

IN THE SUPREME COURT OF THE UNITED STATES

No. A-_____

HARRY C. CALCUTT, III, APPLICANT

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

To the Honorable Brett M. Kavanaugh
Associate Justice of the United States Supreme Court
and Circuit Justice for the Sixth Circuit

Pursuant to Rules 13.5 and 30.2 of this Court, counsel for Harry Calcutt respectfully requests a 45-day extension of time, to and including January 30, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. The court of appeals entered its judgment on September 15, 2022, App., infra, 1a. Unless extended, the time for filing a petition for a writ of certiorari will expire on December 14, 2022. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). The United States does not oppose this request.

1. This case presents important questions of administrative and constitutional law.

First, the Sixth Circuit diverged from this Court and other circuits by holding that when an agency commits legal errors, the court, not the agency, should apply the correct legal rules to the record in the first instance. On that question, the United States recognized that there is “a reasonable probability that the Court will grant review and a fair prospect that it will reverse the judgment below.” Resp. to Stay App. 16. The United States also agreed that this Court has twice in the past 20 years “summarily reversed lower-court decisions that failed to apply the ordinary remand rule.” Id. at 13.

Second, the Sixth Circuit’s decision created a circuit split over whether Collins v. Yellen, 141 S. Ct. 1761 (2021), requires a petitioner to provide concrete proof that a removal restriction has caused prejudice in order for the petitioner to have separation-of-powers challenges resolved on the merits. Specifically, the Sixth Circuit held that it did not need to resolve Mr. Calcutt’s constitutional challenges on the merits because Collins instructs that relief from agency proceedings is predicated on a showing of harm. In contrast, least two other circuits—the Eighth and the Fifth—have interpreted Collins to require courts to resolve the merits of removal challenges, then remand for further proceedings so long as specific allegations suggest some possibility of prejudice. See Bhatti v. FHFA, 15 F.4th 848, 854 (8th Cir. 2021); Collins v. Yellen, 27 F.4th 1068 (5th Cir. 2022).

2. In August 2013, the FDIC issued a Notice of Intent to permanently bar Mr. Calcutt from the banking industry based on his

alleged mishandling of a troubled lending relationship during the Great Recession while Mr. Calcutt was CEO of a regional bank in Michigan. Mr. Calcutt disputed the FDIC's findings.

In 2015, an ALJ adjudicated the dispute. But that ALJ was unconstitutionally appointed under Lucia v. SEC, 138 S. Ct. 2044 (2018), so a new one heard the case in 2019. The new ALJ refused to allow Mr. Calcutt to cross-examine key FDIC witnesses about their apparent bias and irregular conduct. On December 15, 2020, the FDIC's Board issued an order expelling Mr. Calcutt from the banking industry and imposing a \$125,000 penalty.

3. On December 16, 2020, Mr. Calcutt filed a petition for review in the Sixth Circuit and sought an emergency stay of the FDIC's order. Mr. Calcutt argued that the Board had committed several legal errors and raised constitutional challenges to the Board's and ALJ's for-cause-removal protections. The Sixth Circuit granted the stay.

On June 10, 2022, the Sixth Circuit upheld the Board's order in a 2-1 decision and vacated the stay. The majority and dissent agreed that the FDIC's statutory analysis was "riddled with legal error." App., *infra* 92a. Yet the majority declined to remand the flawed order to the agency. Instead, the majority affirmed the FDIC's sanctions based on its own assessment that certain record evidence rendered the Board's legal errors harmless. In dissent, Judge Murphy reasoned that the majority's failure to remand violates "basic administrative-law principles." App., *infra* 91a.

The panel also rejected Mr. Calcutt's constitutional challenges to the FDIC's structure. The FDIC is an independent agency headed by a five-member Board, which consists of three presidentially appointed and Senate-confirmed members, plus the CFPB Director and the Comptroller of the Currency. 12 U.S.C. § 1812(a)(1). The Board's three appointed members serve fixed-length terms. *Id.* § 1812(c). And the FDIC's ALJs are protected by multiple layers of tenure protection. The Sixth Circuit interpreted Collins to bar Mr. Calcutt's separation-of-powers challenges because Mr. Calcutt could not show specific, concrete harm from the unconstitutional removal restrictions.

4. Supported by six amici, Mr. Calcutt petitioned for panel or en banc rehearing. The FDIC's response brief agreed that the panel erred by not remanding the case back to the Board to consider whether Mr. Calcutt should remain prohibited from the industry. Nonetheless, on September 15, 2022, the Sixth Circuit denied rehearing, with Judge Murphy noting a dissent.

On September 21, 2022, the Sixth Circuit denied Mr. Calcutt's request that it stay the mandate pending this Court's disposition of a petition for a writ of certiorari. The next day, Mr. Calcutt filed an application for a stay in this Court, which the United States did not oppose as to the question whether the Sixth Circuit should have remanded to the agency. On September 29, 2022, Justice Kavanaugh recalled and stayed the mandate of the Sixth Circuit.

5. Counsel for applicant respectfully requests a 45-day extension of time, to and including January 30, 2023, within which

to file a petition for writ of certiorari. The undersigned counsel will be presenting oral argument in the First Circuit in Aetna v. Conformis, No. 21-1951, on November 8, 2022. The undersigned counsel is also currently preparing a reply brief in Bartenwerfer v. Buckley, No. 21-908, which is due in this Court on October 24, 2022; and respondent's briefs in Financial Oversight and Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc., No. 22-96, and Gonzalez v. Google, No. 21-133, which are due on December 19, 2022. Undersigned counsel also represents Google, a party in Twitter, Inc. v. Taamneh, No. 21-1496, and the deadline for filing briefs is November 17, 2022. Undersigned counsel also has proximate due dates in other filings, both in this Court and in other courts. Additional time is therefore needed to prepare and print the petition in this case.

Respectfully submitted,

/s/ Sarah M. Harris
Sarah M. Harris
Counsel of Record
WILLIAMS & CONNOLLY LLP
680 Maine Ave., S.E.
Washington, DC 20024
(202) 434-5000

October 17, 2022

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FEDERAL DEPOSIT INSURANCE CORPORATION

CERTIFICATE OF SERVICE

I, Sarah M. Harris, counsel for applicant and a member of the Bar of this Court, certify that, on October 17, 2022, one copy of the Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari in the above-captioned case was sent, by third-party commercial carrier for delivery overnight, to the following counsel:

Elizabeth B. Prelogar
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-2217
SupremeCtBriefs@USDOJ.gov

I further certify that all parties required to be served have been served.

/s/ Sarah M. Harris
Sarah M. Harris