

No. 26-3393

**In the United States Court of Appeals
for the Sixth Circuit**

HARRY C. CALCUTT III,
PETITIONER,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENT.

*ON APPEAL FROM A FINAL DECISION AND ORDER BY THE FEDERAL DEPOSIT
INSURANCE CORPORATION TO REMOVE AND PROHIBIT PETITIONER FROM
FURTHER PARTICIPATION IN BANKING AND TO ASSESS CIVIL MONEY PENALTIES*

EMERGENCY MOTION FOR STAY PENDING REVIEW

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INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 18 and 27, Petitioner Harry C. Calcutt respectfully requests an emergency stay pending this Court’s resolution of his petition for review. On April 16, 2026, after a remand from this Court, the Federal Deposit Insurance Corporation (FDIC or Board) issued an order ejecting Calcutt from the banking industry as of May 16, 2026. Although the FDIC previously agreed “that denial of a stay would likely subject [Calcutt] to adverse consequences that could not be fully remediated,” Ex. H, at 23, and did not oppose a stay during Calcutt’s previous appeals, the FDIC has refused Calcutt’s stay request, Ex. P.

This case remains a quintessential case for a stay. Calcutt is likely to succeed on the merits, because the proceedings below remain rife with constitutional and statutory defects. The agency subjected Calcutt to in-house enforcement proceedings without a jury, imposing civil fines and removal. Since Calcutt’s last appeal, the Supreme Court in *SEC v. Jarkesy*, 603 U.S. 109 (2024), made clear that the Seventh Amendment and Article III require this case to be brought in federal court before a jury. The FDIC Board invoked the “public rights” exception to resist that conclusion, but that narrow (and shrinking) exception has no purchase here. The Board imposed legal penalties

on Calcutt, a private individual, for breaching his duties to his employer, a private bank, applying traditional common-law principles.

The Board's order fares no better on the merits. In 2022, this Court found the Board had committed several legal errors. The Court rejected the Board's definition of an "unsafe or unsound practice," and found that the Board failed to apply proximate-causation principles. The Court remanded for the Board to fix those errors. But the Board largely recycled its prior decision. Thus, the Board's order again misapplies the statutory standards for misconduct and causation.

As before, the harm from removal would be severe and irreparable. Calcutt chairs the board of State Savings Bank, a community bank in Michigan that is pursuing a strategic growth plan spearheaded by Calcutt. Removal thus would not only irreparably damage Calcutt's career and reputation, it would harm a bank and its customers.

Further, a stay would not harm the FDIC or the public. Calcutt's bank is financially sound and highly rated. The FDIC did not oppose a stay during the multiple years that this case was last before this Court and the Supreme Court. It then waited nearly another three years to decide Calcutt's case after

remand. Given this Court previously granted relief in nearly identical circumstances, it should do so again.

BACKGROUND

1. Calcutt is 78 years old and has had a long, successful banking career. From 2000 to 2013, he was CEO of Northwestern Bank, a highly regarded and profitable state-chartered bank in Traverse City, Michigan. In 2014, Northwestern was sold to a competitor at a substantial premium. Calcutt is now Chairman of the Board of State Savings Bank and its holding company. *See* Ex. X.

This case arose in August 2013, when the FDIC served a notice of intent to remove and prohibit Calcutt from banking under 12 U.S.C. § 1818(e) and to impose civil monetary penalties under § 1818(i). As relevant here, § 1818 permits removal if an individual engages in unsafe or unsound practices or breaches a fiduciary duty and his bank “suffer[s] or will probably suffer financial loss or other damage” “by reason of” such conduct and such conduct involved the requisite culpability. 12 U.S.C. § 1818(e)(1). The FDIC alleged that Calcutt mishandled a transaction (referred to as the Bedrock Transaction) and concealed a troubled loan relationship with a large borrower

(the Nielson entities) during the Great Recession. Ex. B. Calcutt vigorously denied the allegations.

2. The ensuing 13 years of proceedings produced three distinct encounters with controlling Supreme Court precedent. The first was in 2018, after the Supreme Court decided *Lucia v. SEC*, 585 U.S. 237 (2018), which held that SEC administrative law judges (ALJs) are officers whose appointments by lower-level officials violated the Appointments Clause, *id.* at 251. That ruling came after the FDIC had subjected Calcutt to a hearing before an unconstitutionally appointed ALJ. Recognizing its error, the Board reassigned the case. Ex. C, at 5. A new ALJ recommended punishment by a prohibition order and fine. Ex. E. In December 2020, the FDIC issued a final order fining Calcutt and expelling him from the banking industry. Ex. D.

Calcutt petitioned for review and moved to stay the order. This Court granted the stay, finding “the FDIC does not deny that the harms alleged by Calcutt are significant” and “the risk of harm to others or the public interest is low.” Ex. F, at 3. The Court later denied Calcutt’s petition for review in a 2-1 decision. Ex. G. The majority acknowledged that the Board had committed multiple legal errors. First, the Board misunderstood the conduct that qualifies as an “unsafe or unsound practice” under § 1818(e)(1)(A). *Id.* at

39. Second, the FDIC misinterpreted the “by reason of” requirement in § 1818(e)(1)(B) by failing to apply traditional notions of proximate causation. *Id.* at 43-47. Third, the FDIC improperly counted harms that did not qualify as “effects.” *Id.* at 46. The Court nonetheless affirmed. *Id.* at 53.

Judge Murphy dissented. On Calcutt’s statutory arguments, Judge Murphy first explained that the FDIC’s definition of “unsafe or unsound practice” “springs from a mode of interpretation that no Justice on the Supreme Court would endorse today.” *Id.* at 79. Applying the ordinary meaning, Judge Murphy noted that “the FDIC nowhere indicated that it must identify a banking ‘practice’” as “the vast majority of its findings relied on a single loan—the Bedrock Transaction.” *Id.* at 82. Next, Judge Murphy explained that the FDIC “ignored but-for cause and disavowed proximate cause,” holding Calcutt liable for the bank’s entire loss from underwater loans “even though the Great Recession likely would have caused the bank to suffer much (if not all) of this loss no matter what he did.” *Id.* at 55.

3. That ruling triggered the second encounter with controlling Supreme Court precedent. Calcutt moved in the Supreme Court to recall and stay this Court’s mandate pending a decision on his certiorari petition. The FDIC did not oppose, and the Supreme Court granted the stay. *Calcutt v.*

FDIC, 22A255 (U.S. Sept. 29, 2022). The Supreme Court then granted Calcutt’s petition and summarily reversed. Ex. I. Citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), the Court unanimously held that this Court should have remanded the matter to the FDIC after identifying the legal errors. *Id.* at 6. On remand, this Court vacated the order and remanded to the FDIC to reconsider Calcutt’s case “in a manner consistent with the Supreme Court’s opinion.” Ex. J.

4. This brings us to the third encounter with controlling Supreme Court precedent. Back before the FDIC, Calcutt moved to dismiss the case or, alternatively, to stay it pending the Supreme Court’s disposition of *SEC v. Jarkesy*. Ex. K. The FDIC stayed the proceedings. Ex. M, at 2. After the Supreme Court decided *Jarkesy*, the FDIC invited the parties to address *Jarkesy*’s impact. Ex. N.

On April 16, 2026—17 months after briefing closed—the FDIC Board issued a new order removing Calcutt and assessing a \$125,000 civil money penalty. Ex. A, at 59. The Board’s reasoning largely tracked its 2020 order. On the misconduct and culpability elements, the Board adopted its prior analysis and conclusions. *Id.* at 16, 38. On causation, it purported to apply a proximate-causation standard to the effects this Court had identified in its

prior decision, and concluded that three effects—a \$30,000 charge-off on the so-called Bedrock Loan, some portion of \$6.443 million in losses on the Nielson loans, and dividends Calcutt received from the bank’s holding company—occurred by reason of Calcutt’s alleged misconduct. *Id.* at 27. The Board concluded that this Court’s mandate foreclosed Calcutt’s Seventh Amendment and Article III arguments. Alternatively, the Board rejected the arguments on the merits, concluding that the public rights exception applies. *Id.* at 52-58.

5. In briefing on remand, Calcutt requested a stay of any removal or monetary penalties. Ex. O, at 41. The Board did not expressly address that request. After the order issued, Calcutt’s counsel requested the FDIC agree to stay the order pending appeal. Ex. P. The FDIC declined to agree to a stay. *Id.*

Absent a stay, the Board’s order will permanently bar Calcutt from the banking industry on May 16, 2026.

LEGAL STANDARD

Whether to stay an agency order depends on (1) whether a petitioner “has made a strong showing that he is likely to succeed on the merits”; (2) whether he “will be irreparably injured absent a stay”; (3) “whether issuance of the stay will substantially injure the other parties interested in the

proceeding”; and (4) “where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation omitted). These factors are not prerequisites but are four considerations balanced together. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). “The probability of success that must be shown is inversely proportional to the degree of irreparable injury the plaintiffs will suffer absent an injunction.” *Id.*

ARGUMENT

I. Calcutt Is Likely to Succeed on the Merits

Calcutt has a strong likelihood of succeeding on the merits. The FDIC imposed civil penalties through in-house agency proceedings without a jury, in violation of the Seventh Amendment and Article III. Further, the FDIC largely regurgitated its prior 2020 decision, again misapplying the statutory standards for imposing such penalties.

A. The Seventh Amendment and Article III Require a Jury Trial in Federal Court

Jarkesy upended agencies’ ability to impose punitive sanctions in agency proceedings. Courts continue to grapple with *Jarkesy*’s fallout; the Supreme Court just granted certiorari to consider whether the Department of Labor may impose civil penalties in agency proceedings. *See DOL v. Sun Valley Orchards, LLC*, No. 25-966 (U.S.). Yet below the FDIC acted like nothing had

changed. It punished Calcutt, a private individual, for allegedly breaching his duties to his employer, a private bank. Calcutt is likely to prevail on the argument that the Seventh Amendment and Article III prohibited the FDIC from doing so.

1. The Seventh Amendment requires a jury trial on the monetary penalty

“[T]he Seventh Amendment extends to a particular statutory claim if the claim is legal in nature”—an inquiry that examines both “the cause of action” and “the remedy it provides.” *Jarkesy*, 603 U.S. at 122-23. Actions “to recover civil penalties under statutory provisions” have “historically ... been viewed as [a] type of action in debt requiring trial by jury.” *Id.* at 122 (quoting *Tull v. United States*, 481 U.S. 412, 418-19 (1987)). Thus, when the government seeks legal monetary relief, “the remedy is all but dispositive.” *Id.* at 123. Monetary penalties are “legal” in nature if they are “designed to punish or deter” rather than to restore the status quo. *Id.* (citation omitted).

The monetary penalty here is legal in nature. As in *Jarkesy*, federal law pegs the penalty’s amount to the actor’s culpability. *Compare* 12 U.S.C. § 1818(i)(2)(A)-(C), (i)(2)(G), *with* 603 U.S. at 124. And as in *Jarkesy*, the FDIC need not return money to victims but instead deposits penalties “into the Treasury.” *Compare* 12 U.S.C. § 1818(i)(2)(J), *with* 603 U.S. at 124. The

conclusion that “the civil penalties in this case are designed to punish and deter, not to compensate . . . effectively decides that this suit implicates the Seventh Amendment right.” 603 U.S. at 125.

The nature of the FDIC’s claims confirms that the Seventh Amendment applies. The FDIC’s claims are aimed at “the same basic conduct,” *Jarkesy*, 603 U.S. at 125, as traditional common-law causes of action. The FDIC expressly charged Calcutt with breach of fiduciary duty under § 1818(e)(1)(A)(iii). Both that charge and the unsafe-or-unsound-practices charge under § 1818(e)(1)(A)(ii) rest on allegations that Calcutt made imprudent lending decisions and failed to disclose information to the bank’s board. Ex. A, at 17-24. Such allegations are at the heart of traditional legal claims for breach of fiduciary duty, gross negligence, and fraud. *See, e.g., Ross v. Bernhard*, 396 U.S. 531, 542 (1970) (claim against corporate director for gross negligence subject to Seventh Amendment); *Dykman v. Keeney*, 154 N.Y. 483, 489 (1897) (bank receiver’s action against directors for negligent lending decisions is at law).

FDIC Enforcement conceded below that “the civil penalty the FDIC seeks in this proceeding is a legal remedy.” Ex. L, at 3. But Enforcement argued, and the Board agreed, that the “public rights” exception nonetheless

permits the FDIC to impose such penalties in administrative proceedings. Ex. A, at 52-58. That conclusion is unlikely to withstand review. As this Court recently observed, the public rights exception has “sharp limits,” *NLRB v. Starbucks Corp.*, 159 F.4th 455, 481 (6th Cir. 2025), and has generated substantial criticism, *see Jarkesy*, 603 U.S. at 131, 138-39 & nn. 3, 4. This suit involving private conduct is nothing like the uniquely public schemes the Supreme Court has excepted from the rule. *See id.* at 128-30 (citing cases).

The FDIC reasoned that its proceedings involve public rights because they “regulate an insurance program created and run by the federal government.” Ex. A, at 53. That the federal government insures private banks (mainly through assessments paid by banks¹) does not transform the case into one involving public rights. The FDIC cited no authority for the proposition that any administrative proceeding with some connection (however remote) to the public fisc triggers the exception. If accepted, that proposition would swallow the rule.

Citing *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the FDIC also concluded that Congress “had the power to condition

¹ <https://www.fdic.gov/resources/deposit-insurance/deposit-insurance-fund>.

receipt of FDIC insurance on compliance with section 1818 procedures without providing an Article III adjudication.” Ex. A, at 54-55. The FDIC, however, cited no statute conditioning anything granted to Calcutt on his agreement to waive his Seventh Amendment and Article III rights. The two million employees of FDIC-insured banks² did not waive their constitutional rights merely by accepting employment with banks.

The FDIC also cited a recent Fifth Circuit decision holding that section 1818 monetary penalties fall within the public rights exception. *Ortega v. Off. of Comptroller of Currency*, 155 F.4th 394 (5th Cir. 2025). The petitioners in that case have petitioned for rehearing, and the Fifth Circuit is holding the petition pending the Supreme Court’s decision in *FCC v. AT&T, Inc.*, No. 25-406, and *Verizon Commc’ns Inc. v. FCC*, No. 25-567.

This Court is likely to disagree with the Fifth Circuit. The Fifth Circuit highlighted that Congress did not create nationally chartered banks until 1864 and did not provide for federal enforcement proceedings until 1966—which in the court’s view meant there was no preexisting history of federal suits against national banks for the Seventh Amendment to “preserve.” *Ortega*, 155 F.4th

² <https://state-tables.fdic.gov/>.

at 406. This case involves a state-chartered bank, not a national bank. Ex. A, at 1. Regardless, under *Jarkesy*, “[e]ven when an action originates in a newly fashioned regulatory scheme, what matters is the substance of the action, not where Congress has assigned it.” 603 U.S. at 134 (citation omitted). The substance of this action, as in *Jarkesy*, is to extract money from an individual as punishment.

2. *The Seventh Amendment requires a jury trial on the removal and prohibition order*

The removal and prohibition order also requires a jury trial. “[W]hen legal and equitable actions are tried together, the right to a jury trial in the legal action encompasses the issues common to both.” *In re Lewis*, 845 F.2d 624, 629 (6th Cir. 1988) (citation omitted). “The legal claim ... must be tried first before a jury and the equitable claim resolved subsequently *in light of* the jury’s determination of the legal claim.” *Id.*; see also *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962). Thus, a jury needed to decide if Calcutt committed the alleged unsafe or unsound practices and breaches of fiduciary duty underlying both remedies.

Even standing alone, the order of removal and prohibition requires a jury trial. The FDIC imposes removal and prohibition as punishment for “past conduct,” not on an individual’s “current competence or the degree of risk she

pose[s] to the public.” *Proffitt v. FDIC*, 200 F.3d 855, 862 (D.C. Cir. 2000) (citation omitted) (prohibition is penalty for statute-of-limitations purposes). And, as already discussed, the FDIC’s claim is akin to traditionally legal causes of action.

3. *Article III requires a federal-court trial*

Even if one or both remedies were equitable and did not require a jury trial, Article III still would require that the FDIC proceed in federal court. Article III prohibits Congress from “withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity.” *Jarkesy*, 603 U.S. at 127 (citation omitted); *see, e.g., Intuit, Inc. v. FTC*, 170 F.4th 411, 419 (5th Cir. 2026) (FTC must bring cease-and-desist claim for deceptive advertising in Article III court). As already discussed, the FDIC’s claims against Calcutt are the kinds of private claims that have traditionally been subject to suits at law or equity, and the public rights exception does not apply.

4. *The mandate rule does not foreclose these challenges*

The FDIC rejected these arguments on the merits but alternatively held that this Court’s mandate foreclosed the arguments. Ex. A, at 42-44. This Court is likely to disagree.

“An appellate court’s mandate ... forecloses a lower court or an agency only from revisiting issues that the appellate court actually decided.” *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 950 (6th Cir. 1999). Mandates may be limited or general. If this Court issues “a limited remand,” it commands the agency “to consider *only* the specific issue [it identifies]—not all issues.” *United States v. Liggins*, 167 F.4th 894, 903 (6th Cir. 2026). By contrast, if the Court issues “a general remand,” the agency has “greater flexibility to address all issues, including unaddressed ones.” *Id.* “Unless otherwise specified, a remand order is presumed to be general.” *United States v. Helton*, 349 F.3d 295, 299 (6th Cir. 2003).

The FDIC misunderstood this Court’s mandate to be limited. The Court remanded for the FDIC to “reconsider Calcutt’s case in a manner consistent with the Supreme Court’s opinion.” Ex. J. And the Supreme Court instructed the FDIC to consider the case “anew in a manner consistent with this opinion.” Ex. I, at 2. This is a classic general remand. *See, e.g., United States v. Moore*, 131 F.3d 595, 598 (6th Cir. 1997) (“remand the case for resentencing consistent with this opinion” is general remand).

Even if this Court had issued a limited remand, courts and agencies may consider new issues on remand when the law has changed. *See, e.g., United*

States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994). The FDIC declined to apply this exception because it concluded on the merits “that there has been no change in the law that requires a jury trial here.” Ex. A, at 44. That reasoning is circular: If Calcutt is entitled to a jury trial or trial by Article III court, the FDIC’s reason for declining to apply the exception falls apart.

As Judge Murphy acknowledged in this Court’s prior decision, courts previously had held that section 1818 remedies fall within the public rights exception. *See* Ex. G, at 72 (citing *Cavallari v. Off. of Comptroller of Currency*, 57 F.3d 137, 145 (2d Cir. 1995); *Simpson v. Off. of Thrift Supervision*, 29 F.3d 1418, 1423 (9th Cir. 1994)). If *Jarkesy* now compels the opposite conclusion, it is only fair to consider Calcutt’s argument on the merits.

B. Calcutt Did Not Cause Any Cognizable Effect

Calcutt is also likely to prevail because the Board failed to properly analyze whether he proximately caused cognizable effects. The relevant facts are summarized in the Court’s and Board’s prior decisions. To briefly summarize, the Board held Calcutt’s actions proximately caused three effects: (1) a \$6,443,000 charge-off across Nielson loans in 2011; (2) a \$30,000 charge-off on the Bedrock Loan in 2012; and (3) a dividend to the Bank’s holding

company in 2011. The Board's causation and effects analysis remains riddled with error.

\$6,443,000 Charge-Off. The Board concluded Calcutt's conduct caused (1) an actual loss when it charged-off \$6,443,000 on loans to the Nielson entities and (2) "a situation in which the Bank could suffer a potential loss." Ex. A, at 37 (quoting Ex. G, at 48). These findings are contrary to law and unsupported by substantial evidence.

As to (1) the actual loss finding, Calcutt's actions did not proximately cause any portion of the charge-offs. Every loan was underwritten, collateralized, **and underwater** before the at-issue Bedrock Transaction. As this Court and Board found, the loans "went into default in 2009" **before** Calcutt acted, Ex. A, at 36, and "the Bank probably would have incurred some loss no matter what Calcutt did," Ex. G, at 47. And the Board found misconduct because Calcutt extended rather than foreclosed on the loans in 2009. Thus, the key question—as the FDIC recognized at the outset of the proceeding³—was whether Calcutt's actions **deepened** the inevitable losses. But the Board made no such finding.

³ Ex. B, at ¶ 110-11.

Further, no evidence shows Calcutt's actions deepened the losses. FDIC expert witnesses admitted they could not determine whether the bank would have been better- or worse-off had the bank foreclosed in 2009.⁴ The FDIC failed to proffer expert testimony analyzing causation, comparing changes in loan value over time, or isolating the effects of Calcutt's conduct versus other factors like the Great Recession.

Rather than deepen the losses, Calcutt's actions benefited the bank. The real estate underpinning the loans could sell only for "pennies on the dollar" in 2009.⁵ Extending the loans thus avoided foreclosing at the worst possible time, and when the bank ultimately foreclosed in 2011, it had received principal paydowns exceeding the amount of the Bedrock Loan.⁶

As to (2) the potential loss finding, the Board misapplied the statute. It found the bank "could suffer a potential loss," Ex. A, at 37, but the statute requires that the bank "has suffered" past, actual harm or "will probably suffer" harm in the future. 12 U.S.C. § 1818(e)(1)(B)(i). Congress thus allowed removal for inflicting past harm or stopping harm before it starts. Nowhere

⁴ Ex. T, at 322:2-15; Ex. U, at 835:2-836:7.

⁵ Ex. V, at 944:3-7.

⁶ Ex. R, at 8; Ex. U, at 836:8-13.

does the statute permit removal for past, ***potential*** financial risk, as the Board found.

\$30,000 Charge-Off. The Board found that Calcutt's negotiation and approval of the Bedrock Transaction in 2009 caused the bank to charge off \$30,000 on the Bedrock Loan in 2012. Ex. A, at 29. But the Board never analyzed whether the charge-off exceeded the losses that would have occurred absent the loan. (As discussed, the Transaction benefited the bank.)

Moreover, Calcutt's approval of the loan two-and-a-half years earlier cannot, standing alone, prove his conduct directly and substantially caused the charge-off. Ex. G, at 45. If it did, bankers could be removed for approving any loan with underwriting deficiencies regardless of when, how, or by how much the loan soured. Case in point: During the interim years, the FDIC investigated the Nielson lending relationship and Calcutt's conduct, after which the FDIC found "no loss" on the Bedrock Loan.⁷ Nine months later, the charge-off occurred. No evidence shows why the charge-off was taken, what changed, or how Calcutt caused it. Further, numerous factors like the Great

⁷ Ex. T, at 323:2–8; Ex. Q, at 84 ("The appraised values support the existing debt and as a result, no loss was identified for [Bedrock].").

Recession could have impacted it, but the FDIC never grappled with those factors. Its causation finding is speculation.

\$463,000 Dividend. The Board found Calcutt’s actions caused him to receive a small portion of a \$463,000 dividend that the bank distributed to its holding company in 2011. The Board’s causal theory improperly goes “beyond the first step.” *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 203 (2017). Calcutt did not directly receive the dividend. Instead, the bank’s board and regulator approved the same dividend that had been approved for years to the holding company, whose board and regulator determined could be distributed to shareholders, including Calcutt. This indirect, multistep causal chain involving multiple independent decision-makers cannot support a finding of proximate causation. *See, e.g., Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 271 (1992); *Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 15 (2010). To permit otherwise would allow removal for conduct whenever the banker has (as commonly occurs) a small, remote financial stake in the bank’s performance.

C. The Board Again Misapplied the “Unsafe or Unsound Practice” Standard

Although it went on to affirm the Board’s misconduct findings, this Court previously rejected the FDIC’s definition of “unsafe or unsound

practice,” finding its “reading contradict[ed] the analyses of our sister circuits” and its cited caselaw was “not convincing.” Ex. G, at 39. More recently, the FDIC proposed a rule defining “unsafe or unsound practice” “to promote greater clarity” and to “prioritize material financial risks over concerns related to policies, process, documentation, and other nonfinancial risks.” *Unsafe or Unsound Practices, Matters Requiring Attention; Proposed Rule*, 90 Fed. Reg. 48,836 (proposed Oct. 30, 2025). But on remand, the Board offered no new analysis addressing this Court’s criticism or its proposed rule. Rather, the Board summarily “adopt[ed] and affirm[ed] the 2020 Decision’s analysis and its conclusions.” Ex. A, at 16. Thus, the Board’s determination of “unsafe or unsound practices” remains inconsistent with the statutory meaning.

The statute’s text permits removal only for a “practice,” which is a habitual action, not a single act. *See* Ex. G, at 80-81 (Murphy, J., dissenting); *compare* 12 U.S.C. § 1818(e)(1)(A)(ii) (removal for “unsafe or unsound **practices**”), *with* § 1818(e)(1)(A)(iii) (removal for “**any act, omission or practice**” breaching a fiduciary duty). To be “unsafe or unsound,” that practice must involve a “sufficient degree of risk of sufficient harm, injury, or damage.” *Unsafe or Unsound Practices*, 90 Fed. Reg. at 48,837; *accord* Ex.

G, at 80-81 (Murphy, J., dissenting). And because that unsafe or unsound practice must be “in connection with” a bank, § 1818(e)(1)(A), the phrase only covers “banking practices,” *Grant Thornton, LLP v. Off. of Comptroller of Currency*, 514 F.3d 1328, 1332-33 (D.C. Cir. 2008). Thus, § 1818(e)(1)(A) requires proving a habitual banking action exposing the bank to a material risk of financial harm.

The Board’s conclusions conflict with the statutory text. The Board removed Calcutt primarily because it found that the Bedrock Transaction was inconsistent with lending policy and prudent practice and that Calcutt failed to disclose it. Ex. A, at 16-21. But the Transaction was not a “banking practice.” It was a one-time solution to avoid imminent harm, and any procedural inconsistencies were not material. *See Unsafe or Unsound Practices*, 90 Fed. Reg. at 48,839 (“it would be rare for an institution to exhibit unsafe or unsound practice ... based solely on the institution’s policies, procedures, documentation or internal controls”); *Matter of Seidman*, 37 F.3d 911, 926 (3d Cir. 1994) (“An officer’s violation of a banking institution’s policy ... is not enough” for unsafe or unsound practice).

II. Calcutt Will Be Irreparably Harmed Absent a Stay

Removing a respected banker from his chosen profession for life constitutes serious, irreparable harm, *see Burgess v. FDIC*, 871 F.3d 297, 303-04 (5th Cir. 2017)—especially when an unconstitutional proceeding produced that draconian result. *See Anonymous v. FDIC*, 617 F. Supp. 509, 516 (D.D.C. 1985).

Here, the harm is severe and irreparable. Calcutt serves as Chairman of the boards of State Savings Bank and its holding company. Ex. X, ¶ 2. Beyond imposing substantial reputational injury, *id.* ¶ 4, the FDIC’s order will prevent him from using his decades of experience to guide State Savings, at great cost to the bank, its employees, and its customers. *Id.* ¶ 10; Ex. W, ¶ 7.

The FDIC previously recognized the irreparable nature of these harms. In the Supreme Court, the FDIC “agree[d] with [Calcutt] that denial of a stay would likely subject him to adverse consequences that could not be fully remediated if the Court ultimately grant[ed] review and reverse[d] the court of appeals’ judgment on the merits.” Ex. H, at 23. Nothing has changed.

If anything, removal now is even harsher. Calcutt has been leading State Savings’ transformative growth, including expansion in Northwest Michigan and critical improvements to technological infrastructure and

investment and trust services. Removal would jeopardize those initiatives, causing irreparable harm not only to him but to State Savings. Ex. W, ¶¶ 3, 7.

His removal also would alienate key employees and important deposit and lending relationships. Ex. X, ¶ 7; Ex. W, ¶ 7. Calcutt has recruited around two-thirds of State Savings' employees, including most lenders and about 20 managers or supervisors. Ex. X, ¶ 7; Ex. W, ¶ 5. And he has been responsible for several million dollars of deposit and lending relationships. Removal would thus threaten the bank's goodwill, reputation, and competitive position. *See Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 279 (6th Cir. 2015).

III. A Stay Will Not Harm the FDIC and Serves the Public Interest

A stay will not harm the FDIC, the financial system, or the public. As this Court previously found, the FDIC “affirmatively state[d] that it ‘does not find that the unusual circumstances of this case necessitate Calcutt’s immediate removal and prohibition prior to this Court’s disposition of the petition for review.’” Ex. F, at 3. This Court accordingly found that “the risk of harm to others or the public interest is low” and granted the stay. *Id.* at 3. The FDIC thereafter took the same position in the Supreme Court. Ex. H. Again, nothing has changed. In fact, the FDIC itself stayed the case for months on remand and then waited 17 more months after the parties

completed briefing to issue its order. It cannot now claim a stay would cause harm.

The public interest also favors a stay. “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994). The public interest is further served by avoiding instability for the bank’s employees, customers, and surrounding community. *See Burgess*, 871 F.3d at 304. State Savings plays a significant role in the local financial ecosystem. For instance, the bank made millions of loans directly supporting local businesses and employees through the pandemic. Ex. Y, ¶ 4. Removing Calcutt risks harming the bank’s reputation, employees, and wider community.

CONCLUSION

For these reasons, Calcutt respectfully requests that the Court stay the FDIC's order pending resolution of his petition for review.

Dated: May 1, 2026

Respectfully submitted,

/s/ Ryan T. Scarborough

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
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/s/ Ryan T. Scarborough
Attorney for Petitioner Harry Calcutt

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Petitioner conferred via email with FDIC Enforcement Counsel, who indicated that FDIC would not agree to stay the effect of its order pending Petitioner's appeal. Accordingly, the motion is deemed opposed.

/s/ Ryan T. Scarborough
Attorney for Petitioner Harry Calcutt

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **EMERGENCY MOTION FOR STAY PENDING REVIEW** were filed with the Clerk's Office for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system and were served by electronic mail upon the following persons:

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APPENDIX OF EXHIBITS**Index of Exhibits**

Exhibit	Date	Document Description
A	April 16, 2026	Decision and Orders of the Federal Deposit Insurance Corporation, Nos. FDIC 12-568e & FDIC 13-115k
B	August 20, 2013	Notice of Intention to Remove from Office and Prohibit from Further Participation, Notice of Assessment of Civil Money Penalties, Findings of Fact, Conclusions of Law, Order to Pay, and Notice of Hearing
C	July 24, 2018	Notice of Reassignment
D	December 15, 2020	Decision and Order to Remove and Prohibit from Further Participation and Assessment of Civil Money Penalties
E	April 3, 2020	Findings of Fact, Conclusions of Law, and Recommended Decision on Remand of the Federal Deposit Insurance Corporation
F	January 5, 2021	Order Granting Stay
G	June 10, 2022	Opinion of the U.S. Court of Appeals for the Sixth Circuit
H	September 28, 2022	Response to Application for a Stay of Proceedings and Recall of the Sixth Circuit's Mandate Pending Petition for a Writ of Certiorari and for an Administrative Stay
I	May 22, 2023	Opinion of the U.S. Supreme Court (per curiam)
J	June 28, 2023	Order on Remand from the Supreme Court of the United States
K	January 18, 2024	Respondent's Motion to Dismiss the Case or, Alternatively, Hold the Proceedings in Abeyance Pending the Supreme Court's Disposition of <i>SEC v. Jarkesy</i> (No. 22-859), or, Alternatively, Assign the Case for Remand Proceedings

L	February 1, 2024	FDIC's Opposition to Motion to Dismiss
M	February 27, 2024	Order Staying Case
N	July 18, 2024	Order on Briefing Schedule
O	November 8, 2024	Respondent's Reply Brief Following Remand
P	April 24, 2026	Email exchange between R. Scarborough and FDIC
Q	August 1, 2011	FDIC Trial Ex. 48: FDIC Report of Examination
R	August 8, 2012	FDIC Trial Ex. 77: Northwestern Bank External Loan Review Report
S		[Intentionally omitted]
T	October 30, 2019	Excerpt of Trial Transcript, pp. 322-324
U	November 1, 2019	Excerpt of Trial Transcript, pp. 835-836
V	November 4, 2019	Excerpt of Trial Transcript, p. 944
W	April 28, 2026	Affidavit of Blake Brooks
X	April 29, 2026	Affidavit of Harry C. Calcutt III
Y	May 10, 2022	CS Bancorp Message to Shareholders