foreclosure Bar preempts state law, protecting Enterprise-owned deeds of trust from extinguishment in Nevada HOA sales. *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017); *Daisy Trust v. Wells Fargo Bank, N.A.*, 445 P.3d 846, 849 (Nev. 2019) (en banc).

In 2007, Freddie Mac acquired a $202,250 loan secured by the property here. Freddie Mac owned both the note and the corresponding deed of trust. Pet. App. 11a. On July 11, 2012, the HOA conducted a foreclosure sale to collect on its lien for unpaid assessments owed by the homeowner. Petitioner bought the property for $5,200 at the sale. *Id.* at 5a. Freddie Mac owned the deed of trust encumbering the property at that time. *See id.* at 14a–16a, 21a–24a.

Just under five years later, on July 7, 2017, Respondents M&T Bank and Freddie Mac sued Petitioner to quiet title, seeking a judgment that the Federal Foreclosure Bar protected Freddie Mac's deed of trust from extinguishment. *Id.* at 5a. Petitioner moved to dismiss the claims as untimely under HERA's three-year statute of limitations for tort claims. *Id*. The district court held that the action was timely filed under a state-law statute of limitations allowing actions "founded upon the title to real property" to be brought within five years of the triggering event. *See id.* at 5a–6a (quoting Nev. Rev. Stat. § 11.070).

The district court later granted summary judgment to Respondents, holding that the Federal Foreclosure Bar preserved the deed of trust from extinguishment. *Id.* at 21a–24a.

Petitioner appealed, again arguing that Respondents' claims were time-barred under HERA's three-year limitations period for tort claims. *See id.* at 3a; Pet. 8. Petitioner limited its appeal to the issue of what period the Limitations Provision specified—whether the contract or the tort prong governed the quiet-title claim.

At no point in the district court or Ninth Circuit proceedings did Petitioner assert any separation-of-powers issue or argue that the conservatorships must be set aside. Nor did Petitioner suggest that the pendency of *Collins v. Yellen*, 938 F.3d 553 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 193, No. 19-422 (July 9, 2020), or the issues presented in that case (which was argued Dec. 9, 2020) might affect the disposition of this case.

The court of appeals unanimously affirmed. Pet. App. 10a. The court held that HERA's Limitations Provision governed Respondents' Federal Foreclosure Bar-based claims despite FHFA's absence from the case, because Respondents "[stood] in the [Agency's] shoes" on the claims. *Id.* at 8a. Next, noting that the Limitations Provision "only explicitly addresses 'tort' and 'contract' claims" but applies to "all claims brought by the FHFA as conservator," the court reasoned that "if neither description is a perfect fit [for Respondents' claims], we must decide when applying the statute whether a claim is better characterized as sounding in contract or tort." *Id.* The court held that Respondents' claims were better viewed as sounding in contract under the Limitations Provision. *Id.* at 9a. The claims depended on Freddie Mac's deed of trust, which was "an interest created by contract," and they did not "seek damages or claim a breach of duty resulting in injury to a person or property, two of the traditional hallmarks of a torts action." *Id.* Finally, the court held that "even if the question were closer," the court would apply the longer limitations period as a matter of federal policy. *Id.* at 9a–10a.

Petitioner moved for panel rehearing and rehearing en banc, but the court of appeals denied the motion on August 4, 2020. Pet. App. 26a–27a. Petitioner then moved to stay the mandate pending a petition to this Court. The court of appeals denied that motion as well, and the mandate issued. Mot. to Stay Mandate, *M&T Bank v. SFR Invs. Pool 1, LLC*, No. 18-17395 (9th Cir. Aug. 10, 2020); Order Denying Mot. to Stay Mandate, *M&T Bank v. SFR Invs. Pool 1, LLC*, No. 18-17395 (9th Cir. Aug. 11, 2020). On December 31, 2020, Petitioner filed the petition in this Court.

Petitioner has an economic incentive to prolong the appeal process. Having acquired the property for far less than fair market value in the HOA foreclosure, Petitioner stands to reap substantial profits by renting it out at market rates. Meanwhile, Freddie Mac—which made a substantially larger, market-priced investment in the loan secured by the property—receives no return at all on its investment until it can enforce its security interest. Indeed, Petitioner and similarly situated parties have moved to stay several similar cases pending in the Ninth Circuit, the federal district court in Nevada, and the Nevada Supreme Court, arguing the pendency of the petition here warrants halting progress in the litigation.

ARGUMENT

Petitioner contends that this Court's forthcoming decision in *Collins* will affect this case, and requests that the Court hold the petition until the *Collins* decision issues, then grant the petition, vacate the decision below and remand this case to the Ninth Circuit. Pet. 10–13. Petitioner also contends that the Ninth Circuit's decision to apply the HERA Limitations Provision's six-year period is independently worthy of this Court's review. *Id.* at 13–27.

Neither contention is correct. The Court should decline to hold the petition and should instead deny certiorari as to both issues without delay.

I. *Collins* Provides No Basis to Grant Certiorari or Hold the Petition.

Petitioner likens this case to *Collins*, posing the question "Whether the FHFA's structure violates separation of powers and, if so, whether its conservatorship of Fannie Mae and Freddie Mac must be set aside." Pet. i. *Collins* is about HERA's Removal Provision, which specifies that FHFA's Director serves for a five-year term "unless removed before the end of such term for cause by the President," 12 U.S.C. § 4512(b)(2). *Collins*'s pendency warrants neither a grant nor a hold of the Petition here.

A. Review of the Removal Provision's Effect on the Conservatorships Is Not Warranted Here.

Petitioner posits that this "case warrants review for the reasons this Court granted certiorari in *Collins*." Pet. 9. Petitioner asserts that if the forthcoming *Collins* decision deems the Removal Provision unconstitutional, "the Agency's decision to put Fannie Mae and Freddie Mac into conservatorship[s] … must be set aside." *Id.* at 9. Curiously, Petitioner then disclaims any intent to have the Court actually consider whether that result would follow. Pet. 10. Instead, Petitioner—who benefits economically from delay, *see supra* at 6—asks the Court to remand the case. *Id.*

Petitioner's disclaimer aside, granting certiorari to consider the Removal Provision's effect on the validity of the nearly 13-year-old conservatorships is unwarranted here, for at least three reasons.

First, Petitioner did not present or preserve any challenge to the Removal Provision below, and cannot do so for the first time before this Court. Petitioner acknowledges this failure but seeks to excuse it because parties may "raise an Appointments Clause challenge" at any time. Pet. 11–12 (citing *Freytag v. C.I.R.,* 501 U.S. 868, 878–79 (1991)). But unlike *Freytag*, neither *Collins* nor this case involves a challenge grounded in the Appointments Clause. *See Freytag,* 501 U.S. at 878 (addressing Appointments Clause objection to "special trial judge"). Instead, the challenges to the Removal Provision rely on more general separation-of-powers principles.

In any event, *Freytag* is inapt. In that case, the petitioner *did* raise its constitutional challenge in the court of appeals. This Court considered only whether the failure to raise it in the *trial court* precluded the Court from considering it. *See id.* at 872. The tax court is an Article I tribunal, so by raising the issue in the court of appeals, the aggrieved party did so at its first opportunity before an Article III tribunal. Thus, this Court had the benefit of a fully developed appellate record.

Here, by contrast, this Court would hear the Removal Provision issue in the first instance. Petitioner would be formulating its theory on the fly, and this Court would face myriad questions about matters such as the statutory basis for Petitioner's challenge, Petitioner's standing to bring such a challenge, whether any such challenge would be timely at this point, and whether Petitioner forfeited its claim—all before even approaching the merits. This Court does not ordinarily consider cases presenting such a variety of threshold problems to be appropriate vehicles for review, even of important and unresolved issues.

Petitioner posits that it would have been "futile" to raise the constitutional issues in the district court or the court of appeals "given existing circuit precedent." Pet. 12. Not so. CFPB and FHFA are different agencies with different organic statutes, so a ruling on CFPB's structure was not binding on a court considering FHFA's structure. Indeed, if the contrary were true, there would have been no reason for this Court to grant certiorari on the substantive separation-of-powers issue in *Collins* and appoint an amicus to defend the constitutionality of FHFA's structure against the separation-of-powers challenge.

Moreover, Petitioner never explains why, if it believed it had a "nonfrivolous argument for … modifying[] or reversing existing law," Fed. R. Civ. P. 11(a), it failed to offer it. Petitioner cannot plausibly argue that the Removal Provision was not yet being debated. This action commenced in the district court in July 2017; Petitioner filed its summary judgment brief in April 2018. Complaint, *M&T Bank v. SFR Invs. Pool 1, LLC*, No. 2:17-cv-01867 (D. Nev. July 7, 2017); Resp. to Mot. for Summ. J., *M&T Bank v. SFR Invs. Pool 1, LLC*, No. 2:17-cv-01867 (D. Nev. Apr. 11, 2018). At that time, the appeal in *Collins* was already fully briefed and argued, and the case had drawn media attention. *See* Oral Argument Docket Entry, *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Mar. 7, 2018).[1] In any event, *Collins*'s posture at that time is beside the point. Petitioner was free to be the first party to raise the structural issue the *Collins* plaintiffs raised.

Second, even if Petitioner's failure to preserve the Removal Provision issue could be excused, Petitioner's argument would fail on the merits because the FHFA Director who made the conservatorship decision was not subject to the removal provision at issue in *Collins*. In enacting HERA, Congress provided that on the effective date of the statute, the Director of the Office of Federal Housing Enterprise Oversight (OFHEO) of the U.S. Department of Housing and Urban Development—James B. Lockhart, III—would "act for all purposes as, and with the full powers of, the [FHFA] Director," and would do so "*[n]otwithstanding*" the subsection containing the Removal Provision.

[1] Despite the different name, this is the same *Collins* case; the caption changed upon the confirmation of a successor public official on January 25, 2021. *See* S. Ct. R. 35(3).

12 U.S.C. § 4512(b)(5) (emphasis added); *see also FHFA v. UBS Americas Inc.*, 712 F.3d 136, 139 (2d Cir. 2013) (discussing functional conversion of OFHEO into FHFA).

Because Mr. Lockhart acted as FHFA Director "notwithstanding" the Removal Provision, it does not apply to him, and therefore his acts do not implicate the constitutional issues underlying *Collins*. Rather, the President's authority to remove Mr. Lockhart was at all times unrestricted. Nothing Mr. Lockhart did while acting as the FHFA Director—including placing the Enterprises into conservatorships—can be unwound on separation-of-powers grounds.

Third, to the extent Petitioner's argument would be construed as a new claim challenging FHFA's decision to place the Enterprises into conservatorships, it would be time-barred. HERA provides that challenges to the Agency's appointment as conservator or receiver had to occur in district court "within 30 days of such appointment." 12 U.S.C. § 4617(a)(5)(A). Even if Petitioner could somehow circumvent that specific time-bar, a putative challenge would still be untimely under 28 U.S.C. § 2401(a), which requires "every civil action commenced against the United States" to be brought "within six years after the right of action first accrues"—here, September 2008.

B. *Collins* Does Not Warrant Holding the Petition.

Having disclaimed any intent to seek substantive review that would, for the reasons stated above, be inappropriate in any event, Petitioner contends that "the Court should hold [the Petition] pending its decision in [*Collins*]," then grant certiorari anyway. Plaintiff's gambit is to request only a grant, vacate, and remand order, based on the assumption that *Collins* will affect this case. Pet. 10. Petitioner's assumption is unfounded and incorrect, and this Court should reject the gambit.

The only connection between *Collins* and this case is that each involves FHFA and the Enterprises under conservatorship. The question in *Collins* is whether the "for cause" requirement in HERA's Removal Provision violates the federal constitutional separation of powers. S*ee* Collins Br. 2, 60–61, *Collins v. Yellen*, No. 19-422. Petitioners in *Collins* contend that if the removal provision is unconstitutional, then the Court should invalidate a particular action FHFA took in 2012—an amendment to an agreement with the Department of Treasury that restructured the Enterprises' dividend and other financial obligations to Treasury. *See id.* at 62–66. The federal government opposes that relief. Fed. Parties' Reply & Resp. Br. 28, 40–47, *Collins v. Yellen*, Nos. 19-422, 19-563 (Oct. 23, 2020).

Here, Petitioner does not attack any particular action of the Conservator, but contends that the protection granted by the Federal Foreclosure Bar should not preserve Freddie Mac's deed of trust on the property at issue because Freddie Mac did not timely assert it. Once a conservatorship is in place, the Federal Foreclosure Bar operates automatically, "cloak[ing] Agency property with Congressional protection unless or until the Agency affirmatively relinquishes it." *Berezovsky*, 869 F.3d at 929. Thus, no action by the Conservator is required for the statutory protection to apply. *See* 12 U.S.C. § 4617(j)(3); *Freddie Mac v. SFR Invs. Pool 1, LLC*, 893 F.3d 1136, 1148 (9th Cir. 2018) (noting that the Federal Foreclosure Bar "does not necessitate a decision by FHFA" but "applies by default"). Indeed, Petitioner did not argue in the proceedings below, and does not argue here, that FHFA acted affirmatively at all in relation to the property, let alone that any such action was invalid.

Petitioner still tries to ride *Collins*'s coattails by claiming that FHFA's decision as regulator to place the Enterprises into conservatorships "must be set aside if this Court determines that FHFA's structure is unconstitutional." Pet. 9; *id*. at 10 ("The decision below should be vacated because the FHFA conservatorship is invalid").

But that would be extraordinary and unprecedented. This Court has never suggested that a constitutionally defective removal provision could make an agency and everything it has ever done void ab initio. To the contrary, the Court stressed in recent removal-power decisions that a constitutionally flawed removal provision in an agency's organic statute *does not* render the agency "and all power and authority exercised by it in violation of the Constitution." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010). *See also Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207–11 (2020) (holding that "the [Consumer Financial Protection Bureau (CFPB)] Director's removal protection [was] severable from the other provisions of Dodd-Frank that establish the CFPB").[2]

Petitioner's argument also contemplates that in deciding *Collins*, the Court will adopt reasoning that no party advocates—that the remedy for an unconstitutional removal provision is the automatic invalidation and reversal of all prior acts of the validly appointed Director, which would require unwinding the conservatorships. No party in *Collins* challenges the decision to place the Enterprises into conservatorships. Indeed, the relief sought in *Collins*—setting aside the contract amendment specifying a formula for computing quarterly dividends to Treasury, Collins Br. at 79—presumes the conservatorships' *continued existence*, as it would preserve the contract while abrogating only the challenged dividend term.

Nor is the outcome Petitioner envisions for *Collins* plausible as a practical matter. The Enterprises are critical to the Nation's housing and financial markets, and while in conservatorship, all of their business activities fall within the Conservator's statutory power to "operate" the Enterprises and to "perform all [their] functions in [their] names." 12 U.S.C. § 4617(b)(2)(B)(i), (iii). Unwinding nearly 13 years of conservatorship operations—if even possible—would

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[2] All parties to *Collins* agree that under *Seila Law*, the Removal Provision is generally severable from HERA's other provisions. *See* Collins Br. 77–78; Fed. Parties' Reply & Resp. Br. 26–27. The *Collins* plaintiffs contend only that the Court cannot sever 12 U.S.C. § 4617(b)(2)(J)(ii) and therefore that clause must be stricken as well. That argument is irrelevant to this appeal. Even if the Court strikes § 4617(b)(2)(J)(ii), that would not alter the Federal Foreclosure Bar's protection.

carry enormously disruptive consequences. The conservatorships own about $5.3 trillion (or about half) of all outstanding mortgages, and have completed roughly 5.5 million foreclosure-prevention actions since the start of the conservatorships in September 2008.[3] In 2020 alone, Fannie Mae issued $1.34 *trillion* of securities backed by single-family mortgages. Fannie Mae Form 10-K Annual Report (for year ending Dec. 31, 2020) at 89.[4] If, as Petitioner suggests, the Court should void the conservatorships, the counterparties to all of these transactions would likely consider their cancellation wrongful and swamp the courts with demands for redress.

II. Petitioner's Second Question Does Not Warrant the Court's Attention.

Petitioner's second question is whether quiet-title claims seeking a judgment that the Federal Foreclosure Bar protected an Enterprise's deed of trust are subject to a six-year limitations period under 12 U.S.C. § 4617(b)(12)(A). This question is not cert-worthy.

A. No Split in Appellate Authority Exists.

Petitioner identifies no split in appellate decisions on whether courts should consider a state-law quiet-title claim implicating the Federal Foreclosure Bar as

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[3] U.S. SEC, U.S. Credit Markets: Interconnectedness and the Effects of the COVID-19 Economic Shock, at 62 (2020), https://www.sec.gov/files/US-Credit-Markets_COVID-19_Report.pdf; FHFA, Foreclosure Prevention and Refinance Report, at 2 (Nov. 2020).

[4] The report is available online at https://www.fanniemae.com/media/38271/display.

a contract or a tort claim under HERA's Limitations Provision. Nor does any split exist.

The Ninth Circuit is the only federal appellate court that has addressed that narrow question. It ruled that HERA's six-year limitations period for contract claims governs the quiet-title claim.. Pet. App. 9a–10a (citing 12 U.S.C. § 4617(b)(12)(A)). When the Nevada Supreme Court addressed the identical question, it agreed with the Ninth Circuit. In *JPMorgan Chase Bank, N.A. v. SFR Investments Pool 1, LLC*, 475 P.3d 52, 56 (Nev. 2020), the Nevada Supreme Court held that "claims seeking to enforce the Federal Foreclosure Bar sound more in contract than in tort" under the Limitations Provision.

These decisions also dovetail with other federal circuit courts that have considered related issues. *See, e.g.*, *Smith v. FDIC*, 61 F.3d 1552, 1560-61 (11th Cir. 1995) (mortgage foreclosure action governed by contract prong of substantially identical limitations provision despite not being a direct contract-enforcement claim); *Nat'l Credit Union Admin. Bd. v. RBS Secs., Inc.*, 833 F.3d 1125, 1130, 1131-32 (9th Cir. 2016) (holding that substantively identical limitations provision applies to "statutory claims" that are not "tort or contract claims," and holding specific claim timely under either prong); *FDIC v. Bledsoe*, 989 F.2d 805, 809 (5th Cir. 1993) (holding that the FDIC's similarly worded limitations period also applied to actions brought by a private entity acting as an assignee for the federal agency).

Petitioner hints at the vague possibility of a disagreement between the decision below and the D.C. Circuit's decision in *Megapulse, Inc. v. Lewis*, 672 F.2d

959 (D.C. Cir. 1982). Pet. 22-23. Not so. The decisions involve different issues. In *Megapulse*, the issue was whether a claim against the United States was "founded upon contract" under the Tucker Act, which waives sovereign immunity for contract claims against the United States. *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1). As a waiver of sovereign immunity, that statute is construed narrowly. *See Lane v. Pena*, 518 U.S. 187, 192 (1996). The *Megapulse* court held that the trade-secret claim at issue was not a contract claim. But it also refuted any suggestion that the claim sounded in tort. The court found jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, not the Tucker Act or the Federal Tort Claims Act. *Megapulse*, 672 F.2d at 971.

As the court of appeals correctly concluded below, *Megapulse* does not suggest that a claim not sounding in contract must sound in tort. *See* Pet. App. 6a n.2. The *Megapulse* inquiry, strictly defining when a claim is "'clearly' a contract claim" for Tucker Act jurisdictional purposes, does not affect the analysis here, where courts must characterize *all* claims as either "contract" or "tort" for the non-jurisdictional purpose applying the Limitations Provision. *See id.*

B. No Important Question of Federal Law Is at Issue.

Petitioner contends that the question "is important" because the Ninth Circuit's decision purportedly "allows classification of other FHFA property claims into contract." Pet. 14. Petitioner asserts that under the Ninth Circuit's reasoning, the Limitations Provision's contract prong would apply to a "trespass" claim. *Id.*

That is wrong. The court of appeals limited its holding to a narrow issue: the categorization, for purposes of HERA's Limitations Provision, of claims that are neither tort nor contract. The court explained that "12 U.S.C. § 4617(b)(12)(A) only explicitly addresses 'tort' and contract' claims, [but] applies to all claims brought by the FHFA as conservator," and therefore "if neither description is a perfect fit, [a court] must decide when applying the statute whether a claim is better characterized as sounding in contract or in tort." Pet. App. 8a.

By its plain language, that holding does not apply to claims—such as claims for common-law torts including trespass—that *do* sound unambiguously in tort or contract. Nor does it apply to all cases involving "an interest in property." Nor does it apply to all cases with "any contract existing in the background." *See* Pet. 14, 25–26. Finally, it does not govern the categorization of claims for purposes other than the Limitations Provision and a few other, similarly worded statutes. *See, e.g.*, 12 U.S.C. § 1787(b)(14)(A) (National Credit Union Administration Board); 12 U.S.C. § 1821(c)(14)(A) (Federal Deposit Insurance Corporation); 12 U.S.C. § 2277a-10c(b)(14)(A) (Farm Credit System Insurance Corporation).

Petitioner's contention that the Ninth Circuit's decision will have "broad and harmful consequences" is unfounded. *See* Pet. 24–26. The decision can affect the outcome of only the narrow set of cases in which (1) FHFA as Conservator, or a party asserting the Conservator's rights, asserts a claim that is not obviously contract or tort; and (2) the claim's categorization under the Limitations Provision would make it timely under one prong but not the other.

Petitioner's assertion that the "Ninth Circuit's decision … will dictate the outcome of hundreds, if not thousands, of cases throughout the western United States," Pet. 24, is wildly overstated. So far as Respondents are aware, the Limitations Provision has come up in litigation in only three contexts—Federal Foreclosure Bar cases in Nevada, a handful of securities actions (that are now finished) in other jurisdictions, and a contract case (also concluded).

To be sure, there once were hundreds of Federal Foreclosure Bar cases in Nevada. But now, the parties have fully resolved most. Respondents believe that fewer than 60 remain pending in federal courts, and of those, only a subset would be affected even if Petitioner were to prevail here and apply the shortest three-year period possible under the Limitations Provision. In suggesting that "scores more cases" pending in federal courts could be affected, Petitioner must be counting all pending Federal Foreclosure Bar cases, rather than the subset of cases in which the provision's application *would make any difference*. *See* Pet. 24.

Petitioner cannot plausibly make that claim in any event, because the state-law limitations period that would apply if Respondents' claim is a tort under the Limitations Provision is an open question. If the Nevada Supreme Court were to conclude that the five-year state-law limitations period for actions founded upon title applied, very few (if any) cases would turn on any ruling this Court could make here or the Ninth Circuit's holding below.

Contrary to Petitioner's contentions, the Ninth Circuit's decision does not subvert "common law and

Nevada definitions of tort and contract claims," *see id.* at 13, or erode state sovereignty, *see id.* at 23. To the contrary, the Nevada Supreme Court independently analyzed the Limitations Provision's operation and applied it as the Ninth Circuit did, while expressing no concern about supposed incursions into Nevada's law or sovereignty. *Chase v. SFR*, 475 P.3d at 56–57.

C. This Issue Would Not Control the Outcome of the Case Anyway.

Even if this Court ruled Respondents' claim were a "tort" under the HERA Limitations Provision, it would likely still be timely. In that scenario, the Limitations Provision would adopt the applicable state-law period, which the district court ruled was five years under Nev. Rev. Stat. § 11.070. *M&T Bank v. SFR Invs. Pool 1, LLC*, 2018 WL 11270090, at *3 (D. Nev. Mar. 15, 2018).

The Ninth Circuit has stated that *if* a state-law period applied to a Federal Foreclosure Bar-based quiet title claim, it would be subject to a five-year limitations period. *Ditech Fin., LLC v. Paradise Springs One Homeowners Ass'n*, 799 F. App'x 526, 527 (9th Cir. 2020) (unpublished decision). District courts have held the same. *E.g.*, *Ocwen Loan Servicing, LLC v. Operture Inc.*, No. 2:17-cv-1026-GMN-CWH, 2018 WL 1092337, at *1 (D. Nev. Feb. 28, 2018); *Bank of N.Y. Mellon Tr. Co., N.A. v. Jentz*, No. 2:15-cv-1167-RCJ-CWH, 2016 WL 4487841, at *2–3 (D. Nev. Aug. 24, 2016).

For that reason, a ruling that the Ninth Circuit should have characterized the claim as falling under the "tort" prong of HERA's Limitations Provision—unlikely as that is—still would not benefit Petitioner.

D. The Decision Below Is Correct.

Nearly all of Petitioner's discussion of the decision below amounts to a plea for error correction. *See* Pet. 9-10, 13-26. In its introductory discussion, Petitioner asserts that "[t]his Court must intervene" because the Ninth Circuit's decision "defies the plain language of the statute and basic common sense." *Id.* at 9-10. And in its argument section, Petitioner's first substantive contention about the decision is that it is supposedly "incorrect." *Id.* at 13.

This Court "rarely" grants certiorari to review "the misapplication of a properly stated rule of law." S. Ct. R. 10. But that is immaterial, as no error exists for the Court to correct.

The parties agree that "[a]lthough § 4617(b)(12) only explicitly addresses 'tort' and 'contract' claims, it applies to all claims brought by the FHFA as conservator." Pet. App. 8a; *see also UBS Ams. Inc.*, 712 F.3d at 141–42 (holding that the Limitations Provision applies to "*all* claims brought by FHFA as Conservator"); *FHFA v. Nomura Holding Am., Inc.*, 873 F.3d 85, 115 n.32 (2d Cir. 2017) (rejecting argument that "because it refers only to 'contract' and 'tort' claims, rather than securities claims," 12 U.S.C. § 4617(b)(12) did not preempt statutes of repose).

On the key issue—whether Respondents' quiet-title claim falls into the Limitations Provision's contract or tort category—the court of appeals correctly held that contract is the proper choice for that limited purpose, even though the claim is not one for direct enforcement of a contract. The court determined that "the claims in this action are 'contract' claims under 12 U.S.C. § 4617(b)(12)(A)(i)." Pet. App. 9a.

That conclusion was reasonable. Respondents' quiet-title claim depends on a *contractually* created interest—the deed of trust. *See Smith*, 61 F.3d at 1561 ("a mortgage lien is an interest in property created by contract," so an action determining the lien's survival is "clearly a contract action"). And while Petitioner and Freddie Mac are not in privity of contract, they are in a privity relationship *created by the contract*—Freddie Mac succeeded to the lender's security interest in the property, while Petitioner succeeded to the original homeowner's title interest, placing them into privity of estate. *See Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, N.A.*, 758 F.3d 592, 599-600 (5th Cir. 2014) (describing relationship between privity of contract and privity of estate as parties succeed to contractually created interests in land).

By contrast, as the Ninth Circuit noted, the claim bears no material similarity to any tort claim. It does not involve a "duty" element—Respondents need not, and do not, contend that Petitioner (or anyone else) owed or breached any duty. Pet. App. 9a. Instead, the claim asks for a judicial determination of the parties' respective interests in the property.

Petitioner retorts that some torts do not "require[] duty as an element" under Nevada law, Pet. 18–19, but that is mistaken. The torts Petitioner lists either require breach of specific duty arising out of the parties' relationship, *see, e.g.*, *Collins v. Union Fed. Sav.*

& Loan Ass'n, 662 P.2d 610, 623 (Nev. 1983) ("the wrongful foreclosure claim turns on whether the respondents breached the loan agreement"), or breach of a general "duty of reasonable care" toward others, *see Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 206 P.3d 81, 86 (Nev. 2009). Similarly, even if "injury is just an element of *some* torts" and "[c]ontract actions equally involve money damages," Pet. 21, the court of appeals was still right in concluding that Respondents' claim lacks "traditional hallmarks of a torts action," Pet. App. 9a. Indeed, the Nevada Supreme Court was unpersuaded by virtually identical arguments in Petitioner's request for a rehearing en banc in *Chase v. SFR*. *See* Pet. for Rehearing, *JPMorgan Chase Bank v. SFR Invs. Pool 1, LLC*, No. 77010 (Nev. Nov. 30, 2020); Order Denying Rehearing, *JPMorgan Chase Bank v. SFR Invs. Pool 1, LLC*, No. 77010 (Nev. Dec. 23, 2020).

Petitioner argues that any claim that does not seek direct enforcement of a contract must be a tort, repeatedly asserting that "claims … arising from … statutory duties" sound in tort. *See, e.g.*, Pet. 13–14, 16, 17–18. That is wrong. Courts often acknowledge that certain claims—including "statutory claims"—do not fall under either doctrine. *See Nat'l Credit Union Admin. Bd.*, 833 F.3d at 1131-32 (9th Cir. 2016) (recognizing that "statutory claims" are not "tort or contract claims," but were within a similar limitations provision's scope). And nothing in the Limitations Provision suggests that the tort prong is the "catch-all" for such claims. The statute does *not* isolate formal contract-enforcement claims or reveal any intention to make "tort" the default category. Rather, the statute leaves it to the court hearing a claim that sounds neither in tort nor in contract to make a context-specific determination about which is the better fit—exactly what the district court and the Ninth Circuit did here.

Nor can Petitioner reasonably argue that the outcome here—a holding that Respondents' quiet-title claim was timely—somehow contradicts sound policy. The Ninth Circuit's decision preserved a claim that, in turn, preserves the conservatorship's interest in a valuable asset. That outcome aligns with the policy underlying the Conservator's federal statutory powers to "collect all obligations and money due" the Enterprises in conservatorship and to "preserve and conserve [conservatorship] assets and property." 12 U.S.C. § 4617(b)(2)(B)(ii), (iv).

Thus, even assuming Respondents' claim could imaginably fall into *either* the tort or the contract category, HERA's six-year limitations period properly applies as a matter of federal policy. *See* Pet. App. 9a; *FDIC v. Former Officers & Dirs. of Metro. Bank*, 884 F.2d 1304, 1307 (9th Cir. 1989) (holding that under closely analogous statute, 28 U.S.C. § 2415(b), where "there [was] a substantial question whether FDIC's claims … are properly characterized as sounding in tort or in contract," the "court should apply the longer"); *see also Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1187 n.2 (9th Cir. 2010) (similar); *Abbitt v. Franklin*, 731 F.2d 661, 663 (10th Cir. 1984) (similar).

There is no reason for this Court's review.

CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

Matthew A. Fitzgerald*
John H. Maddock, III
Sarah B. Boehm
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
(804) 775-4716
mfitzgerald@mcguirewoods.com

**Counsel of Record for Federal Home Loan Mortgage Corporation*

Nathan F. Smith*
Malcolm Cisneros
2112 Business Center Drive
Irvine, CA 92612
(949) 252-9400

**Counsel of Record for M&T Bank*

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