No.

In the Supreme Court of the United States

HARRY C. CALCUTT, III,
APPLICANT

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

APPLICATION FOR A STAY OF PROCEEDINGS AND RECALL OF THE SIXTH CIRCUIT'S MANDATE PENDING A PETITION FOR A WRIT OF CERTIORARI AND FOR AN ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicant (petitioner below) is Harry C. Calcutt, III. Respondent (also respondent below) is the Federal Deposit Insurance Corporation.

The proceedings below were:

1. *Harry C. Calcutt, III v. Federal Deposit Insurance Corporation*, No. 20-4303 (6th Cir.).
2. *In the Matter of Harry C. Calcutt, III*, Nos. FDIC-12-568e & FDIC-13-115k (FDIC).

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TO THE HONORABLE BRETT KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:

Pursuant to 28 U.S.C. §§ 2101(f) and 1651 and Supreme Court Rule 23, Harry C. Calcutt, III applies to recall and stay the mandate of the United States Court of Appeals for the Sixth Circuit pending a decision on applicant's forthcoming petition for a writ of certiorari. Applicant further requests that the Court enter an immediate administrative stay to allow time to review the filings. The Sixth Circuit's mandate just issued this morning, September 22, 2022.

INTRODUCTION

In administrative law as elsewhere, with great power comes great responsibility. Agencies can impose career-ending bans and ruinous monetary penalties through in-house agency proceedings. To wield their immense authority, agencies must follow the law and operate within our constitutional structure.

Yet the agency here, the Federal Deposit Insurance Corporation (FDIC), exercised its discretion to issue a lifetime ban and a $125,000 penalty—the death penalty of administrative sanctions—in an order that the Sixth Circuit acknowledged was riddled with serious legal errors. Even the government agrees that the proper step forward is a remand for the agency to redo the decision. Yet the Sixth Circuit refused to remand in a 2-1 decision, refused to grant rehearing despite the government's concession, and then refused to stay its mandate in another divided opinion. That lifetime ban is now set to take effect today, September 22. Absent a swift recall and stay of the mandate, this violation of administrative-law and separation-of-powers principles will inflict irreparable harm.

This case manifestly satisfies this Court's criteria for a stay pending the disposition of a petition for certiorari. The Sixth Circuit's decision opens clear circuit splits and defies two lines of this Court's precedents. First, this Court has long held that agencies must adequately justify decisions under the correct legal standards. When agencies misinterpret the law, courts cannot simply redo the analysis themselves. *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80, 94 (1943). Thus, when an agency order rests on legal error, every other circuit vacates and remands for the agency to apply the right legal rule to the facts.

Here, however, the Sixth Circuit held that when an agency commits legal errors, the court can and should apply the right legal standard and check for itself if the record might support affirmance. App.46a-53a. The majority thus upheld an FDIC order barring applicant Harry Calcutt from the banking industry for life despite faulting the FDIC's prolific legal errors, based on the majority's own view of the record.

As Judge Murphy's dissent observed, the majority's "inexplicable" no-remand approach defies a long line of this Court's *Chenery* precedents, splits with other circuits, and perversely rewards slipshod agency decision-making. App.91a-92a. This Court has summarily reversed courts of appeals for similarly rushing to judgment and preemptively filling in the agency's blanks. Every other circuit applies the exact opposite approach and would have remanded this case. Even the FDIC conceded that the Sixth Circuit "erred in presuming" that an agency "would be legally 'bound' to reach the same conclusion" when rendering a discretionary judgment as to penalties, and agreed that "the prevailing authority, including that on which the panel relied, appears to favor remand." FDIC Reh'g Resp. Br. 4, C.A. Dkt. 99. Yet the Sixth Circuit majority still refused to remand. As five

rehearing-stage amici stressed, the Sixth Circuit's holding "invite[s] the FDIC and other agencies to cite it as the administrative law equivalent of a 'the dog-ate-my-homework' excuse to justify sloppy agency decisions." Am. For Prosperity Reh'g Br. 2, C.A. Dkt. 73; *see* Bank Dirs. Reh'g Br. 5-8, C.A. Dkt. 95; Chamber Reh'g Br. 4-7, C.A. Dkt. 94; George Mason SOP Clinic Reh'g Br. 11-14, C.A. Dkt. 97; WLF Reh'g Br. 2-8, C.A. Dkt. 93.

Another seminal separation-of-powers rule is that the President must retain control over removal of executive decisionmakers. That rule is particularly important for the many independent agencies like the FDIC, where the President is restricted in his ability to remove the agency's heads at will. Moreover, the FDIC's administrative law judges—its frontline adjudicators in career-threatening enforcement proceedings—are unaccountable to anyone because they are insulated by at least four layers of tenure protections.

Yet, the Sixth Circuit's decision effectively forecloses constitutional challenges to the structure of independent agencies by requiring challengers to prove that the President's inability to remove subordinates at will inflicted "concrete" prejudice—an all-but-insurmountable standard. App.27a. That far-reaching holding parts ways with the Fifth and Eighth Circuits' approaches, gravely misinterprets this Court's recent decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), and would give unconstitutionally structured agencies a free pass in perpetuity.

Only this Court's intervention can restore uniformity among the circuits and ensure fidelity to this Court's precedents on these two questions of paramount importance to administrative law and the separation of powers. A recall and stay of the Sixth Circuit's mandate pending the disposition of applicant's forthcoming petition is also imperative to

avoid the obvious irreparable harm from Mr. Calcutt's imminent debarment from his profession, which risks severe disruption for the bank he has helmed for many years. Indeed, the FDIC has not only conceded that these harms are severe, but also disclaimed any need for its prohibition order to take effect during the pendency of earlier proceedings.

This Court should recall and stay the Sixth Circuit's mandate—which issued today, September 22, 2022—pending disposition of applicant's petition for a writ of certiorari. To give itself time to consider this emergency application, the Court should also enter an administrative stay.

OPINIONS BELOW

The June 10, 2022 decision of the Sixth Circuit (App.2a-92a) is published at 37 F.4th 293. The December 15, 2020 decision of the FDIC's Board is reproduced at App.96a-143a.

JURISDICTION

This Court has jurisdiction to resolve this application under 28 U.S.C. §§ 1331 and 2101(f).

STATEMENT

A. The Federal Deposit Insurance Corporation

The FDIC is an independent agency headed by a five-member Board, which consists of three presidentially appointed and Senate-confirmed members, plus the CFPB Director and the Comptroller of the Currency. 12 U.S.C. § 1812(a)(1). The Board's three appointed members serve fixed-length terms, *id.* § 1812(c), which courts have treated as precluding presidential removal except for cause. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 487 (2010) (assuming for-cause removal for fixed-term SEC Commissioners).

The FDIC exercises vast authority over the banking industry, acting as judge, jury, and executioner in administrative proceedings alleging violations of banking standards. First, the Board acts like a prosecutor by issuing a complaint following an enforcement investigation (here, the "Notice of Intention to Remove from Office and Prohibit from Further Participation").

Next, an administrative law judge (ALJ) reaches initial conclusions in the enforcement proceeding. Multiple layers of tenure protection insulate those ALJs from presidential control. First, ALJs can only be removed for cause. App.28a. Further, to initiate removal proceedings, four agencies—the FDIC and three others that jointly employ these ALJs—must all agree that cause for removal exists. Yet most of those agencies' heads can themselves only be removed for cause. App.31a. Then, another agency—the Merit Systems Protection Board (MSPB)—ultimately decides whether to remove the ALJ. But the MSPB's heads also are removable only for cause. 5 U.S.C. § 1202(d). Thus, if the President wished to remove an ALJ who was thwarting his policy objectives, at least four layers of for-cause tenure protections stand in the way.

After the ALJ's decision, the case returns to the Board, which may "unilaterally issue final decisions awarding legal and equitable relief." *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2200 (2020); 12 U.S.C. § 1818(a)-(b), (e), (i). The Board enjoys case-by-case discretion over sanctions ranging from cease-and-desist orders to monetary penalties. Permanently barring a banker from the industry is the nuclear option. 12 U.S.C. § 1818(e); FDIC Formal & Informal Enf't Actions Manual 6-1 to 6-4, 6-12 (June 2022).

B. Factual Background

1. In August 2013, the FDIC issued a Notice of Intent to permanently bar 74-year-old banker Harry Calcutt from the industry based on his alleged mishandling of a troubled lending relationship during the Great Recession while CEO of Northwestern Bank, a regional bank in Traverse City, Michigan. App.13a. Northwestern had extended loans to the Nielson Entities, a group of family-owned businesses engaged in oil and real estate development. By 2009, the Nielson Entities owed Northwestern about $38 million—a fraction of Northwestern's $800 million lending portfolio and about half of its core capital (i.e., the bank's best, most available capital to cover defaults). App.41a; C.A. A206-07, A216, A431. Then, the Nielsons informed Northwestern that they could not cover debt payments due to the Great Recession, and on September 1, 2009, ceased repaying all loans. App.9a.

After months of discussions, Northwestern attempted to salvage the situation by engaging in the "Bedrock Transaction," under which Northwestern would renew the Nielsons' loans for one year and disburse a new $760,000 loan to a Nielson Entity to fund debt service for several months. App.10a. In return, the Nielsons offered additional collateral and to bring all past-due loans current by paying $600,000 cash that another Nielson Entity had pledged as collateral for other loans. App.10a.

Northwestern's senior management testified that they believed the Transaction was in Northwestern's best interest. C.A. A211, A241. And Mr. Calcutt—who approved the Transaction alongside other senior managers—testified that he believed that it provided "time in the hope that [the Nielsons] would … pay off some of the[] loans" when the economy improved "or sell the underlying collateral … and use the proceeds to pay the loan[s] off." C.A. A576.

The Transaction stabilized the Nielson lending relationship for the next year, with the Nielsons reducing their outstanding loan balance by almost $1.5 million. C.A. A607-08, A615-16. But the Nielson Entities were unable to repay their loans when some matured in September 2010, prompting another default. App.12a. Northwestern and the Nielsons tried to negotiate a global restructuring. C.A. A275-76. In December 2010, Northwestern agreed to accept $690,000 of additional cash from a Nielson Entity to bring past-due loans current and fund debt service through January 2011. App.12a. Again, Mr. Calcutt and senior management believed receiving this cash was in Northwestern's best interests. C.A. A243. Ultimately, the sides were unable to agree on restructuring, and Northwestern pursued collection efforts. C.A. A139-40.

2. In 2012, the FDIC began investigating Northwestern based on a highly unusual submission to the agency from Cori Nielson, a Nielson Entities manager. C.A. A213. She eventually told FDIC examiner Anne Miessner that she wanted "a fresh face to talk to at the bank"—not Mr. Calcutt, who had rebuffed Nielson's demands for loan concessions. C.A. A604. Miessner coordinated her investigation with Nielson in a manner another FDIC examiner agreed was "shocking." C.A. A529.

The FDIC's Notice of Intent alleged that Mr. Calcutt and two others mishandled the Nielson lending relationship because the Bedrock Transaction did not comply with Northwestern's loan policies and Northwestern's board was not fully aware of the nature of the Bedrock Transaction. App.12a-13a. Mr. Calcutt disputed those findings.

3. In 2015, an ALJ adjudicated the dispute. But that ALJ was unconstitutionally appointed under *Lucia v. SEC*, 138 S. Ct. 2044 (2018), so a new one heard the case in 2019.

The new ALJ refused to allow Mr. Calcutt to cross-examine key FDIC witnesses about their apparent bias and irregular conduct, App.15a, and ruled against Mr. Calcutt in 2020.

4. On December 15, 2020, the FDIC's Board issued an order expelling Mr. Calcutt from the banking industry and imposing a $125,000 penalty. Statutorily, the Board "may" exercise its discretion to issue a prohibition order only if a banker (1) willfully engaged in an "unsafe or unsound practice" or breached a fiduciary duty; (2) "by reason of" which; (3) the bank "suffered or will probably suffer financial loss," or other harms ensued. 12 U.S.C. § 1818(e)(1). Monetary penalties require similar findings. *Id.* § 1818(i)(2). The Board deemed these elements satisfied as follows:

Unsafe/unsound practice: The board centered its "unsafe or unsound practice" assessment on a single, imprudent act—Mr. Calcutt's approval of a $760,000 stopgap loan (the so-called Bedrock Transaction)—but never found that transaction abnormally risky to the bank's stability. App.39a. The Board also found that Mr. Calcutt breached fiduciary duties based on that same act. App.41a.

By reason of: The Board held that "an individual respondent need not be the proximate cause of the harm to be held liable." App.44a. Nor did the Board analyze but-for causation.

Statutory harms: The Board held Mr. Calcutt liable for over $8 million in harms, including $2 million in fees the bank paid to accountants and lawyers, App.47a-48a; $6.443 million in *all* Nielson-related losses, which largely pre-dated any alleged misconduct, App.47a; and Mr. Calcutt's portion of a dividend that the bank's holding company paid shareholders, App.47a-48a.

C. Procedural History

1. On December 16, 2020, Mr. Calcutt filed a petition for review in the Sixth Circuit and sought an emergency stay of the FDIC's order. The Sixth Circuit granted the stay, citing the FDIC's concession that it did "not view the circumstances here as necessitating that its prohibition order take effect while this proceeding is pending," C.A. Dkt. 12 at 6-7, and noting that the "FDIC [did] not deny that the harms alleged by Calcutt are significant." App.95a. On June 10, 2022, the Sixth Circuit upheld the Board's order in a 2-1 decision and vacated the stay. App.2a.

a. The majority and dissent agreed the FDIC's statutory analysis was "riddled with legal error." App.92a. (Murphy, J., dissenting); *see* App.36a-53a. The Board misinterpreted what conduct qualifies as an "unsafe or unsound practice" under 12 U.S.C. § 1818(e)(1)(A), App.39a-41a; applied the wrong causation standard, App.44a-46a; and counted harms that cannot qualify under 12 U.S.C. § 1818(e)(1)(B), App.46a-51a.

Yet the majority declined to remand the flawed order to the agency. Instead, the majority affirmed the FDIC's sanctions based on its own assessment that certain record evidence—including what the majority recognized as "connection[s]" that the agency "did not explicitly draw," App.41a—rendered the Board's errors harmless. App.51a. Thus, despite acknowledging that the Board's sanctions were "discretionary" and rested upon legally defective findings, the majority did not remand for the Board to revisit Mr. Calcutt's lifetime ban under the proper legal framework. App.53a.

Judge Murphy dissented, reasoning that the majority's failure to remand violates "basic administrative-law principles." App.91a. He explained: "When an agency's decision rests on a collapsed legal foundation …. [w]e must let the agency apply the proper law in

the first instance." App.91a. That was particularly so, Judge Murphy added, when agency error calls into question the appropriateness of discretionary sanctions. App.91a-92a.

b. The panel also rejected Mr. Calcutt's constitutional challenges to the Board's and ALJ's for-cause-removal protections. App.18a. Mr. Calcutt argued that the President's inability to remove three of the FDIC Board's five members at will is unconstitutional, as are FDIC ALJs' extraordinary, multi-layer protections from removal. App.18a.

But the panel interpreted *Collins v. Yellen*, 141 S. Ct. 1761 (2021), to bar such separation-of-powers challenges unless plaintiffs can show specific, "concrete" harm from the unconstitutional removal restrictions. App.27a. The majority also expressed "doubt" that insulating ALJs from removal is unconstitutional. App.29a-30a; *but see Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022) (declaring ALJ tenure protections unconstitutional). Judge Murphy would have found no prejudice on different grounds. App.68a-71a.

2. Supported by six amici, Mr. Calcutt petitioned for panel or en banc rehearing. To its credit, the FDIC's response brief agreed that "the panel erred" at least in not remanding the case back to the Board to reconsider "whether prohibition is warranted," and that prevailing authority "appears to favor remand." C.A. Dkt. 99 at 6-8. The FDIC thus did not oppose granting rehearing in order to remand Mr. Calcutt's case to the agency for reassessment in light of the panel's statutory analysis. *See id.*

Nonetheless, on September 15, 2022, the Sixth Circuit denied rehearing, with Judge Murphy noting a dissent. C.A. Dkt. 100-1. On September 19, 2022, the FDIC informed Mr. Calcutt that it would not voluntarily stay or reconsider the prohibition order. That same day, Mr. Calcutt requested that the Sixth Circuit stay the mandate pending this Court's

disposition of a petition for a writ of certiorari. On September 21, 2022, the Sixth Circuit panel denied the stay, again in a 2-1 decision over Judge Murphy's dissenting vote. App.1a.

Mr. Calcutt has exhausted every possible avenue below. He obtained an initial stay pending appeal from the Sixth Circuit, which the panel vacated after affirming the FDIC's order. The FDIC has declined to voluntarily stay or reconsider its order, and the Sixth Circuit has refused to stay the mandate. The FDIC's order permanently barring Mr. Calcutt from the banking industry and imposing a $125,000 penalty is now set to take effect imminently, as the mandate issued this morning, September 22.

ARGUMENT

This case amply satisfies the standard under 28 U.S.C. § 2101(f) for this Court to stay lower-court proceedings "pending the filing and disposition of a petition for a writ of certiorari." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Such a stay is appropriate when the applicant shows "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Id.* This case presents two important administrative-law and constitutional questions, either one of which satisfies the stay criteria.

I. There is a Reasonable Probability the Court Will Grant Certiorari and a Fair Prospect of Reversal of the Sixth Circuit's No-Remand Holding

The panel's decision to affirm, rather than remand, a legally flawed agency order presents a quintessential case for certiorari, if not summary reversal. The panel unanimously agreed that legal errors pervaded the FDIC's discretionary decisions to impose a lifetime industry ban and six-figure penalty. Yet the majority declined to remand,

instead embarking on its own application of corrected legal standards to ferret out record facts that might support the agency's judgment on other grounds. That holding contravenes this Court's precedents and opens a glaring circuit split with every other court of appeals on a fundamental question of administrative law that arises in virtually every case involving judicial review of agency action. And the Sixth Circuit's no-remand ruling is so patently incorrect that even the FDIC agreed a remand was warranted, at least to let the agency "decide whether the effects properly considered under the panel's legal standard … support prohibition." FDIC Reh'g Resp. Br. 4, C.A. Dkt. 99.

A. There Is a Reasonable Probability of Certiorari on This Issue

The Sixth Circuit's holding that courts, not agencies, should apply legal rules to the record in the first instance conflicts with *Chenery* and other circuits' caselaw. There is more than a reasonable prospect that this Court would grant review of that untenable result. Indeed, this Court has summarily reversed similar *Chenery*-defying decisions.

1. The Sixth Circuit's No-Remand Ruling Conflicts with *Chenery* and Every Other Circuit's Precedents

a. As Judge Murphy's dissent observed, the majority's approach contravenes this Court's bedrock administrative-law precedents. App.91a-92a. The longstanding *Chenery* rule generally prohibits courts from affirming agencies' discretionary decisions where the agency has "misconceived the law." *Chenery I*, 318 U.S. at 94. Courts should remand for the agency to apply correct legal principles to the record; courts may not themselves rehabilitate the decision "by substituting what [they] consider[] to be a more adequate or proper basis," as the Sixth Circuit did here. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947); *accord Smith v. Berryhill*, 139 S. Ct. 1765, 1779 (2019).

So clear is the rule that courts must remand rather than "decid[e] whether the facts as found fall within a statutory term" that this Court has summarily reversed contrary rulings repeatedly. *Gonzales v. Thomas*, 547 U.S. 183, 185-87 (2006) (per curiam). When the Ninth Circuit undertook its own inquiry into whether an asylum applicant satisfied the legal standard for showing changed home-country conditions, the Supreme Court held that this refusal to remand flouted "every consideration that classically supports the law's ordinary remand requirement." *INS v. Orlando Ventura*, 537 U.S. 12, 13, 17-18 (2002) (per curiam). And when the Ninth Circuit similarly resolved "in the first instance" another legal question the "agency ha[d] not yet considered"—whether the "facts as found" meant a "particular family" qualified for protection under the asylum statute—the Court summarily reversed again. *Gonzales*, 547 U.S. at 184-87.

On top of that, this Court has been especially emphatic that remands are required when, as here, the agency commits legal errors while reaching a "discretionary judgment." *E.g.*, *Sure- Tan, Inc. v. NLRB*, 467 U.S. 883, 905-06 (1984); *cf. Golan v. Saada*, 142 S. Ct. 1880, 1895-96 (2022). Thus, even the FDIC agreed that "the prevailing authority, including that on which the panel relied, appears to favor remand." FDIC Reh'g Resp. Br. 4, C.A. Dkt. 99 (citing, e.g., *Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 544 (2008)).

b. By contravening *Chenery*, the Sixth Circuit's no-remand holding also created a stark circuit split. Every other circuit would correct the agency's legal error, then remand. And "[t]he majority's no-remand rule is not limited to the FDIC. If permitted to stand, [the panel's] novel approach would fundamentally alter review of federal agency actions within

[the Sixth] Circuit and create a conflict with every other Circuit." Chamber Reh'g Br. 7, C.A. Dkt. 94; *see also* WLF Reh'g Br. 2-4, C.A. Dkt. 93. A sampling:

- The D.C. and First Circuits hold: "[W]hen a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *Me. Med. Ctr. v. Burwell*, 841 F.3d 10, 16 (1st Cir. 2016) (quoting *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995)); *see Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1139 (D.C. Cir. 2014).
- In the Third Circuit, where a court "ha[s] made a legal determination … that fundamentally upsets the balancing of facts and evidence upon which an agency's decision is based," it is "obliged to remand to the agency." *Gui Cun Liu v. Ashcroft*, 372 F.3d 529, 534 (3d Cir. 2004) (Alito, J.).
- In the Fifth Circuit, "[w]hen an administrative agency has made an error of law, the duty of the Court is to correct the error of law committed by that body, and, after doing so to remand the case." *BizCapital Bus. & Indus. Dev. Corp. v. Comptroller of Currency*, 467 F.3d 871, 874 (5th Cir. 2006) (citation omitted); *accord Osmani v. Garland*, 24 F.4th 617, 621 (7th Cir. 2022).

Sharpening the split, the majority's no-remand ruling breaks from other circuits' decisions in the agency-enforcement context—as the FDIC acknowledged here. The Ninth, Eleventh, and D.C. Circuits hold that if an agency's discretionary penalty rests in part on legal errors, courts must remand so the agency can decide if the original penalty remains

appropriate. Thus, the FDIC *agreed* that a remand to the agency would be warranted under the principle that courts "will not uphold a discretionary agency decision where the agency has offered a justification in court different from what it provided in its opinion." FDIC Reh'g Br. 4, C.A. Dkt. 99 (quoting *Morgan Stanley*, 554 U.S. at 544). The FDIC also cited "prevailing authority" from courts of appeals that "appears to favor remand." *Id.*

The contrast between the Sixth Circuit and others is acute. In identical circumstances, the Ninth Circuit refused to affirm an FDIC lifetime ban after the agency erroneously counted some misconduct. *De la Fuente v. FDIC*, 332 F.3d 1208 (9th Cir. 2003). Unlike the Sixth Circuit, the Ninth Circuit considered it irrelevant that independent types of misconduct "standing alone" might still have supported the Board's decision. *Id.* at 1226. Because the agency might "decline to reimpose" its "extraordinary removal sanction "in the absence" of certain misconduct, the Ninth Circuit insisted that the agency consider whether the lifetime-ban sanction "remains deserved." *Id.* at 1219; 1226-27. As the FDIC noted, the Ninth Circuit holds that "an FDIC decision based on two violations of law could not be upheld after the court found error in one of the violations." FDIC Reh'g Br. 4.

The Eleventh Circuit likewise vacated and remanded a banking agency's lifetime-ban penalty after holding that it had improperly classified certain conduct as unlawful. That court would "not assume" that the agency "would issue the same severe sanction" of removal "without all of the violations upon which it previously relied." *Doolittle v. Nat'l Credit Union Ass'n*, 992 F.2d 1531, 1538 (11th Cir. 1993); *accord United States v. Schwarzbaum*, 24 F.4th 1355, 1366-67 (11th Cir. 2022).

Similarly, the D.C. Circuit vacated and remanded an SEC lifetime-suspension order that relied "in part" on an improper theory of liability. *Lorenzo v. SEC*, 872 F.3d 578, 595-96 (D.C. Cir. 2017), *aff'd*, 139 S. Ct. 1094 (2019). Because there could be "no assurance that the Commission would have imposed the same level of penalties in the absence of its" faulty liability finding, the D.C. Circuit held it "must remand to enable" the agency "to reassess the appropriate penalties." *Id.* (citation omitted). And, as the FDIC acknowledged in conceding that remand appeared warranted, the D.C. Circuit has long held that "[t]he purpose of [*SEC v.*] *Chenery* is to insure that courts do not trespass on agency discretion." FDIC Reh'g Br. 4 (quoting *United Video, Inc. v. FCC*, 890 F.2d 1173, 1190 (D.C. Cir. 1989)).

2. The Remand Issue Is Important, Constantly Recurs, and Justifies Immediate Review

This Court's intervention is imperative to prevent the Sixth Circuit's no-remand approach from distorting administrative law and producing inequitable outcomes based on geography. The availability of agency remands is a fundamental issue that arises in virtually every challenge to administrative action, from immigration to SEC enforcement proceedings.

But, absent this Court's intervention, parties challenging agency action face disparate rules based solely on the circuit where they are able to seek judicial review. In the Sixth Circuit, courts will take their own stab at weighing the record in the first instance and can assume that agencies will always pick the most severe penalties. Everywhere else, when an agency's order is infected with legal error, challengers will get a chance to argue for lesser penalties and different outcomes on remand. The Sixth Circuit's approach "would deprive regulated parties of the reasonable expectation that an administrative agency's

action would stand or fall based on the agency's stated reasons" as well as "the opportunity to make arguments to [the] regulator in the first instance." Chamber Reh'g Br. 5-6, C.A. Dkt. 94. Parties subject to the Sixth Circuit's anomalous approach would have to constantly seek this Court's intervention just to obtain remands they would obtain anywhere else.

The majority's no-remand approach also threatens the separation of powers. When Congress validly vests discretionary enforcement decisions in an agency, courts usurp executive power by making their own decisions about appropriate penalties. *Cf. Chenery I*, 318 U.S. at 88; *Seila Law*, 140 S. Ct. at 2200- 01; *see* App.91a. (Murphy, J., dissenting). Worse, the majority imposes a one-way ratchet: so long as a statute technically authorizes the harsher penalty, petitioners will never get a reprieve.

Meanwhile, the majority's "good-enough-for-government-work" approach (App.91a (Murphy, J., dissenting)), encourages slipshod agency decision-making. Agencies could produce administrative gibberish, yet the Sixth Circuit would sustain the result so long as it can discern some record support under the right legal standard. The panel's holding thus "rolls out the red carpet for agency abuse, overreach, and regulatory ping pong in a host of contexts." Am. for Prosperity Reh'g Br. 1, C.A. Dkt. 73. Only this Court's intervention will avert those harms.

B. There is a Fair Prospect of Reversal

On the merits, this is not a close case. The Sixth Circuit majority brazenly departed from the *Chenery* doctrine, identifying legal errors in the FDIC's analysis and then supplying missing factfinding, reasoning, and discretionary judgments itself. "That is precisely what *Chenery* prohibits." Chamber Reh'g Br. 5, C.A. Dkt. 94; *accord* George Mason SOP Clinic Reh'g Br. 13, C.A. Dkt. 97; WLF Reh'g Br. 4, C.A. Dkt. 93.

For instance, the FDIC never inquired whether statutory misconduct presented "abnormal financial risk" to the bank, as the statute requires. Yet, the majority itself "dr[e]w that connection" based on its assessment of the record. App.39a-41a. As the Sixth Circuit held, the FDIC also ignored statutory causation requirements, App.44a-46a, and relied on millions of dollars in harms that do not legally qualify, App.47a-48a. Yet, rather than let the agency make "notoriously difficult" judgments about whether Mr. Calcutt proximately caused qualifying harms, App.45a, the majority did its own review. App.46a. Then, despite deeming Mr. Calcutt responsible for only a fraction of identified harms, the majority assumed that because the agency still had statutory authority to impose the same penalties, the agency would necessarily do so. App.52a-53a. In short, the Sixth Circuit substituted its own frontline judgments of the facts and the appropriateness of discretionary penalties for the agency's.

Again, this Court has repeatedly summarily reversed courts of appeals under similar circumstances. *Gonzales*, 547 U.S. at 185-87; *Orlando Ventura*, 537 U.S. at 17-18; *supra* p. 13. And again, even the FDIC agreed that the "panel erred" in its no-remand ruling and did not oppose a remand to "consider whether prohibition [is] still warranted." FDIC Reh'g Resp. Br. 3, C.A. Dkt. 99. Yet the Sixth Circuit still refused to remand.

Not only that, this Court has already rejected the Sixth Circuit majority's grounds for refusing to remand. The majority believed that the Administrative Procedure Act's "substantial-evidence standard of review," 5 U.S.C. § 706(2)(E), compels courts to uphold agencies' orders if they might survive on proper legal grounds. App.52a. But this Court instructs that courts must remand even if "it does not necessarily follow" from an agency's

legal errors that the underlying decision "was incorrect." *Port of Portland v. United States*, 408 U.S. 811, 842 (1972); *accord FEC v. Akins*, 524 U.S. 11, 25 (1998). The substantial-evidence rule merely "governs … review of the agency's factual findings," and does not empower courts to apply the "correct legal view" to facts. App.91a (Murphy, J., dissenting); *see Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) ("'substantial evidence' … describe[s] how courts are to review agency factfinding").

The Sixth Circuit also considered a remand futile because, in its view, the agency *could* make the same findings under the proper legal standards. App.53a. But this Court deems remands futile only if the governing law "*required*" a certain result, not merely if the law would permit the agency to reach the same conclusion. *Morgan Stanley*, 554 U.S. at 544-45. The Sixth Circuit's citations confirm this. Take *United Video, Inc. v. FCC*, where the FCC's reasoning why a statute did not prohibit its rule was incorrect. 890 F.2d 1173, 1190 n.15 (D.C. Cir. 1989) (cited at App.53a). The D.C. Circuit declined to remand because the statute could *never* be read to prohibit the FCC's rule. *Id.* But the D.C. Circuit recognized that remands remain imperative where, as here, an order reflects discretionary judgments that only the agency can make, *id.* at 1190. Likewise, remands remain essential where, as here, the agency applied the "wrong standards to the adjudication of a complex factual situation." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969).

Finally, the Sixth Circuit majority held that, because the Federal Deposit Insurance Act authorized the agency's draconian sanction, there was no need to ask if the agency would exercise its discretion the same way on remand. App.52a. Even the FDIC agrees that holding is incorrect and contrary to this Court's and other circuits' cases. FDIC Reh'g

Resp. Br. 3-4, C.A. Dkt 99. Assuming the agency would reimpose the same sanction, simply because it "might have" done so, *Chenery I*, 318 U.S. at 94, usurps the authority Congress vested in the agency to calibrate discretionary enforcement decisions. *Negusie v. Holder*, 555 U.S. 511, 523-24 (2009); *see* App.91a-92a (Murphy, J., dissenting).

In sum, the Sixth Circuit's no-remand holding is plainly erroneous and immensely consequential. The forthcoming cert petition will present this Court with a critical opportunity to reinforce bedrock principles affecting every administrative-law challenge.

II. There Is a Reasonable Probability the Court Will Grant Certiorari and a Fair Prospect of Reversal of the Sixth Circuit's Proof-of-Prejudice Requirement for Separation-of- Powers Challenges

The Sixth Circuit's separation-of-powers holding independently checks all of this Court's boxes for review and reversal. The FDIC—like many other independent agencies—presents a panoply of constitutional problems with respect to its structure and accountability to the President. Yet, under the decision below, the Sixth Circuit will automatically reject standalone constitutional challenges to restrictions on the President's ability to remove subordinates absent "concrete" proof that removal restrictions cause prejudice. App.27a. And such proof will virtually never exist. Presidents generally do not announce that they want to fire subordinates, but cannot due to removal restrictions. That concrete-proof requirement conflicts with at least two other circuits' approach, misreads this Court's decision in *Collins v. Yellen*, and risks rendering separation-of-powers challenges to removal restrictions a dead letter.

A. There Is a Reasonable Probability of Certiorari on This Issue

The decision below departs from other circuits' decisions in the wake of *Collins* over the proper standard for assessing whether unconstitutional restrictions on the President's

removal authority are remediable. Without this Court's intervention, removal challenges will be practically closed off in the Sixth Circuit and disuniformity will reign as to what sorts of allegations of prejudice suffice to allow removal challenges to proceed.

1. The Decision Below Conflicts with Other Circuits' Precedents

The decision below transforms *Collins* into a total bar on separation-of-powers challenges to removal restrictions—a reading at odds with other circuits' decisions, not to mention *Collins* itself. *See* NCLA Reh'g Br. 2, Dkt. 96. That conflict over the meaning of a seminal decision of this Court presents a classic case for this Court's intervention.

Collins recently declared unconstitutional the for-cause removal restrictions insulating the Federal Housing Finance Agency's Director. 141 S. Ct. at 1783-84. Turning to remedies, *Collins* observed that the challengers "no longer have a live claim for prospective relief" because the agency revoked the complained-of action. *Id.* at 1787. Thus, "the only remaining remedial question concerns retrospective relief," *id.*, which *Collins* held depends on whether the Director's removal restrictions "inflicted harm." *Id.* at 1789. On that score, the challengers adduced no concrete proof, but alleged "the President might have replaced one of the confirmed Directors who supervised the implementation of" the challenged action, or that "a confirmed Director might have altered his behavior" in a helpful way. *Id.* *Collins* remanded for lower courts to consider prejudice. *Id.*

At least two other circuits—the Eighth and the Fifth—have interpreted *Collins* to require courts to resolve the merits of removal challenges, then remand for further proceedings so long as specific allegations suggest some possibility of prejudice.

The Eighth Circuit thus remanded petitioners' removal challenge even without concrete evidence of prejudice. *Bhatti v. FHFA*, 15 F.4th 848, 854 (8th Cir. 2021). That court deemed sufficient petitioners' allegations that President Trump "would have removed and replaced" the Director during the customary process of "select[ing] new leadership for virtually every non-independent federal agency at the outset of his Administration." Suppl. Br. of Pls. Appellants 6-7, No. 18-2506 (Aug. 10, 2021).

The Fifth Circuit took the same approach in *Collins v. Yellen*, 27 F.4th 1068 (5th Cir. 2022). Rather than reject petitioners' harm showing, the court held that "questions surrounding retrospective relief" made it "clear that the prudent course is to remand" for further inquiry into prejudice. *Id.* at 1069.

Further, while the Ninth Circuit employs a different approach, that court has looked for either "evidence" or "a plausible theory to show that the removal provision caused [the challenger] any harm." *Kaufman v. Kijakazi*, 32 F.4th 843, 849-50 (9th Cir. 2022). For instance, in a case concerning unconstitutional removal restrictions on the Commissioner of the Social Security Administration, the Ninth Circuit suggested that it might be sufficient to allege "that the Commissioner directed the Appeals Council to decide her case in a particular way because of the statutory limits on the President's removal authority." *Id.* at 850. The challenger there simply failed to present any plausible link. *Id.*; *accord CFPB v. CashCall, Inc.*, 35 F.4th 734, 742-43 (9th Cir. 2022); *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021).

Only the Sixth Circuit's decision below erects a far higher prejudice standard, requiring "concrete" proof of prejudice, not just a possibility of prejudice. App.27a. No

matter the type of case—whether the matter involves an issue likely to hit the President's desk or not—the Sixth Circuit gives the same answer: no concrete proof that the outcome would be different absent removal restrictions, no separation-of-powers challenge. The decision below thus dismissed allegations of prejudice as "vague" and "generalized," App.28a, even though those allegations were at least as substantial as those warranting remands in the Fifth and Eighth Circuits. For instance, the President might have routinely replaced FDIC Board members when administrations turned over, but for tenure protections, and that a less insulated ALJ would likely have followed Executive Branch positions. In other circuits, challengers would have a chance to develop those theories on remand and have courts adjudicate the merits of separation-of-powers challenges.

2. The Issue Is Important, Recurrent, and Warrants Review in This Case

Whether parties challenging removal restrictions must conclusively establish prejudice from the removal restriction for courts to ever entertain their claims is a question of surpassing significance. This Court's intervention is imperative to ensure that such challenges can be brought in all circuits and to resolve the current disuniformity as to what types of allegations of prejudice will allow substantial constitutional challenges to proceed. This case cleanly presents that question and is an optimal vehicle for review.

a. This Court has long emphasized the importance of encouraging challengers to bring separation-of-powers challenges in order to vindicate individual liberty. *E.g.*, *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991). But the Sixth Circuit's prejudice-first, no-merits-later approach "will effectively insulate from juridical correction virtually every unconstitutional removal restriction." Chamber Reh'g Br. 7, C.A. Dkt. 94. Unless petitioners brandish

smoking-gun proof that the President would have removed the relevant official absent the removal restriction—proof that virtually never exists—the Sixth Circuit would never resolve the constitutionality of removal restrictions in standalone challenges. Even blatantly unconstitutional removal restrictions can evade review so long as the government can fault challengers for failing to conclusively establish prejudice.

The upshot is that "[a]dministrative targets subjected to quasi-criminal prosecution" by and in front of constitutionally illegitimate officers will almost never be able to raise their challenges in the Sixth Circuit. NCLA Reh'g Br. 8, C.A. Dkt. 96. And such situations arise frequently. The result will be "longstanding detrimental consequences on the balance of power between Congress, the judiciary, and the executive." George Mason SOP Clinic Reh'g Br. 2, C.A. Dkt. 97.

b. This case provides is an ideal vehicle for addressing the issue. Because the Sixth Circuit started and ended with remedies, this case presents a clean opportunity for the Court to focus on *Collins*'s remedial questions. And the stark results of the Sixth Circuit's rule—effectively foreclosing judicial review of unconstitutionally insulated officers—alone would warrant this Court's review.

B. There Is a Fair Prospect of Reversal on This Issue

The Sixth Circuit's holding "rests on a fundamental misunderstanding of *Collins*." Chamber Reh'g Br. 8, C.A. Dkt. 94. To start, *Collins* is incompatible with the Sixth Circuit's concrete-proof-of-prejudice requirement. The challengers in *Collins* themselves lacked concrete proof of prejudice. *See* 141 S. Ct. at 1789. Yet *Collins* first invalidated the restriction on the President's ability to remove the FHFA Director absent cause, then tackled remedies. *Id.* at 1784-87. And on that score, *Collins* held that because "*the*

possibility that the unconstitutional restriction" harmed the challengers could not "be ruled out," lower courts must assess prejudice on remand. *Id.* at 1789 (emphasis added). *Collins*'s reliance on "the possibility" of harm, *id.*, makes clear that a mere possibility of prejudice suffices for courts to resolve the merits of separation of powers challenges, then to remand for further inquiry into remedies. *Contra* App.26a-27a.

Further, the Sixth Circuit also disregarded limitations on *Collins*'s reach and extended the proof-of-prejudice requirement even to cases involving *prospective* relief. *Collins* only addressed retrospective remedies for "compensable" harms. *Id.* at 1787-89. But Mr. Calcutt and many other applicants in his shoes seek redress for prospective, ongoing harm from an injunction-like order that agencies can revise at any time. 12 U.S.C. § 1818(e)(7)(B); see Enforcement Manual 6-5. The Sixth Circuit reasoned "[t]hat distinction does not matter" because *Collins* discussed "harm" generally. App.25a-26a. But *Collins* referred to "compensable harm" because "the only remaining remedial question" there "concern[ed] retrospective relief" for contractual claims. 141 S. Ct at 1787-89. Other courts thus read *Collins* not to require proof of "compensable harms" to obtain declaratory relief. *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 2022 WL 1577222, at *13 (E.D. Tex. Mar. 18, 2022).

III. Absent a Stay, Applicant Will Be Irreparably Harmed

Mr. Calcutt faces extreme, irremediable harm from the FDIC's prohibition order. As the Sixth Circuit concluded in granting a stay pending appeal at the outset of this case, the "FDIC [did] not deny that the harms alleged by Calcutt are significant." App.95a.

Absent a recall and stay of the mandate, Mr. Calcutt will be immediately forced to exit his profession and lose his livelihood. Removing a respected banker from his chosen profession forever is irremediable harm. *See Burgess v. FDIC*, 871 F.3d 297, 303-04 (5th Cir. 2017); *Anonymous v. FDIC*, 617 F. Supp. 509, 516 (D.D.C. 1985) (removal causing "severe and permanent injury to plaintiff's reputation, and the concomitant destruction of his career in his chosen profession of banking, constitutes an irreparable injury").

Further, the order would wrench Mr. Calcutt from his leadership in role State Savings Bank and its holding company, CS Bancorp, at a time when economic uncertainties make Mr. Calcutt's decades of experience invaluable to the bank, its employees, and its customers. C.A. Dkt. 7 at 507-08. The FDIC's abrupt removal of Mr. Calcutt from his trusted position risks compromising the Bank's strategic vision and key initiatives and driving away key employees, along with important deposit and lending relationships. C.A. Dkt. 7 at 503, 507-08. Those consequences would also threaten the Bank's goodwill and competitive position.

IV. The Equities Favor a Stay

To the extent the Court weighs the equities, they too favor a stay. "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. Given the likelihood of review in this case, coupled with the clear, irreparable harm to Mr. Calcutt from being barred for life from his profession, this should not be a close case.

Regardless, staying the proceedings will not harm the FDIC or the financial system. As the Sixth Circuit concluded when granting a stay pending appeal, "the risk of harm to others or the public interest is low." App.95a. The FDIC certainly cannot claim any

immediate need to remove Mr. Calcutt from the banking industry. The FDIC on August 30, 2022 supported remanding the case to the agency, including to consider whether a lifetime ban is warranted. FDIC Reh'g Resp. Br. 3-4, C.A. Dkt. 99. And in December 2020, the FDIC acknowledged that "the FDIC does not find that the unusual circumstances of this case necessitate Calcutt's immediate removal and prohibition." FDIC Emergency Stay Resp. Br. 3, C.A. Dkt. 12.

Nine years have passed since the FDIC served its 2013 Notice of Intent to bar Mr. Calcutt from the industry. Not only have no problems arisen; Mr. Calcutt's banks have thrived. In 2014, he sold Northwestern Bank at a substantial premium to book value, reflecting strong financials and goodwill. C.A. Dkt. 7 at 502-03. Since then, Mr. Calcutt has served as a director of two institutions that have received strong regulatory ratings, and, with the FDIC's approval, merged. C.A. Dkt. 7 at 502. The merged bank, State Savings, has earned excellent ratings from multiple bank regulators, has strong financials, and has issued loans critical to community businesses during the pandemic. *Id.* at 502, 507. Given this record, the FDIC has no basis for deeming Mr. Calcutt a danger to the financial sector if he continues his decades-long career while this Court reviews the petition.

The public interest also favors a stay. Mr. Calcutt raises serious questions about the legitimacy of upholding an agency order that reflects extraordinary coercive powers, including the power to strip individuals of their livelihoods. Further, the public interest strongly supports avoiding instability for the bank, its employees, its customers, and the surrounding community. *See Burgess*, 871 F.3d at 304.

CONCLUSION

This Court should grant the application to recall the mandate and stay proceedings pending a petition for writ of certiorari. This Court should also issue a temporary stay pending the Court's consideration of this stay application.

Respectfully submitted,

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