

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.

RESPONSE TO PETITIONER'S EMERGENCY MOTION FOR STAY
PENDING REVIEW

On Petition for Review of the Final Decision and Orders of the Federal Deposit
Insurance Corporation, Nos. FDIC-12-568e, FDIC-13-115k

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INTRODUCTION

On April 29, 2026, Petitioner Harry C. Calcutt III petitioned for review of an April 16, 2026 decision of the Federal Deposit Insurance Corporation (“FDIC”). The orders accompanying that decision prohibited Calcutt from participating in the banking industry (“Prohibition Order”) and assessed a civil money penalty of \$125,000 (“CMP Order”). The Orders were served on April 17, 2026, and the Prohibition Order will take effect on May 17, 2026 under 12 U.S.C. § 1818(e)(4). Calcutt now moves for a stay pending appeal (“Mot.”).

As in his first appeal, Calcutt refused to follow the FDIC’s stay procedure. He did not ask the FDIC Board for a stay after the Orders were issued, and it is no substitute only to ask for the position of Enforcement Counsel (Ex. P¹), who are not decisionmakers. Although the Court excused Calcutt’s failure to comply with Federal Rule of Appellate Procedure 18(a) in his first appeal, it did so only because the FDIC had determined that the balance of factors in that appeal could warrant a stay. Ex. F at 2. This appeal, however, presents different issues, and the Court should not again excuse Calcutt’s circumvention of the FDIC’s process.

Even if Calcutt had satisfied those procedural prerequisites, the Court should still deny a stay request because he is unlikely to succeed on the merits. The FDIC Board properly determined that it need not consider Calcutt’s request for a jury trial

¹ Exhibit references are to the Exhibits attached to Petitioner’s motion.

at this late juncture. Moreover, no court has held that a petitioner has a right to a jury trial in this context, and Calcutt's cited authorities are distinguishable. Calcutt's attacks on the Board's assessment of the statutory factors fare no better, rehashing arguments already rejected by this Court in his first appeal. The remaining factors, considered in conjunction with his low likelihood of success on the merits, likewise do not support a stay.

BACKGROUND

The FDIC insures the deposits of qualifying banks. *See* 12 U.S.C. § 1811(a). To protect the integrity of insured banks, the FDIC may bring enforcement actions against “institution-affiliated part[ies],” such as bank officers. *See* 12 U.S.C. § 1818(e)(1)(A) and (i)(2). The FDIC may issue an order “remov[ing] [a] party from office” or “prohibit[ing] any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.” *Id.* § 1818(e)(1). Such an order is proper when the FDIC determines (1) that the party “committed misconduct,” which includes “unsafe or unsound practice[s]” or breaches of fiduciary duty; (2) that the institution “has suffered or will probably suffer financial loss” or other damage, and (3) that the misconduct “involves personal dishonesty” or “demonstrates willful or continuing disregard” for the institution’s safety or soundness. *Id.* The FDIC also may issue CMPs. 12 U.S.C. § 1818(i)(2).

The FDIC initiated an action against Calcutt in 2013 based on his actions

while President, CEO, and Chairman of the Board of Northwestern Bank in Traverse City, Michigan. Ex. B. The FDIC alleged that Calcutt engaged in unsafe and unsound banking practices and breaches of fiduciary duty that harmed the bank. Specifically, the FDIC alleged actions related to transactions designed to buoy the Bank's largest lending relationship with entities connected to the Nielson family and to conceal the troubled nature of the Nielson loans from the bank's board and regulators. *Id.*

After the FDIC conducted lengthy proceedings and a full hearing before an administrative law judge ("ALJ"), the U.S. Supreme Court issued *Lucia v. SEC*,² which prompted the FDIC Board to formally appoint its ALJs and reschedule pending enforcement matters for a new hearing before a new ALJ. Ex. C. The new ALJ, after a hearing, issued a recommended decision to the FDIC Board. Ex. E.

The Board rejected Calcutt's exceptions to that decision and adopted the ALJ's recommendation to impose a removal and prohibition order and a \$125,000 CMP. Ex. D at 45-48. Calcutt petitioned for review, and this Court sustained the Board's order, rejecting Calcutt's constitutional challenges to the enforcement proceeding and determining that the "FDIC Board did not err in determining that Calcutt engaged in unsafe or unsound practices," Ex. G at 40, and breached his fiduciary duties. *Id.* at 41-43. The Court held the Board should have applied a

² 585 U.S. 237 (2018).

proximate-causation standard in analyzing the statutory effects of Calcutt's misconduct, but found that Calcutt had proximately caused some, though not all, of the harms that the Board identified as statutory "effects." *Id.* at 45. Because the Court found substantial evidence of qualifying effects, it deemed a remand to the Board unwarranted. *Id.* at 52.

Calcutt petitioned the U.S. Supreme Court for a writ of certiorari, which the FDIC did not contest to the extent it sought reversal for failure to remand to the FDIC Board. The Supreme Court granted the petition and issued a *per curiam* opinion reversing the Court's judgment and ordering remand to the FDIC to determine the severity and type of sanctions warranted upon the Board's correction of the causation analysis errors. Ex. I at 7.

This Court remanded the matter, and after supplemental briefing, the FDIC again determined that prohibition and a \$125,000 CMP were warranted. Ex. A. The Board analyzed the "effects" of Calcutt's misconduct and found that each of the three effects this Court identified as proximately caused by Calcutt's misconduct independently supported a prohibition order. Ex. A at 28-38. The Board also rejected Calcutt's jury trial argument as outside the Court's remand mandate (*id.* at 42), and further concluded that, even if the issue could be considered, no jury trial was required: removal and prohibition proceedings do not implicate the Seventh Amendment (*id.* at 45), and the proceedings at issue can be heard administratively

“because they concern public rights.” *Id.* at 52.

On April 29, 2026, Calcutt petitioned this Court for review.

ARGUMENT

The FDIC opposes Calcutt’s stay request because (1) he did not properly seek relief from the FDIC first and (2) the circumstances of this appeal do not warrant a stay, particularly given Calcutt’s unlikelihood of success on the merits. A movant seeking a stay pending appeal must make a “strong showing that he is likely to succeed on the merits,” and must also show that a stay will prevent irreparable harm, is favored by the balance of hardships, and serves the public interest. *Thompson v. DeWine*, 959 F.3d 804, 807 (6th Cir. 2020). Likelihood of success on the merits is “often ... the determinative factor” when preliminary relief rests on a constitutional challenge. *Kentucky v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020).

While the FDIC did not oppose a stay at prior stages of this proceeding, it does not consent now given Calcutt’s different arguments for a stay in this appeal and this Court’s prior determination that a decision on the basis now adopted by the FDIC would be permissible. The Orders should take effect without further delay.

I. This Court should decline to consider Calcutt’s stay motion given his repeated failure to follow the FDIC’s procedures.

Under F.R.A.P. 18(a)(1), “[a] petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.” To satisfy this requirement, a stay motion must either “show that moving first before the agency

would be impracticable,” or “state that a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action.” F.R.A.P. 18(a)(2)(A). Calcutt does not claim that he fulfilled these requirements or justify his failure to seek relief from the Board. Instead, he cites only FDIC Enforcement Counsel’s refusal to consent to a stay. Mot. at 1. Mere opposition by counsel does not show that moving the Board would have been impracticable.

Calcutt may assert in reply that he requested a stay in pre-decisional briefing to the Board, but that is not sufficient either, as litigants cannot address the application of the stay factors when the basis for the Board’s decision is still unknown. The FDIC rule governing stay requests also contemplates that a petition for review must be pending when a request is made. 12 C.F.R. § 308.41 (“Board of Directors may, in its discretion, and on such terms as [it] finds just, stay the effectiveness of all or any part of its order *pending a final decision on a petition for review* of that order”) (emphasis added).³ Because Calcutt again failed to seek relief from the FDIC before seeking a stay from this Court, the Court should deny his request.

³ The Board can act after a petition is filed because court of appeals jurisdiction becomes exclusive only after the agency files the record. 12 U.S.C. § 1818(h)(2).

II. Calcutt is unlikely to succeed in challenging the Orders as issued in violation of the Seventh Amendment.

As noted above, likelihood of success on the merits is often determinative when a movant seeks preliminary relief based on a constitutional challenge. Calcutt cannot show any such likelihood here, let alone the “strong” and “substantial” likelihood required for a stay pending appeal. *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 929-30 (6th Cir. 2002). The FDIC Board correctly concluded that an administrative debarment proceeding does not implicate the Seventh Amendment, and Calcutt identifies no salient flaws in the Board’s conclusion.

A. The Seventh Amendment does not apply to removal and prohibition actions.

The Seventh Amendment applies only to actions tried “at common law” in 1791, *see* U.S. Const. amend. VII, and has no application to suits at equity. *See SEC v. Jarkesy*, 603 U.S. 109, 122 (2024). In determining whether an action is legal or equitable, courts must consider the cause of action and the requested remedy, treating the remedy as the “more important consideration.” *Id.* at 123 (citations omitted). The equitable nature of the FDIC’s removal and prohibition remedy is dispositive here. Reinstatement and removal remedies in the conventional employment setting have been viewed as equitable for these purposes,⁴ and

⁴ *See McGruder v. Metropolitan Gov’t*, 99 F.4th 336, 339 (6th Cir. 2024).

debarment remedies fall outside the Seventh Amendment. *See, e.g., Genovese v. SEC*, No. 25-CV-2704, 2026 WL 446219, at *5 n.7 (S.D.N.Y. Feb. 17, 2026) (“[D]ebarment is an equitable form of relief to which the Seventh Amendment does not apply.”).

Calcutt’s contention that the FDIC’s removal and prohibition remedy is intended to punish, and thus is legal rather than equitable (Mot. at 13-14), has no merit. Numerous courts have recognized in related constitutional contexts that debarment remedies, and § 1818(e)’s remedies in particular, are primarily remedial rather than punitive. *Hudson v. United States*, 522 U.S. 93, 104-05 (1997) (§ 1818(e) prohibition not punitive); *United States v. Smith*, 1996 WL 511578, at *1, 97 F.3d 1453 (table) (6th Cir. 1996) (debarment “was a remedial penalty (protecting the public)”; *see also United States v. Rusk*, 96 F.3d 777, 779 (5th Cir. 1996) (“[D]ebarment orders do not serve a punitive purpose but rather the remedial goal of protecting the banking industry.”). *Proffitt v. FDIC* found a punitive or deterrent aspect to § 1818(e) orders for purposes of the statute of limitations, but expressly distinguished constitutional “punitive” analyses. 200 F.3d 855, 860 n.5 (D.C. Cir. 2000). Calcutt does not explain why *Proffitt* applies here.

Even if the remedial nature of the § 1818(e) action did not settle the Seventh Amendment question, the Amendment would be inapplicable because the FDIC’s cause of action is not rooted in any action tried at law in 1791. The FDIC’s removal

and prohibition proceeding rested on breaches of fiduciary duty and unsafe and unsound practices. Breach of fiduciary duty actions, to the extent they existed in 1791, were brought in equity. *See Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 568-69 (1990); *Evans v. Pearson Enter.*, 434 F.3d 839, 849 (6th Cir. 2006). The concept of unsafe and unsound banking practices, moreover, had *no* analogue in common-law torts.⁵

Calcutt’s attempts to compare the FDIC’s claims to fraud and gross negligence fail. Mot. at 10. Those actions required in 1791—and still require—actual loss to the plaintiff (“money damages”⁶), and are brought to “recover” those losses. *See Dykman v. Keeney*, 154 N.Y. 483, 489 (1897). The FDIC’s § 1818(e) actions require only a showing of a *risk* of loss and do not seek to recover specific ill-gotten sums. Furthermore, a § 1818(e) action can rest on a variety of different showings, many of which do not resemble fraud at all (e.g., “willful or continuing disregard” for a bank’s safety and soundness), and the FDIC does not bring its action to compensate the victim or to avoid a contract or other arrangement procured by fraud. As for gross negligence, the FDIC Board has expressly distinguished that

⁵ *See Michael v. FDIC*, 687 F.3d 337, 352 (7th Cir. 2012) (unsafe and unsound practice is “(1) an imprudent act (2) that places an abnormal risk of financial loss or damage on a banking institution”); *see also, e.g.*, Patricia McCoy, *A Political Economy of the Business Judgment Rule in Banking*, 47 Case W. Res. L. Rev. 1, 23-26, 29 (1996) (nineteenth-century court decisions “rewarded, rather than penalized, risk” and “refused to interfere with lending decisions”).

⁶ *Ross v. Bernhard*, 396 U.S. 531, 542 (1970).

standard from the scienter required under § 1818(e).⁷

Congress created a new action, with a new remedy, when it authorized removal and prohibition under § 1818(e), and Calcutt fails to persuasively link that action to actions tried at law in 1791. The Seventh Amendment is therefore inapplicable.

B. The Action Concerned Public Rights.

Furthermore, the FDIC's removal and prohibition action (like its CMP action) could constitutionally be adjudicated within the Executive Branch because it concerned public rights. Actions "involving governmental prerogatives" fall within the public rights doctrine,⁸ and the FDIC's removal and prohibition action plainly involves the sovereign interests of the FDIC as deposit insurer: it is brought to protect the industry from unsafe practices that have the potential to jeopardize the stability of insured institutions, and by extension to safeguard the Deposit Insurance Fund from potential failures arising from those unsafe practices. Just as the tax, customs, and public benefits examples identified in *Jarkesy* fall within the public rights exception,⁹ an action to prevent drawdowns on the Fund is a public rights matter. The historically extensive regulation of the banking industry, conducted to

⁷ See, e.g., *In the Matter of James L. Leuthe*, FDIC-95-15e, 1998 WL 438323, at *14 n.26 (FDIC June 26, 1998).

⁸ See *Jarkesy*, 603 U.S. at 120.

⁹ 603 U.S. at 128-30.

preserve the stability of the broader financial system, likewise supports the view that sovereign prerogatives permit administrative adjudication here. *Cf. id.* at 135 (exception inapplicable to regulation of “transactions between private individuals interacting in a pre-existing market”).¹⁰ Calcutt argues that the connection between the FDIC’s enforcement actions and the public fisc is “remote” and that applying the exception would “swallow the rule” (Mot. at 11), but the integrity of the Fund is directly at issue when bankers endanger the health of their banks. Few administrative proceedings implicate the public fisc in this way.

An “unbroken tradition” of administrative enforcement is significant as well. *Jarkesy*, 603 U.S. at 128-29. Matters that “historically could have been determined exclusively by [the executive and legislative] branches, even [if] judicial power [wa]s capable of acting on them” are protected by the exception. *Id.* at 128. Here, banking regulation has been litigated “exclusively” in administrative bodies, going back nearly a century.¹¹ Unlike the SEC, the FDIC has not been authorized to bring enforcement actions in federal court, an option that the Supreme Court deemed

¹⁰ *See, e.g., Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995) (exception applies to address disregard of banking authority’s orders, as regulatory scheme was created “in order to safeguard the thrift industry and the FDIC”); *Simpson v. OTS*, 29 F.3d 1418, 1423 (9th Cir. 1994) (exception applies because “Congress created the administrative forum to effectuate and protect the public interest,” specifically by “safeguard[ing] the thrift industry, the depositors, and the federal insurance fund.”).

¹¹ *See, e.g., Pub. L. No. 73-66*, §§ 3(a), 30 (June 16, 1933) (agencies authorized to suspend member bank and remove directors and officers after notice and hearing).

significant in *Jarkesy*. 603 U.S. at 116, 118, 119, 120.

It is also noteworthy that the public rights doctrine permits administrative adjudication where the subject of the proceeding voluntarily participated in the pertinent regulatory scheme. *See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 571, 589 (1985) (participants in such a scheme could be required to submit to “binding arbitration with only limited judicial review”). *A fortiori*, this matter, which provides for plenary review by this Court, is permissible under the exception. Calcutt claims that the Board “cited no statute” on this point (Mot. at 12), but the entirety of § 1818 deals with “insured depository institutions.” Northwestern Bank voluntarily joined that class of institutions and Calcutt voluntarily chose to work there; both thereby accepted the possibility of administrative enforcement proceedings.

Many courts, including three different circuits, have recognized that the public rights exception applies to proceedings under § 1818(e)—including the Fifth Circuit’s recent decision in *Ortega v. OCC*,¹² where the court recognized that § 1818 actions are brought to “ensure proper stewardship of public funds in the federal deposit insurance program” and to “vindicate safety in the banking ecosystem at large” and thus fall within the exception. *Id.* at 404, *see also supra* n.10. Furthermore, while the common law fraud actions that underlay the SEC’s *Jarkesy* proceeding “had a

¹² 155 F.4th 394 (5th Cir. 2025).

long history of adjudication in Article III courts,” banking enforcement proceedings have always been “exclusively in-house proceedings,” *id.*, and Congress’s recognition of “the inadequacy of court adjudication of a particular problem, creat[ion of] new remedies to target that particular problem, and assign[ment of] their adjudication to an administrative agency” allowed administrative enforcement. *Id.* at 408. Calcutt attempts to distinguish *Ortega* as applicable only to national banks (Mot. at 13), but the Fifth Circuit stated that the exception governs “federal banking enforcement actions,” *id.* at 409, and all the above considerations apply equally to insured state-chartered banks. Thus, the exception applies.

Finally, although Calcutt attacks the merits of the CMP Order and the Prohibition Order (Mot. at 9-12), he does not contend that he will be irreparably harmed absent a stay of the CMP Order, and indeed this Court has held that “potential monetary damage does not constitute irreparable harm.” *Baker*, 310 F.3d at 930. Recognizing this, Calcutt attempts to portray the CMP and Prohibition Orders as inextricable, citing *In re Lewis* for the proposition that “when legal and equitable actions are tried together ... the legal claim ... must be tried first before a jury,”¹³ but there both types of action were validly filed in a court, an option not available here. Should the Court hold that the Prohibition Order can be tried before an ALJ while the CMP requires a jury, the end result is that the Prohibition

¹³ 845 F.2d 624, 629 (6th Cir. 1988).

Order will stand while the CMP Order is vacated, not that the prohibition action must await a CMP action that cannot proceed anywhere. *Lewis* did not address administrative adjudications at all, let alone the presentation of both equitable and legal claims to an ALJ. At any rate, the above public rights discussion applies equally to the CMP Order.

Finally, the public rights exception also applies equally to any argument that administrative adjudication violated Article III. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989).

C. The Mandate Rule bars Calcutt’s Seventh Amendment claim.

Calcutt also attacks the Board’s conclusion that the mandate rule did not permit Calcutt to raise new arguments (Mot. at 14-15), but overlooks the nature of that rule: “a specific application of the law of the case doctrine.” *In re Purdy*, 870 F.3d 436, 442 (6th Cir. 2017). That doctrine, as applied to successive appeals, prohibits an appellant from raising issues in the second appeal that were never argued in the first. *Burley v. Gagacki*, 834 F.3d 606, 619 (6th Cir. 2016). This Court explained in *United States v. O’Dell* that where an appellant fails to raise an issue in an initial appeal, the issue cannot be reopened on remand “unless the mandate can reasonably be understood” to allow such reopening. 320 F.3d 674, 679

(6th Cir. 2003).¹⁴ The mandate rule thus operates *within* the law-of-the-case doctrine to narrow the remaining issues.

Calcutt did not raise the Seventh Amendment issue with this Court in his prior appeal, and nothing about this Court’s remand order “can reasonably be understood” as inviting never-previously-considered arguments. The law of the case, and the mandate rule, prohibit him from raising that argument now. Whether this Court’s prior remand was limited or general (*cf.* Mot. at 15), is therefore irrelevant.¹⁵

III. Calcutt is unlikely to succeed in challenging the Board’s analysis of the statutory factors for prohibition.

Calcutt’s challenges to the Board’s analysis of the statutory factors for prohibition fare no better than his Seventh Amendment argument. This Court has already determined that the effects found by the Board qualify under the statute and has already found no reversible error in the Board’s misconduct analysis. Calcutt’s challenges to the Board’s conclusions with respect to these factors is unlikely to succeed.

¹⁴ Criminal resentencing remands necessarily call for *de novo* proceedings to consider all sentencing factors, whether or not previously forfeited, and thus fall outside the law-of-the-case doctrine. *Pepper v. United States*, 562 U.S. 476, 507-08 (2011); *see also United States v. Pembroke*, 79 F.4th 720, 729-31 (6th Cir. 2023) (distinguishing *de novo* resentencing rule from “appellate forfeiture”). The FDIC Board’s consideration of causation is not akin to criminal sentencing, however, and Calcutt’s reliance on sentencing cases is unavailing.

¹⁵ As for Calcutt’s contention that *Jarkesy* changed the law (Mot. at 15-16), the Court stated that it was simply following prior precedents, not overruling them. *Jarkesy*, 603 U.S. at 134, 136.

A. This Court has already determined that the effects found by the Board qualify under the statute.

On remand, the Board reassessed three effects cited in its prior decision to determine whether Calcutt's misconduct was a proximate cause of those effects. These included (1) a \$30,000 charge-off to the \$760,000 Bedrock Loan; (2) dividends that Calcutt received from the Bank's holding company in 2011; and (3) some portion of \$6.443 million in losses that the Bank recorded on other Nielson loans. Ex. A at 27. The Board found that Calcutt's misconduct proximately caused all or a portion of each, and concluded that each would independently support prohibition. *Id.* at 38. Calcutt's challenge to these findings is unlikely to succeed.

\$30,000 Charge-Off. Calcutt's argument that his misconduct was too distant in time from the Bank's charge-off to have proximately caused it is unlikely to succeed. The proximate cause inquiry focuses not on temporal proximity but instead on "substantiality, directness, and foreseeability." *Crosby v. Twitter, Inc.*, 921 F.3d 617, 624 (6th Cir. 2019). Applying this standard, the Board agreed with this Court that "because Calcutt participated extensively in negotiating and approving the Bedrock Transaction," proximate cause was shown. Ex. A. at 29; Ex. G at 45. Calcutt's speculation about other causal factors does not call the Board's conclusion into question, as an event may have more than one proximate cause,¹⁶ and the Board

¹⁶ See *Rupert v. Daggett*, 695 F.3d 417, 426 (6th Cir. 2012).

found no evidence of unforeseeable events that broke the causal chain between Calcutt's misconduct and the Bank's loss. Ex. A at 31-32.

Dividend. Equally unlikely to succeed is Calcutt's argument that intervening steps between his misconduct and his receipt of holding company dividends broke the causal chain. Mot. at 20. This Court has concluded that "the evidence and common sense support the agency's position,"¹⁷ and none of the cases Calcutt cites compel a different result. After the Supreme Court's remand in *Bank of America Corporation v. City of Miami*,¹⁸ the Eleventh Circuit found that the plaintiff had plausibly pled proximate cause in a Fair Housing Act case despite multiple links in the causation theory. *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1272-73 (11th Cir. 2019), *vacated as moot*, 589 U.S. 1249 (2020). Calcutt's reliance on *Holmes v. Securities Investor Protection Corp.*¹⁹ is also misplaced; proximate cause under the Clayton Act was found there to require some direct relation between the injury and the injurious conduct alleged, but the Court did not hold that any intervening causal event prevents a finding of proximate cause. *Id.* at 269-70. Calcutt's receipt of the dividend from the holding company, rather than the Bank, likewise did not prevent the Board from concluding that causation was established.

\$6,443,000 Charge-Off. Calcutt argues that his misconduct could not have

¹⁷ Ex. G at 49.

¹⁸ 581 U.S. 189 (2017).

¹⁹ 503 U.S. 258 (1992).

proximately caused any portion of the Bank's charge-off of Nielson loans because the loans were made and underwater before his misconduct occurred and the Board made no finding that his misconduct worsened the Bank's position. Mot. at 17. Both this Court and the Board, however, have already concluded "from the record as a whole that Calcutt's actions proximately caused an actual and potential loss to the Bank." Ex. G at 48; Ex. A at 37. With respect to actual loss, the Court addressed Calcutt's assertion that his misconduct did not deepen the Bank's losses, and determined that the evidence did not foreclose the FDIC's opposite conclusion. Ex. G at 47-48. As to potential loss, Calcutt argues that the Board misapplied the statute by finding that the bank "could suffer a potential loss" (Ex. A at 37) rather than that the bank "will probably suffer" future loss. Mot. at 18. He neither explains how this slight difference in phrasing is consequential nor acknowledges that the Board adopted this phrasing from the Court's own decision. Ex. G at 48.

B. This Court has already determined that the Board did not err in determining that Calcutt engaged in unsafe or unsound practices.

Calcutt contends that he is likely to succeed in challenging the Board's unsafe or unsound practices analysis, citing a proposed new FDIC rule and the definition proposed by the dissent in his first appeal. Mot. at 21. A proposed rule, however, does not bind the agency. *See Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1418-19 (D.C. Cir. 1998). Moreover, the first panel majority's decision upholding the Board's findings on this issue suggests that the Court is unlikely to adopt

Calcutt's stricter interpretation now. *See* Ex. G at 39. And even if it did, Calcutt's contention that his misconduct was a "one-time" act or process violation (Mot. at 22) is unsupported: the Board cited numerous acts, including imprudent lending practices, violations of the Bank's substantive (not just procedural) policies, and misleading regulators. Ex. A at 17-21. It is likely that the Court will again uphold the Board's conclusion that these acts constituted unsafe or unsound practices.

IV. Calcutt Would Not Be Irreparably Harmed Absent a Stay.

Calcutt's arguments that he will be irreparably harmed absent a stay pending appeal are unpersuasive. He relies on *Burgess v. FDIC*²⁰ for the proposition that a banker is irreparably harmed when a removal order takes effect pending appeal (Mot. at 23), but that order rested on a finding of likelihood of success on the merits and on the petitioner's inability to find substitute employment. *Burgess*, 871 F.3d at 303-04. Calcutt has made neither showing here.

Calcutt also relies on the supposed damage to State Savings Bank from his removal, namely to its reputation, employee and customer relationships, and growth initiatives. Mot. at 23-24. Even assuming that a movant may cite harm to third parties in seeking preliminary relief,²¹ Calcutt does not explain—nor do the cited

²⁰ 871 F.3d 297 (5th Cir. 2017).

²¹ *Cf. Kansas v. United States*, 124 F.4th 529, 534 (8th Cir. 2024) ("The irreparable-harm analysis focuses on the moving party, not the nonmoving party or some third party.") (citations omitted).

affidavits address—why those harms would result from his *temporary* removal. And as for reputational harm (Mot. at 23), Calcutt’s prohibition proceeding is already public; he does not explain what additional harm would result from the Prohibition Order taking effect now.²² Because a mere “possibility” of irreparable harm does not entitle a movant to preliminary relief, no stay is warranted here. *See EOG Resources, Inc. v. Lucky Land Mgmt., LLC*, 134 F.4th 868, 885 (6th Cir. 2025).

Finally, Calcutt cites the FDIC’s decision not to oppose a stay when this case was previously at the Supreme Court (Mot. at 23), but for purposes of preliminary injunctive relief, a strong likelihood of success on the merits—there, the need for a remand—lessens the need to show irreparable harm. *Michigan Coalition v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (“[M]ore of one excuses less of the other.”). As the FDIC was not contesting the need for a remand, the quantum of irreparable harm necessary for a stay at that point was reduced. Following the remand, however, Calcutt’s likelihood of prevailing on the merits is low, and he has not made a sufficient showing of harm to warrant a stay.

V. The Balance of Hardships and the Public Interest Do Not Favor a Stay.

The remaining factors do not support a stay. Because the FDIC is a

²² Calcutt cites *Anonymous v. FDIC*, 617 F. Supp. 509 (D.D.C. 1985), but that decision’s harm analysis rested on the disclosure of previously sealed proceedings. *Id.* at 516. A subsequent statutory change made the FDIC’s enforcement proceedings public, *see* 12 U.S.C. § 1818(u), so any harm to Calcutt’s reputation has already occurred and cannot be augmented by the removal order taking effect.

government agency, the harm that it would suffer from a stay “merge[s]” with the “public interest,”²³ and neither consideration favors a stay. Courts presume that preliminary relief that disrupts an agency’s fulfillment of its statutory mission harms the agency and the public interest. *See, e.g., Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998) (injunction “against the enforcement of a likely constitutional statute would harm the government”). The FDIC brought its enforcement action pursuant to § 1818, which authorizes the FDIC to act to protect the stability of the banking system and the integrity of the Deposit Insurance Fund, and the public interest favors allowing its Orders to take effect. *See In the Matter of De La Fuente*, FDIC-97-31e, 2003 WL 21233537, *3 (FDIC Apr. 18, 2003) (where the elements of § 1818(e) are satisfied, the public interest favors removal and prohibition). Here as well, Calcutt’s reliance on the FDIC’s representations to the Supreme Court, when the FDIC stated that its order need not take effect immediately because remand was necessary, is unavailing. Mot. at 24. And the FDIC’s prior position in this Court, when a far broader range of issues was presented and the likelihood of success analysis was more complex, likewise has little if any bearing on the present posture.

²³ *Nken v. Holder*, 556 U.S. 418, 435 (2009).

CONCLUSION

For the foregoing reasons, the Court should deny Calcutt's request for a stay.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limit of Fed. R. App. P. 27(d)(2)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,199 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Baskerville Old Face font.

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