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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. This Case Should Be Held For *Collins*.

Because this case raises the same separation-of-powers issue the Court will be deciding in *Collins v. Yellen*, No. 19-422, this petition should be held pending the Court's decision in that case and given an appropriate disposition in light of the Courts' decision there.[1] Respondents provide no convincing reason to do otherwise.

Respondents first argue that petitioner has forfeited any right to rely on the Court's forthcoming decision in *Collins* because it failed to raise a separation-of-powers challenge below. BIO 10. But as the petition explained, this Court will consider "structural constitutional objections that could be considered on appeal whether or not they were ruled upon below," even if the issue is raised for the first time in this Court. *Freytag v. Comm'r*, 501 U.S. 868, 878-79 (1991); *see* Pet. 11-12. Respondents note that *Freytag* considered "a challenge grounded in the Appointments Clause," while this petition is based on "more general separation-of-powers principles." BIO 10. But *Freytag* invoked a non-waiver principle

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[1] Petitioner believes that a remand is likely the most appropriate disposition, although it may depend on what the Court decides (and does not decide) in *Collins*. For example, if the Court does not resolve one or more of the important questions raised in *Collins* for reasons specific to that litigation, this case may provide the Court an appropriate vehicle for finishing the work it started in that case. In those circumstances, the extensive treatment of the questions by the parties and lower courts in *Collins* would compensate for the lack of development in this case. *Contra* BIO 11.

founded in the "strong interest of the federal judiciary in maintaining the *constitutional plan of separation of power*," of which the Appointments Clause is but one part. 501 U.S. at 879 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (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."). Accordingly, the cases on which *Freytag* relied were not Appointments Clause decisions, but cases addressing other aspects of the "constitutional plan of separation of powers." *Glidden*, 370 U.S. at 536; *see Freytag*, 501 U.S. at 878-79 (collecting examples). Petitioner's separation-of-powers claim in this case falls squarely within that tradition.[2]

For that reason, it makes no difference whether petitioner *could have* raised a separation-of-powers objection below. But any such attempt would have been futile in light of then-existing Ninth Circuit precedent upholding the structure of the Consumer Financial Protection Bureau (CFPB). Pet. 12-13. Respondents say (BIO 11) that "CFPB and FHFA are different agencies," but they do not identify any difference that would have been relevant to the constitutional analysis. And FHFA itself and the Solicitor General have agreed there is none. Pet. 12.

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[2] The same precedents preclude respondents' attempt (BIO 11) to distinguish *Freytag* on the ground that the Appointments Clause challenge in that case was raised in the court of appeals. *See Freytag*, 501 U.S. at 879 (explaining that Court has considered a separation-of-powers claim "despite the fact that it had not been raised in the District Court or in the Court of Appeals") (quoting *Glidden*, 370 U.S. at 536).

For that reason, petitioner had no "nonfrivolous argument" for distinguishing that recent circuit precedent before the district court or Ninth Circuit panel. BIO 12 (citation omitted). And respondents cite no authority requiring a party to seek rehearing en banc before coming to this Court, even when ordinary preservation rules apply.

Second, respondents assert (BIO 12) that "Petitioner's argument would fail on the merits" for a variety of reasons. For example, they say, no separation-of-powers problem arises in this case because the decision to impose the conservatorship was made by an acting director allegedly subject to removal at will by the President. BIO 12-13. But an acting director also made the decisions at issue in *Collins*, where FHFA has raised the same argument. *See Collins* Federal Parties Reply Br. 31-37. The challengers there have explained why that position lacks merit. *Collins* Petr. Reply Br. 11-18. But the more important point for present purposes is that this Court will resolve the dispute in short order.[3]

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[3] In a related pending petition, petitioner raises the same separation-of-powers challenge to attempts to apply the Federal Foreclosure Bar to dozens of other properties. *See SFR Invs. Pool 1, LLC v. Fed. Home Loan Mortg. Corp.*, No. 20-907. Some of those foreclosures took place at a time when the agency, under a permanent director, applied an announced policy of never consenting to foreclosures based on homeowner association liens (the kind of foreclosures at issue in petitioner's cases). *See* FHFA, Statement of the Federal Housing Finance Agency on Certain Super-Priority Liens (Dec. 22, 2014), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx; 20-907 C.A. E.R. 527-528. Accordingly, even if *Collins* holds that the acting

Respondents next argue that petitioner's objections are time-barred under two different statutes of limitations. BIO 13. But petitioner raises the invalidity of the conservatorship purely as a defense to respondents' lawsuit (*i.e.*, as a reason why the Foreclosure Bar does not apply to extinguish its property rights). And it is black-letter law that statutes of limitations apply to lawsuits, not defenses. *See, e.g.*, *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 415-16 (1998) ("[T]he object of a statute of limitation in keeping 'stale litigation out of the courts' would be distorted if the statute were applied to bar an otherwise legitimate defense to a timely lawsuit, for limitation statutes 'are aimed at lawsuits, not at the consideration of particular issues in lawsuits.'") (quoting *United States v. W. Pac. R.R.*, 352 U.S. 59, 72 (1956)) (internal citation omitted).

In any event, neither limitations period applies. The first governs only suits by Fannie Mae or Freddie Mac challenging the conservatorship, not suits involving private parties like petitioner. *See* 12 U.S.C. § 4617(a)(5)(A). The second applies to a "civil action commenced against the United States," 28 U.S.C. § 2401(a), whereas this civil action was commenced against a private corporation (petitioner) by a private bank and Freddie Mac. *See Meridian Invs., Inc. v. Fed. Home Loan Mortg. Corp.*, 855 F.3d 573, 578-79 (4th Cir. 2017) (Freddie Mac is not "the United States" within the meaning of Section 2401(a)).

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director operated constitutionally, the petition in No. 20-907 would provide a vehicle for resolving the constitutionality of FHFA's structure under a permanent director.

Third, respondents say the issues in this case are different from those the Court will decide in *Collins*. BIO 14-15. For one thing, they claim, "Petitioner does not attack any particular action of the Conservator" given that "the Federal Foreclosure Bar operates automatically." BIO 14. But, to the extent that the respondents believe that they can rely on the Bar, they can only do so because the Director made the unilateral decision to impose the conservatorship. *See* 12 U.S.C. § 4617(a)(2) (FHFA "may, at the discretion of the Director, be appointed conservator"). Whether the Director can exercise such power on behalf of a federal agency, given his insulation from presidential oversight, is the core question in *Collins*.

Given this direct link between petitioner's injury at the hands of the Foreclosure Bar and the Director's exercise of unsupervised authority, petitioner would indisputably have standing to bring a separation-of-powers suit against the Director. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020); *contra* BIO 11 (referring in passing to unspecified standing question). But standing has nothing to do with petitioner's claims in any event because "petitioner is *the defendant* and did not invoke the Court's jurisdiction." 140 S. Ct. at 2195. "When the plaintiff has standing, 'Article III does not restrict the opposing party's ability to object to relief being sought at its expense.'" *Ibid.* (quoting *Bond v. United States*, 564 U.S. 211, 217 (2011)).[4]

Respondents further assert that petitioner seeks a remedy "no party advocates" in *Collins*, *i.e.*,

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[4] For the same reason, petitioner needs no "statutory basis" authorizing its constitutional defense, as it might if *it* were the plaintiff bringing this lawsuit. BIO 11.

"automatic invalidation and reversal of all prior acts of the validly appointed Director." BIO 16. In fact, the challengers in *Collins* do argue that "a federal official's actions must be set aside if the official acts without constitutional authority." *Collins* Petr. Br. 65; *see also ibid.* (when official is unconstitutionally insulated from presidential oversight, "the official's actions are *ultra vires* and must be set aside").

But in any event, petitioner does not seek the "unwinding [of] the conservatorships." BIO 16. Instead, like the challengers in *Collins*, petitioner seeks only a remedy for the injury the conservatorship has caused it—*i.e.*, rejection of respondents' invocation of the Federal Foreclosure Bar to strip petitioner of its property in Nevada. The Court's decision in *Collins* need not directly address that specific remedy in order to justify holding the petition or asking the Ninth Circuit to consider the question in light of this Court's analysis of the closely related remedial question in *Collins*. *See* Pet. 11.

II. Defining An Action Challenging A Foreclosure Sale Arising Under The Federal Foreclosure Bar Deserves This Court's Attention.

Regardless of the result in *Collins*, the Court should take up the question of which statute of limitations relative to a foreclosure applies to actions brought by FHFA or its agents when it claims that a party did not have authority or consent required by the Federal Foreclosure Bar to foreclose on the FHFA's lien interest.

1. Respondents' defense of the decision below (BIO 23-26) is unavailing. As the petition explained, the claim here should have been categorized as a tort.

"The technical legal title of a claim is not controlling; rather, the court must look at the underlying facts on which the claim is based." *Blum v. State Farm Fire & Cas. Co*., 145 F.3d 1336 (9th Cir. 1998). Under Nevada law, the tort of wrongful foreclosure fits perfectly to the facts on which respondents relied in their complaint. Lack of authority is one of the quintessential hallmarks of wrongful foreclosure in Nevada: "[a] wrongful foreclosure claim challenges the authority behind the foreclosure, not the foreclosure act itself." *See McKnight Fam., L.L.P. v. Adept Mgmt.*, 310 P.3d 555, 559 (2013); *see also Collins v. Union Fed. Sav. & Loan Ass'n*, 662 P.2d 610, 623 (Nev. 1983) (defining wrongful foreclosure as a tort).

This is exactly what the Agency successfully argued before the Ninth Circuit in *Berezovsky*, when it said it was not challenging the foreclosure itself, it was the ability of the foreclosure to eliminate the deed of trust for lack of the equivalent of authority, consent. *See Berezovsky v. Moniz*, 869 F.3d 923, 927 (9th Cir. 2017). Furthermore, the Ninth Circuit acknowledged no contract existed between petitioner SFR and respondents, meaning the claim had none of the "traditional hallmarks" of a contract claim. Pet. App. 9a.

Yet respondents urged, and the Circuit agreed, there was no tort which would fit the claim, simply because it was labeled quiet title and sought declaratory relief. *Ibid.* But, unlike the cases relied on by the Ninth Circuit in its opinion categorizing this claim as a contract action, respondents were not seeking to enforce a contract. The Ninth Circuit should not be able to move from that position and respondents should not now be allowed to argue that

the claim is not completely founded on this lack of authority. The claim is the tort of wrongful foreclosure. Respondents argue that wrongful foreclosure requires some duty not to foreclose as between the parties. BIO 24-25. But the tort of wrongful foreclosure must be decided *before* the court could determine the deed of trust survived. It does not matter whether the remedy being sought was monetary damages (which should have been the proper result as this action should have been brought against the HOA) or seeking to keep the deed of trust intact. Under Nevada law wrongful foreclosure has a three-year statute of limitations because it arises from a statute. *See* NRS 11.090(3). Thus, pursuant to 12 U.S.C. § 4617(b)(12)(A)(ii), the statute of limitations should have been three years.

2. Respondents nonetheless argue that the Ninth Circuit's decision should go uncorrected because it only affects a minimal number of cases in Nevada and does not have any sweeping effect. BIO 19-22. Not so. The Ninth Circuit's decision will have far-reaching and long-lasting effects, as it can be applied to all claims involving any real property claim where Fannie Mae, Freddie Mac, or the FHFA claim an interest in real property. It changes the definition of tort. The Agency's claims should not be defined by the existence of its ownership, rather it should be by the actual facts underlying its claims.

The practical consequences of the decision below are far-reaching because Fannie Mae and Freddie Mac regularly elect not to record their interests in public property records. There are almost 26 million residents in almost 141,000 homeowners associations

in 21 states with super-priority liens.[5] As a consequence, many homeowners associations and potential purchasers have no way of knowing that the Foreclosure Bar could apply, and no notice that the sale could be invalidated years later unless they first obtain FHFA's consent to the foreclosure. The Ninth Circuit's decision exacerbates that already intolerable situation by extending the time for FHFA to effectively rescind the sale to six years, double the default rule for tort-based claims under the statute, and specifically for wrongful foreclosure for lack of authority.

The decision thus dramatically undermines the policies that underly state statutes, like Nevada's, which are designed to get properties that have fallen into default into the hands of someone who will pay the monthly assessments. With six years for a Federal Foreclosure Bar challenge, no title company will insure such a property. Neither is this decision limited to foreclosures under NRS 116. It can, and will, spill over into foreclosures by sale under deeds of trust, where Fannie Mae or Freddie Mac have an interest in the second deed of trust, thereby dissuading investors from purchasing properties at those types of sales and driving down the market.

3. Finally, respondents argue (BIO 22-23) that any decision by this Court would not affect the outcome of this case. That is so, they say, because if the case were considered one sounding in tort, the district court has already held that the statute would

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[5] https://www.corelogic.com/products/easset_upload_file31279_204550_e.jpg (last accessed Apr. 6, 2021) and https://foundation.caionline.org/wp-content/uploads/2020/08/2020StatsReview_Web.pdf (last accessed Apr. 6, 2021).

borrow the five-year statute of limitations imposed by NRS 11.070 for suits "founded upon the title to real property."

But there is pending litigation in the Nevada Supreme Court on the very question of the appropriate statute of limitations for cases such as this.[6] Accordingly, should this Court grant certiorari and reverse, the federal courts likely would no longer be required to guess at which statute of limitations Nevada would apply. Moreover, were the Court to reverse on the ground that respondents' suit effectively alleges—the tort of wrongful foreclosure for lack of authority—there is no reason to believe the Nevada Supreme Court would not follow suit and apply the three-year limitations period.

The questions before this Court merit consideration. This Court should grant the petition.

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[6] In fact, the Nevada Supreme Court has elected to stay its decisions on the issue pending the outcome of this petition. *See, e.g.*, Order granting stay of its mandate, termed "remittitur" in the Nevada state court system, *JPMorgan Chase Bank, National Ass'n v. SFR Investments Pool 1, LLC*, Nevada Supreme Court Case No. 77010 (staying remittitur pending outcome of the petition in this case) (Mar. 19, 2021). The Nevada Supreme Court has also granted stays of briefing or stays of remittitur in all cases which could be impacted by a decision on this petition, entering orders as recently as April 2, 2021 in Case Nos. 80586, 82078, 76733, 79306, 77547, 79313. Thus, the Nevada Supreme Court is poised for direction from this Court on the issues raised in the petition. These represent only a small number of cases currently pending, because cases remain in the state and federal district courts as well as in the state and federal appellate courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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