No. 22A255

IN THE SUPREME COURT OF THE UNITED STATES

HARRY C. CALCUTT, III, APPLICANT

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

RESPONSE TO 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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The Solicitor General, on behalf of the Federal Deposit Insurance Corporation (FDIC), respectfully files this response to the 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. The FDIC agrees that the application should be granted.

STATEMENT

1. The FDIC insures the deposits of qualifying banks. See 12 U.S.C. 1811(a). The agency is managed by a five-member Board of Directors (Board), one of whom is the Comptroller of the Currency, one of whom is the Director of the Consumer Financial Protection Bureau, and three of whom "shall be appointed by the President, by and with the advice and consent of the Senate." 12 U.S.C. 1812(a)(1)(C); see 12 U.S.C. 1812(a)(1). Each of the three appointed members "shall be appointed for a term of 6 years." 12 U.S.C. 1812(c)(1). The parties have litigated this case on the

understanding that the appointed Board members serving fixed terms may be removed for cause but are not removable at the will of the President. Appl. 4. No more than three Board members may be of the same political party. 12 U.S.C. 1812(a)(2).

To protect the integrity of insured banks, the FDIC may impose penalties against "institution-affiliated part[ies]," such as bank officers. See 12 U.S.C. 1818(e)(1)(A) and (i)(2). As relevant here, 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" when the FDIC determines that three prerequisites are met. 12 U.S.C. 1818(e)(1). First, the FDIC must determine that the party committed misconduct, including by "engag[ing] or participat[ing] in any unsafe or unsound practice in connection with any insured depository institution" or by breaching a fiduciary duty. 12 U.S.C. 1818(e)(1)(A)(ii); see 12 U.S.C. 1818(e)(1)(A)(iii). Second, the FDIC must determine that, "by reason of" the party's misconduct, "such insured * * * institution has suffered or will probably suffer financial loss or other damage" or the party "has received financial gain or other benefit." 12 U.S.C. 1818(e)(1)(B)(i) and (iii). Third, the FDIC must determine that the party's misconduct "involves personal dishonesty" or "demonstrates willful or continuing disregard by such party for the safety or soundness of such * * * institution."

12 U.S.C. 1818(e)(1)(C). The FDIC may also issue civil money penalties if it makes similar determinations. 12 U.S.C. 1818(i)(2).

A party against whom the FDIC initiates an enforcement action is entitled to an adversarial hearing that typically is conducted before an administrative law judge (ALJ) in accordance with the Administrative Procedure Act, 5 U.S.C. 551 et seq., 701 et seq. 12 U.S.C. 1818(h). FDIC ALJs may be removed only for cause as determined by the Merit Systems Protection Board (MSPB), 5 U.S.C. 7521(a), and MSPB members may be removed only for cause by the President, 5 U.S.C. 1202(d). After an ALJ holds a hearing, she must file a recommended decision and order. 12 C.F.R. 308.38(a). The FDIC Board then reviews the ALJ's recommendation and issues a final decision. 12 C.F.R. 308.40(c). The Board's decision is subject to judicial review in either the D.C. Circuit or the circuit in which the relevant institution is located. 12 U.S.C. 1818(h)(2).

2. Applicant was the President, CEO, and Chairman of the Board of Directors at Northwestern Bank (the Bank), an FDIC-insured institution. Appl. App. 8a. Applicant left Northwestern Bank in 2013 and now serves as the Chairman of another bank. Ibid.

Around 2009, Northwestern Bank's largest loan relationship (amounting to around $38 million in loans) was with a group of companies that were controlled by the Nielson family and were

called the Nielson Entities. Appl. App. 8a. The Bank's loans to the Nielson Entities were neither cross-collateralized against one another nor personally guaranteed by the Nielsons. Id. at 9a.

In September 2009, facing financial difficulties, the Nielson Entities stopped repaying those loans. Appl. App. 9a. Three months later, the Bank and the Nielson Entities consummated the "Bedrock Transaction." Id. at 10a, 104a. As part of that transaction, the Bank extended a $760,000 loan to one of the Nielson Entities, Bedrock Holdings, to be used to cover the entities' loan payments through April 2010. Ibid. The Bank also released to the Nielson Entities $600,000 of collateral in investment-trading funds and renewed the Nielson Entities' matured loans. Ibid. Before entering the Bedrock Transaction, the Bank failed to gather certain required financial information from the Nielson Entities and to perform certain required cash-flow analyses and appraisals. Id. at 105a. The Bank also failed to seek or obtain timely approval of its Board of Directors, even though the Bank's rules required such approval. Id. at 11a, 105a-106a.

Notwithstanding the Bedrock Transaction, the Nielson Entities defaulted again in September 2010. Appl. App. 12a, 108a. The Bank released to the entities another $690,000 in secured funds, but the entities defaulted a final time in January 2011. Ibid. They have remained in default ever since. Id. at 12a.

3. a. In 2013, the FDIC issued a notice of intention to remove applicant from office, prohibit him from further banking activities, and assess civil money penalties against him. Appl. App. 13a, 97a. An ALJ held an eight-day hearing in applicant's case. Id. at 13a. After this Court's decision in Lucia v. SEC, 138 S. Ct. 2044 (2018), the FDIC Board appointed its ALJs, and applicant's case was reassigned to a new, properly appointed ALJ, who conducted a new hearing. Appl. App. 14a-15a. The new ALJ issued a decision recommending that applicant "be prohibited from banking and assessed a $125,000 [civil money penalty]." Id. at 16a.

b. The FDIC Board accepted the ALJ's findings and issued a final removal and prohibition order and $125,000 civil money penalty. Appl. App. 96a, 141a-143a. The Board first found that "[t]he record clearly establishes [applicant's] unsafe and unsound practices and breaches of fiduciary duty." Id. at 113a. Specifically, the Board found that applicant had approved the Bedrock Transaction without conducting the proper analyses or obtaining timely Board of Directors approval, id. at 114a; had jeopardized the Bank's "safety and soundness" by "failing to properly manage the risks posed by the Nielson borrowing relationship," id. at 115a; had "repeatedly concealed material information about the Nielson Loans from the Bank's regulators," including by making "misleading statements to examiners," id. at

117a; and had "attempted to shift responsibility for the mishandling of the Nielson Loans onto his subordinates," id. at 119a.

Turning to the harmful "[e]ffects" of applicant's misconduct, the Board stated that applicant need not have been "the proximate cause of the harm to be held liable." Appl. App. 121a-122a (emphasis omitted). The Board found "ample evidence" that "the Bank suffered or likely will suffer financial loss or other damages, and that [applicant] received gain or other financial benefit from his misconduct." Id. at 122a. In particular, the Board identified the following as cognizable effects of applicant's misconduct: a $30,000 charge-off (an amount unlikely to be collected) against the $760,000 loan to Bedrock Holdings, ibid.; $6.443 million in losses on other Nielson Loans, id. at 122a-124a; certain "investigative and auditing expenses" incurred by the Bank, id. at 124a; and a financial benefit for applicant in the form of inflated dividends paid to the Bank's holding company (of which applicant was a large shareholder), id. at 127a.

Finally, the Board found that applicant had acted with the requisite culpability, including by "persistently conceal[ing] from both the Bank's Board and its regulatory examiners the true common nature of the Nielson Entities Loan portfolio, problems with that portfolio, and [applicant's] efforts in dealing with the

Nielson Family's decision to stop making payments on the loans." Appl. App. 128a (citation omitted).

4. After staying the FDIC's order pending review, Appl. App. 93a-95a, the Sixth Circuit denied applicant's petition for review and sustained the order, id. at 2a-92a.

a. The court of appeals held that the alleged constitutional infirmity in the statutory provisions governing removal of the FDIC's Board members and ALJs provided no basis for setting aside the Board's order in this case. Appl. App. 22a-31a. As to the Board, the court concluded that, under this Court's decision in Collins v. Yellen, 141 S. Ct. 1761 (2021), applicant "is not entitled to the relief he seeks, because he has not specified the harm that occurred as a result of the allegedly unconstitutional removal restrictions." Appl. App. 22a. The court held that applicant could not obtain relief based on the mere "possibility that the FDIC would have taken different actions in his case, if the Board" members had been removable at will. Id. at 26a. Under Collins, the court observed, "a more concrete showing was needed." Id. at 27a. The court also declined applicant's request to remand to the FDIC "for further findings" on harm. Ibid. The court emphasized that applicant had requested a "remand[] to an agency rather than another court," and it questioned "how yet another proceeding before the FDIC would aid in developing the record on this point." Id. at 28a.

"[F]or similar reasons," the court of appeals rejected applicant's request for relief premised on the ALJs' removal protections. Appl. App. 28a. The court explained that, even assuming those protections were unconstitutional, applicant "is not entitled to relief unless he establishes that those protections 'inflict[ed] compensable harm,' and he has not made this showing." Ibid. (citation omitted; brackets in original). The court stated that applicant had offered only "vague assertions that it 'cannot be ruled out'" that he was harmed by the ALJs' removal protections, "but a generalized allegation is insufficient for affording relief." Id. at 29a (citation omitted). The court additionally observed that this Court in Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010), had "omit[ted] ALJs from the scope of its holding" invalidating the two-layer for-cause removal protections there. Appl. App. 30a.

b. The court of appeals then addressed applicant's statutory arguments. It first determined that the "FDIC Board did not err in determining that [applicant] engaged in unsafe or unsound practices," Appl. App. 41a, and breached his fiduciary duties, id. at 41a-44a; see 12 U.S.C. 1818(e)(1)(A).

The court of appeals next addressed the Board's findings that certain harmful effects had occurred "by reason of" applicant's misconduct. 12 U.S.C. 1818(e)(1)(B). The court held that the phrase "'by reason of'" in Section 1818(e)(1)(B) "mandates

proximate causation," and that the Board had failed to apply a proximate-causation standard. Appl. App. 44a (citation omitted). The court then considered "the statutory effects identified by the FDIC Board" and determined that "substantial evidence supports the conclusion that some -- but not all -- of the impacts to the Bank are 'effects' * * * proximately caused by [applicant's] misconduct." Id. at 46a. Specifically, the court concluded that applicant had proximately caused a $30,000 charge-off on the Bedrock Holdings loan, ibid.; that investigative and auditing expenses incurred by the Bank were not relevant "effects" under the statute, id. at 47a; that "substantial evidence" indicated that applicant had proximately caused "part" of the Bank's $6.443 million in losses from loans to the Nielson Entities, id. at 48a; that "there is substantial evidence that [applicant's] actions resulted in probable future losses to the Bank," id. at 49a; and that some, but not all, of the dividend payments to the Bank's holding company "occurred 'by reason of' [applicant's] misconduct," id. at 51a; see id. at 50a-51a (summarizing "[c]umulative [e]ffects").

The court of appeals concluded that a remand to the Board was unwarranted, notwithstanding the Board's legal error in evaluating causation. Appl. App. 51a. The court stated that the Board may issue a removal and prohibition order so long as "substantial evidence supports the FDIC's finding as to one effect out of

multiple possibilities." Ibid. In response to the dissent's invocation of SEC v. Chenery Corp., 318 U.S. 80 (1943), the court stated that "[r]emand is unnecessary where an agency's incorrect reasoning was confined to [a] discrete question of law and played no part in its discretionary determination, and [the agency] reaches a conclusion that it was bound to reach." Appl. App. 53a (citation and internal quotation marks omitted).

c. Judge Murphy dissented. Appl. App. 55a-92a. He "agree[d] with" the majority that applicant was not entitled to relief based on the allegedly unconstitutional restrictions on removal of FDIC Board members and ALJs. Id. at 55a. He found no "source of law that requires (or permits) courts to treat the FDIC's past actions as void because potentially unconstitutional statutes attempted to insulate" the relevant FDIC officers "from the President's removal power." Id. at 63a. He therefore "conclude[d] that [applicant] could not obtain this relief even if he successfully established the statutes' unconstitutionality." Ibid.

As to applicant's statutory claims, Judge Murphy -- like the majority -- concluded that "[t]he FDIC misinterpreted the causation element" in Section 1818(e)(1)(B) by failing to assess whether applicant's misconduct had proximately caused the relevant harmful effects. Appl. App. 86a-87a (Murphy, J., dissenting). In light of that agency error, Judge Murphy would have "remand[ed]

for the FDIC -- the fact finder -- to apply the correct causation rules * * * in the first instance." Id. at 91a. He concluded that the majority had "run[] afoul of basic administrative-law principles" by affirming the FDIC's decision based on proximate-cause determinations that the agency itself had not made. Ibid. He also noted, as an additional ground for remand, that the statute "leaves the FDIC with discretion over whether to bar [applicant]" from banking, so that the FDIC could reconsider its sanction on remand if it "were to find that [applicant's] conduct caused a tiny fraction of [the relevant] harm." Id. at 91a-92a.

5. Applicant filed a petition for rehearing in the court of appeals. In its response to the petition, the FDIC did "not oppose a panel rehearing for the limited purpose of revising the majority opinion to order a remand for the Board to decide whether the effects properly considered under the panel's legal standard, when viewed alongside the gravity of [applicant's] misconduct and level of culpability, support prohibition." Resp. to Reh'g Pet. 4. The FDIC did oppose rehearing on applicant's removal challenges. Id. at 4-10.

The court of appeals denied applicant's rehearing petition and his motion to stay the mandate, Appl. App. 1a. The mandate issued on September 22, 2022.

ARGUMENT

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (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. 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 v. Perry, 558 U.S. 183, 190 (2010) (per curiam). A stay is warranted here because applicant has satisfied this standard as to the first question presented -- i.e., whether the court of appeals erred by declining to remand to the FDIC Board after it determined that the Board had applied the wrong causation standard. A stay would not be warranted as to the second question presented -- i.e., whether the court of appeals erred in denying relief based on applicant's constitutional challenges to the statutory provisions that address the tenure and removability of FDIC Board members and ALJs.

1. a. "Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." INS v. Orlando Ventura, 537 U.S. 12, 16 (2002) (per curiam). That ordinary remand rule follows from "[f]undamental principles of administrative law * * *

teach[ing] that a federal court generally goes astray if it decides a question that has been delegated to an agency if that agency has not first had a chance to address the question." Smith v. Berryhill, 139 S. Ct. 1765, 1779 (2019); see SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

During the past 20 years, this Court has twice summarily reversed lower-court decisions that failed to apply the ordinary remand rule. In Orlando Ventura, the court of appeals resolved a factual issue that the agency had not addressed instead of remanding to the agency for consideration of that issue. 537 U.S. at 15. This Court held that the court of appeals had "committed clear error" by failing to apply the "ordinary remand requirement." Id. at 17. In Gonzales v. Thomas, 547 U.S. 183 (2006) (per curiam), the court of appeals adopted a new legal standard and then applied that standard to the facts rather than remanding for the agency to do so. Id. at 184-185. This Court again held that the court of appeals "should have applied the ordinary remand rule." Id. at 186-187 (quoting Orlando Ventura, 537 U.S. at 18) (internal quotation marks omitted).

Other courts of appeals have applied the ordinary remand rule in circumstances akin to those here. In De La Fuente v. FDIC, 332 F.3d 1208 (2003), the Ninth Circuit rejected certain FDIC liability findings while sustaining others, and then "remand[ed] th[e] matter to the Board for it to consider, in light of this

disposition, whether th[e] extraordinary sanction [of a banker's removal and prohibition] remains deserved." Id. at 1227. And in Lorenzo v. SEC, 872 F.3d 578 (2017), aff'd, 139 S. Ct. 1094 (2019), the D.C. Circuit disapproved one SEC "finding of liability" while sustaining others, and then remanded for the SEC to "reassess the appropriate penalties" because the court "ha[d] no assurance that the Commission would have imposed the same level of penalties in the absence of its [rejected] finding of liability." Id. at 595-596; see Doolittle v. National Credit Union Admin., 992 F.2d 1531, 1538 (11th Cir. 1993) (similar).

To be sure, the ordinary remand rule is not ironclad. Remand is unnecessary where it "would be an idle and useless formality" because no "uncertainty" exists about the "outcome of [the] proceeding" on remand. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969). For example, where an agency is legally "required" to reach a particular outcome, the agency's "different rationale for the necessary result is no cause" for vacatur and remand. Morgan Stanley Capital Grp. Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 544-545 (2008); see United Video, Inc. v. FCC, 890 F.2d 1173, 1190 & n.15 (D.C. Cir. 1989); 5 U.S.C. 706 ("[A] court shall review the whole record * * * and due account shall be taken of the rule of prejudicial error."). But that analysis does not apply when an agency's determination about whether to impose a sanction is discretionary.

Under the foregoing authorities, there is a reasonable probability that this Court will grant review and a fair prospect that it will hold that the Sixth Circuit erred by declining to apply the ordinary remand rule. The Sixth Circuit held that the FDIC Board had applied the wrong causation standard when determining that certain harmful effects had occurred "by reason of" applicant's misconduct. Appl. App. 44a (quoting 12 U.S.C. 1818(e)(1)(B)). But instead of remanding for the Board to apply the correct causation standard to the facts, see Gonzales, 547 U.S. at 186, the court of appeals found it sufficient "that substantial evidence supports the conclusion that some -- but not all -- of the impacts to the Bank are 'effects' * * * proximately caused by [applicant's] misconduct," Appl. App. 46a. Because the court of appeals concluded that the Board had not made the requisite proximate-cause finding with respect to any of those "effects," the court's determination that substantial evidence supported such a finding was an inadequate basis for affirming the Board's decision.[1]

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[1] Applicant suggests (Appl. 9) that the court of appeals also held that the FDIC Board had applied the wrong legal standard when evaluating whether applicant had committed misconduct under Section 1818(e)(1)(A). That is incorrect. The court simply questioned one argument that the FDIC had made on appeal -- that the statute does not require applicant's conduct to have posed an "abnormal financial risk[]" to the bank -- but held that the result would be the same "[w]hether or not we interpret the statute to require a finding of abnormal financial risk." Appl. App. 40a; see id. at 40a-41a. In any event, the court found no fault with the Board's separate conclusion that applicant had "breached his

The court of appeals further erred in sustaining the Board's removal and prohibition order based on a narrower set of harmful effects than the Board itself found. Appl. App. 52a. Congress has vested the FDIC with discretion over removal and prohibition orders, stating that the FDIC "may" pursue such an order when it determines that the statutory factors are met. 12 U.S.C. 1818(e)(1). While the FDIC on remand could order removal and prohibition in this case based on a narrower set of harmful effects, it would not be legally "required" to do so. Morgan Stanley, 554 U.S. at 544. Nor does the Board's decision indicate the extent to which its removal and prohibition order rested on each of the harmful effects found. For these reasons, in the court of appeals, the FDIC did "not oppose a panel rehearing for the limited purpose of revising the majority opinion to order a remand for the Board to decide whether the effects properly considered under the panel's legal standard, when viewed alongside the gravity of [applicant's] misconduct and level of culpability, support prohibition." Resp. to Reh'g Pet. 4. Accordingly, as to the first question presented, applicant has shown both a reasonable probability that the Court will grant review and a fair prospect that it will reverse the judgment below.

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fiduciary duties," id. at 41a; see id. at 41a-44a, which independently satisfies the misconduct element, 12 U.S.C. 1818(e)(1)(A)(iii).

b. In contrast, there is no reasonable probability that the Court will grant review and no fair prospect that it will reverse on the second question presented: whether the court of appeals erred in holding that applicant was not entitled to relief based on his challenge to the removal protections for the FDIC Board and ALJs. The Court will not need to reach the second question presented if it grants review on the first question presented and orders a remand to the FDIC Board. In any event, the second question presented does not meet this Court's standard for review.

The court of appeals did not decide whether the statutory provisions that define the tenure and removability of FDIC Board members and ALJs violate constitutional separation-of-powers principles. Rather, the court held only that, regardless of the proper resolution of those questions, applicant would "not [be] entitled to the relief he seeks, because he has not specified the harm that occurred as a result of the allegedly unconstitutional removal restrictions." Appl. App. 22a; see id. at 29a. The dissenting judge likewise concluded that applicant "could not obtain [vacatur of the Board's decision] even if he successfully established the statutes' unconstitutionality." Id. at 63a.

Applicant asserts (Appl. 21-23) that the court of appeals' resolution of the second question presented conflicts with decisions of other circuits. That is incorrect.

Applicant first contends that the Fifth and Eighth Circuits have held that courts must "resolve the merits of removal challenges, then remand for further proceedings so long as specific allegations suggest some possibility of prejudice." Appl. 21. But the Fifth and Eighth Circuit decisions that applicant cites involved the identical challenge to the Federal Housing Finance Agency Director's removal protections that this Court had already resolved in Collins. See Collins v. Yellen, 27 F.4th 1068, 1069 (5th Cir. 2022) (per curiam); Bhatti v. Federal Housing Finance Agency, 15 F.4th 848, 853 (8th Cir. 2021). The approach that the Sixth Circuit took in this case -- addressing the remedial issue without determining whether any constitutional violation had occurred -- therefore was not available to the Fifth and Eighth Circuits. Instead, based on this Court's controlling decision in Collins, those courts noted the unconstitutionality of the Director's removal protections and remanded to the district court for initial consideration of the remedial issue, just as the Court in Collins had remanded on that issue. See Collins, 141 S. Ct. at 1789; Collins, 27 F.4th at 1069; Bhatti, 15 F.4th at 853-854. Neither the Fifth nor the Eighth Circuit suggested that a court must invariably resolve the constitutional issue before turning to the remedial one, or that a court of appeals must invariably remand a remedial issue where a plaintiff simply alleges the possibility of harm.

The Fifth and Eighth Circuit decisions differ from the decision below in another respect as well. In Collins and Bhatti, the courts of appeals remanded for district-court factfinding about whether the unconstitutional removal restriction had harmed the plaintiffs. See Collins, 27 F.4th at 1069; Bhatti, 15 F.4th at 854. In this case, by contrast, no district court was involved in the earlier proceedings, and applicant accordingly requested a remand to the Board. Appl. App. 27a; see id. at 28a (distinguishing Collins and Bhatti on this ground). Any such remand would have required the Board members to consider whether the Board (or the agency's ALJs) would have taken different actions if they had viewed themselves as removable at will, and potentially whether the President would have removed the members or the ALJs if he had viewed that option as open to him. The court of appeals understandably concluded that Board consideration of those issues would not "aid in developing the record on this point." Id. at 28a.

Applicant additionally claims (Appl. 22) that the Sixth Circuit's decision conflicts with decisions of the Ninth Circuit addressing the appropriate standard for assessing prejudice in circumstances like these. As an initial matter, each of the cited Ninth Circuit decisions held, without remanding, that no remedy was warranted because the challenger had not shown the requisite prejudice, so the results of those decisions are consistent with

the outcome below. CFPB v. CashCall, Inc., 35 F.4th 734, 742-743 (2022); Kaufmann v. Kijakazi, 32 F.4th 843, 849-850 (2022); Decker Coal Co. v. Pehringer, 8 F.4th 1123, 1137 (2021).

The Sixth Circuit's "prejudice standard" (Appl. 22) is likewise consistent with the Ninth Circuit's approach. The Sixth Circuit asked whether applicant had "specified the harm that occurred as a result of the allegedly unconstitutional removal restrictions." Appl. App. 22a. It noted that the "possibility that harm might occur" was insufficient, and that a "more concrete showing was needed." Id. at 27a. It then rejected applicant's allegations of harm as overly "vague" and "generalized." Id. at 28a-29a. Although applicant suggests that the court required "smoking-gun" or "conclusive[]" proof of prejudice, Appl. 24, the court did not use such language.

In Kaufmann, the Ninth Circuit similarly explained that "[a] party challenging an agency's past actions must * * * show how the unconstitutional removal provision actually harmed the party," and held that the plaintiff there "ha[d] presented neither evidence nor a plausible theory to show that the removal provision caused her any harm." 32 F.4th at 849-850; see id. at 850 (rejecting allegation of harm as "not particularized to" plaintiff); cf. Appl. App. 28a (rejecting applicant's allegation of harm in this case as overly "vague" and "generalized"). Like the Sixth Circuit, Appl. App. 27a, the Ninth Circuit found it insufficient that a particular

agency official "theoretically might have acted differently" if he were removable at will, explaining that such "speculation" cannot meet the "burden of showing actual harm." Kaufmann, 32 F.4th at 850. Applicant emphasizes the Ninth Circuit's observation that a plaintiff could plausibly meet her burden by showing "that the President took an interest in her claim or 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." Ibid. But the Sixth Circuit neither endorsed nor disapproved that view of prejudice; it simply did not reference it because applicant had made no such showing here.[2]

Finally, applicant contends (Appl. 25) that the decision below conflicts with Collins because it applies the Collins remedial inquiry to a "case[] involving prospective relief." But while the Collins Court addressed only the standard for awarding retrospective relief, that was because the administrative action the plaintiffs had challenged there was no longer in place when the case reached this Court, rendering the plaintiffs' claim for prospective relief moot. 141 S. Ct. at 1780. Nothing in Collins suggests that the Court would have mandated a different remedial inquiry if the plaintiffs' prospective-relief claim had remained

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[2] The prejudice standard applied in the other Ninth Circuit decisions cited by applicant is also consistent with the Sixth Circuit's standard here. See CashCall, Inc., 35 F.4th at 742-743; Decker Coal, 8 F.4th at 1137.

in the case. See id. at 1788-1789. And no sound basis exists for finding Collins' remedial inquiry to be inapplicable to the challenge at issue here, since that inquiry derives from the "traditional remedial rule[]," Appl. App. 71a (Murphy, J., dissenting), that "there is no reason to regard any of the actions taken by" an improperly insulated official "as void," Collins, 141 S. Ct. at 1787.[3]

2. Absent a stay, applicant will be forced to withdraw immediately from his current position as Chairman of a bank and will be barred from "any further participation * * * in any manner, in the conduct of the affairs of any insured depository institution." 12 U.S.C. 1818(e). In arguing that "irreparable harm will result from the denial of a stay," Hollingsworth, 558 U.S. at 190, applicant contends that "[r]emoving a respected banker from his profession forever is irremediable harm," Appl. 26. For purposes of this Court's stay decision, however, the existence and extent of irreparable harm do not turn on what harm applicant will

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[3] Applicant appears to view his own removal-power challenge as seeking prospective relief because resolution of that challenge could determine whether he can lawfully participate in banking in the future. See Appl. 25 (characterizing the Board decision at issue here as "an injunction-like order that agencies can revise at any time"). But the dissenting judge below, in agreeing with the majority that applicant was not entitled to relief on his removal-power claim, appeared to view applicant as requesting retrospective relief. That judge concluded that the purported constitutional defect in the statutes that define the tenure of the relevant FDIC officers could not justify "treat[ing] the FDIC's past actions as void." Appl. App. 63a.

suffer if his challenge to the prohibition order is ultimately unsuccessful and he is barred from banking "forever." Ibid. Rather, the irreparable-harm determination turns on the consequences that applicant is likely to experience during the pendency of the proceedings in this Court if a stay is denied, and the extent to which any adverse consequences could be remedied after the fact if applicant's challenge prevails. As to those questions, applicant provides no meaningful information about (for example) his prospects of obtaining alternative employment until proceedings in this Court conclude, or the likelihood that his current employer will rehire him if he is dismissed pursuant to the prohibition order but that order is later set aside.

Nevertheless, the FDIC agrees with applicant that denial of a stay would likely subject him to adverse consequences that could not be fully remediated if the Court ultimately grants review and reverses the court of appeals' judgment on the merits. And the FDIC remains of the view that "the circumstances here [do not] necessitat[e] that its prohibition order take effect while this proceeding is pending." FDIC C.A. Resp. to Pet. Emergency Mot. For Stay Pending Review 5-6. Thus, the balance of the equities favors a stay.

CONCLUSION

The application should be granted.

Respectfully submitted.

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Solicitor General

SEPTEMBER 2022