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Case No. 20-4303

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

HARRY C. CALCUTT, III

Petitioner

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

Respondent

BEFORE: BOGGS, Circuit Judge; GRIFFIN, Circuit Judge; MURPHY, Circuit Judge;

Upon consideration of the petitioner's motion to stay the mandate,

It is ORDERED that the motion is DENIED. Judge Murphy would grant the motion to stay the mandate.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: September 21, 2022

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 22a0122p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HARRY C. CALCUTT III,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

No. 20-4303

On Petition for Review of an Order of the Federal Deposit Insurance Corporation;
Nos. FDIC-12-568e; FDIC-13-115k.

Argued: October 20, 2021

Decided and Filed: June 10, 2022

Before: BOGGS, GRIFFIN, and MURPHY, Circuit Judges.

COUNSEL

ARGUED: Sarah M. Harris, WILLIAMS & CONNOLLY LLP, Washington, D.C., for Petitioner. Michelle Ognibene, FEDERAL DEPOSIT INSURANCE CORPORATION, Arlington, Virginia, for Respondent. **ON BRIEF:** Sarah M. Harris, Ryan T. Scarborough, William B. Snyderwine, Helen E. White, WILLIAMS & CONNOLLY LLP, Washington, D.C., Barry D. Hovis, MUSICK, PEELER & GARRETT LLP, San Francisco, California, for Petitioner. Michelle Ognibene, John Guarisco, FEDERAL DEPOSIT INSURANCE CORPORATION, Arlington, Virginia, for Respondent. John M. Masslon II, WASHINGTON LEGAL FOUNDATION, Washington, D.C., Ilya Shapiro, CATO INSTITUTE, Washington, D.C., Michael Pepson, AMERICANS FOR PROSPERITY FOUNDATION, Arlington, Virginia, Andrew J. Pincus, MAYER BROWN LLP, Washington, D.C., Robert D. Nachman, BARACK FERRAZZANO KIRSCHBAUM & NAGELBERG LLP, Chicago, Illinois, for Amici Curiae.

BOGGS, J., delivered the opinion of the court in which GRIFFIN, J., joined. MURPHY, J. (pp. 54–91), delivered a separate dissenting opinion.

OPINION

BOGGS, Circuit Judge. Harry C. Calcutt III, a bank executive and director, petitions for review of an order issued by the Federal Deposit Insurance Corporation ("FDIC") that removes him from his position, prohibits him from participating in the conduct of the affairs of any insured depository institution, and imposes civil money penalties. In addition to attacking the conduct and findings in his individual proceedings, he also brings several constitutional challenges to the appointments and removal restrictions of FDIC officials.

His first hearing in these proceedings occurred before an FDIC administrative law judge ("ALJ") in 2015. Before the ALJ released his recommended decision, the Supreme Court decided *Lucia v. SEC*, 138 S. Ct. 2044 (2018), which invalidated the appointments of similar ALJs in the Securities and Exchange Commission ("SEC"). The FDIC Board of Directors then appointed its ALJs anew, and in 2019 a different FDIC ALJ held another hearing in Calcutt's matter and ultimately recommended penalties.

Broadly, Calcutt's claims fall into two categories. First, he brings structural constitutional challenges, contending that: The FDIC Board of Directors is unconstitutionally shielded from removal by the President; the FDIC ALJs who oversee enforcement proceedings are also unconstitutionally insulated from removal; and the second hearing before a different ALJ failed to afford him a "new hearing," as mandated by *Lucia*. In his second group of challenges, Calcutt attacks the procedure used and results reached in his post-*Lucia* adjudication. He begins by contending that the ALJ abused his discretion by curtailing cross-examination about bias of the witnesses. He then argues that the FDIC Board failed to find that he had committed misconduct that caused "effects" for Northwestern Bank, as the governing statute, 12 U.S.C. § 1818(e)(1), requires. *See Dodge v. Comptroller of Currency*, 744 F.3d 148, 152 (D.C. Cir. 2014).

We deny his petition. Calcutt's challenges to the removal restrictions at the FDIC are unavailing, because even if he were to establish a constitutional violation, he has not shown that he is entitled to relief. *See Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021). We also conclude that his 2019 hearing satisfied *Lucia*'s mandate. As for the limits on cross-examination at that hearing, any error committed by the ALJ was harmless. Finally, there is substantial evidence in the record to support the FDIC Board's findings regarding the elements of § 1818(e)(1).

I. BACKGROUND

A. Overview of FDIC Enforcement Proceedings

Among other functions, the FDIC conducts examinations and investigations to ensure banks' safety, soundness, and compliance with statutes and regulations. *See* 12 U.S.C. § 1811. It has the authority to impose a range of enforcement remedies. *Id.* § 1818. These include removal and prohibition orders, in which the FDIC orders "an institution-affiliated party" to be removed from office or "prohibit[s] any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution." *Id.* § 1818(e)(1). An institution-affiliated party includes "any director, officer, employee, or controlling stockholder (other than a bank holding company or savings and loan holding company) of, or agent for, an insured depository institution." *Id.* § 1813(u)(1).

Section 8(e) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(e), as amended by the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), P.L. No. 101-73, § 903, 103 Stat. 183, 453–54 (1989), provides that FDIC may remove an institution-affiliated party from office or prohibit the party from participating in conducting the affairs of any insured institution upon establishing three elements: "(1) the banker committed an improper act; (2) the act had an impermissible effect, either an adverse effect on the bank or a benefit to the actor; and (3) the act was accompanied by a culpable state of mind." *De la Fuente v. FDIC*, 332 F.3d 1208, 1222 (9th Cir. 2003). First, the Board of Directors of the FDIC ("FDIC Board" or "Board") must find that the party has committed misconduct, including engaging in "any unsafe or unsound practice in connection with any insured depository institution" or committing "any act, omission, or practice which constitutes a breach of such party's fiduciary duty." 12 U.S.C. § 1818(e)(1)(A)(ii)–(iii). Second, the Board must find that at least one requisite effect has occurred, i.e., that "by reason of" the party's action, the insured depository institution "has suffered or will probably suffer financial loss or other damage," its depositors have been or could be prejudiced, or the party has received financial gain or other benefit. *Id.* § 1818(e)(1)(B). Finally, the party must have had a culpable state of mind: The violation must be one that "involves personal dishonesty" or "demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution." *Id.* § 1818(e)(1)(C).

The FDIC may also issue civil money penalties ("CMPs") under a similar test. *See* 12 U.S.C. § 1818(i)(2). As relevant here, the agency may impose a "second tier" penalty of $25,000 per day of violation when a party "recklessly engages in an unsafe or unsound practice in conducting the affairs of [an] insured depository institution" or "breaches any fiduciary duty," and that action "is part of a pattern of misconduct," causes more than minimal loss to the institution, or benefits the institution-affiliated party. *Id.* § 1818(i)(2)(B).

To commence these enforcement proceedings, the FDIC first serves the party with a notice of intention to remove the party from office and/or prohibit that party from participating in other insured depository institutions. *See id.* § 1818(e)(1); *see also id.* § 1818(i)(2)(E)(i) (requiring notice for civil money penalty). The notice must contain a statement of facts establishing grounds for the removal and indicate a time and place for a hearing. *Id.* § 1818(e)(4). The institution-affiliated party may then appear at the hearing to contest the notice; failure to appear constitutes consent to the order. *Ibid.*

An ALJ conducts the adversarial hearing in accordance with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–559. *See* 12 U.S.C. § 1818(h)(1) (requiring hearings to be "conducted in accordance with the provisions of chapter 5 of Title 5"). Under the applicable regulations, an ALJ presiding over a removal proceeding has "all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay," 12 C.F.R. § 308.5(a), including the power to "receive relevant evidence and to rule upon the admission of evidence and offers of proof," *id.* § 308.5(b)(3); "[t]o consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding . . . ," *id.* § 308.5(b)(7); and "[t]o prepare and present to the Board of Directors a recommended decision," *id.* § 308.5(b)(8).

The regulations also provide that evidence that would be admissible under the Federal Rules of Evidence is admissible in adjudicatory proceedings, *id.* § 308.36(a)(2), and that except as otherwise provided, "relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law," *id.* § 308.36(a)(1). If evidence meets this latter standard but would be inadmissible under the Federal Rules of Evidence, the ALJ may not deem the evidence inadmissible. *Id.* § 308.36(a)(3).

After the hearing, the ALJ must file and certify a record of the proceeding, including a recommended decision, recommended findings of fact, recommended conclusions of law, and a proposed order. *Id.* § 308.38(a). A party then has thirty days to file written exceptions for the FDIC Board's review objecting to particular matters or omissions in the ALJ's recommendations, but a failure to file an exception on a particular matter is treated as a waiver of that objection, and the Board need not consider any such objections that were not initially raised before the ALJ. *Id.* § 303.39.

The Board then reviews the ALJ's recommendations and issues a final decision. *Id.* § 308.40. Its review is "based upon review of the entire record of the proceedings," although it may limit its review to those arguments and exceptions that were raised by the parties. *Id.* § 308.40(c)(1). After the Board's final decision, a party may petition for review in the United States Court of Appeals for the District of Columbia Circuit or the circuit in which the institution's home office is located. 12 U.S.C. § 1818(h)(2).

B. FDIC Composition and Structure

The FDIC Board consists of five members: the Comptroller of the Currency, the Director of the Consumer Financial Protection Bureau ("CFPB"), and three additional directors who are appointed by the President with the advice and consent of the Senate. 12 U.S.C. § 1812(a)(1). The Comptroller of the Currency and the CFPB Director are also appointed by the President with Senate advice and consent. *Id.* § 2 (Comptroller of the Currency); *id.* § 5491(b)(2) (CFPB Director). The Board also incorporates a measure of partisan balancing, with a maximum of three directors permitted to be members of the same political party. *Id.* § 1812(a)(2).

The three members of the Board not appointed by virtue of another office serve fixed terms, and the parties agree that they are not removable at will. During the proceedings before the ALJs in this case, the CFPB Director also enjoyed for-cause protection from removal under 12 U.S.C. § 5491(c)(3); however, before the Board issued its final order, the Supreme Court held this removal restriction to be unconstitutional. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020). The Comptroller of the Currency's term lasts for five years "unless sooner removed by the President, upon reasons to be communicated by him to the Senate," and Calcutt concedes that this provision provides for at-will removal. 12 U.S.C. § 2. In practice, however, the FDIC Board has had several vacancies during the proceedings in Calcutt's case; additionally, at least one board member continued to serve after his term expired until a successor was appointed. *See* 12 U.S.C. § 1812(c)(3) (providing for continuation of service of appointed members after expiration of term before a successor is appointed).

The ALJs who hear FDIC removal and prohibition proceedings are part of a pool housed in the Office of Financial Institution Adjudication ("OFIA"), an interagency body established by FIRREA that presides over enforcement proceedings brought by the FDIC, the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("FRB"), and the National Credit Union Administration ("NCUA"). *See* FIRREA § 916, 103 Stat. 183, 486–87 (codified at 12 U.S.C. §1818 note); 12 C.F.R. § 308.3 (defining OFIA as "the executive body charged with overseeing the administration of administrative enforcement proceedings" of OCC, FRB, FDIC, and NCUA).[1] These agencies signed an agreement that provides for cost-sharing and specifies that the FDIC is the "Host Agency," responsible for the employment of an office staff consisting of ALJs and administrative employees. *See* Ex. L to Emergency Motion for Stay Pending Review, at 1–6. The agreement also states: "Any change to the Office Staff personnel shall be subject to the prior written approval of all Agencies." *Id.* at 3. Two ALJs currently make up the pool in OFIA. *See Our Judges*, Office of Financial Institution Adjudication, https://www.ofia.gov/who-we-are/our-judges.html (last visited May 24, 2022).

[1]Initially, the Office of Thrift Supervision served as "host agency" for OFIA, but that agency's responsibilities were transferred to FRB, OCC, and FDIC in Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No 111-203, 124 Stat. 1376 (2010).

Until *Lucia*, these ALJs were not appointed by the FDIC. After the Supreme Court held in *Lucia* that SEC ALJs were officers who must be appointed by the President, a court of law, or a head of department, *see* 138 S. Ct. at 2051–54, the FDIC Board then newly appointed the same ALJs without conceding that their previous appointments had been unconstitutional. The FDIC ALJs may only be removed "for good cause" determined by the Merit Systems Protection Board ("MSPB") on the record after an opportunity for a hearing. 5 U.S.C. § 7521(a). Members of the MSPB, in turn, may be removed by the President "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

C. Calcutt's Actions at Northwestern Bank

With this background, we turn to the facts of the present case. Calcutt was the President, CEO, and Chairman of the Board of Directors of Northwestern Bank (the "Bank"), which had its principal place of business in Traverse City, Michigan. He also served as a member of the Bank's senior loan committee and as CEO of the Bank's holding company, Northwestern Bancorp. The Bank was an insured state nonmember bank subject to the FDI Act, as well as associated regulations and Michigan state laws. Calcutt retired from his positions at the Bank in 2013 and now serves as the Chairman of State Savings Bank in Michigan and its holding company. Northwestern Bank was purchased by a competitor in 2014.

Under the Bank's management structure, twenty employees reported directly to Calcutt, including Richard Jackson, an Executive Vice President and board member. A commercial-loan officer named William Green also worked for the Bank.

By 2009, the Bank's largest loan relationship was with a group of nineteen limited liability companies controlled by the Nielson family (the "Nielson Entities"). These businesses' activities involved development of real estate, holding vacant and developed real estate, and holding oil and gas interests. At that time, the Bank's loans to the Nielson Entities (the "Nielson Loans") amounted to approximately $38 million. The value of the Nielson Entities' holdings during this time was approximately $112 million, with $7–9 million in cash or cash equivalents, and $80 million available in real estate or oil and gas assets that could be used for collateral or loan-payment purposes.

As early as 2008, FDIC examiners identified several of the Nielson Entities as a single borrower and identified the Bank's loans to these businesses as a "concentration of credit"—defined as a lending relationship that exceeds twenty-five percent of a bank's Tier 1 capital. Although in practice the Nielsons could use cash derived from one entity to pay the loans of another entity, the loans were not cross-collateralized, meaning that the collateral in one Nielson Entity did not secure loans to other Nielson Entities, despite the common control. Neither were the loans supported by personal guarantees: If a Nielson Entity failed, the Bank could not compel the Nielsons to personally satisfy the obligation. Loans lacking personal guarantees were considered to be an exception to the Bank's commercial-loan policy.

In April 2008, Calcutt and Green met Cori Nielson, one of the managers of the limited-liability company that managed the Nielson Entities, and Autumn Berden, the chief financial officer of that company. Calcutt and Green requested that the Nielsons stop reporting transfers between Nielson Entities as intercompany loans on their balance sheets; instead, the bankers recommended that when an entity needed funds, another entity should distribute funds to its members, who could then loan or give the funds to the cash-strapped entity. Such a payment mechanism would not be reported to regulators as an intercompany transfer and would conceal the Nielson Entities' "common use of funds." According to the FDIC, over the following months this strategy also masked the interrelationship of the Nielson Entities and hid loans to Entities that had no positive cash flow by routing funds through other actors in the Nielson group.

The relationship between the Bank and the Nielsons began to deteriorate during the Great Recession. Although in May 2009 several of the Nielson Entities wrote to Calcutt stating that they had sufficient cash flow for debt service, by August multiple loans were past due. More were scheduled to mature on September 1. On August 10, Berden told the Bank that the Nielson Entities would need to restructure their loans, and on August 21, Cori Nielson made a similar communication. The Bank did not oblige, and the Nielson Entities stopped paying their loans on September 1.

Over the following months, the Nielsons and the Bank continued to negotiate, but their efforts were fruitless. The Nielsons sought measures such as debt forbearance, reduction of loan payments, or deeds in lieu of foreclosure,[2] because ongoing problems in the real-estate market had diminished their ability to repay existing debts. Calcutt, on the other hand, later testified that he thought that the Nielsons were "posturing" and possessed sufficient funds to pay their loans. The Bank attempted to convince the Nielsons to refinance and provide greater payments on their loans. Cori Nielson later testified that in response to her communications, Calcutt expressed concerns about raising "red flags" to regulators about the Bank's relationship with the Nielson Entities. By November 30, 2009, several of the loans to the Nielson entities were automatically placed on nonaccrual status by the Bank, meaning that they were ninety days past due.

Also on November 30, the Bank and the Nielson Entities finally reached an agreement that would bring all the loans current. First, the Bank extended a loan of $760,000 to Bedrock Holdings LLC, one of the Nielson Entities (the "Bedrock Loan"), which would be used for the companies' future required loan payments until April 2010. After receipt of the loan, Bedrock Holdings transferred the funds into accounts at the Bank for other Nielson Entities. Second, the Bank agreed to release $600,000 worth of collateral in investment-trading funds that had been granted to it by another Nielson Entity, Pillay Trading LLC (the "Pillay Collateral").[3] This collateral release allowed the Nielson Entities to bring their past-due loans current. Finally, the Bank renewed the Nielson Entities' matured loans, including a loan of $4,500,000 to Bedrock Holdings. The parties refer to this agreement, which took effect in December 2009, as the "Bedrock Transaction." Consequently, the Nielson Entities' loans were removed from the Bank's nonaccrual list on December 1.

The FDIC Board would later find that the actions surrounding the Bedrock Transaction violated the Bank's commercial-loan policy. That policy required that "all commercial loans are to be supported by a written analysis of the net income available to service the debt and by written evidence from the third parties supporting the collateral value of the security," yet the Bank did not conduct these analyses or collateral appraisals prior to providing the Bedrock Loan

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[2]Through a deed in lieu of foreclosure, "a mortgagee . . . take[s] a conveyance from the mortgagor in full or partial satisfaction and as a substitute for foreclosure." Restatement (Third) of Property (Mortgages) § 8.5 cmt. b (Am. Law Inst. 1997).

[3]As discussed below, a year later Northwestern Bank also released $690,000 in collateral from Pillay Trading LLC. We refer to the $600,000 and $690,000 disbursements together as the "Pillay Collateral."

and releasing the Pillay Collateral. At the 2019 hearing, however, Calcutt testified that he thought that the Bedrock Transaction was in the Bank's best interest, because it provided time for the Nielson Entities to pay off their debt and because he believed they had the resources to do so.

Moreover, the commercial-loan policy required approval by two-thirds of the board of directors for loans "where the total aggregate exposure is between 15 and 25 percent of the Bank's Regulatory Capital." *Ibid.* The loans to the Nielson Entities were approximately half of the Bank's Tier 1 capital, thereby qualifying for the voting requirement. According to the FDIC, however, the board did not approve the Bedrock Transaction until March 2010—approximately four months after the disbursements. The loan write-up for the Bedrock Transaction that was presented to the board in March 2010 also contained inaccurate information, including misstating the purpose of the Bedrock Loan as "working capital requirements" and omitting that the Bedrock Transaction had already occurred.

That loan write-up was prepared by a credit analyst based on information provided by Green, and Calcutt and Jackson both initialed the document. Before the FDIC, Calcutt argued that: (a) the write-up's errors and mischaracterization could not be attributed to him; (b) the board of directors was aware of the difficulties with the Nielson Entities in November 2009 because of materials it had received; and (c) the board of directors verbally approved the Bedrock Transaction in November and December 2009. The ALJ and FDIC Board, however, found against him on these points.

Calcutt's actions surrounding the FDIC's June 2010 examination of the Bank also attracted scrutiny. In May 2010, Calcutt signed an Officer's Questionnaire required by the agency. The first question required him to list the loans that the Bank had renewed or extended since the previous year's examination by accepting separate notes for the payment of interest or without fully collecting interest, as well as any loans made for the direct benefit of anyone other than the named recipients of the loans. On the questionnaire, Calcutt answered that he was not aware of any such loans. He later testified that these answers were incorrect in light of the Bank's activities with the Nielson Entities, but argued that the misstatements were "inadvertent and unintentional." (Brackets omitted.)

Additionally, Calcutt participated in a decision to sell several Nielson Entity loans to two of Northwestern Bank's affiliates in May 2010, shortly before the FDIC examiners were due to arrive. Green told Berden that he and Calcutt would continue to serve as the points of contact on those loans. In late September 2010, the Bank repurchased the loans, at which point the loans were delinquent and past maturity.

Despite these actions, by September 2010 the Nielson Entities' position remained precarious. Beginning on September 1, they again stopped making payments on their loans. Several additional months of negotiations ensued, and in December 2010 the parties agreed to an additional release of $690,000 of collateral from Pillay Trading LLC to fund the Nielson Entities' debt service from September 2010 to January 2011. The Bank's board of directors agreed to this arrangement. At the end of that period, however, the Nielson Entities yet again stopped making payments, and they have been in default since then.

D. The 2011 Examination

Shortly before the FDIC's 2011 regular examination of the Bank was set to begin on August 1, 2011, Cori Nielson sent the agency a binder with approximately 267 pages of correspondence between herself, Berden, Green, and Calcutt. The binder's contents went beyond the correspondence that FDIC examiners had found in the Bank's loan file. According to Calcutt, Nielson's move also began a series of actions in which she and Berden improperly influenced the FDIC's Case Manager, Anne Miessner, and Miessner became biased against Calcutt while participating in the examination.

During his September 14, 2011 meeting with examiners from the FDIC and the Michigan Office of Financial and Insurance Regulation,[4] Calcutt made several false statements about the Bedrock Transaction. First, in response to a question about his understanding as to the purpose of the Bedrock Loan, Calcutt said that the funds were meant to provide "working capital" in connection with an acquisition of another business, although their true purpose was to help pay off the loans to Nielson Entities. Second, when examiners asked him about the release of the Pillay Collateral, he responded, "I thought we still had them," although he had authorized

[4] This agency has been renamed the Michigan Department of Insurance and Financial Services.

releases of the collateral in 2009 and 2010. Third, when queried about how the Nielson Entities managed to bring their loans current in December 2010, he answered that they used their "vast resources between oil, gas, and rentals," although the December 2010 release of Pillay Collateral was in fact used to satisfy these obligations.

In its 2011 examination, the FDIC also noted that the Nielson relationship "should have been reported as nonaccrual on quarterly Call Reports beginning no later than December 2009," and that its omission "has resulted in a material overstatement in earnings both in the form of falsely inflated interest income and of grossly understated provision expense." Calcutt signed the Call Reports, yet he later testified that he was not involved in their preparation.

Ultimately, the FDIC's 2011 examination report identified the Bank's failures in securing and analyzing the Bedrock Transaction, its reporting inaccuracies, and its misstatements during the examination. It ordered the Bank to charge off $6.443 million on the loans to Nielson Entities, which represented the amount that the Bank would be unlikely to collect.[5] On July 31, 2012, the Bank charged off an additional $30,000 specifically on the Bedrock Loan.

E. Administrative Proceedings

1. *The 2015 Hearing*

On April 13, 2012, the FDIC formally opened an investigation into the Bank's officers. Its investigation ended on August 20, 2013, and the agency issued a Notice of Intention to Remove from Office and Prohibit from Further Participation against Calcutt, Jackson, and Green, as well as a notice of assessment of civil money penalties (the "Notice"). In 2015, both Jackson and Green stipulated to orders prohibiting them from banking activity, and Jackson agreed to a $75,000 CMP. Calcutt proceeded to discovery and further administrative proceedings.

In September 2015, ALJ C. Richard Miserendino held an eight-day hearing on Calcutt's charges. Among the several witnesses who testified were Calcutt, Jackson, Nielson, Berden, Miessner, and Dennis O'Neill (one of the FDIC examiners). ALJ Miserendino released a

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[5]The parties disagree about whether a charge-off necessarily qualifies as a loss. *See infra* at 45.

recommended decision on June 6, 2017. However, before the Board issued its final decision, it stayed the case pending the Supreme Court's decision in *Lucia*, because ALJ Miserendino had not been appointed by an agency head.

2. *The 2019 Hearing*

Following *Lucia*, the FDIC Board formally appointed Miserendino and its other ALJ, Christopher B. McNeil, then remanded and reassigned each ALJ's pending cases to the other ALJ "for a new hearing and a fresh reconsideration of all prior actions, including summary dispositions, taken before the hearing." *See* FDIC Resolution Seal No. 085172, Order in Pending Cases (July 19, 2018). The Board permitted each new ALJ to conduct a paper hearing on remand, but if a party objected to the paper hearing, the Board ordered that the ALJ "must conduct a new oral hearing in accordance with 12 C.F.R. § 308.35, except that the ALJ may accept the written transcript of prior testimony of any witnesses for which the parties agreed to accept such testimony."

Calcutt's case was reassigned to ALJ McNeil, who stated that he would conduct an oral hearing and requested that the parties submit objections to ALJ Miserendino's prehearing rulings. In response, Calcutt asserted that the prior proceedings were entirely void under *Lucia* because the prior ALJ had not been appointed by an agency head. ALJ McNeil rejected this argument, and proceeded to request that the parties submit specific examples where the prior proceeding's outcome turned on evidence that should have been included or excluded, or "elements, such as witness demeanor, that are not readily determined from a review of the written record."

Calcutt then reasserted his argument that "the original proceeding was void *ab initio*" and objected to the inclusion of the record from the 2015 proceedings because the case "turn[ed] entirely on credibility assessments." In an order dated March 19, 2019, ALJ McNeil rejected these arguments, concluding that the second hearing would not be de novo, and that "[t]he prior proceedings have not been deemed void *ab initio*, but instead serve as the primary source of the evidentiary record, subject to review and reconsideration by the new ALJ." ALJ McNeil went on to observe that although credibility assessments were material to the decision of the case, Calcutt had not established that a review of the 2015 hearing transcript would be hindered by an inability to view witnesses' demeanor. Finally, he rejected Calcutt's objections to the admission of several exhibits from the 2015 proceedings.

On March 20, 2019, ALJ McNeil released an additional prehearing order, which among other things specified that the parties should identify witnesses by May 15, 2019 and indicate each witness's expected testimony. The order specified that "during the evidentiary hearing, witness testimony will be limited to the descriptions provided in this summary." Calcutt sought an interlocutory appeal before the FDIC Board on ALJ McNeil's limitations on the oral hearing. The Board granted his request for a new oral hearing on all issues considered at the prior hearing, including live witness testimony, but it denied his request for an entirely new proceeding as untimely.

In the next prehearing order, ALJ McNeil granted enforcement counsel's motions to strike Calcutt's affirmative defenses of laches, entrapment, and examiners' violation of the agency's own procedural rules. Then, in response to the parties' motions in limine, he permitted introduction of Green and Jackson's testimony and the parties' stipulations at the 2015 hearing, among other evidentiary rulings.

The hearing lasted from October 29 to November 6, 2019. Calcutt was among twelve witnesses who testified. During the proceedings, Calcutt's counsel unsuccessfully attempted to cross-examine witnesses, including Berden, Miessner, and Nielson, about the theory that Miessner and the FDIC were biased against Calcutt due to their relationship with the Nielsons. In sustaining enforcement counsel's objections to this testimony, ALJ McNeil reasoned that these questions were outside the scope of direct examination, and that in accordance with his March 20, 2019 order, Calcutt could have identified these witnesses in a prehearing submission as subject to questioning about bias but failed to do so.

On April 3, 2020, ALJ McNeil issued the Findings of Fact, Conclusions of Law, and Recommended Decision on Remand (the "Recommended Decision"), finding that Calcutt's actions surrounding the Bedrock Transaction amounted to unsafe or unsound practices and breached his fiduciary duties of care and candor; that these actions caused the Bank to suffer damages and financially benefitted Calcutt; and that the actions involved personal dishonesty and willful and continuing disregard for the Bank's safety and soundness. *See* 12 U.S.C. § 1818(e)(1). Finding that Calcutt's actions satisfied the requirements for a removal and prohibition order and civil money penalties, ALJ McNeil recommended that Calcutt be prohibited from banking and assessed a $125,000 CMP.

Calcutt filed exceptions to the FDIC Board, challenging many of these findings and conclusions. He also argued that the proceedings were invalid because the restrictions on ALJ McNeil's removal were unconstitutional, and because the new hearing granted after *Lucia* did not remedy the Appointments Clause violation in the previous proceedings before ALJ Miserendino. He did not argue that the Board was also improperly shielded from removal.

Upon review, the FDIC Board accepted ALJ McNeil's findings and conclusions, and on December 15, 2020, it issued a final Decision and Order to Remove and Prohibit from Further Participation and Assessment of Civil Money Penalties (the "Removal and Prohibition Order"). The Board concluded that Calcutt's involvement with the Bank's loans to the Nielson Entities, as well as his misrepresentations to regulators and the board of directors, were both unsafe and unsound practices and breaches of his fiduciary duties. *See* 12 U.S.C. § 1818(e)(1)(A). It also found that sufficient effects had occurred by reason of Calcutt's malfeasance: loan charge-offs; the Bank's increased investigative, legal, and auditing expenses; and Calcutt's receipt of dividends from the Bank's holding company that reflected the Nielson portfolio's inflated value. *See* 12 U.S.C. § 1818(e)(1)(B). And it concluded that Calcutt acted with the requisite culpability. *See* 12 U.S.C. § 1818(e)(1)(C). The Board similarly upheld ALJ McNeil's conclusions regarding the appropriateness of the civil money penalty. *See* 12 U.S.C. § 1818(i). Finally, it rejected Calcutt's exceptions regarding the ALJ's insulation from removal, the adequacy of the new hearing after *Lucia*, the ALJ's evidentiary rulings, the statute of limitations, and the ALJ's bias.

Calcutt petitioned this court for review the following day. On December 21, 2020, he moved for an emergency stay. A panel of this court granted the stay on January 5, 2021. We have jurisdiction over Calcutt's petition for review of the FDIC's order under 12 U.S.C. § 1818(h)(2).

II. STANDARD OF REVIEW

The judicial-review provisions of the APA apply to FDIC removal and prohibition orders and orders assessing CMPs. 12 U.S.C. § 1818(h)(2). Accordingly, we must hold unlawful and set aside agency actions, findings, or conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; "in excess of statutory jurisdiction, authority, or limitations"; "without observance of procedure required by law"; or "unsupported by substantial evidence." 5 U.S.C. § 706(2). Furthermore, "due account shall be taken of the rule of prejudicial error." *Ibid.*; *see Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 664, 659–60 (2007) (explaining that this statutory language refers to a harmless-error rule). Though a court does not "substitute its judgment for that of the agency" over decisions within the agency's delegated authority in applying the APA's arbitrary-and-capricious standard, the agency's conclusions must still be based on "reasoned decision making." *Wollschlager v. FDIC*, 992 F.3d 574, 581–82 (6th Cir. 2021).

We review other agency determinations differently. Questions of law are reviewed de novo, but we defer to an agency's interpretation of a provision in a statute that it is entrusted with administering, if (1) Congress has not "directly spoken to the precise question at issue," and (2) "the agency's answer is based on a permissible construction of the statute." *N. Fork Coal Corp. v. Fed. Mine Safety & Health Rev. Comm'n*, 691 F.3d 735, 739 (6th Cir. 2012) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). And an agency's factual findings are reviewed for substantial evidence, which is "more than a scintilla of evidence but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Gen. Med., P.C. v. Azar*, 963 F.3d 516, 520 (6th Cir. 2020) (quoting *Cutlip v. Sec'y of Health & Hum. Servs.*, 25 F.3d 284, 286 (6th Cir. 1994)). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

III. REMOVAL PROTECTIONS

Calcutt maintains that two features of the structure of the FDIC violate Article II and the separation of powers and thus compel invalidation of the agency's proceedings against him. First, relying principally on *Seila Law*, he argues that the members of the FDIC Board are unconstitutionally insulated from removal by the President. Second, he contends that the FDIC's ALJs are insulated by multiple levels of for-cause protection in contravention of the Supreme Court's holding in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).

Neither alleged infirmity, however, compels invalidation of the FDIC proceedings against Calcutt. As the Court recently explained in *Collins v. Yellen*, even if an agency's structure unconstitutionally shields officers from removal, a party challenging the agency's action is not entitled to relief unless that unconstitutional provision "inflict[s] compensable harm." 141 S. Ct. at 1789. Calcutt has not demonstrated that the removal protections of the FDIC Board or the FDIC ALJs caused such harm to him.

A. FDIC Board Structure

We first address Calcutt's challenge to the FDIC Board's structure. To start, we conclude that Calcutt has not forfeited this claim. However, Calcutt has not demonstrated that the purported constitutional infirmity inflicted harm. *See Collins*, 141 S. Ct. at 1789. Thus, he is not entitled to invalidation of the proceedings on this basis.

1. *Issue Exhaustion*

At the outset, we disagree with the argument by the FDIC that Calcutt has forfeited his challenge to the Board's removal protections by not raising it in his exceptions to the recommended decision of ALJ McNeil. This is a question of "issue exhaustion," a rule in many administrative contexts that requires a party to present an issue to an agency before pursuing judicial review on that issue. *Carr v. Saul*, 141 S. Ct. 1352, 1358 (2021).

We have recognized three types of issue-exhaustion requirements. First, many "requirements of administrative issue exhaustion are largely creatures of statute." *Sims v. Apfel*, 530 U.S. 103, 107 (2000). Second, an agency's regulations may require exhaustion, *id.* at 108, so long as the regulations "comport with the statute" and are not applied arbitrarily, *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 747 (6th Cir. 2019). Third, a court may impose an issue-exhaustion requirement without either a statute or regulation. *Sims*, 530 U.S. at 108; *see Bryan*, 937 F.3d at 747–48 (describing "prudential exhaustion" and its unclear doctrinal source). In this last context, "[t]he desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Carr*, 141 S. Ct. at 1358 (quoting *Sims*, 530 U.S. at 109). This resemblance to an adversarial litigation in turn depends on "whether claimants bear the responsibility to develop issues for adjudicators' consideration." *Ibid.*

The FDIC argues that its regulations (namely 12 C.F.R. § 308.39(b)) compelled Calcutt to raise any Appointments Clause challenge to the Board's structure in his exceptions to the Recommended Decision before raising them before this court. Moreover, the agency adds, *Carr*'s limitation on imposing issue-exhaustion requirements in non-adversarial proceedings do not apply here, because Calcutt's adjudication was adversarial.

Calcutt responds that § 308.39(b) requires exhaustion only of issues over which the agency has jurisdiction, and that because agencies lack "authority to entertain a facial constitutional challenge to the validity of a law," he did not need to exhaust the removal issue before the ALJ or the Board. Reply Br. 2 (quoting *Jones Bros.*, 898 F.3d at 673); *see* 12 C.F.R. § 308.39(c)(1) (stating that exceptions "must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations"). Relatedly, he argues that an agency proceeding is an inappropriate forum to consider a structural constitutional claim such as the Board's removability, because the Board has no special expertise in Appointments Clause jurisprudence and has previously disclaimed authority to entertain constitutional challenges to statutes, meaning that raising this issue before the Board would have been futile.

We think Calcutt has the better of the argument, and that in the "particular administrative scheme at issue" in this case, no statute, regulation, or prudential principle required him to raise his challenge to the FDIC Board during the administrative proceedings. *Joseph Forrester Trucking v. Dir., Off. of Workers' Comp. Programs*, 987 F.3d 581, 590 (6th Cir. 2021) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)). To begin with, the judicial review provision of the FDI Act, 12 U.S.C. § 1818(h), says nothing bearing on exhaustion. We have explained that a statute must contain language "directing parties to raise issues" before the agency in order to create a statutory issue-exhaustion requirement. *See Bryan*, 937 F.3d at 749; *Jones Bros., Inc. v. Sec'y of Lab.*, 898 F.3d 669, 673–74 (6th Cir. 2018).

The applicable FDIC regulations hit closer to the mark. They provide that the "[f]ailure of a party to file exceptions . . . is deemed a waiver of objection thereto." 12 C.F.R. § 308.39(b)(1). This text might be read to create an issue-exhaustion requirement in light of our decision in *Bryan*, where we detected an issue-exhaustion requirement in a regulation requiring that a petition for review list "specific issues to be considered" for appeals from Black Lung Benefits Act adjudications to the Benefits Review Board. 937 F.3d at 749 (quoting 20 C.F.R. § 802.211(a)). However, there is an important difference between *Bryan* and this case. Calcutt raises a facial constitutional challenge to the FDI Act, and the FDIC has no power to invalidate its own organic statute; thus, it could never entertain Calcutt's separation-of-powers challenge to the FDIC Board in the first place. *See Jones Bros.*, 898 F.3d at 673–74 (reading statute not to impose issue-exhaustion requirement on facial constitutional challenges where agency could not "invalidate the statute from which it derives its existence and that it is charged with implementing"). True, we have explained that an agency may entertain certain facial constitutional challenges and therefore impose issue-exhaustion requirements where it has long asserted that authority. *See Joseph Forrester Trucking*, 987 F.3d at 588–89; *Bryan*, 937 F.3d at 753. But the FDIC Board has previously disclaimed the authority to determine the constitutionality of statutes. *See Matter of the Bank of Hartford*, No. FDIC-92-212kk, at A-2525 (FDIC Apr. 11, 1995), https://www.fdic.gov/bank/individual/enforcement/5223.html (last visited June 8, 2022)). Though the FDIC now offers a list of examples in which it has considered constitutional claims in adjudications, almost none of those decisions considered a constitutional challenge to the authority or structure of the FDIC, and the decision that did so—*Matter of* ***, No. FDIC-85-363e, 1986 WL 379631 (FDIC Apr. 21, 1986)—predates *Bank of Hartford*.[6] And even if we recognize that the FDIC has asserted authority to decide *some* constitutional issues, we cannot say that this constitutes an established practice for the type of separation-of-powers claim at issue here.

A further consideration counsels against imposing an issue-exhaustion requirement here: Calcutt's challenge to the removal protections of the FDIC Board is a structural constitutional challenge over which the FDIC Board has no special expertise. *See Carr*, 141 S. Ct. at 1360. And had Calcutt raised this challenge before the Board, his efforts would have been futile. *See id.* at 1361 ("[T]his Court has consistently recognized a futility exception to exhaustion requirements.").[7] To illustrate, consider what remedy the Board could have offered if Calcutt had raised the issue and the Board had agreed that it was unconstitutionally shielded from removal. The remedies granted by Article III courts, such as severing and striking the Board's for-cause protections from the FDIC's organic statute, would have been unavailable, because the Board, an agency of the Executive Branch, cannot edit its own organic statute. *Cf. Seila Law*, 140 S. Ct. at 2207–09. Similarly, the Board could hardly have told the President to treat it as if it had no protections from removal, since an agency cannot compel the President to act (let alone violate a statute). Another possibility would be for it to vacate Calcutt's penalty, but that would not resolve the constitutional issue, because the removal restrictions would persist. Requiring issue exhaustion in this situation would have been a pointless exercise.

In sum, Calcutt has not forfeited his claim that the FDIC Board is unconstitutionally insulated from removal.

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[6]This is not to say that the FDIC has disavowed authority to address *any* constitutional claim. As the FDIC notes, it has previously addressed Appointments Clause and separation-of-powers challenges to ALJs. *See Matter of Sapp*, Nos. FDIC-13-477(e), FDIC-13-478(k), 2019 WL 5823871, at *18–19 (FDIC Sept. 17, 2019); *Matter of Landry*, No. FDIC-95-65e, 1999 WL 440608, at *27–29 (FDIC May 25, 1999); *Matter of Leuthe*, Nos. FDIC-95-15Ee, FDIC-95-16k,1998 WL 438323, *10–11 (FDIC June 26, 1998). Those decisions, however, did not concern a separation-of-powers challenge to the FDIC Board.

[7]While the Supreme Court has cautioned that courts should hesitate to apply exceptions to mandatory exhaustion requirements in a *statute*, *see Ross v. Blake*, 136 S. Ct. 1850, 1857–58 (2016), that concern does not apply here because, as we have explained, the FDI Act does not clearly mandate an issue-exhaustion requirement.

2. *FDIC Board Structure*

Calcutt would have us hold that the FDIC Board is unconstitutionally shielded from removal and therefore asks us to invalidate his entire proceeding. Under the framework set out by the Supreme Court's recent separation-of-powers decisions, however, he is not entitled to invalidation of his proceedings. *See Collins*, 141 S. Ct. at 1783–89; *Seila Law*, 140 S. Ct. at 2198–2204. In particular, *Collins* indicates that Calcutt 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. *See* 141 S. Ct. at 1788–89.

Article II of the Constitution states that "[t]he executive Power shall be vested in a President," U.S. Const. art. II, § 1, cl. 1, and requires the President to "take Care that the Laws be faithfully executed," *id.* art. II, § 3. This language establishes a core principle of constitutional separation of powers: "[T]he President's removal power is the rule, not the exception." *Seila Law*, 140 S. Ct. at 2206; *see also Myers v. United States*, 272 U.S. 52, 163–64 (1926).

In *Seila Law*, the Court provided the framework for analyzing the constitutionality of a restriction on the President's removal authority. 140 S. Ct. at 2198. At the first step, we ask whether an officer's tenure protection falls within an established exception to the general removal authority. *Id.* at 2198. As relevant here, one such exception, identified in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), permits for-cause removal protections for "multimember expert agencies that do not wield substantial executive power." *Seila Law*, 140 S. Ct. at 2199–2200.[8] To determine whether an agency falls within this category, we consider whether (a) the agency is a "body of experts," *id.* at 2200 (quoting *Humphrey's Ex'r*, 295 U.S. at 624); (b) the agency is nonpartisan or balanced along partisan lines, *ibid.*; and (c) the agency is closer to "a mere legislative or judicial aid" that "was said not to exercise any enforcement power," *id.* at 2199–2200, or rather an enforcement body that may "promulgate binding rules," "unilaterally issue final decisions awarding legal and equitable relief in

[8]The *Seila Law* Court also recognized an exception for "inferior officers with limited duties and no policymaking or administrative authority" under *Morrison v. Olson*, 487 U.S. 654 (1988). *See Seila Law*, 140 S. Ct. at 2199–2200. However, this exception does not apply to the FDIC Board, which qualifies as the head of a department. *See Free Enter. Fund*, 561 U.S. at 512–13 (explaining that multimember commissions can qualify as head of a department).

administrative adjudications," and "seek daunting monetary penalties against private parties on behalf of the United States in federal court," *id.* at 2200.

At the second step, if an agency structure does not fall within an established exception, we must determine "whether to extend those precedents to the 'new situation.'" *Seila Law*, 140 S. Ct. at 2201 (quoting *Free Enter. Fund*, 561 U.S. at 483). In concluding that the CFPB Director was unconstitutionally shielded from removal, the *Seila Law* Court emphasized two key features: the historical novelty of an agency headed by a single director removable only for cause, and the inconsistency of this design with constitutional structure. *Id.* at 2201–04.

As for the historical inquiry, the Court canvassed American history and found only "modern and contested" examples of agencies headed by a single director who enjoyed good-cause tenure, such as the Federal Housing Finance Agency ("FHFA") Director, and a "one-year blip" during the Civil War in which the Comptroller of the Currency received for-cause protections. *Id.* at 2202; *see also Collins*, 141 S. Ct. at 1783 (holding that removal restriction for FHFA Director was unconstitutional, and that *Seila Law* was "all but dispositive" on the question).

As for the structural inquiry, the Court underscored that the constitutional scheme's combination of the separation of powers and democratic accountability foreclosed executive officers from exercising significant authority without direct presidential supervision. The Constitution emphasizes the division of power, but it also recognized the need for an "energetic executive" to respond quickly and flexibly to challenges. *Seila Law*, 140 S. Ct. at 2203 (discussing The Federalist No. 51 (James Madison) and The Federalist No. 70 (Alexander Hamilton)). To resolve these dueling priorities, the Constitution makes the President directly accountable to the American people through elections, allowing him to delegate authority to subordinate officials to complete the tasks of governance so long as that delegated authority "remains subject to the ongoing supervision and control of the elected President." *Ibid.* The CFPB Director's for-cause protections violated this structure because, by eliminating the President's ability to remove the CFPB Director at will, the CFPB concentrated power in a single officer while insulating him from presidential control. *Id.* at 2204. This infirmity was exacerbated by the CFPB Director's five-year term, which meant that "some Presidents may not have any opportunity to shape its leadership," and the agency's independence from the normal appropriations process. *Ibid.*

We need not delve deeply into the *Seila Law* inquiry in this case, however, because *Collins* instructs that relief from agency proceedings is predicated on a showing of harm, a requirement that forecloses Calcutt from receiving the relief he seeks. *See* 141 S. Ct. at 1788–89. *Collins* concerned the Director of the Federal Housing Finance Agency, an agency with authority to regulate and act as the conservator or receiver of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). *Collins*, 141 S. Ct. at 1770. Acting as the companies' conservator, the FHFA amended stock purchasing agreements with the Treasury Department, which altered the dividends that Fannie Mae and Freddie Mac were required to pay to Treasury in exchange for capital. *See id.* at 1772–75. Shareholders of the companies brought suit against the FHFA and the FHFA Director as a result. *See id.* at 1775. As relevant here, the shareholders argued that the statutory for-cause removal protection of the FHFA Director violated the separation of powers, *see id.* at 1778, and that therefore the amendment to the FHFA-Treasury agreement "must be completely undone," *id.* at 1787.

The Supreme Court agreed that the for-cause removal provision was unconstitutional, as its decision in *Seila Law* was "all but dispositive." *Id.* at 1783. Just as the CFPB in that decision presented a "novel context of an independent agency led by a single Director" whose for-cause removal protections "lack[ed] a foundation in historical practice and clashe[d] with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control," so too did the single-director structure and removal protections in the FHFA unconstitutionally limit the President's removal power. *Id.* at 1783–84 (quoting *Seila Law*, 140 S. Ct. at 2192).

Yet although the removal restriction was unconstitutional, the Court held that the shareholders were not entitled to relief absent further findings by the lower courts. The shareholders were not entitled to a prospective remedy, because a subsequent agreement between the FHFA and Treasury had deleted the dividend formula that caused the alleged injury. *Id.* at 1779–80. As to retrospective relief for the claimed injury during the years that the dividend formula was in effect, the Court observed that "[a]lthough the statute unconstitutionally limited the President's authority to *remove* the confirmed Directors, there was no constitutional defect in the statutorily prescribed method of appointment to that office." *Id.* at 1787. Thus, the Director "lawfully possess[ed]" the power to implement the provision. *Id.* at 1788.

The Court explained that the shareholders would be entitled to relief if the unconstitutional removal restriction "inflict[ed] compensable harm," and it remanded the case to the Court of Appeals to conduct this inquiry. *Id.* at 1789. To establish such harm, the shareholders would need to show that the removal restriction *specifically* impacted the agency actions of which they complained:

> Suppose, for example, that the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have "cause" for removal. Or suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way. In those situations, the statutory provision would clearly cause harm.

Ibid. Several concurring Justices confirmed that a petitioner would have to establish that an unconstitutional removal protection specifically caused an agency action in order to be entitled to judicial invalidation of that action. *See id.* at 1789 (Thomas, J., concurring) (agreeing with majority's remedial analysis "that, to the extent a Government action violates the Constitution, the remedy should fit the injury"); *id.* at 1801 (Kagan, J., concurring in part and concurring in the judgment) ("I also agree that plaintiffs alleging a removal violation are entitled to injunctive relief—a rewinding of agency action—only when the President's inability to fire an agency head affected the complained-of decision."); *id.* at 1803 n.1 (Sotomayor, J., concurring in part and dissenting in part) (agreeing with majority's remedial discussion).

Calcutt attempts to distinguish *Collins* by observing that the decision concerned only retrospective relief, because the FHFA had already ended the challenged action, whereas Calcutt's Removal and Prohibition Order remains in effect and operates prospectively. That distinction does not matter here. The *Collins* inquiry focuses on whether a "harm" occurred that would create an entitlement to a remedy, rather than the nature of the remedy, and our determination as to whether an unconstitutional removal protection "inflicted harm" remains the same whether the petitioner seeks retrospective or prospective relief (particularly when we review an adjudication that has already ended). *Collins*, 141 S. Ct. at 1789. In other words, *Collins* instructs that we must ask whether the FDIC Board's for-cause protections "inflicted harm," such as by preventing superior officers from removing Board members when they attempted to do so, or possibly by altering the Board's behavior. *Ibid*. The Removal and Prohibition Order's prospective effect does not change a court's ability to conduct that inquiry.

Collins thus provides a clear instruction: To invalidate an agency action due to a removal violation, that constitutional infirmity must "cause harm" to the challenging party. *Ibid.* Our sister circuits that have considered the question agree that this is the key inquiry. *See Kaufmann v. Kijakazi*, 32 F.4th 843, 849 (9th Cir. 2022) (explaining that "[a] party challenging an agency's past actions must . . . show how the unconstitutional removal provision *actually harmed* the party"); *Bhatti v. Fed. Housing Fin. Agency*, 15 F.4th 848, 854 (8th Cir. 2021) (identifying issue under *Collins* as whether unconstitutional removal restriction "caused compensable harm");[9] *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137 (9th Cir. 2021) (stating that, under the "controlling" authority of *Collins,* "[a]bsent a showing of harm, we refuse to unwind the [agency] decisions below").

Calcutt has not demonstrated that the structure of the FDIC Board caused him harm. He first states that the FDIC Board's Removal and Prohibition Order "inflicts ongoing harm" by preventing him from participating in banking activities. Reply Br. 10. However, *Collins* does not say that *any* administrative penalty imposed by an unconstitutionally-structured agency must be vacated. Instead, the constitutional violation must have *caused* the harm. *See Collins*, 141 S. Ct. 1789 (identifying inquiry as whether "an unconstitutional provision . . . inflict[ed] compensable harm").

Calcutt also argues that the *possibility* that the FDIC would have taken different actions in his case, if the Board not been unconstitutionally shielded from removal, means that we should

[9]In *Bhatti*, the Eighth Circuit also remanded to the district court "to determine if the shareholders suffered 'compensable harm' and are entitled to 'retrospective relief.'" *Bhatti*, 15 F.4th at 854 (quoting *Collins*, 141 S. Ct. at 1789). This language does not conflict with our conclusion that *Collins* does not rest on whether relief is prospective or retrospective, because *Bhatti* concerned the same agency actions as *Collins* did. *See id.* at 852. Because the *Collins* Court recognized that only retrospective relief was available to Fannie Mae and Freddie Mac shareholders, the *Bhatti* court followed that precedent. *See ibid.*

vacate and remand. Taken in isolation, some language in *Collins* might be read to support this view. *See, e.g.*, *ibid.* ("[T]he possibility that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect [of inflicting compensable harm] cannot be ruled out."). But such a broad reading would effectively eliminate any need to show that unconstitutional removal protections caused harm, because a petitioner could always assert a possibility that an agency with different personnel might have acted differently. The *Collins* Court was not deterred from its holding by the very possibility that harm *might* occur; rather, it indicated that a more concrete showing was needed.

Calcutt also posits that if the FDIC Board had not been unconstitutionally insulated from removal, after *Lucia* it might have "altered [its] behavior," *ibid.*, and provided new proceedings as recommended by the Solicitor General, *see* Mem. from the Solicitor General to Agency General Counsels, Guidance on Administrative Law Judges after *Lucia v. SEC* (S. Ct.) 8–9, https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf (last visited May 24, 2022). While failure to follow executive-branch policy could certainly help indicate that a removal restriction inflicted harm, that is not what happened here. As we explain further below, the FDIC provided a new hearing to Calcutt consistent with *Lucia*. *See infra* at 30–35. We also fail to see how the FDIC disregarded the Solicitor General's guidance. The Solicitor General told agencies that while "a full soup-to-nuts redo of the administrative proceeding" was "the safest course" after *Lucia*, it was not the only course available:

> While litigants may be expected to argue otherwise, however, we do not believe a complete do-over is constitutionally required. We believe that a 'new hearing' will be constitutionally adequate as long as the new ALJ is careful to avoid any taint from the prior ALJ's decision. Thus, we do not think it is necessarily fatal if the new ALJ starts with the existing record in the proceeding (including hearing transcripts), much of which there would be little purpose in generating anew.

Mem. from the Solicitor General to Agency General Counsels 8–9. Thus, we disagree with Calcutt's suggestion that the FDIC Board failed to follow executive-branch policy—let alone that it did so because of its removal protections.

Finally, Calcutt asks this court to remand to the FDIC to determine whether the removal restriction "inflicted harm" in his case, as the *Collins* court also remanded for further findings.

We do not think this step is necessary. The record is sufficiently clear that the removal protections did not cause harm, and Calcutt provides only vague, generalized allegations in response. *See Decker Coal Co.*, 8 F.4th at 1137 (declining to remand where "the record is clear"). We also note that, unlike the *Collins* Court or the Eighth Circuit in *Bhatti*, we would be remanding to an agency rather than another court. *See Collins*, 141 S. Ct. at 1789 (remanding to court of appeals); *Bhatti*, 15 F.4th at 854 (remanding to district court to determine whether Fannie Mae and Freddie Mac shareholders suffered compensable harm entitling them to relief under *Collins*). We do not see how yet another proceeding before the FDIC would aid in developing the record on this point.

B. FDIC ALJ Structure

Calcutt's separation-of-powers challenge to the removal protections of FDIC ALJs is unsuccessful for similar reasons as his challenge to the structure of the FDIC Board. First and foremost, even if we were to accept that the removal protections for the FDIC ALJs posed a constitutional problem, Calcutt is not entitled to relief unless he establishes that those protections "inflict[ed] compensable harm," and he has not made this showing. *Collins*, 141 S. Ct. at 1789. Second, even if he established that the removal protections caused him harm, *Free Enterprise Fund* explicitly excludes ALJs from its prohibition on multiple levels of for-cause removal protection, and thus, like *Seila Law*, it only provides weak support for his position. *See Free Enter. Fund*, 561 U.S. at 507 n.10.

To recall, FDIC ALJs can only be removed if the MSPB finds that there is "good cause" for removal on the record after an opportunity for a hearing. 5 U.S.C. § 7521(a). The President may remove MSPB members "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). Additionally, the FDIC ALJs are housed in an interagency body—the Office of Financial Institution Adjudication, or OFIA—composed of the FDIC, OCC, FRB, and NCUA. The memorandum of understanding for OFIA states: "Any change to the Office Staff personnel shall be subject to the prior written approval of all Agencies." *See* Ex. L to Emergency Motion for Stay Pending Review, at 3. According to Calcutt, OFIA's structure "magnifies the constitutional problem" by requiring all four member agencies to consent before "initiat[ing] ALJ removal proceedings." Br. of Petitioner 30.

We begin with the *Collins* issue. As previously discussed, that decision requires a showing that an unconstitutional removal restriction "cause[d] harm" to invalidate an agency action. 141 S. Ct. at 1789.[10] Here, again, Calcutt offers vague assertions that it "cannot be ruled out" that the multiple levels of for-cause removal protections insulating ALJ McNeil caused him harm, but a generalized allegation is insufficient for affording relief. Reply Br. 18 (quoting *Collins*, 141 S. Ct. at 1789). He also argues that had these removal restrictions not been in place, ALJ McNeil would have been more responsive to executive-branch policy, would have properly offered a new hearing after *Lucia*, and would not have issued a recommended decision that conflicted with the FDI Act. But those arguments are premised on the success of Calcutt's other claims of constitutional and statutory violations, and as we explain below, none of those claims succeed. *See infra* at 30–35, 37–53. Thus, he cannot rely on those allegations of harm, either.

An additional feature in this case further suggests that no harm was caused by the removal restrictions. Before *Lucia*, FDIC adjudications were performed by two ALJs who were not appointed by the FDIC Board: ALJ Miserendino and ALJ McNeil. After *Lucia* held that similar ALJs in the SEC were inferior officers who must be appointed by the President, a court of law, or a head of department, *see* 138 S. Ct. at 2051 (citing U.S. Const. art. II, § 2, cl. 2), the FDIC could have appointed new ALJs. However, it simply appointed the officials who had previously been acting as ALJs—including ALJ McNeil. In the specific circumstances of this case, where the FDIC newly appointed an ALJ when it had the option not to do so, it is unlikely that the restriction on the removal of the ALJ prevented the agency from pursuing a different path respecting Calcutt.

Even if relief were available, we doubt Calcutt could establish a constitutional violation from the ALJ removal restrictions. Though *Free Enterprise Fund* concluded that the two layers of for-cause protections enjoyed by the members of the Public Company Accounting Oversight Board were "incompatible with the Constitution's separation of powers," *Free Enter. Fund*,

[10]Even if the restrictions on the *removal* of FDIC ALJs were invalid, both parties agree that ALJ McNeil was validly *appointed*. Therefore, we need not address whether Calcutt would be entitled to relief on grounds specifically relating to McNeil's appointment. *See Collins*, 141 S. Ct. at 1787–88.

561 U.S. at 498, the Court took care to omit ALJs from the scope of its holding, *id.* at 507 n.10 ("[O]ur holding also does not address that subset of independent agency employees who serve as administrative law judges."). The Court explained that its decision did not apply to ALJs for several reasons: "Whether administrative law judges are necessarily 'Officers of the United States' is disputed," and many ALJs "perform adjudicative rather than enforcement or policymaking functions, . . . or possess purely recommendatory powers." *Ibid.* (citing *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000) (statutory citations omitted)). Similarly, as then-Judge Kavanaugh explained in dissent in the District of Columbia Circuit proceedings, the for-cause protections of ALJs are distinguishable because agencies can choose not to use ALJs in adjudications; ALJs may not be officers (as the law stood at that time); and many ALJs perform adjudicatory functions that are subject to review by higher agency officials, which "arguably would not be considered 'central to the functioning of the executive Branch' for purposes of the Article II removal precedents." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (quoting *Morrison v. Olson*, 487 U.S. 654, 691–92 (1988)).

Other than the argument that ALJs are not officers, which *Lucia* forecloses, *see* 138 S. Ct. at 2053–54, these rationales still apply to the FDIC ALJs. First, the FDIC ALJs perform adjudicatory functions, and they file a recommended decision that is subject to review by the FDIC Board. *See Free Enter. Fund*, 561 U.S. at 496 n.10; *Free Enter. Fund*, 537 F.3d at 699 n.8 (Kavanaugh, J., dissenting); 12 C.F.R. § 308.38(a). Second, "Congress has not tied the President's hands and hindered his control over his subordinates here." *Decker Coal Co.*, 8 F.4th at 1133. Rather, the FDIC must conduct hearings "in accordance with the provisions of [the APA]," 12 U.S.C. § 1818(h)(1), and the APA permits an agency to choose whether to preside over an adjudication itself, allow one or more members to be presiding officers, or use an ALJ, 5 U.S.C. § 556(b). In short, though Calcutt is correct that *Free Enterprise Fund* left open whether it applied to ALJs, that decision's reasoning for exempting ALJs still extends to this case.

Calcutt and amicus Chamber of Commerce of the United States of America also argue that the structure of OFIA provides particularly egregious removal protections for FDIC ALJs that violate the separation of powers. Under OFIA's governing memorandum of understanding, all the constituent agencies of OFIA—the FDIC, OCC, FRB, and NCUA—must approve "[a]ny change to the Office Staff personnel." Ex. L to Emergency Motion for Stay Pending Review, at 3. According to Calcutt, this provision means that each agency has veto power over any other agency's attempt to remove an ALJ. Exacerbating this problem, he adds, several of the agencies who must agree to removal also enjoy for-cause protection. *See* 12 U.S.C. § 242 (FRB); 12 U.S.C. § 1752a(c) (NCUA Board members serve fixed terms); *supra* at 6 (FDIC for-cause protections).

Although OFIA may present a "novel structure," *Free Enter. Fund*, 561 U.S. at 495, the *Free Enterprise Fund* exception for ALJs centers on their status as adjudicatory officials that issue non-final recommendations to an agency, and not on how many levels of removal protections they enjoy, *see id.* at 496 n.10. Consequently, OFIA does not present a reason for us to hold that the removal restrictions for FDIC ALJs violates constitutional separation of powers. More importantly, even if we were to find such a violation, *Collins* decisively precludes relief for Calcutt.

C. Appointments Clause

The Appointments Clause requires that "Officers of the United States" be appointed by the President with the advice and consent of the Senate, but Congress may allow "inferior Officers" to be appointed by the President alone, by courts, or by heads of departments. U.S. Const. art. II, § 2, cl. 2. "[T]he 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed official.'" *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 188 (1995)). Calcutt argues that he did not receive this "new hearing," but he is wrong.

Calcutt states that the FDIC ALJs are "inferior Officers," and the FDIC does not contest this point. We agree that FDIC ALJs are inferior officers and that they were improperly appointed before *Lucia*. *Cf. Burgess v. FDIC*, 871 F.3d 297, 302–03 (5th Cir. 2017) (reasoning that FDIC ALJs are officers). Because they are inferior officers, the FDIC ALJs must be appointed by the President, a court, or the FDIC Board. U.S. Const. art. II, § 2, cl. 2. Prior to

2018, the FDIC Board did not appoint the ALJs, so their appointments were invalid. *See Jones Bros.*, 898 F.3d at 679.

Calcutt and the FDIC also agree up to a point that the remedy for the prior Appointments Clause violation is "a new 'hearing before a properly appointed' official" distinct from the previous ALJ. *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder*, 515 U.S. at 188). However, Calcutt argues that a new hearing must consist of an entirely new proceeding, where the new adjudicator starts from scratch and ignores the record from the prior proceeding. He specifically objects to ALJ McNeil's admission of stipulations and transcripts from the 2015 proceedings, and he contends that ALJ Miserendino's procedural rulings in 2015 narrowed the scope of discovery in a manner that impacted the 2019 proceedings. The FDIC, in contrast, contends that the "new hearing" requires only a new, independent evaluation of the merits of a case without limiting consideration of the prior record, and that therefore ALJ McNeil's use of the 2015 record was proper.

Lucia does not specify what features a "new hearing" must contain, other than a new adjudicator. 138 S. Ct. at 2055. Other decisions addressing the remedies for Appointments Clause violations are similarly vague. *See Ryder*, 515 U.S. at 188 (holding that petitioner "is entitled to a hearing before a properly appointed panel" of military court); *Jones Bros.*, 898 F.3d at 679 (holding that petitioner "is entitled to a new hearing before a constitutionally appointed administrative law judge" and remanding for "fresh proceedings").

Other decisions indicate that courts afford agencies more leeway on remand after Appointments Clause violations than Calcutt's all-or-nothing position suggests. In *Lucia*, for example, the Supreme Court recognized that in situations where "there is no substitute decisionmaker" after an Appointments Clause violation, a new hearing before the original decisionmaker could be proper. *Lucia*, 138 S. Ct. at 2055 n.5 (citing *FTC v. Cement Inst.*, 333 U.S. 683, 700–03 (1948)). The Federal Circuit, after finding that administrative patent judges were invalidly appointed, also explained that it required a "new hearing" before a "new panel" of judges, but that it saw "no error in the new panel proceeding on the existing record" and left to the agency's "sound discretion" whether to "allow additional briefing or reopen the record in any individual case." *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1340

(Fed. Cir. 2019), *vacated on alternate grounds and remanded sub nom. United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).[11] For its part, the Court of Appeals for the District of Columbia Circuit rejected a petitioner's claim that a new proceeding by a properly appointed official must involve entirely new proceedings that ignore the prior record. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d. 111, 117–19 (D.C. Cir. 2015). Instead, that court concluded that a subsequent proceeding is valid when "a properly appointed official has the power to conduct an independent evaluation of the merits and does so," *id.* at 117, and that as a constitutional matter this "independent evaluation" could include a review of prior records and transcripts, *see id.* at 122.

This reluctance to adopt a bright-light rule makes sense. To hold that all adjudications must start from zero after a judicial decision invalidating ALJ appointments would result in cumbersome, repetitive processes throughout the executive branch simply to produce findings and orders that would often be identical the second time around. Moreover, as the District of Columbia Circuit observed, an "independent evaluation of the merits" does not require an ALJ to *ignore* all past proceedings: Independence is not a synonym for ignorance. *See id.* at 121–23.[12]

Thus, our inquiry focuses on whether ALJ McNeil's consideration of the 2015 stipulations and testimony showed "sufficient continuing taint arising from the first [proceeding]" to demonstrate that the second proceeding was not "an independent, de novo

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[11]We note that although the Supreme Court stated that a new hearing was unnecessary in *Arthrex*, it explained that Arthrex was not entitled to a new hearing before a new panel "[b]ecause the source of the constitutional violation is the *restraint on the review authority* of the Director [of the Patent and Trademark Office], *rather than the appointment* of [administrative patent judges] by the Secretary [of Commerce]." *Arthrex*, 141 S. Ct. at 1988 (emphases added). This decision thus did not reject the Federal Circuit's conclusion that, if the administrative patent judges' appointments had been invalid, a new hearing would be appropriate, including some consideration of the original record.

[12]Our dissenting colleague characterizes our approach as a cost-benefit balancing exercise. *See* Dissent at 74. But determining whether a new ALJ can conduct an "independent evaluation of the merits," *see Intercollegiate Broad. Sys.*, 796 F.3d at 117, involves analyzing the impact of those past proceedings on a current adjudication—an inquiry that bears little resemblance to a weighing of the relative costs and benefits of a new administrative proceeding. Though we mention prudential considerations that favor our approach, we do not rely on them. Instead, our conclusion rests on the principle illustrated in *Intercollegiate Broadcasting System* and other decisions that, following an Appointments Clause violation, a new proceeding affords adequate remedy when a new decisionmaker can independently consider the merits. *See id.* at 117–20; *Arthrex*, 941 F.3d at 1340.

decision." *Id.* at 124 (citing *Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 708 n.5 (D.C. Cir. 1996)). No such ongoing impact occurred here.

First, ALJ Miserendino's general ability to shape the record at the 2015 hearing does not demonstrate that ALJ McNeil lacked independence. Calcutt implies that any decision at a prior proceeding that shapes the record of a later proceeding invalidates the latter's outcome. That goes too far. *See Intercollegiate Broad. Sys.*, 796 F.3d at 124 (explaining that "not every possible kind of taint is fatal because, if it were, there would be no way to remedy an Appointments Clause violation"); *Legi-Tech*, 75 F.3d at 708–09 (accepting that past Appointments Clause violation will have some impact on later proceedings, but refusing to restart administrative process). And where a party receives an opportunity to submit additional evidence and to specify alleged defects in the first proceeding, as the FDIC's order after *Lucia* provided here, the subsequent proceeding is even more likely to be independent.

Second, ALJ McNeil's reliance on stipulations that the FDIC, Calcutt, Green, and Jackson made during the 2015 proceedings before Green and Jackson settled did not taint the proceedings. Calcutt and amicus Washington Legal Foundation argue that the settlement altered the facts that Calcutt would have conceded. At most, however, the cases cited by the parties show that courts sometimes accept stipulations made in prior proceedings and sometimes do not, and that these decisions are reviewed for abuse of discretion. *See United States v. Kanu*, 695 F.3d 74, 78 (D.C. Cir. 2012); *Waldorf v. Shuta*, 142 F.3d 601, 616 (3d Cir. 1998); *Hunt v. Marchetti*, 824 F.2d 916, 918 (11th Cir. 1987). To the extent that these decisions about judicial proceedings apply to administrative adjudications, ALJ McNeil did not abuse his discretion. In *Waldorf*, the court specified that "a stipulation does not continue to bind the parties if they expressly limited it to the first proceeding or if the parties intended the stipulation to apply only at the first trial," 142 F.3d at 616, and in this case the parties had agreed to stipulations at the 2015 proceedings without expressly limiting the stipulations to those proceedings. Moreover, while stipulations from prior proceedings may be excluded if their admission would create a "manifest injustice," *Kanu*, 695 F.3d at 78, Calcutt did not deny that the stipulations were accurate, but rather argued that they were irrelevant or inappropriate to the new proceeding now that that his co-respondents had settled. The ALJ did not abuse his discretion by admitting the stipulations when Calcutt had failed to show that their admission would produce manifest injustice and had failed to expressly limit their use to the prior proceedings.

Finally, Calcutt contends that ALJ McNeil and the FDIC Board's use of the record of the 2015 hearing hampered their ability to make an independent judgment. At the 2019 hearing, Calcutt objected to using that record for all but two witnesses,[13] except for impeachment purposes. ALJ McNeil indicated that he was willing to use the entire 2015 record for substantive as well as impeachment purposes, and he ultimately used that record at several points throughout the hearing and his recommended decision. The FDIC Board then referred to the 2015 record in its final decision at several points, including instances when the 2015 record was the only cited evidence. It also concluded that it could consider Calcutt's testimony during 2015 as either impeachment or substantive evidence.

This inclusion of the 2015 record also did not prevent ALJ McNeil and the Board from conducting an "independent evaluation of the merits." *Intercollegiate Broad. Sys.*, 796 F.3d at 122. To begin with, Calcutt's prior testimony likely qualifies as an opposing party's statement, despite his objection. *See* 12 C.F.R. § 308.36(a)(2) (permitting admission of evidence that would be admissible under Federal Rules of Evidence); *United States v. Cunningham*, 679 F.3d 355, 383 (6th Cir. 2012) (explaining that Federal Rule of Evidence 801(d)(2)(A) allows "a party's own statement to be offered as evidence against that party even where the statement would otherwise be inadmissible as hearsay"). Additional testimony from 2015 was corroborated by other evidence. The remaining isolated instances in which either ALJ McNeil or the Board relied on the 2015 record for substantive conclusions do not convince us that the agency was unable to independently consider the merits of Calcutt's case. And, if there was error at these points in its analysis, it was likely harmless due to the abundance of evidence in the record supporting the agency's decision. *See* 5 U.S.C. § 706(2); *see also infra* at 37–53.

In sum, *Lucia* required that Calcutt receive a new hearing, and that is what he got. A new hearing need not be from scratch; rather, the impact of the prior proceeding must be sufficiently muted that the new adjudicator can independently consider the merits. ALJ McNeil and the

[13]The parties agreed by stipulation to introduce the 2015 testimony of Dennis O'Neill and Charles Bird, two FDIC examiners.

FDIC Board did not abuse their discretion by admitting the 2015 materials when they remained capable of drawing their own conclusions about Calcutt's case.

IV. HEARING CHALLENGES

We now turn from Calcutt's structural constitutional challenges to his claims regarding the specifics of his 2019 hearing. These fall into three categories: a challenge relating to the decision of the ALJ to limit cross-examination on bias at the hearing, a challenge to the substance of the FDIC Board's findings and conclusions, and an abuse-of-discretion challenge to the FDIC Board's choice of sanction.

A. Cross-Examination

Under the FDI Act and the APA, parties are entitled "to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d); *see* 12 U.S.C. § 1818(h)(1) (requiring FDIC hearings to be conducted in accordance with APA adjudication procedures). The FDIC's regulations provide that evidence which would be admissible under the Federal Rules of Evidence is also admissible in an enforcement hearing, 12 C.F.R. § 308.36(a)(2), and that evidence that would be inadmissible under the Federal Rules of Evidence is admissible in the hearing if it is "relevant, material, reliable, and not unduly repetitive," *id.* § 308.36(a)(3); *see id.* § 308.36(a)(1). Calcutt argues that ALJ McNeil erred under these provisions by limiting cross-examination of Autumn Berden, Cori Nielson, and Anne Miessner regarding their purported bias against Calcutt, and that the Board erred by accepting these limitations. The parties agree that neither Berden, Nielson, nor Miessner testified about bias at the hearing.

We review an ALJ's exclusion of evidence under an abuse-of-discretion standard. *NLRB v. Jackson Hosp. Corp.*, 557 F.3d 301, 305–06 (6th Cir. 2009). An abuse of discretion occurs when the ALJ "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *B & G Mining, Inc. v. Dir., Off. of Workers' Comp. Programs*, 522 F.3d 657, 661 (6th Cir. 2008) (quotation marks omitted).

Yet, "due account must be taken of the rule of prejudicial error." 5 U.S.C. § 706(2); *see* 12 U.S.C. § 1818(h)(2) (providing that the APA governs review of FDIC enforcement proceedings). This language applies the federal harmless-error standard from civil cases. *See Shinseki v. Sanders*, 556 U.S. 396, 406–07 (2009). We employ a "case-specific application of judgment, based upon examination of the record," *id.* at 407, to determine whether the error "affect[ed] the substantial rights of the parties," 28 U.S.C. § 2111. An error is not harmless when, for example, an agency violates its own procedural rules and the petitioner shows that he "has been prejudiced on the merits or deprived of substantial rights because of the agency's procedural lapses." *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 547 (6th Cir. 2004) (quotation marks and emphasis omitted).

We need not reach whether ALJ McNeil abused his discretion in limiting cross-examination on the bias of Berden, Nielson, and Miessner, because even if he did, that error was harmless. As we have explained in the civil context, an adjudicator's erroneous exclusion of evidence is not prejudicial, and therefore is harmless, "if other substantially equivalent evidence of the same facts [was] admitted into evidence." *In re Air Crash Disaster*, 86 F.3d 498, 526 (6th Cir. 1996) (quoting *Leonard v. Uniroyal, Inc.*, 765 F.3d 560, 567 (6th Cir. 1985) (alteration in original)). Thus, we recently observed that where a court excluded evidence of police interview transcripts but the record contained depositions of "most of the same witnesses" quoted in the transcripts, any error was harmless. *M.J. v. Akron City Sch. Dist. Bd. of Educ.*, 1 F.4th 436, 447 (6th Cir. 2021); *see also Smith v. Woolace Elec. Corp.*, 822 F. App'x 409, 417 (6th Cir. 2020) (potential error over excluding witness's testimony was harmless where plaintiff "introduced substantially equivalent evidence" through another witness's testimony).

ALJ McNeil and the FDIC Board had access to the 2015 record, which contained substantially equivalent evidence regarding Berden, Nielson, and Miessner's bias. *See supra* at 31–35. During those earlier proceedings, Calcutt's counsel examined Berden, Nielson, and Miessner about their bias and alleged collaboration. Other documents in the record were also relevant to bias, including an email where Nielson told Miessner about difficulties with Northwestern Bank, requested that the FDIC contact Michigan regulators, and stated, "I just wish there was a fresh face to talk to at the bank—all this collateral damage is meaningless"; an email in which Miessner communicated with Michigan regulators regarding Nielson's request; Berden's handwritten notes from meetings with FDIC officials; and an email correspondence between Miessner, Nielson, and Berden about FDIC charges against Calcutt, titled "A little news to brighten your weekend." Although further cross-examination would have allowed Calcutt to further develop his bias argument, the availability of these other materials indicates that the agency's factfinders possessed sufficient information regarding the possible bias of Berden, Nielson, and Miessner to render any error harmless. Thus, the limits on cross-examination do not necessitate a new proceeding.

B. Substantive Challenges

As previously discussed, Section 8(e) of the FDI Act permits the FDIC to enter a removal and prohibition order against an institution-affiliated party after finding that three elements have been met: misconduct, effects, and culpability. *See Dodge*, 744 F.3d at 152. Misconduct occurs when a party has "directly or indirectly" violated a law or regulation, "engaged or participated in any unsafe or unsound practice" connected with an insured institution, or breached a fiduciary duty. 12 U.S.C. § 1818(e)(1)(A). The requisite effects take place when, "by reason of" the misconduct, the insured institution "has suffered or will probably suffer financial loss or other damage," its depositors' interests are prejudiced, or the party "has received financial gain or other benefit by reason of" the misconduct. *Id.* § 1818(e)(1)(B). And the culpability element is met when the party's action "involves personal dishonesty" or "demonstrates willful or continuing disregard . . . for the safety or soundness" of the insured institution. *Id.* § 1818(e)(1)(C). We review the FDIC Board's factual findings for substantial evidence and set aside the agency's legal conclusions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Pharaon v. Bd. of Governors of Fed. Rsrv. Sys.*, 135 F.3d 148, 152 (D.C. Cir. 1998) (quoting 5 U.S.C. § 706(2)(A)).[14]

Calcutt argues that the FDIC exceeded its statutory authority by finding misconduct when none of his actions qualified under the statutory definitions, failing to demonstrate that any

[14]Though the FDIC Board's interpretation of Section 8(e) of the FDI Act may receive persuasive weight, at least one of our sister circuits has explained that the FDIC receives no *Chevron* deference to its interpretation of the Act, because several agencies administer that statute. *Dodge*, 744 F.3d at 155.

effects resulted "by reason of" of the misconduct, and failing to identify qualifying effects. He therefore does not challenge the Board's finding as to his culpability, so we do not address that part of the Removal and Prohibition Order. He also challenges his civil money penalty only to the extent that the Board's reasoning for the penalty overlaps with its analysis supporting the Removal and Prohibition Order.

1. *Misconduct*

As to misconduct, Calcutt maintains that the FDIC Board erred by determining that his actions constituted an "unsafe or unsound practice" or a breach of fiduciary duties under the statute.[15] We disagree.

a. Unsafe or Unsound Practice

The FDI Act does not define an "unsafe or unsound practice," and the term is interpreted flexibly. *See Seidman v. Off. of Thrift Supervision (Matter of Seidman)*, 37 F.3d 911, 926–27 (3d Cir. 1994). However, courts have generally treated the phrase as referring to two components: "(1) an imprudent act (2) that places an abnormal risk of financial loss or damage on a banking institution." *Id.* at 932; *see also Michael v. FDIC*, 687 F.3d 337, 352 (7th Cir. 2012) (same); *Landry*, 204 F.3d at 1138 (identifying imprudent-act and abnormal-financial-risk components).

Calcutt emphasizes the financial-risk component and argues that the Bedrock Transaction did not pose an abnormal financial risk to Northwestern Bank. Along with amicus American Association of Bank Directors, he characterizes the Bedrock Transaction as a good-faith attempt to shore up one of the Bank's largest lending relationships during the tumult of the Great Recession by releasing collateral and extending a loan that amounted to only a fraction of the Nielson Entities' total debt. And even if the $760,000 loan and $600,000 in collateral were ultimately not collected, he says, that loss would have been insignificant, considering that the Bank's Tier 1 capital totaled more than $70 million.

[15] The FDIC does not argue that Calcutt's actions violated any explicit statute, regulation, cease-and-desist order, or other similar requirement. *Cf.* 12 U.S.C. § 1818(e)(1)(A)(i).

The FDIC responds that the statute does not require a finding of a threat to bank stability in order to find "unsafe or unsound" practice, and that "[c]ourts have affirmed prohibition orders based on unsafe and unsound practices with a much more limited effect." Br. of Respondent 46. That reading contradicts the analyses of our sister circuits in *Seidman*, *Michael*, and *Landry*, and the decisions that the agency cites in support of its interpretation are not convincing. *Ulrich v. U.S. Department of Treasury* is a Ninth Circuit memorandum in which the court concluded that a loan "fraught" with financial risk, not just a limited effect, was an unsafe or unsound practice. 129 F. App'x 386, 390 (9th Cir. 2005). Other decisions that the FDIC cites—*Gully v. National Credit Union Administration Board*, 341 F.3d 155 (2d Cir. 2003), *First State Bank of Wayne County v. FDIC*, 770 F.2d 81 (6th Cir. 1985), and *Jameson v. FDIC*, 931 F.2d 290 (5th Cir. 1991)—did not engage with the question of whether financial risk to the institution was necessary to demonstrate an unsafe or unsound practice. Still other cited decisions linked a finding of unsafe or unsound practices to abnormal financial risks, again controverting the FDIC. *See Gulf Fed. Sav. & Loan Ass'n of Jefferson Parish v. Fed. Home Loan Bank Bd.*, 651 F.2d 259, 264 (5th Cir. 1981); *Matter of* ***, FDIC-83-252b&c, FDIC-84-49b, FDIC-84-50e (Consolidated Action), 1985 WL 303871, at *9 (FDIC Aug. 19, 1985).

Whether or not we interpret the statute to require a finding of *abnormal* financial risk, however, the FDIC's finding that Calcutt committed an "unsafe or unsound practice" is supported by substantial evidence. First, Calcutt does not address the Board's finding that he "repeatedly concealed material information about the Nielson Loans" from regulators, and that such misrepresentations "constitute unsafe or unsound practices." *See De la Fuente*, 332 F.3d at 1224 ("Failure to disclose relevant information to a government investigator can constitute an unsound banking practice."); *Seidman*, 37 F.3d at 937 (stating that "hindering [a financial regulatory agency] investigation is an unsafe or unsound practice").

Second, the record supports the FDIC Board's conclusion that Calcutt committed additional imprudent acts that posed an abnormal financial risk. In particular, the Board underscored that when the Nielson Entities indicated to the Bank that they would not be able to pay off their loans in 2009, Calcutt declined to seek additional financial information and instead approved the Bedrock Transaction, which extended further credit to the Entities and renewed the outstanding $4.5 million in loans to Bedrock Holdings. The Board also found that Calcutt's actions violated the Bank's commercial-loan policy because he approved the Bedrock Transaction without either determining that the Nielson Entities had sufficient income to service their debt, obtaining personal guarantees on the loans, or receiving approval by a two-thirds majority of the board of directors.

Calcutt responds that such actions do not constitute "unsafe or unsound" practices absent abnormal financial risk to the Bank, and that his actions did not present such a risk. His first proposition may be correct. *See Seidman*, 37 F.3d at 932. However, Calcutt's actions concerned the Bank's largest lending relationship—the Nielson Entities—which represented approximately $38 million in loans and half of the Bank's Tier 1 capital. The FDIC Board had substantial evidence to find that his actions presented a risk in this context, even if it did not explicitly draw that connection. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998) (explaining that substantial-evidence test "gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the court that the requisite fact exists, but merely the degree which could satisfy a reasonable factfinder" (emphasis omitted)). We therefore hold that the FDIC Board did not err in determining that Calcutt engaged in unsafe or unsound practices.

b. Breach of Fiduciary Duties

The FDIC Board also concluded that the misconduct element was satisfied because Calcutt breached his fiduciary duties of care and candor. *See* 12 U.S.C. § 1818(e)(1)(A)(iii). These duties are determined by state law rather than federal common law. *See Atherton v. FDIC*, 519 U.S. 213, 226 (1997) (holding that state law rather than federal common law defines standard of care for corporate governance); *Mickowski v. Visi-Trak Worldwide, LLC*, 415 F.3d 501, 511–12 (6th Cir. 2005). Under Michigan law, bank directors and officers have a fiduciary duty to act with the degree of care "that an ordinarily prudent person would exercise under similar circumstances in a like position." Mich. Comp. Laws Ann. § 487.13504(1) (2021). And in other contexts, Michigan courts have recognized that "[a] fiduciary has an affirmative duty to disclose" material facts relating to the fiduciary relationship to a principal. *Silberstein v. Pro-Golf of Am., Inc.*, 750 N.W.2d 615, 624 (Mich. Ct. App. 2008); *see also Lumber Vill., Inc. v.*

Siegler, 355 N.W.2d 654, 694–95 (Mich. Ct. App. 1984) (recognizing that courts may toll the statute of limitations for fraudulent concealment actions when a fiduciary fails to inform a principal of material facts relating to the claim, because "there is an affirmative duty to disclose where the parties are in a fiduciary relationship").

On appeal, Calcutt presents three arguments, none availing. First, he contends that he cannot have violated his duty of care, because his actions did not create an "undue risk" to the Bank. Br. of Petitioner 51 (quoting *Kaplan v. Off. of Thrift Supervision*, 104 F.3d 417, 421 (D.C. Cir. 1997)). This argument echoes his position that he did not commit an "unsafe or unsound" practice with regard to the Bedrock Transaction.[16] *See Landry*, 204 F.3d at 1138 (noting overlap in analyses of breach of fiduciary duties and unsafe or unsound practices). And it fails for the same reason as his unsafe-or-unsound claim: The record presents substantial evidence to support a finding of financial risk.

Second, Calcutt argues that the Board's finding that he failed to supervise his subordinates (namely Green, Jackson, and other Bank employees) does not indicate that he breached his duty of care. It is true that an officer does not necessarily violate a duty of care merely because subordinates failed to follow orders. *See Doolittle v. Nat'l Credit Union Admin.*, 992 F.2d 1531, 1537 (11th Cir. 1993); *see also Kaplan*, 104 F.3d at 422 (explaining that director's approval of plan that ultimately led other officers and directors to "dishonestly short circuit the required procedures" was not "remotely foreseeable" and did not "contribut[e] to any increased risk" to institution).

But even if Green, Jackson, and other employees committed many of the actions related to the Nielson Entities, Calcutt remains responsible if he knew about their actions and permitted them to occur. Failure to supervise subordinates breaches an officer's duty of care when the officer knows about subordinates' activities or buries his head in the sand. *See Hoye v. Meek*, 795 F.2d 893, 896 (10th Cir. 1986) (holding that bank director and president inadequately supervised subordinate, because "[w]here suspicions are aroused, or should be aroused, it is the

[16]We note that the Board also concluded that the December 2010 release of Pillay Collateral violated the duty of care, but it did not conclude that the collateral release constituted an unsafe or unsound practice. This difference between the two types of misconduct findings does not affect our analysis.

directors' duty to make necessary inquiries"). In *Doolittle*, for instance, the Eleventh Circuit clarified that an officer was not responsible for his subordinates' actions when he gave proper orders to them, they failed to follow those orders, and he attempted to take remedial measures, but that those circumstances did not present "a case where a fiduciary engaged in imprudent lending activities or stood idle and allowed damage to increase." 992 F.2d at 1537.[17]

The record provides substantial evidence that Calcutt knew about his subordinates' activities and permitted them to continue. For instance, in 2008, he was involved in discussions with Green and the Nielsons involving the suggestion that they change their methods of intercompany loans. Calcutt was aware of the Nielson Entities' difficulty in paying their loans, although he testified that he thought that they were "posturing." He received correspondence directly from the Nielsons. Berden testified that though Calcutt would not attend all meetings, Green often sought his approval before proceeding in negotiations. Calcutt had received a memo from Green in November 2009 describing the loan to Bedrock Holdings. He was aware of (and possibly participated in approving) the sale of Nielson Entity loans to affiliated banks. And Green reported directly to Calcutt. There was ample evidence for the FDIC Board to find that he had breached his duty of care by failing to supervise subordinates.

Finally, Calcutt resists the Board's conclusion that he breached his duty of candor to the Bank's board of directors by failing to timely disclose the information about the status of the Nielson Loans and the Bedrock Transaction. He asserts that the duty of candor requires corporate fiduciaries to "disclose only 'material information relevant to corporate decisions from which [the fiduciary] may derive a personal benefit,'" and that he did not have a personal interest in the Bedrock Transaction. Br. of Petitioner 53 (quoting *De la Fuente*, 332 F.3d at 1222 (alteration in original)). Even if we accept this framing of the duty, however, the FDIC concluded that Calcutt derived a personal benefit from misrepresenting the status of the Nielson

[17]Calcutt and amicus American Association of Bank Directors refer to the business-judgment rule and urge us not to fault Calcutt for taking what they characterize as reasonable, good-faith, but ultimately mistaken decisions in managing the Bank. Michigan courts have recognized that "[i]nterference with the business judgment of corporate directors is not justified by allegations that a different policy could have been followed." *Matter of Est. of Butterfield*, 341 N.W.2d 453, 462 (Mich. 1983). However, they also recognize that a breach of fiduciary duty merits judicial intervention. *Ibid.* The business-judgment rule thus does not prevent us from considering whether Calcutt breached fiduciary duties.

Loans to regulators, because he received dividends through the Bank's holding company that reflected the Bank's artificially inflated income. To the extent that substantial evidence supports the personal-benefit determination, the finding that Calcutt breached his duty of candor would also be sufficiently supported. In addition, even if Calcutt did not receive a personal benefit, the support for the Board's finding that he committed unsafe and unsound practices and violated the duty of care means that this error would be harmless. *See Sanders*, 556 U.S. at 407.

In sum, we decline to set aside the Board's conclusions that Calcutt met the misconduct element of the statute.

2. *Effects*

Under the FDI Act, the FDIC must find that "by reason of" Calcutt's misconduct, one or more of the following effects resulted: The Bank "has suffered or will probably suffer financial loss or other damage," its "depositors have been or could be prejudiced," or Calcutt "has received financial gain or other benefit." 12 U.S.C. § 1818(e)(1)(B). The FDIC Board found that three types of harms qualified under this provision: (1) a $30,000 charge-off to the $760,000 Bedrock Loan that the Bank recorded; (2) $6.443 million in other charge-offs that the Bank recorded on other Nielson Loans; and (3) investigative, legal, and auditing expenses that the Bank incurred. It also found that Calcutt received a financial benefit, because he received dividends from the Bank's holding company that would have been smaller had he reported the condition of the Nielson Loans and not approved the Bedrock Transaction or 2010 release of Pillay Collateral.

Calcutt commences by arguing that the Board erred by failing to read the statute's "by reason of" language to require proximate causation. In its final decision, the FDIC was unwilling to apply a proximate-causation standard, instead stating that "an individual respondent need not be the proximate cause of the harm to be held liable under section 8(e)."

Because Section 8(e) requires that a bank's loss or potential loss, or a party's benefit, occur "by reason of" the misconduct, it mandates proximate causation. 12 U.S.C. § 1818(e)(1)(B). Recently, we observed that "[t]he Supreme Court has repeatedly and explicitly held that when Congress uses the phrase 'by reason of' in a statute, it intends to require a showing of proximate cause." *Crosby v. Twitter, Inc.*, 921 F.3d 617, 623 (6th Cir. 2019) (quoting *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 391 (7th Cir. 2018)). This interpretation has occurred in the context of other statutory schemes. *See Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) (civil RICO statute, 18 U.S.C. § 1964(c)); *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992) (same); *Crosby*, 921 F.3d at 623 (Anti-Terrorism Act, 18 U.S.C. § 2333). The FDIC has not offered a reason why the phrase should not have the same meaning in Section 8(e), and "[i]n the absence of any statutory definition to the contrary, courts assume that Congress adopts the customary meaning of the terms it uses." *United States v. Detroit Med. Ctr.*, 833 F.3d 671, 674 (6th Cir. 2016) (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

The FDIC alternatively argues that its formulation—that "by reason of" requires only "a causal 'nexus' between the misconduct and harm, or that harm was reasonably foreseeable"—is consistent with proximate causation. Br. of Respondent 50. This has some appeal; after all, it is notoriously difficult for judges to define proximate cause. *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535–36, 535 n.32 (1983); *Crosby*, 921 F.3d at 623–24. We also recognize that in prior adjudications, the FDIC has concluded that a reasonably foreseeable loss "satisfies the 'effects' requirement." *Matter of Conover*, Nos. FDIC-13-214e, FDIC-13-217k, 2016 WL 10822038, at *22 (FDIC Dec. 14, 2016); *see also Matter of* ***, 1985 WL 303871, at *114 (declining to characterize the causation standard as proximate cause). However, while reasonable foreseeability may be a necessary component of proximate causation, it is not sufficient: "substantiality, directness, and foreseeability are all relevant in a proximate cause determination," though these concepts may overlap. *Crosby*, 921 F.3d at 624.

The decisions cited by the FDIC as support for its view are consistent with a proximate-causation definition of "by reason of" that incorporates substantiality, directness, and foreseeability. In *De la Fuente*, for example, the Ninth Circuit held that a risk of loss must be "reasonably foreseeable," but did not conclude that reasonable foreseeability alone was enough for liability. 332 F.3d at 1223; *see also United States v. Gamble*, 709 F.3d 541, 549 (6th Cir. 2013) (holding that harms must be reasonably foreseeable to be proximately caused, but not stating that reasonable foreseeability is sufficient). *Haynes v. FDIC*, a memorandum, seemingly treated "reasonably foreseeable" as interchangeable with "by reason of," but did so in a summary fashion that we do not consider persuasive. *See* 664 F. App'x 635, 637 (9th Cir. 2016). Although in *Landry*, the Court of Appeals for the District of Columbia Circuit recognized that an individual could be liable for the effects of misconduct even if he acted "only indirectly," the court was construing the misconduct element of Section 8(e). 204 F.3d at 1139; *see* 12 U.S.C. § 1818(e)(1)(A) (identifying relevant finding as whether a party has "directly or indirectly" committed misconduct). We do not read that decision to say that when it comes to the effects inquiry, reasonable foreseeability alone suffices to show causation.

With the causation standard established, we consider the statutory effects identified by the FDIC Board. We conclude that substantial evidence supports the conclusion that some—but not all—of the impacts to the Bank are "effects" under Section 8(e) and were proximately caused by Calcutt's misconduct.

a. The $30,000 Charge-Off on the $760,000 Bedrock Loan

The charge-off on the loan to Bedrock Holdings, which was part of the Bedrock Transaction, is an effect under the statute. Calcutt argues that a charge-off does not reflect actual losses but rather estimates possible future loss, but the FDI Act is clear that a loss that a bank will "probably suffer" qualifies as an effect, 12 U.S.C. § 1818(e)(1)(B)(i). Similarly, an estimated loss is sufficient. *See Dodge*, 744 F.3d at 158 (explaining that effects requirement "is satisfied by evidence of either potential or actual loss to the financial institution, and the exact amount of harm need not be proven"); *Pharaon*, 135 F.3d at 157 (holding that FDIC Board need not "demonstrate the exact amount of harm"). Though Calcutt argues that some charge-offs are too small to constitute effects, we need not address this issue, because the FDIC supplemented its finding with respect to the $30,000 effect with several other findings of effects. And the record indicates that, because Calcutt participated extensively in negotiating and approving the Bedrock Transaction, his actions proximately caused the Bedrock Loan charge-off.

b. Investigative, Auditing, and Legal Expenses

The FDIC Board also agreed with ALJ McNeil that Calcutt's misconduct caused the Bank to incur expenses by retaining a CPA firm and a legal firm to conduct work relating to the regulatory problems with the Nielson Entities relationship. We conclude, however, that such professional fees are not "effects" under Section 8(e). Banks regularly engage accounting and legal firms as part of their normal business, and we do not see how employing such businesses for additional services related to imprudent loans is meaningfully different from their run-of-the-mill engagements.

The FDIC Board reasoned that though legal fees "presumptively are a normal cost of doing business," they can constitute an effect when they "are coupled with other 'non-neutral indicia of loss,'" and that the Bank's payments to a CPA firm and loan charge-offs constituted such other non-neutral indicia. *See Matter of Proffitt*, FDIC-96-105e, 1998 WL 850087, at *9 n.11 (FDIC Oct. 6, 1998) (considering "a [court] judgment of improper and illegal behavior" in a related lawsuit to be a non-neutral indicium). We are unpersuaded by this rationale: If professional fees are not a loss unless they are coupled with other "non-neutral indicia of loss," then it may be that the fees do not have any independent significance. The two FDIC decisions cited by the Board exemplify this problem, since in both instances banks suffered losses *in addition to* their payment of professional fees. In *Matter of Proffitt*, the Board explained that "a judgment of improper and illegal behavior"—in that context, a court judgment awarding a bank to pay damages—plus legal fees could establish a qualifying loss. *Id.* at *3, *9 & n.11. And in *Matter of Shollenburg*, the bank suffered additional losses besides professional fees in order to satisfy tax laws that the respondents had violated. *See* FDIC-00-88e, 2003 WL 1986896, at *12–13 (FDIC Mar. 11, 2003).

c. $6.443 Million in Other Losses

Next, the Board found that Calcutt's actions cost the Bank $6.443 million in losses from other loans to the Nielson Entities, and that his approval of the release of approximately $1.2 million in Pillay Collateral prevented the Bank from using those funds to recoup part of those losses. Apart from asserting that the Board failed to apply a proximate-causation standard, Calcutt argues that under that standard, the $6.443 million loss does not count as an effect, because it represents a probable future loss from the entire Nielson Entity loan portfolio that would have occurred regardless of his actions, and because the $1.2 million in released collateral was used to pay off the Nielson Entities' debts, thereby benefitting the Bank.[18]

Only part of the $6.443 million in charge-offs can be described as an effect proximately caused by Calcutt's misconduct. Recall that the Nielson Entities indicated that they were unable to pay off debts as early as 2009. The Bank probably would have incurred *some* loss no matter what Calcutt did: Although multiple parties' actions can proximately cause the same outcome, the state of the Bank's relationship with the Nielson Entities suggests that Calcutt's actions did not substantially or directly contribute to *all* of its ultimate losses.

Additionally, the FDIC's explanation for considering the $1.2 million of released collateral in its loss calculation is unconvincing. In its decision, the FDIC Board reasoned that had Calcutt not participated in the release of the Pillay Collateral in 2009 and 2010, those funds would have been available to pay off debts owed by certain Nielson Entities that were secured by that collateral. But that view ignores that the release of Pillay Collateral was used to satisfy *other* Nielson Entity debts, and that the FDIC, in calculating the $6.443 million in losses, considered all of the Bank's loans to the companies together. We fail to see how the agency could reasonably consider the interrelatedness of the Nielson Entities in one part of its loss calculation and ignore those connections in another. Thus, the mere release of the $1.2 million in collateral does not qualify as an effect.

Nevertheless, there is substantial evidence that part of the $6.443 million in losses was an effect of Calcutt's actions. The record indicates that Calcutt, knowing that the Nielson Entities were near default and that they were a large lending relationship, extended credit and renewed loans to them while concealing these transactions and the scale of the problem from the Bank's board and from regulators. ALJ McNeil also found that, in 2009, the Nielson Entities had proposed loan renewals, forbearance, deeds in lieu of foreclosure, and other mechanisms to relieve their obligations. Though Calcutt may have thought that these options would have

[18] Calcutt also suggests that because the $6.443 million was recorded in charge-offs, it does not qualify as a loss. For the reasons previously discussed, this view fails. *See supra* at 45.

resulted in "sure losses" to the Bank, the FDIC could have concluded from the record that his decision to extend additional loans ultimately exacerbated the problem.

Additionally, there is substantial evidence that Calcutt's actions resulted in probable future losses to the Bank. *Cf.* 12 U.S.C. § 1818(e)(1)(B)(i) (permitting effects finding where bank "will probably suffer financial loss or other damage"); *Proffitt v. FDIC*, 200 F.3d 855, 863 (D.C. Cir. 2000) (noting that "the effect prong can be met by either potential or actual 'financial loss or other damage'"). Even if there were insufficient evidence that Calcutt's actions surrounding the Bedrock Transaction and 2010 release of Pillay Collateral caused an *actual* loss, his negotiation with the Nielson Entities and approval of loans despite indications that they would not be able to repay their debts was a direct, substantial, and foreseeable cause of a situation in which the Bank could suffer a potential loss. The record also shows that Calcutt's actions prevented the board and regulators from discovering and mitigating the probable losses from these activities. *Cf. Seidman*, 37 F.3d at 937 (noting, in the context of identifying an unsafe or unsound practice, that a chairman of a board of director's "attempt to obstruct the investigation, if continued, would pose an abnormal risk of damage" to the agency). Relying on board members' testimony and contemporaneous board minutes,[19] ALJ McNeil found that the board did not approve the loan to Bedrock Holdings until several months after the loan had already been made. And Miessner testified (despite Calcutt's theory that she was biased) that, in her opinion, misrepresenting the condition of the Bank's loans with the Nielson Entities exposed the Bank to additional risk. In these circumstances, we conclude from the record as a whole that Calcutt's actions proximately caused an actual and potential loss to the Bank—even if the loss did not amount to the total of $6.443 million.

d. Holding Company Dividends

Finally, the Board concluded that the dividends Calcutt received from the Bank's holding company qualified as a financial benefit that satisfied the "effects" element. *See* 12 U.S.C. § 1818(e)(1)(B)(iii) (providing that an effect is present when a party "has received financial gain or other benefit by reason of such violation, practice, or breach"). The holding company,

[19] ALJ McNeil also found that Calcutt's testimony regarding the timing of the board's approval of the Bedrock Transaction was not credible.

Northwestern Bancorp, wholly owned the Bank, and Calcutt held approximately ten percent of the shares in the holding company. In 2010 and 2011, the Bank paid dividends to Northwestern Bancorp. The holding company, in turn, paid a dividend to its shareholders. Calcutt argues that his alleged misconduct cannot have proximately caused a financial benefit, because Northwestern Bancorp operated independently from the Bank and had alternative sources of income; thus, even if the Bank's income appeared inflated due to the improper reporting of the Nielson Loans, it did not substantially affect the holding company's payout to shareholders.

As in the circumstance of the FDIC's categorization of the $6.443 million in losses, the record compels an answer somewhere in between the two parties' positions. On one hand, the FDIC did not point to specific evidence in the record showing that Northwestern Bancorp's dividends with certainty reflected the inflated earnings from the Nielson Entities. It simply assumed (and reasonably so) that the dividends paid by the holding company reflected the value of the dividends paid by the Bank. On the other hand, Calcutt does not really challenge the findings that the Bank paid a dividend to the holding company, nor that the Bank's dividend reflected its inflated representation of the Nielson Loans' performance. Rather, his position is that the holding company still might have paid out dividends from its other sources of income. He does not provide evidence (other than his own testimony, which is stated in general terms)[20] that the holding company had ever paid dividends over and above a reflection of the Bank's perceived performance. Absent such evidence, we are skeptical that the Bank's earnings did not impact its holding company's dividend payments. On balance, the evidence and common sense support the agency's position as to this effects finding.

e. Cumulative Effects

In sum, the support for the effects findings made by the FDIC Board are mixed. Taken together, the $30,000 charge-off on the Bedrock Loan, some of the $6.443 million in other losses related to the Nielson Entities, and some of the dividend payments that Calcutt received from

[20]"Q. Did the holding company have sufficient capacity to make payments to shareholders regardless of whether there were dividends being paid by the Bank to the holding company?

A. [Calcutt:] Yes, for some years the holding company not only had its own assets that generated some income but it had a line of credit so it had capacity to make dividend payments to shareholders. Again, we were, we were laughed at a bit in the industry because we had one of the lowest dividend payout ratios that was recorded."

Northwestern Bancorp occurred "by reason of" his misconduct surrounding loan activities and misrepresentations to the Bank's board of directors and regulators. But the Bank's auditing and legal fees do not qualify as an effect, and Calcutt's actions may not have proximately caused some of the losses and dividend payments.

These conclusions lead to a further question: If some, but not all, of the FDIC's effects findings are supported, should the Removal and Prohibition Order be remanded? One might argue that had the FDIC only considered those effects for which the record presented substantial evidence, it would not have thought it appropriate to remove Calcutt from his banking positions and prohibit him from participation in the industry. Or, perhaps one might say that the whittled-down effects findings are sufficiently minimal to compel us to send the matter back to the agency for further findings and proceedings.

A remand is not necessary, for several reasons. To start, the text of the statute indicates that if substantial evidence supports the FDIC's finding as to *one* effect out of multiple possibilities, the fact that it fails to adequately support its other effects findings does not limit its power to issue a removal and prohibition order. Section 8(e)(1)(B) separates the categories of permissible effects by the disjunctive term "or": The agency must find that "by reason of" the misconduct,

> (i) such insured depository institution . . . has suffered *or* will probably suffer financial loss *or* other damage;
>
> (ii) the interests of the insured depository institution's depositors have been *or* could be prejudiced; *or*
>
> (iii) such party has received financial gain *or* other benefit . . . .

12 U.S.C. § 1818(e)(1)(B) (emphases added). Generally, "terms connected by a disjunctive [are] given separate meanings, unless the context dictates otherwise." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). For example, when a statute lists two activities connected by "or," the natural reading is usually that it applies to *either* activity. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018). Thus, the text of the FDI Act permits the FDIC to remove and prohibit a party (assuming that the misconduct and culpability elements are met) as long as the evidence supports a finding of one out of any of the options provided by Section

8(e)(1)(B). Because we conclude here that substantial evidence supports several of the FDIC's effects findings, the statutory text indicates that the Removal and Prohibition Order should stand.

Additionally, other circuits have also suggested that when such a finding can be supported by one of several alternative bases, courts should deny petitions challenging the agency's order. In *Dodge*, for example, the District of Columbia Circuit upheld an effects finding when substantial evidence supported the Comptroller of the Currency's conclusions that a bank's depositors could be prejudiced under Section 8(e)(1)(B)(ii) and that the petitioner received a financial benefit under Section 8(e)(1)(B)(iii)—even when the court declined to rely on the Comptroller's finding of potential harm to the bank under Section 8(e)(1)(B)(i). 744 F.3d at 158. And in *De la Fuente*, the Ninth Circuit held that the FDIC Board "correctly concluded that De La Fuente's [sic] actions had an impermissible effect because he received financial benefit from the transaction *and/or* because the interests of [the bank's] depositors were prejudiced thereby." 332 F.3d at 1223 (emphasis added). That is, the court suggested that even if the Board had incorrectly concluded that the petitioner received financial benefit, its separate finding of prejudice to depositors was sufficient to satisfy the effects element.

Finally, a remand would be in tension with the substantial-evidence standard of review for factual findings. In conducting this review, we consider the whole record, 5 U.S.C. § 706(2), but we must uphold an agency's decision even if we "would decide the matter differently . . . and even if substantial evidence also supports the opposite conclusion." *Gen. Med., P.C.*, 963 F.3d at 520 (quoting *Cutlip*, 25 F.3d at 286). As we have explained, the record in this case provides substantial evidence to conclude that Calcutt's actions produced sufficient effects to merit the FDIC's sanction, even if some findings as to other effects were incorrect. We cannot nitpick the agency's factfinding more than that.

Our dissenting colleague would nonetheless remand the petition to the FDIC, reasoning that only that remedy is consistent with the principle that courts may not uphold an agency's order "unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). While we do not question *Chenery*, that decision does not mean that a court must remand where the agency makes *any* legal error, especially where substantial evidence amply supports an agency's findings. Remand is unnecessary where an agency's "incorrect reasoning was confined to that discrete question of law and played no part in its discretionary determination," and it reaches a conclusion that it was bound to reach. *United Video, Inc. v. FCC*, 890 F.2d 1173, 1190 (D.C. Cir. 1989); *see also Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1.*, 554 U.S. 527, 545 (2008) ("That [the agency] provided a different rationale for the necessary result is no cause for upsetting its ruling."). Reading *Chenery* so broadly as to compel remand in such circumstances would result in yet another agency proceeding that amounts to "an idle and useless formality." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality op.). And it would risk contradicting the harmless-error rule in courts' review of agency action. *See Sanders*, 556 U.S. at 406–07.

Thus, we do not uphold the FDIC's order in this case simply by substituting our reasoning for the agency's discretionary determinations. Rather, our inquiry focuses on whether substantial evidence supports the FDIC's factual findings that the charge-offs, dividends, and other expenses were "effects" under the statute. Notwithstanding the agency's error in identifying the appropriate causation standard, and our conclusion that legal expenses do not qualify as "effects," the agency's findings clear this hurdle. We decline to remand the petition to the FDIC.

3. *Sanction*

Finally, Calcutt claims that the FDIC's order removing him from his position and prohibiting him from future banking activities is an abuse of discretion. Courts review a removal sanction for abuse of discretion. *Grubb v. FDIC*, 34 F.3d 956, 963 (10th Cir. 1994). A sanction constitutes an abuse of discretion when it "is unwarranted in law or without justification in fact." *Ibid.* (quoting *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185–86 (1973)) (quotation marks omitted). According to Calcutt, his penalty is "plainly excessive" in light of his subsequent, misconduct-free work for State Savings Bank, his age, and the harshness of the penalty. Br. of Petitioner 63. True, removal and prohibition are "extraordinary sanction[s]." *De la Fuente*, 332 F.3d at 1227. And, as Calcutt notes, the FDIC could have opted to proceed with only a cease-and-desist order or civil monetary penalty. But for the reasons we have explained, Section 8(e) clearly permits removal and prohibition for the actions that the FDIC alleges in this case, and the FDIC's conclusions are well supported. The agency's sanction choice is not an abuse of discretion under these circumstances.

V. CONCLUSION

For the reasons above, we deny Calcutt's petition for review and vacate our stay of the FDIC's Removal and Prohibition Order.

DISSENT

MURPHY, Circuit Judge, dissenting. After adjudging Harry Calcutt guilty of misconduct in the management of a bank, the Federal Deposit Insurance Corporation (FDIC) issued an order that would bar him from working in his profession and fine him $125,000. Calcutt challenges this order on constitutional and statutory grounds. My colleagues reject all of his claims. I agree with them on his constitutional claims but must part ways on his statutory ones.

Calcutt's three constitutional claims do not entitle him to relief. He first alleges that Congress has unconstitutionally restricted the President's right to terminate (and so to control) the FDIC's Board of Directors. But his argument rests on a misreading of the Board's enabling statute. It gives the President complete authority to fire most of the Board's members. Calcutt next argues that Congress at least gave one Board member and the FDIC's administrative law judges unconstitutional protections from removal. Even assuming that this claim has merit, however, he fails to show why these unconstitutional *statutes* would entitle him to the relief that he seeks—vacatur of the FDIC's *actions* in his case as "void." The Constitution itself requires no remedy. And I would read recent Supreme Court precedent to bar his preferred remedy because that reading best comports with the historical practices that we should follow until Congress says otherwise. Calcutt lastly notes that the first administrative law judge who heard his case had not been appointed in a manner that comported with the Constitution's Appointments Clause. The Board agreed and gave him a new hearing before a new judge. Calcutt now claims that the Appointments Clause barred this new judge from relying on any evidence developed at the initial hearing. But again, nothing in the Constitution required any remedy, let alone Calcutt's expansive one.

Calcutt's statutory claims are another matter. The FDIC misread the statute on which it relied to sanction him. Of most note, the FDIC cannot bar Calcutt from banking unless it proves that his bank will suffer a loss (or that he will receive a benefit) "by reason of" his misconduct. 12 U.S.C. § 1818(e)(1)(B). As the Supreme Court has long made clear, the phrase "by reason of" incorporates common-law principles of but-for and proximate cause. Yet the FDIC's order ignored but-for cause and disavowed proximate cause. In fact, the agency held Calcutt liable for his 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. Congress has given the FDIC "extraordinary power" to regulate private parties with only limited judicial oversight. *In re Seidman*, 37 F.3d 911, 929 (3d Cir. 1994). After *Stern v. Marshall*, 564 U.S. 462 (2011), one might wonder whether the agency exercises judicial power by adjudicating cases that deprive individuals of private rights. At the least, its significant authority should make us diligent to ensure that the agency has "turn[ed] square corners when" dealing with the regulated community. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). Because the FDIC did not do so in this case, I would remand for it to apply the proper law. I thus respectfully dissent.

I. Background

Calcutt served for years as the President and Chairman of Northwestern Bank in Traverse City, Michigan. During his tenure, entities controlled by the Nielson family (the "Nielson Entities") became the Bank's largest borrowers with $38 million in loans. The Nielson Entities ran real-estate businesses that struggled during the Great Recession. They defaulted in September 2009. Two months later, the Bank entered into the "Bedrock Transaction" with the entities. It issued them another $760,000 loan and released to them $600,000 of funds held as a security interest. Yet things did not improve. The Nielson Entities again defaulted in September 2010. After the Bank released to them another $690,000 in secured funds, the entities defaulted a final time in January 2011. The Bank incurred $6.443 million in "charge-offs" (amounts unlikely to be collected) from the loans and $30,000 in charge-offs from the Bedrock Transaction.

These events led the FDIC to seek to "remove" Calcutt "from office" and to impose a "civil penalty" on him. 12 U.S.C. § 1818(e)(1), (i)(2)(B). The first administrative law judge who heard his case had been unlawfully appointed, so the FDIC assigned him a new judge. This judge found that Calcutt had committed many statutory violations and that the FDIC should bar him from banking and fine him $125,000. The FDIC agreed. It held that Calcutt had engaged in "unsafe or unsound practice[s]" and committed "breach[es]" of his "fiduciary dut[ies]" mainly in connection with the Bedrock Transaction. *Id.* § 1818(e)(1)(A)(ii)–(iii). Among other misconduct, it found that he had violated the Bank's lending standards by agreeing to that transaction, had hid the transaction's true nature from the Bank's board of directors, and, perhaps most seriously, had lied to regulators about it. The FDIC also found that the Bank would likely suffer "financial loss" and that Calcutt had "received financial gain" "by reason of" this misconduct. *Id.* § 1818(e)(1)(B).

II. Constitutional Claims

I agree with my colleagues that Calcutt's constitutional arguments all fall short. But my reasoning rests largely on different grounds.

A. Restrictions on the President's Ability to Control the FDIC

Calcutt first argues that the FDIC's statutory scheme gives the President constitutionally insufficient control over the agency's exercise of executive power. Why? He assumes that the statute creating the FDIC's five-member Board of Directors bars the President from removing most of its members except "for cause." *See* 12 U.S.C. § 1812. This limit, Calcutt reasons, impairs the President's ability to command the "executive Power" and to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* § 3. He has a point. The Supreme Court recently found unconstitutional similar "for cause" limits on the President's ability to remove the Director of the Consumer Financial Protection Bureau (CFPB). *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197–2207 (2020). In response, the FDIC "does not dispute Calcutt's assumption" that § 1812 gives the Board these removal protections. Resp. Br. 17 n.7. But it argues that they pass muster under *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which upheld similar protections for the Federal Trade Commission (FTC). *Id.* at 626–30.

As an intermediate judge, I find this constitutional question difficult. On the one hand, *Humphrey's Executor* relied on the FTC's nonpartisan, multimember structure to uphold the provision limiting the President's ability to fire its commissioners. *Id.* at 624–25. The FDIC shares the same structure. *Compare* 12 U.S.C. § 1812(a)(1)–(2), *with* 15 U.S.C. § 41. And while *Seila Law* may well call *Humphrey's Executor* into doubt, lower courts must follow a case that is directly on point even if another decision has undercut it. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

On the other hand, *Humphrey's Executor* may not be directly on point. It also upheld the FTC's removal protections because, as the Court understood the FTC's duties in 1935, the agency undertook "no part of the executive power[.]" 295 U.S. at 628. The FDIC, by contrast, performs core executive functions. Here, it has essentially brought a civil-enforcement suit against Calcutt to ban him from banking and impose a hefty fine on him. It thus is executing (i.e., carrying into effect) the law barring "unsafe or unsound" banking practices. 12 U.S.C. § 1818(e)(1)(A)(ii); *see* Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 537–40 (2005). For executive officers of this kind, "the President's removal power [has been] the rule, not the exception." *Seila Law*, 140 S. Ct. at 2206; *see Myers v. United States*, 272 U.S. 52, 111–75 (1926); Michael W. McConnell, *The President Who Would Not Be King* 161–69, 335–41 (2020).

But I see no reason to resolve the parties' constitutional debate because I do not read the FDIC's statutory scheme to implicate it. Rather, I read the statute that creates the FDIC's Board (12 U.S.C. § 1812) as giving the President *full* power to remove all but one of the Board's five members. Since the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Board has consisted of the Comptroller of the Currency, the CFPB's Director, and three other presidentially appointed members. Pub. L. No. 111-203, § 336(a), 124 Stat. 1376, 1540 (2010); 12 U.S.C. 1812(a)(1). All agree that the President may fire the Comptroller for any reason. 12 U.S.C. § 2.

So the President's ability to control the Board turns on whether he has free rein to fire its three appointed members. The statute creating their offices provides: "Each appointed member shall be appointed for a term of six years." *Id.* § 1812(c)(1). This statute says nothing that expressly grants for-cause removal protections to these members. Maybe the mere creation of a fixed-year term *implies* that the President may not remove them before their terms end? That view raises a host of problems. If read this way, wouldn't the text create an "absolute" ban on removal even if the President has an excellent reason (like fraud)? *Parsons v. United States*, 167 U.S. 324, 343 (1897). How can we read the text to include an implied gloss authorizing some removals (for cause) on top of an implied restriction generally barring them? That is an awful lot of implications. And if we were to create this gloss, how do we decide what counts as adequate "cause"? Judicial intuition? Simply put, we would be legislating rather than interpreting if we read § 1812 to bar all but for-cause removals. *See Morgan v. Tenn. Valley Auth.*, 115 F.2d 990, 992–93 (6th Cir. 1940).

Historical context confirms that § 1812 does not interfere with the President's ability to remove the Board's appointed members. The provision establishing their six-year term dates to the creation of the FDIC in 1933. Banking Act of 1933, Pub. L. No. 73-66, § 8, 48 Stat. 162, 168. At that time, a "well-approved" "rule of" "statutory construction" directed courts to interpret laws that gave the President the power to appoint an executive officer as including the power to remove the officer. *Myers*, 272 U.S. at 119. So if a law was silent on removal, the President could terminate the officer for any reason. *See Shurtleff v. United States*, 189 U.S. 311, 316 (1903); *Parsons*, 167 U.S. at 338–39. The Congress that created the FDIC operated against this interpretive rule. *See Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021). And while the Court has since departed from the rule once, it relied on the "philosophy of *Humphrey's Executor*" to do so. *Wiener v. United States*, 357 U.S. 349, 356 (1958). That philosophy did not exist in 1933.

A constitutional concern points the same way. Before *Humphrey's Executor*, the Supreme Court had broadly held that Congress could not constitutionally limit the President's power to fire officers who are appointed with the advice and consent of the Senate. *See Myers*, 272 U.S. at 109–76. The FDIC was created between *Myers* and *Humphrey's Executor*—when the Court treated these removal protections as presumptively invalid. *Myers* "aroused wide interest," *Morgan*, 115 F.2d at 992, so Congress would have known that such protections raised "grave" constitutional "doubts," *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). These concerns make it all the more implausible to read a law passed at this time as *silently* including them. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 545–46 (2010) (Breyer, J., dissenting). In short, the President has unfettered power to fire (and control) most of the FDIC's Board.

To be sure, both parties seem content to assume that the statute grants the Board protections from removal. *Cf. United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). In a related case, the Supreme Court also assumed that another agency had these protections. *Free Enter. Fund*, 561 U.S. at 487. Yet parties cannot force courts to accept their stipulations of law. *See Young v. United States*, 315 U.S. 257, 258–59 (1942). Under basic avoidance principles, moreover, our power to address an unraised issue reaches its apex when parties ask us to resolve a weighty constitutional question that a statute might not present. *Cf. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009). That is especially true here. Calcutt's constitutional claim, if accepted, would take us right back to a statutory "severability" question: Which parts of the statute must we set aside as unconstitutional? *See Free Enter. Fund*, 561 U.S. at 508–10; John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 Geo. Wash. L. Rev. 56, 88–89 (2014). If the removal protections are imaginary, this question has an easy answer. We should disregard those protections. Since we may have to consider this statutory issue even if we reach Calcutt's constitutional claim, we might as well reach it immediately. *See* William Baude, *Severability First Principles*, 109 Va. L. Rev. ____ (forthcoming 2023) (manuscript at 44–45).

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Even so, Calcutt responds, the President and Board *believed* that § 1812 contained removal protections. This belief, Calcutt argues, "shows that the Board enjoyed *de facto* tenure protections while pursuing this enforcement action, causing" him harm. Reply Br. 7 n.1. I agree that the executive branch likely read the statute this way. But why would "de facto" protections violate the law? Consider a hypothetical: Disagreeing with my reading, the President issues an order stating that he will adhere to for-cause removal rules for the Board due to his views of § 1812 and the Constitution. If we conclude that this order misreads § 1812 and that the statute would be unconstitutional if it imposed such protections, would the order violate the Constitution or statute?

I fail to see why it would violate the Constitution. Like the Supreme Court when resolving cases, the President must interpret the Constitution when performing his constitutional duties. *See Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 753 (6th Cir. 2019) (citing Frank H.

Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905 (1990)). Presidents have routinely done so. When exercising his pardon power, President Jefferson pardoned those convicted under the Sedition Act of 1798 because he believed that the convictions violated the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 273–76 (1964). When exercising his veto power, President Jackson vetoed a bill reauthorizing the national bank because he believed that Congress lacked the power to create it. *See* Easterbrook, *supra*, at 909–10. Like these powers, the removal power belongs to the President. *See Seila Law*, 140 S. Ct. at 2197–98. So what constitutional provision would the President offend by self-limiting this power? If anything, a court's intrusion on his authority would raise the concerns. If an injured bank customer had sued President Jackson over his national-bank veto, nobody (I hope) would claim that a court could enjoin the President's veto with a citation to *McCulloch v. Maryland*, 17 U.S. 316 (1819). *See Collins*, 141 S. Ct. at 1794 (Thomas, J., concurring). We would raise identical separation-of-powers problems if we intruded on the President's lawful exercise of the removal power with a citation to *Seila Law*.

Nor would this hypothetical executive order violate § 1812. The statute gives the President the power to remove any of the Board's appointed members for any reason. The President thus may *retain* any member for any reason—whether based on his reading of the statute or on the benefits of a civil-service system. In this respect, the statute is not much different than a provision that sets the minimum process that an agency must provide. That floor does not foreclose the agency from offering additional process. *Cf. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543–49 (1978); *Al-Saka v. Sessions*, 904 F.3d 427, 432 (6th Cir. 2018); Easterbrook, *supra*, at 908. So while § 1812 does not impose for-cause removal protections on the President, it also does not bar him from imposing those protections on himself.

Now adjust my hypothetical slightly: Before the FDIC acted in Calcutt's case, "suppose that the President had made a public statement expressing displeasure with actions taken by [its Board] and had asserted that he would remove [its members] if [§ 1812] did not stand in the way." *Collins*, 141 S. Ct. at 1789. If the President's (mis)reading of § 1812 does not violate the law once he knows that the courts will interpret it differently than he does, why would this reading violate the law before he knows how they will interpret it? I am not sure. Yet I would leave open whether courts may vacate agency action as "arbitrary and capricious" under the Administrative Procedure Act (APA) if the President's reading tangibly affected the disputed action. 5 U.S.C. § 706(2)(A); *Collins*, 141 S. Ct. at 1794 n.7 (Thomas, J., concurring). We need not decide this question because the APA tells us to take "due account" "of the rule of prejudicial error." 5 U.S.C. § 706. Calcutt thus would have needed to show that any mistaken belief about the Board's removal protections harmed him (by, for example, affecting the Board's makeup). *See Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010). He presented no such evidence.

Calcutt responds that we should remand to the FDIC to allow him to seek discovery over whether any de facto protections harmed him. That leads to my final point. An FDIC regulation contains an issue-exhaustion rule that requires parties to raise all exceptions to an administrative law judge's decision with the Board. 12 C.F.R. § 308.39(b). Calcutt concedes that he did not raise this facial constitutional challenge with the agency but says that exhaustion mandates categorically do not apply to those challenges. I am not so confident. Courts must tread lightly before creating implied exceptions to regulatory exhaustion rules (as opposed to judge-made ones). *Bryan*, 937 F.3d at 751–52. Yet I find the FDIC's *specific* regulation unclear as to whether its text even covers these types of challenges. *Cf. id.* at 752. I thus would leave this question for another day because exhaustion is a nonjurisdictional affirmative defense. *See Jones v. Bock*, 549 U.S. 199, 211–12 (2007). A rejection of Calcutt's claim on statutory grounds makes the issue unnecessary to decide. *Cf. Woodford v. Ngo*, 548 U.S. 81, 101 (2006). Apart from exhaustion, however, I see no reason why we should give Calcutt a redo to obtain discovery that he did not seek the first time around.

B. Restrictions on Removal of the CFPB Director and Administrative Law Judge

Calcutt next challenges two unambiguous removal protections. First, the law that created the FDIC's final Board member—the CFPB Director—gives the Director these protections. 12 U.S.C. § 5491(c)(3). As noted, *Seila Law* found this provision unconstitutional. 140 S. Ct. at 2201–07. And while the President could control all of the other Board members, Calcutt claims that Congress may not create a multimember agency with even one tenure-protected member.

Second, "dual for-cause limitations" on removal insulated the administrative law judge who heard Calcutt's case from presidential oversight. *Free Enter. Fund*, 561 U.S. at 492. The judge could be fired only if the Merit System Protection Board found "good cause," 5 U.S.C. § 7521(a), and the President could remove that entity's members only for cause too, *id.* § 1202(d). Calcutt claims that the Constitution bars the judge's "double insulation" from the President. *Compare Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1129–36 (9th Cir. 2021), *with Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1113–18 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part).

I see no need to opine on the merits of these claims. We must distinguish the constitutional questions that Calcutt raises (do the removal statutes violate the Constitution?) from a separate remedies question (if so, do these defects entitle him to his requested relief?). As his proposed remedy, Calcutt asks us to vacate the FDIC's order as "void." But he fails to identify the source of law that requires (or permits) courts to treat the FDIC's *past actions* as void because potentially unconstitutional *statutes* attempted to insulate two of the FDIC's officers from the President's removal power. And my review of the relevant legal authorities leads me to conclude that Calcutt could not obtain this relief even if he successfully established the statutes' unconstitutionality.

1

Because Calcutt seeks relief for a constitutional violation, the Constitution provides the place to start on this remedies question. But it says almost nothing about remedies. *Cf. Hernandez v. Mesa*, 140 S. Ct. 735, 741–43 (2020); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–27 (2015). Except for a few provisions like the requirement to pay "just compensation" for a taking, *see Knick v. Township of Scott*, 139 S. Ct. 2162, 2171 (2019), the Constitution sets only limits on government conduct without prescribing specific relief for violations, *see* Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev 1109, 1118 (1969). One thus will search Article II in vain for an explicit constitutional remedy that applies to an invalid removal provision.

Where else should we look? The founders enacted the Constitution against the backdrop of a preexisting legal system with preexisting causes of action and remedies. *See id.* at 1131–32. Before the founding, for example, this system often allowed equity courts to issue injunctions to stop "illegal executive action[.]" *Armstrong*, 575 U.S. at 327; *Ex parte Young*, 209 U.S. 123, 150–51 (1908). The Supreme Court has held that we may use these preexisting "judge-made" remedies to redress constitutional wrongs unless Congress displaces them. *Armstrong*, 575 U.S. at 327–28.

But courts should not take this allowance too far. The Constitution does not give us freewheeling power to adopt federal common-law remedies based on our views of wise policy. *See Hernandez*, 140 S. Ct. at 741–42 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). And the Court "disfavor[s]" remedies that are rooted in legislative-like choices about the best way to deter illegal acts. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (citation omitted).

This dichotomy points the way here. We lack an inherent power to treat the FDIC's actions as "void" because we think it would be a good idea. *See Hernandez*, 140 S. Ct. at 741–42. We instead must look to the causes of action and remedies that traditionally applied to claims like Calcutt's—that a statutory provision related to an office was illegal and that this defect rendered the officer's actions void. When courts traditionally chose remedies for this sort of claim, they distinguished between two types of officers: a "de facto officer" in a lawful office (whose actions were enforceable) and a "mere usurper" in an unlawful one (whose actions were void). Albert Constantineau, *A Treatise on the De Facto Officer Doctrine* §§ 5, 34, at 8–10, 52–53 (1910).

De Facto Officer in Lawful Office. For centuries, parties have alleged that an officer was unlawfully holding (and performing the duties of) an office. To give an example at the time of the founding, a party claimed that a sheriff could not hold that office because the sheriff had not lived in the county as long as the law required. *State v. Anderson*, 1 N.J.L. 318, 324–28 (N.J. 1795).

English courts channeled these claims into a specific writ ("quo warranto") with a specific remedy (prospectively ousting the officer). *See* 3 William Blackstone, *Commentaries*

*262–64; 2 Edward Coke, *Institutes of the Laws of England* 282, 494–99 (1642). American courts followed suit. Constantineau, *supra*, § 451, at 635 n.1; *State v. Parkhurst*, 9 N.J.L. 427, 437–38 (N.J. 1802). Three aspects of the quo warranto action deserve mention. For one, invalid officers caused public harms, so the government itself typically needed to sue them. *See Wallace v. Anderson*, 18 U.S. 291, 292 (1820). Yet private parties could sue on the government's behalf if they showed a unique interest. *See Newman v. United States ex rel. Frizzell*, 238 U.S. 537, 549–51 (1915). For a second, the remedy was exclusive. Constantineau, *supra*, § 451, at 635. A party disputing an officer's authority could not sue for an injunction "to restrain the exercise of official functions[.]" Floyd R. Mecham, *A Treatise on the Law of Public Offices and Officers* § 478, at 307 (1890). For a third, the remedy exists today. *See* D.C. Code § 16-3503. Parties may ask the Attorney General to seek this relief or request leave of court to seek it themselves—a process that may look "cumbersome" to modern eyes. *Andrade v. Lauer*, 729 F.2d 1475, 1497–98 (D.C. Cir. 1984) (Wright, J.).

Yet the process has always looked cumbersome. Rather than file a direct quo warranto suit to oust invalid officers, parties harmed by the officers' actions have tried to collaterally attack their qualifications in suits involving the actions. *Id.* at 1496. Since 1431, English courts have rebuffed these attacks under the "de facto officer doctrine." Constantineau, *supra*, § 5, at 8–10 (citing *The Abbé de Fontaine*, 1431 Y.B. 9 Hen. VI, fol. 32, pl. 3 (Eng.)); Clifford L. Pannam, *Unconstitutional Statutes and De Facto Officers*, 2 Fed. L. Rev. 37, 39–42 (1966). That doctrine treats the past actions of an officer with a colorable claim to office as valid whether or not the officer met all conditions to hold the office. Constantineau, *supra*, § 1, at 3–4. English courts introduced it "into the law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office, without being lawful officers." *State v. Carroll*, 38 Conn. 449, 467 (1871).

American courts likewise adhered to the de facto officer doctrine as a corollary to the exclusive quo warranto remedy. *See Cocke v. Halsey*, 41 U.S. 71, 81–88 (1842); *Taylor v. Skrine*, 5 S.C.L. 516, 516–17 (S.C. 1815); *Fowler v. Bebee*, 9 Mass. 231, 234–35 (1812); *People ex rel. Bush v. Collins*, 7 Johns. 549, 554 (N.Y. 1811) (per curiam). Notably, these courts upheld the actions of invalid officers who did not meet *constitutional* conditions on their offices. An officer might not have taken an oath. *Cf. Bucknam v. Ruggles*, 15 Mass. 180, 182–83 (1818) (per curiam). Or the officer might have been appointed in an illegal way. *Cf. Ex parte Ward*, 173 U.S. 452, 454 (1899). Or the officer might have flunked an eligibility requirement. Perhaps the officer was too young. *Cf. Blackburn v. State*, 40 Tenn. 690, 690–91 (1859). Or maybe the officer had been in the Congress that increased the office's salary before taking office. *Cf.* U.S. Const. art. I, § 6, cl. 2; William Baude, *The Unconstitutionality of Justice Black*, 98 Tex. L. Rev. 327 (2019); *In re Griffin*, 11 F. Cas. 7, 27 (C.C.D. Va. 1869) (No. 5,815). The same rules applied even if the officer held the office by reason of an unconstitutional *statute*. *See* Constantineau, *supra*, §§ 192–96, at 264–70. An early decision thus upheld the acts of an officer who had been appointed by the governor under a statute authorizing this appointment, even though the state constitution had required the legislature to elect the officer. *See Taylor*, 5 S.C.L. at 516–17; *Carroll*, 38 Conn. at 474; *see also State v. McMartin*, 43 N.W. 572, 572 (Minn. 1889); *Ex Parte Strang*, 21 Ohio St. 610, 615–18 (1871); *cf. Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (per curiam).

Usurper in Unlawful Office. Other times, parties have alleged that a generic office could not exist because it had been assigned "sovereign functions" that it could not possess. Mecham, *supra*, § 4, at 5. In one case, for example, a party alleged that a legislatively created "court" could not perform judicial duties because those duties had been vested in a wrongly abolished life-tenured court. *Hildreth's Heirs v. McIntire's Devisee*, 24 Ky. 206, 207–08 (1829); Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 76–80 (2022).

Courts granted much broader relief for this type of claim. Parties affected by an illegal office did not need to sue in quo warranto to dispute the officeholder's power to perform the challenged function. Parties instead could dispute the officer's conduct "in any kind" of suit. *Walcott v. Wells*, 24 P. 367, 370 (Nev. 1890); Mecham, *supra*, §§ 324–26, at 216–18. And the opposing party could not defend the officer's past acts using the de facto officer doctrine. Constantineau, *supra* §§ 34–36, at 51–55. The officer instead was "merely a usurper, to whose acts no validity can be attached[.]" *Norton v. Shelby County*, 118 U.S. 425, 449 (1886).

This rule extended to constitutional defects. The Supreme Court may have followed it as early as *United States v. Yale Todd* (U.S. 1794). *United States v. Ferreira*, 54 U.S. 40, 52–53 (1851) (note by Taney, C.J.). This unreported case addressed a law allowing pensions for disabled Revolutionary War veterans. The law ordered circuit courts to determine whether applicants were disabled and to send their findings to the Secretary of War. Circuit judges (including Supreme Court Justices) found that the law unconstitutionally gave courts executive power by making them the Secretary's administrators. *Hayburn's Case*, 2 U.S. 408, 410 n.* (1792). Given the law's benevolent goals, though, some judges awarded pensions by claiming to act as "commissioners." *See* Wilfred J. Ritz, United States v. Yale Todd *(U.S. 1794)*, 15 Wash. & Lee L. Rev. 220, 228–29 (1958). Congress ordered the Attorney General to seek Supreme Court review of pensions granted by judges "styling themselves commissioners." Act of Feb. 28, 1793, 1 Stat. 324, 325. In Yale Todd's case, the Court required him to return the funds. Ritz, *supra*, at 228–30. As others have noted, the Court may well have found the judges' actions void because they unconstitutionally undertook executive functions. *Ferreira*, 54 U.S. at 53 (note by Taney, C.J.); Keith E. Whittington, *Judicial Review of Congress before the Civil War*, 97 Geo. L.J. 1257, 1270–74 (2009).

Many decisions followed this remedial approach for claims that a legislative body had granted functions to an office that it could not lawfully possess. *See Town of Decorah v. Bullis*, 25 Iowa 12, 18–19 (1868); *Hildreth's Heirs*, 24 Ky. at 207–08; G. L. Monteiro, Annotation, *De Jure Office as Condition of De Facto Officer*, 99 A.L.R. 294 § III(a) (1935), Westlaw (database updated 2022). When, for example, a legislature assigned local-government functions to a board of commissioners that the state constitution vested in justices of the peace, the Supreme Court treated the board's actions as void. *Norton*, 118 U.S. at 441–49. It refused to apply the de facto officer doctrine because that doctrine required a valid ("de jure") office. *Id.* at 444–45.

The Supreme Court's modern cases also treat an officer's actions as void if the generic office could "not lawfully possess" the power to take them. *Collins*, 141 S. Ct. at 1788. The Court thus found invalid a bankruptcy judge's decision in a suit that an Article III court needed to resolve. *See Stern v. Marshall*, 564 U.S. 462, 503 (2011). And a plurality rejected the de facto officer doctrine when a party claimed that Congress assigned to Article I judges a duty (sitting on circuit courts) that Article III judges must perform. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535–37 (1962) (plurality opinion); *cf. Bowsher v. Synar*, 478 U.S. 714, 732 (1986); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 815 (1987) (Scalia, J., concurring in the judgment).

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This "long history of judicial review" has relevance for Calcutt's request that we vacate the FDIC's order in his case because invalid removal protections shielded two of its officers. *Armstrong*, 575 U.S. at 327. To begin with, the history refutes the theory that the Constitution of its own force compels courts to treat as "void" any action taken by officers whose exercise of an office does not comport with a constitutional command. That view would treat the de facto officer doctrine *itself* as unconstitutional. Yet it formed part of the legal backdrop against which the founders enacted the Constitution. Near the founding, judges described the doctrine as "a well settled principle of law," *Bush*, 7 Johns. at 554, or "too well established to admit of a doubt," *Taylor*, 5 S.C.L. at 517. Nothing in the Constitution can be read to do away with it.

This history also highlights the key inquiry for deciding whether courts may vacate an officer's actions as a "judge-made remedy" when a statute unconstitutionally limits the President's removal authority. *Armstrong*, 575 U.S. at 327. Does the unconstitutional removal provision show that Congress vested "sovereign functions" in an invalid office that cannot possess them? Mecham, *supra*, § 4, at 5; *Norton*, 118 U.S. at 449. If so, courts should treat the officer's actions as void wherever they arise. Or is the removal provision "distinct from the provisions creating the . . . office" such that the office itself is valid "even assuming that the [removal provision] is" not? *McMartin*, 43 N.W. at 572; *Carroll*, 38 Conn. at 449. If so, courts should enforce the officer's acts in suits involving third parties (in contrast to suits between the government and the officer).

Unfortunately for Calcutt, his claim falls on the wrong side of this divide. He does not even argue that the two executive officers (the CFPB Director and administrative law judge) sat in offices that constitutionally "could not exist" (because, for example, the Constitution vested their duties in another branch). *Ashley v. Bd. of Supervisors of Presque Isle Cnty.*, 60 F. 55, 65

(6th Cir. 1893). Indeed, his argument's very premise—that Congress has illegally insulated the officers from the President—assumes that they perform *executive* functions. *Cf. Seila Law*, 140 S. Ct. at 2209. So I would treat the constitutional "condition" in this case (that an officer be accountable to the President) like other constitutional conditions the violation of which does not void an officer's acts. The condition is not much different than, say, a condition that an officer be of a certain age, *see Blackburn*, 40 Tenn. at 690–91, or be elected rather than appointed, *see* Constantineau, *supra*, § 192, at 264–65. If statutes departing from these mandates did not render an officer's actions void, I fail to see why an unconstitutional removal provision would. Under traditional remedial principles, then, Calcutt could not obtain the relief that he seeks in this case.

The "lack of historical precedent" to attack removal provisions in a suit like Calcutt's reinforces the conclusion that the provisions did not traditionally render an officer's actions void. *Seila Law*, 140 S. Ct. at 2201 (citation omitted). If any private party could collaterally attack removal provisions in any suit implicating an officer's acts, one would expect to see many of these suits. After all, Congress began to enact constitutionally dubious removal provisions shortly after the Civil War during President Johnson's administration. *See Myers*, 272 U.S. at 166–73. Yet Calcutt cites no historical example in which courts evaluated removal provisions in this type of litigation. So constitutional questions about the provisions lingered for decades. *Id.* at 173.

Challenges to the validity of removal provisions instead arose in employment disputes. *See Humphrey's Executor*, 295 U.S. at 618–19; *Myers*, 272 U.S. at 106; *cf. Shurtleff*, 189 U.S. at 311–12; *Reagan v. United States*, 182 U.S. 419, 424 (1901); *Ex parte Hennen*, 38 U.S. 230, 256–57 (1839). A discharged officer would sue to recover a salary (or seek reinstatement) on the ground that the termination violated a tenure-protection statute. *Myers*, 272 U.S. at 106. The government would respond that the statute could not restrict the President's power. *Id.* This different kind of suit required courts to resolve the constitutional question. Courts "almost universally recognized" that the de facto officer doctrine did not apply because the suit was between the government and the officer (not a third party) and because only valid officers could receive salaries. Constantineau, *supra*, § 236, at 331; 2 James Kent, *Commentaries on American Law* 355 n.2 (11th ed. 1867).

Modern precedent confirms my conclusion. The Supreme Court's recent cases have all held that unconstitutional removal provisions do not render the office to which they attach invalid or require courts to find actions taken by the officers void. *See Collins*, 141 S. Ct. at 1787–89; *Seila Law*, 140 S. Ct. at 2207–11; *Free Enter. Fund*, 561 U.S. at 508–10. Take *Free Enterprise Fund*. There, accountants under investigation by the Public Company Accounting Oversight Board filed an *Ex Parte Young* suit seeking to enjoin all of the Board's actions as void because of its removal protections. *See* 561 U.S. at 487, 491 n.2, 508. The Court agreed that various removal provisions unconstitutionally intruded on the President's authority. *Id.* at 492–98. But it refused to treat the Board's actions as void. *Id.* at 508–10. It held that the Board could perform the executive functions assigned to it despite the invalid removal provisions because they were "severable from the remainder of the statute." *Id.* at 508. The Court analyzed this issue in terms of "severability." *See id.* at 509. But it could just as well have reasoned that the unconstitutional *statutes* did not render the Board's *actions* void in third-party suits and so did not entitle the accountants to their requested remedy. *Cf. McMartin*, 43 N.W. at 572; Harrison, *supra*, at 73–75.

Seila Law fits a similar mold. The CFPB in that case issued a civil investigative demand seeking documents from a law firm. 140 S. Ct. at 2194. The firm refused to comply, so the CFPB filed a petition to enforce its demand. *Id.* The district court rejected the firm's request to deny the CFPB's petition on the ground that its Director's removal protections rendered all CFPB actions void. *Id.* After agreeing that the protections were unconstitutional, the controlling Supreme Court opinion again held that the invalid provisions were severable and did not render all CFPB actions void. *Id.* at 2208–11 (opinion of Roberts, C.J.). Admittedly, the opinion did not simply reject the law firm's remedy and affirm the enforcement of the CFPB's demand. Rather, it remanded for the lower courts to decide whether the demand had been "validly ratified" by a Director accountable to the President. *Id.* at 2211. This resolution might have implied that all CFPB actions (including the investigative demand) had been void *prior to* the Court's severance "remedy." *Id.* at 2208. But the Court has since clarified that *Seila Law* did *not* hold that the CFPB's prior actions were invalid and instead had left all remedy-related issues for the lower courts. *See Collins*, 141 S. Ct. at 1788.

Most recently in *Collins*, the Court expressly held that unconstitutional removal provisions do not render an officer's past actions void in suits by third parties. Headed by a director with removal protections, the agency in *Collins* served as the conservator to two large mortgage-financing companies. 141 S. Ct. at 1771–72. This agency entered into agreements with the Department of Treasury requiring the companies to pay large dividends to the Treasury. *Id.* at 1772–74. The companies' shareholders sued to compel the Treasury to return the dividends on the ground that the director's removal protections were unconstitutional and that they voided the agency's past acts (including the challenged agreements). *Id.* at 1775. Although the Court agreed that the removal protections were unconstitutional, *id.* at 1783–87, it rejected the broad remedy, *id.* at 1787–89. The Court found "no reason to regard any of the actions taken by the" agency "as void" simply because its head had been protected by invalid removal provisions. *Id.* at 1787.

All told, under traditional remedial rules, unconstitutional removal provisions do not render the offices to which they attach invalid and so do not allow courts to vacate the actions of officers as void in suits by third parties. This tradition compels me to reject Calcutt's proposed remedy.

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I end with two disclaimers about things I need not decide. Disclaimer One: Congress may generally displace judge-made remedial principles. *Armstrong*, 575 U.S. at 327–29. Congress, for example, has sometimes restricted a court's power to grant *Ex Parte Young*'s injunctive relief for violations of federal law. *See id.* And *Bowsher* teaches that Congress may adjust the relief for structural constitutional claims too. There, the Court followed the statutory remedy once it found that Congress had illegally entrusted a legislative officer with executive duties. 478 U.S. at 734–35. Congress thus may permit courts to vacate actions taken by officers subject to unconstitutional removal protections even if traditional judge-made remedial limits would foreclose relief.

Has Congress done so here? The FDIC's statute incorporates the APA. 12 U.S.C. § 1818(h)(2). It orders a court to "hold unlawful and set aside agency action" that is "contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2)(B). Perhaps this text could be read to allow courts to depart from traditional limits and vacate agency "actions" if a law has structured the agency in a way that is "contrary to constitutional right" or "power." *Id.*; *cf. Collins*, 141 S. Ct. at 1795 (Gorsuch, J., concurring in part). That the Constitution's structural principles exist to protect individual liberty could reinforce this reading that a structural problem is "contrary to constitutional right" within the meaning of the APA. *See Bond v. United States*, 564 U.S. 211, 220–24 (2011).

In most structural constitutional cases, however, a private party claims that the challenged action *itself* is "contrary to constitutional right." 5 U.S.C. § 706(2)(B). So parties routinely allege that a prosecution violates the Constitution because the relevant law reaches conduct that Congress may not proscribe. *See, e.g.*, *Bond*, 564 U.S. at 224. Yet, as I have explained, an unconstitutional removal statute for an office would not necessarily render the officer's "actions" void and so would not necessarily render those actions "contrary to constitutional right." 5 U.S.C. § 706(2)(B). Perhaps the APA's text is thus best read to incorporate—not depart from—traditional remedial limits. *Cf. id.* § 702; Tom C. Clark, *Att'y Gen.'s Manual on the Admin. Proc. Act* 108 (1947).

And even if the APA expanded the available relief, recall that it requires courts to take "due account" "of the rule of prejudicial error." 5 U.S.C. § 706. The Court has read this text to adopt the harmless-error principles that "ordinarily apply in civil cases." *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009). Under those principles, constitutional errors can be harmless. *See O'Neal v. McAninch*, 513 U.S. 432, 440 (1995). Although *Collins* did not cite the APA, this harmless-error provision might be one way to understand its suggestion that third parties could seek relief for unconstitutional removal provisions if they showed that the provisions harmed them (that is, if they showed that the error was not harmless). 141 S. Ct. at 1788–89. At day's end, I would leave these statutory questions open. The parties did not address the APA's scope and focused only on whether the removal provisions rendered the FDIC's order unconstitutionally void. They did not.

Disclaimer Two: The parties *assume* that the FDIC performs only executive functions. Our resolution should not be taken to have impliedly adopted that premise. The FDIC did not just *prosecute* this action. It also *adjudicated* the action—finding Calcutt guilty and imposing a punishment on him in the form of an end to his career and a $125,000 penalty. Once an Article III court finally enters the picture, moreover, it may review the FDIC's factual findings only under a deferential substantial-evidence test—a test that has been called more deferential than the one governing our review of a district court's factual findings. *See Dickinson v. Zurko*, 527 U.S. 150, 153 (1999).

Yet both Article III and the Due Process Clause generally require the government to follow common-law procedure (including, fundamentally, the use of a "court") when seeking to deprive people of their private rights to property or liberty. *See Stern*, 564 U.S. at 482–84; Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 569–70 (2007). At first blush, one might think that the FDIC has sought to deprive Calcutt of his "core private rights" to both. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting). According to Blackstone, Calcutt had a "property" interest in the thousands of dollars that the government seeks to take. *See* 1 Blackstone, *supra*, at *134–35. According to Coke, he had a "liberty" interest in continuing in his profession. *See* 2 Coke, *supra*, at 47. So perhaps the FDIC has undertaken judicial functions here—functions that the Constitution vests in courts. *See Stern*, 564 U.S. at 482–84. If the FDIC needed to file suit, moreover, the filing would have triggered the Seventh Amendment's right to a jury, which Justice Brennan made clear applies to suits seeking civil penalties. *See Tull v. United States*, 481 U.S. 412, 422–25 (1987).

The government traditionally has responded to this call for more "process" with the defense that its action seeks to vindicate "public rights," rights that need not be litigated in a court with a jury. *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018); *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 450–51 (1977). And maybe Calcutt did not raise this argument here because a healthy amount of caselaw has accepted that defense in the banking context. *See 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, 1422–24 (9th Cir. 1994). Yet this precedent predates the Court's recent instructions in cases like *Stern*, which held that the adjudication of a state tort claim required an

Article III court. *See* 564 U.S. at 487–501. And while *Stern* did not involve an agency, the Court "recognize[d]" that its cases may not provide "concrete guidance" on the scope of the public-rights doctrine in the administrative context. *Id.* at 494. Several Justices have also expressed concern with extending the doctrine too far. *See Oil States*, 138 S. Ct. at 1381–85 (Gorsuch, J., joined by Roberts, C.J., dissenting); *B & B Hardware*, 575 U.S. at 170–74 (Thomas, J., joined by Scalia, J., dissenting).

There must be *some* limit to the government's ability to dissolve the Constitution's usual separation-of-powers and due-process protections by waiving a nebulous "public rights" flag at a court. When the government indicts a person for a crime, it also vindicates "public rights" that belong to the community. *Spokeo v. Robins*, 578 U.S. 330, 345 (2016) (Thomas, J., concurring) (citing Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 695–700 (2004)). But the government cannot send people to prison using a hearing room rather than a court room or an administrative officer rather than a jury of peers. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.24 (1982) (plurality opinion). Why should this case be different simply because Calcutt must pay a civil penalty rather than a criminal fine? *Cf. Jarkesy v. SEC*, __ F.4th __, 2022 WL 1563613, at *2–7 (5th Cir. May 18, 2022). The FDIC one day must provide answers to these questions in a case that does not assume them.

C. Remedy for Appointments Clause Violation

Calcutt lastly challenges the FDIC's remedy for an undisputed constitutional wrong. The Appointments Clause sets the ground rules for the appointment of officers. U.S. Const. art. II, § 2, cl. 2. It allows Congress to vest the power to appoint inferior officers in "the President," "Courts of Law," or "Heads of Departments." *Id.* In *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Court held that the SEC's administrative law judges are inferior officers who must be appointed by the President or the Commission. *Id.* at 2051–55. The parties agree that the FDIC's administrative law judges are likewise inferior officers, but Calcutt litigated his first hearing before a judge who had not been appointed by the President or FDIC. The FDIC thus granted Calcutt a "new" hearing before a different, lawfully appointed judge—the remedy that *Lucia* ordered. *See id.* at 2055. Calcutt argues that this remedy still fell short because the FDIC allowed the second judge to use records, stipulations, and orders from the invalid judge's first hearing. According to him, the Appointments Clause required the second judge to ignore everything that occurred before.

To decide what *Lucia* meant by its "new hearing" remedy, my colleagues engage in a cost-benefit balance that resembles the Supreme Court's test for whether a court should suppress evidence in a criminal trial under the Fourth Amendment's "exclusionary rule." *Davis v. United States*, 564 U.S. 229, 236–38 (2011). They point out that Calcutt's remedy would impose heavy administrative costs (because it would require inefficient, duplicative processes). They add that it would offer few private benefits (because it is unnecessary to insulate the valid judge's decision from the first hearing's "taint"). Based on this prudential balancing, they reject Calcutt's claim that the second judge had to ignore items from the first hearing. Their balance seems reasonable enough. But I would reject Calcutt's view of *Lucia* based on structural grounds rooted in the best reading of the Appointments Clause and the Court's current approach to judge-made remedies.

At the outset, I do not mean to critique my colleagues for engaging in a cost-benefit inquiry. The Supreme Court's instructions in Appointments Clause cases may well be read to contemplate it. *See Lucia*, 138 S. Ct. at 2055 & nn.5–6; *Ryder v. United States*, 515 U.S. 177, 182–83 (1995). In *Ryder*, a court-martialed member of the Coast Guard had his conviction upheld by a panel that included judges whose appointments violated the Appointments Clause. 515 U.S. at 179–80. The Court of Military Appeals affirmed the panel's conviction under the de facto officer doctrine. *Id.* at 180. The Supreme Court reversed and refused to apply this doctrine. It held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." *Id.* at 182–83. Did *Ryder* look to the "original meaning" of the Appointments Clause to adopt this remedy and reject the de facto officer doctrine? *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1659 (2020). No, the Court rested on a sentence of pure policy: "Any other rule would create a disincentive to raise Appointments Clause challenges[.]" *Ryder*, 515 U.S. at 183.

The Court summarily found the "proper" remedy to be a second appeal before a lawfully constituted panel. *See id.* at 188.

Lucia followed the same reasoning. It noted that *Ryder* called for a new hearing before a properly appointed administrative law judge. 138 S. Ct. at 2055. It then added a new requirement: an agency may not assign the case to the judge who initially heard it even if that judge had been properly appointed in the interim. *Id.* When responding to the claim that this "new judge" remedy was not needed to further the Appointments Clause's purposes, the Court reasoned that its remedies in this area have been "designed not only to advance those purposes directly, but also to create '[]incentive[s] to raise Appointments Clause challenges.'" *Id.* at 2055 n.5 (quoting *Ryder*, 515 U.S. at 183). In both cases, therefore, the Court chose a remedy to "incentivize" these claims.

This reasoning should look familiar. The Court once expansively created judge-made remedies that would best promote the purposes of constitutional rights. Although, for example, Congress has allowed damages claims *only* against state officers who violate the Constitution, 42 U.S.C. § 1983, the Court felt free to create a remedy allowing parties to seek damages from federal officers who violate the Fourth Amendment. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 395–96 (1971). And although the Fourth Amendment says nothing about the rules of evidence in criminal trials, the Court created the exclusionary rule to "remov[e] the incentive to disregard" its ban on unreasonable searches. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (citation omitted). *Ryder* bears the hallmarks of *Bivens* and *Mapp*. It even discussed the exclusionary rule. The Court noted that its cases have rejected that rule when the rule's costs (allowing criminals to go free) exceeded its benefits (incentivizing officers to obey the law). *See Ryder*, 515 U.S. at 185–86 (citing *United States v. Leon*, 468 U.S. 897 (1984)). Analogizing to this approach, *Ryder* foresaw no ill effects from granting an Appointments Clause remedy on direct appeal and suggested that this appellate relief would create "incentives to make such challenges." *Id.* at 186.

Although *Ryder* might mesh well with *Mapp*, the Court in recent years has treated these types of judge-made innovations with a healthy dose of skepticism. *See Hernandez*, 140 S. Ct. at 747. The creation of remedies amounts to "lawmaking" that must balance the benefits of any remedy against its costs. *Id.* at 741–42. Yet the Constitution reserves this task to Congress, not the courts. *See id.* As a result, the Court has all but held that *Bivens* was wrong and has refused to extend it to any other constitutional right for some 40 years. *See id.* at 742–43 (citing cases); *Abbasi*, 137 S. Ct. at 1856–58. It has also continued to narrow the scope of the exclusionary rule, acknowledging that it is a "judicially created remedy" that must be applied cautiously only in cases of clear police misconduct. *Davis*, 564 U.S. at 238 (citation omitted); *see, e.g.*, *Utah v. Strieff*, 579 U.S. 232, 237–38, 241 (2016); *Herring v. United States*, 555 U.S. 135, 140–44 (2009).

What do these principles mean for the issue that confronts us? I agree that *Ryder* and *Lucia* leave open whether a lawful judge at a "new 'hearing'" may rely on evidence developed at the invalid hearing or on orders entered by the invalid judge. *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder*, 515 U.S. at 182–83). To resolve the ambiguity, I would read the cases in a way that best comports with the Constitution's "original meaning," *Aurelius*, 140 S. Ct. at 1659, and with the Court's recent guidance to act cautiously before expanding judge-made remedies, *Hernandez*, 140 S. Ct. at 747. When analyzed in that fashion, the FDIC's remedy more than sufficed.

The Appointments Clause does not compel Calcutt's conclusion that a valid judge must ignore all prior proceedings before an invalid one. If anything, the clause itself requires *no* remedy. The de facto officer doctrine broadly applied to claims like Calcutt's that an officer had been appointed by the wrong person. *See* Constantineau, *supra*, §§ 182–86, at 248–55. An English judge who sat on the first case to enforce the doctrine in 1431 "apparently recognized" its application in this setting. *Id.* § 182, at 248. American courts routinely relied on it when an officer was unconstitutionally appointed by, say, the governor rather than the legislature, *see Carroll*, 38 Conn. at 474 (discussing *Taylor*, 5 S.C.L. at 516–17), or the mayor rather than the governor, *see Strang*, 21 Ohio St. at 615–19. And if the Constitution requires some way in which to dispute an officer's right to an office, Congress left open the traditional (if narrow) quo warranto remedy. D.C. Code § 16-3503; *cf.* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1366–67 (1953).

Ryder and *Lucia* thus must rest on a power to create judge-made remedies for constitutional violations. But we must act with caution when asked to expand these remedies because the weighing of the costs and benefits amounts to a legislative task, not a judicial one. *See Abbasi*, 137 S. Ct. at 1856–57. On the benefits side, Calcutt's remedy would certainly promote the purposes of the Appointments Clause. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021). But no provision—not even a constitutional one—"pursues its purposes at all costs." *Hernandez*, 140 S. Ct. at 741–42 (citation omitted). And Calcutt's remedy comes with its burdens too. It would add to the "administrative costs" already associated with the new hearings. *Abbasi*, 137 S. Ct. at 1856. More fundamentally, courts long recognized that permitting parties to challenge an officer's validity *at all* in appeals of the officer's actions could create "endless confusion[.]" *Norton*, 118 U.S. at 441–42; *see* Constantineau, *supra*, § 4, at 7. That is why they channeled these challenges into special suits that would oust officers only *prospectively*, not into appeals that would reverse their actions *retrospectively*. *See* Constantineau, *supra*, § 451, at 635–36. I see no judicial mode of analysis that can resolve this legislative weighing of interests.

All told, the Court's cautious approach to judge-made remedies comports with traditional remedial practice governing challenges to the validity of an officer's appointment. *See Hernandez*, 140 S. Ct. at 742. I thus would not read *Ryder* and *Lucia* broadly to compel administrative judges to disregard all that occurred at a prior hearing. I would instead read them literally to compel a new hearing before a properly appointed judge. Calcutt got just that.

III. Statutory Claims

In my view, Calcutt's statutory claims fare better. The statute allowing the FDIC to bar bankers from the industry requires it to prove three things: that a banker has engaged in a listed kind of misconduct, that the misconduct will harm the bank (or benefit the banker), and that the banker acted with a culpable state of mind. 12 U.S.C. § 1818(e)(1)(A)–(C). The statute allowing the FDIC to impose penalties largely covers the same terrain. *Id.* § 1818(i)(2)(B). Here, Calcutt argues that the FDIC failed to prove the "misconduct" and "effect" elements. I agree that the FDIC misread these provisions and would remand for it to reconsider the case under the proper law.

A. Misconduct

To remove Calcutt from the Bank, the FDIC first must prove that he engaged in one of three types of misconduct. *Id.* § 1818(e)(1)(A). Specifically, the statute allows the FDIC to remove an "institution-affiliated party" if that the party "has, directly or indirectly":

> (i) violated—
>
> > (I) any law or regulation;
> >
> > (II) any cease-and-desist order which has become final;
> >
> > (III) any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or request by such depository institution or institution-affiliated party; or
> >
> > (IV) any written agreement between such depository institution and such agency;
>
> (ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or
>
> (iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty[.]

Id. The FDIC found that Calcutt violated the second and third clauses by engaging in "unsafe or unsound practice[s]" and committing "breach[es]" of his "fiduciary duty." App. 18–26. (It imposed the $125,000 penalty for the same reasons. *See* App. 35.)

1. *Unsafe or Unsound Practice*. The statute gives the FDIC the power to ban a banker from the profession if the banker has "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution[.]" 12 U.S.C. § 1818(e)(1)(A)(ii). Regulators have long defined the key phrase—"unsafe or unsound practice"—using a two-part test that courts have generally accepted. *See First Nat'l Bank of Eden v. Dep't of Treasury*, 568 F.2d 610, 611 n.2 (8th Cir. 1978). Under this test, an act qualifies as an unsafe or unsound practice if it conflicts with "generally accepted standards of prudent operation" and creates an "abnormal risk of loss or harm" to the bank. App. 18 (quoting *Michael v. FDIC*, 687 F.3d 337, 352 (7th Cir. 2012)).

This test was not intuitive to me from a review of the text, so I looked into its origins. One court transparently identified its source: "Because the statute itself does not define an unsafe or unsound practice, courts have sought help in the legislative history." *In re Seidman*, 37 F.3d 911, 926 (3d Cir. 1994). The Fifth Circuit started down this path. *See Gulf Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 651 F.2d 259, 263–65 (5th Cir. 1981). Rather than seek out the ordinary meaning of "unsafe or unsound practice," it jumped to a "lively" debate in the congressional record. *Id.* at 263. During this debate, the court noted, a few legislators had treated as "authoritative" a definition proposed by an agency chairman. *Id.* at 264. Under the chairman's view, the phrase covered "any action" that "is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds." *Id.* (citation omitted). The court accepted his view as law. *Id.* at 264–65.

This straight-from-the-legislative-history test has spread widely since. The few courts with reasoned analysis regurgitate the same bit of legislative history. *Seidman*, 37 F.3d at 926. Most others, though, simply cite other precedent for this test without considering its origins. *See Frontier State Bank v. FDIC*, 702 F.3d 588, 604 (10th Cir. 2012); *Michael*, 687 F.3d at 352; *Landry v. FDIC*, 204 F.3d 1125, 1138 (D.C. Cir. 2000); *Simpson*, 29 F.3d at 1425; *Doolittle v. Nat'l Credit Union Ass'n*, 992 F.2d 1531, 1538 (11th Cir. 1993); *Nw. Nat'l Bank v. Dep't of Treasury*, 917 F.2d 1111, 1115 (8th Cir. 1990).

I am troubled by this approach. The test springs from a mode of interpretation that no Justice on the Supreme Court would endorse today. In recent decades, the Court has given us clear marching orders: the answer to an interpretive question begins by identifying the ordinary meaning of Congress's words when read against their context and structure. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019); *Ross v. Blake*, 578 U.S. 632, 638 (2016). This "first canon" is also the "last" if the text has a clear meaning. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Here, however, courts have viewed the legislative history as both the beginning and the end of the analysis. *Gulf Federal* even claimed that the agency chairman's proposed test had been "adopted in both Houses"—by which the court meant that it had been read into the legislative record. 651 F.2d at 264 (citation omitted). "But legislative history is not the law." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). And the Court has not been kind to other tests that developed in this manner. *See, e.g.*, *Food Mktg.*, 139 S. Ct. at 2364.

I am also troubled by this approach because courts have chosen it to create a "flexible" statute allowing regulators to address "changing business problems[.]" *Seidman*, 37 F.3d at 927. What does this even mean? If an agency condones a banker's "new business model," the agency can constrict the statute to give the banker a pass? *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725–26 (2017). But if the agency disapproves of a competitor's practice, it can expand the statute to punish the competitor? This accordion-like view of the rule of law has no place in our constitutional order—one in which the President lacks any "dispensing" prerogative. *Cf. Clark v. Martinez*, 543 U.S. 371, 382 (2005); McConnell, *supra*, at 115–19. If anything, this view has things backwards. This statute can deprive citizens of their property and livelihoods. So it would better align with our interpretive traditions if we construed the phrase "strictly" rather than flexibly. 1 Blackstone, *supra*, *88; *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). After all, the rule of lenity (the rule that we resolve ambiguities against the government) historically applied not just to criminal laws, but also to all laws considered "penal"—"that is, laws inflicting any form of punishment" like a civil penalty. *Wooden v. United States*, 142 S. Ct. 1063, 1086 n.5 (2022) (Gorsuch, J., concurring in the judgment). This statute fits that bill. *See Proffitt v. FDIC*, 200 F.3d 855, 860–62 (D.C. Cir. 2000). At the least, courts should give a phrase that affects core private rights its ordinary meaning—not a malleable one.

How might an ordinary banker interpret the phrase? The legislative history reaches any "imprudent act." *Seidman*, 37 F.3d at 932; *see Gulf Federal*, 651 F.2d at 264. Yet this definition does not adequately account for two parts of the actual text. For starters, the statute uses the word "practice," not "act." 12 U.S.C. § 1818(e)(1)(A)(ii). Those words mean different things. If an otherwise conscientious banker makes a single imprudent loan to a couple down on their luck, the banker might have engaged in an unsound "act." But nobody would say that the banker has made it a "practice" of issuing bad loans after just the one. This word includes a connotation of repetition (of *habitual* acts). The banker must have a habit of making bad loans (or, at the least, the bank must have that habit and the banker must "participate[] in" it). *Id.*; *cf. Nw. Nat'l Bank*, 917 F.2d at 1115. That is because a "practice" is a "habitual or customary performance," *American College Dictionary* 951 (1970), or a "habitual or customary action or way of doing something," *American Heritage Dictionary of the English Language* 1028 (1973).

The statute itself contemplates this distinction. One clause bars bankers from engaging in "any unsafe or unsound practice[.]" 12 U.S.C. § 1818(e)(1)(A)(ii). The next bars them from engaging in "any *act*, *omission*, or *practice*" that breaches their fiduciary duties. *Id.* § 1818(e)(1)(A)(iii) (emphases added). We presume that Congress meant different things when it used different words in clauses that sit right next to each other. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018). So even a single *act* or *omission* "that breaches [a] fiduciary duty" suffices for punishment, but only a *habit* of "unsafe or unsound" actions does.

Next, the statute does not cover every unsafe or unsound practice *in the abstract*. Rather, the practice must be "in connection with" a bank. 12 U.S.C. § 1818(e)(1)(A)(ii). The Supreme Court has recognized that this phrase has an "indeterminat[e]" scope. *Maracich v. Spears*, 570 U.S. 48, 59–60 (2013); *see Mont v. United States*, 139 S. Ct. 1826, 1832 (2019). If we read it broadly here, it could cover practices with the remotest of relations to banking—such as a banker's decision to speed to work every morning. *See Maracich*, 570 U.S. at 59. One regulator even thought that the phrase covered a decision to seek judicial review of the regulator's *own* regulatory decision. *Johnson v. Off. of Thrift Supervision*, 81 F.3d 195, 202 (D.C. Cir. 1996). Could Calcutt's decision to file a petition in this court also be an "unsound practice" because we reject his appeal? I would not read the statute this broadly. Courts instead must interpret the clause to adopt the "limiting principle" that best comports with the statute's context and structure. *See Maracich*, 570 U.S. at 59–60; *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 387–91 (2014).

For the reasons that a D.C. Circuit decision has explained, I would read this clause to cover only "unsafe or unsound *banking* practices." *Grant Thornton, LLP v. Off. of the Comptroller of the Currency*, 514 F.3d 1328, 1332–33 (D.C. Cir. 2008). This definition "harmonizes" this subsection with the rest of § 1818. *Id.* at 1332. The section includes several other provisions that regulate unsafe or unsound practices "in conducting the business" of a bank, including one permitting the FDIC to issue cease-and-desist orders. 12 U.S.C. § 1818(b)(1). It would be odd to permit a limited remedy (a cease-and-desist order) only for unsound banking practices but a severe remedy (removal from a bank) for any unsound practice with any connection to the bank. And a definition that covered only "banking" practices would exclude, for example, an outside auditor's deficient audit, *see Grant Thornton*, 514 F.3d at 1332–33, or a decision to seek judicial review.

All of this said, courts that apply a broad legislative-history test have recognized that their reading could lead to "open-ended supervision." *Gulf Fed.*, 651 F.2d at 265. So they compensate by adding a limiting principle that I do not necessarily see in the text either. They have read the phrase "unsafe or unsound practice" to require that an action pose a risk of *extreme* harm—one that threatens the bank's "financial stability," *Seidman*, 37 F.3d at 928, or "integrity," *Johnson*, 81 F.3d at 204 (quoting *Gulf Fed.*, 651 F.2d at 267). An "unsafe" practice (one that exposes the bank to "danger or risk") may well require a risk of *some* harm. 2 *Oxford Universal Dictionary* 2312 (3d ed. 1968). But the statute also covers an "unsound" practice in the disjunctive (a practice that is "not based on proven practice, established procedure, or practical knowledge"). *Webster's New International Dictionary* 2511 (3d ed. 1966). Perhaps the entire phrase "unsafe or unsound" may be one of those "doublets" that Congress uses to convey a single idea (like "aid and abet" or "cease and desist"). *Doe v. Boland*, 698 F.3d 877, 881 (6th Cir. 2012) (citing *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635–36 (2012)). Even still, I would not think that this text requires the risk of financial collapse. A loan officer at a massive bank who has followed a consistent pattern of making bad loans may have engaged in an "unsafe or unsound practice" even if the banker's portfolio cannot threaten the bank's existence.

Be that as it may, I would save the required financial-risk level for another appeal. When sanctioning Calcutt here, the FDIC did not apply my reading that the statute requires unsafe or unsound *banking practices*. I would remand for it to do so in the first instance. Most notably, the FDIC nowhere indicated that it must identify a banking "practice" as I read the phrase—i.e., a "habitual or customary action[.]" *American Heritage*, *supra*, at 1028. To the contrary, as Calcutt notes, the vast majority of its findings relied on a *single* loan—the Bedrock Transaction. It concluded, among other things, that Calcutt violated the Bank's lending policies and engaged in imprudent lending by approving that transaction. App. 19–21. It is not clear that Calcutt's actions with respect to this loan can rise to the level of an unsafe or unsound "practice."

This fact contrasts Calcutt's case with those that the FDIC cited—which involved a pattern of bad loans. *See, e.g.*, *First State Bank of Wayne Cnty. v. FDIC*, 770 F.2d 81, 82–83 (6th Cir. 1985).

2. *Breach of Fiduciary Duty*. The statute also gives the FDIC the authority to ban a banker from the profession if the banker has "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty[.]" 12 U.S.C. § 1818(e)(1)(A)(iii). The parties' briefing on this portion of the statute raises more questions in my mind than it answers.

Start with a choice-of-law question. Citing *Atherton v. FDIC*, 519 U.S. 213 (1997), my colleagues and Calcutt suggest that the relevant state's corporate-governance law supplies the rule of decision for determining whether a banker has breached a "fiduciary duty" within the meaning of § 1818(e)(1)(A)(iii). (The FDIC does not enlighten us with its position on this choice-of-law subject.) I am skeptical that their reading is correct. The relevant portion of *Atherton* that they cite was not interpreting federal statutory language like the "fiduciary duty" text in § 1818(e). It was rejecting the claim that *purely* federal common law should supply the "corporate governance standards" for federally chartered entities. *See* 519 U.S. at 217–26. Here, by contrast, we must determine the proper "interpretation of a federal statute," not whether we may create federal common law. *Id.* at 218. And when a federal statute uses a common-law term of art, the Supreme Court generally interprets its language to adopt a uniform standard of conduct for all 50 states based on generic common-law concepts. *See, e.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754–55 (1998); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–41 (1989). I might take that approach here. It would likely mean that we should interpret this phrase to codify the well-known duties of care and loyalty as they existed in this corporate-governance context at the time that Congress adopted this language in 1966. *See, e.g.*, Harry G. Henn, *Handbook of the Law of Corporations and Other Business Enterprises* 362–70 (1961); William J. Grange & Thomas C. Woodbury, *Corporation Law: Operating Procedures for Officers and Directors* § 268, at 286–87, § 311, at 325–26 (2d ed. 1964); Dow Votaw, *Modern Corporations* 63–64 (1965); Harold Koontz, *The Board of Directors and Effective Management* 84–86 (1967).

Turn to the substantive standards. The Board held that Calcutt had breached his duty of care to the Bank by acting incompetently in his approval of the Bedrock Transaction and in his failure to manage the Nielson Loans. App. 23–24. But from my review of the FDIC's order, I cannot even determine the substantive standards of conduct that it applied. Its order did not use the words "negligence" or "gross negligence." And for decades, courts have debated which of these standards the statute incorporates. Julie Andersen Hill & Douglas K. Moll, *The Duty of Care of Bank Directors and Officers*, 68 Ala. L. Rev. 965, 986–92 (2017). The Board also neglected to mention the traditional "business-judgment rule," the application of which is also contested. Patricia A. McCoy, *A Political Economy of the Business Judgment Rule in Banking: Implications for Corporate Law*, 47 Case W. Res. L. Rev. 1, 22–60 (1996). Yet another layer in this morass is that in the 1980s, Congress also adopted a "gross negligence" floor to govern the conduct of officers and directors in a related context. 12 U.S.C. § 1821(k); *see Atherton*, 519 U.S. at 226–28. That separate section's implications for § 1818(e) are unclear.

Yet I would not authoritatively answer these choice-of-law or substantive questions now. As I explain below, I would remand to allow the FDIC to reconsider whether Calcutt's misconduct was the cause of any of the claimed harms. On remand, I would give the FDIC a chance to clarify its views on these legal questions about the meaning of this fiduciary-duty statute.

B. Causation

The statute next requires the FDIC to prove either that Calcutt's misconduct had the potential to harm the Bank or that Calcutt received a benefit from that misconduct. *See* 12 U.S.C. § 1818(e)(1)(B). This "effect" subparagraph provides in full:

> (B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)—
>
> (i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;
>
> (ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or
>
> (iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach[.]

Id. The specific civil-penalty provisions on which the FDIC relied required similar "effects." *See id.* § 1818(i)(2)(B)(ii)(II)–(III); App. 34–35.

The FDIC misinterpreted the causation element in this subparagraph. To show why, I start with the causation basics. The common law has long recognized two types of causation: factual (or "but for") causation and legal (or "proximate") causation. *See* William L. Prosser, *Handbook of the Law of Torts* §§ 45–46, at 311, 321–22 (1941). But-for causation creates a simple rule. As its name suggests, it requires a plaintiff to show that an injury would not have occurred "but for" the defendant's wrongful conduct. *See Burrage v. United States*, 571 U.S. 204, 211–12 (2014); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013). Suppose, for example, that after a neighbor's dam breaks and floods a plaintiff's property, the plaintiff sues the neighbor for building the dam negligently. *See* Restatement (Second) of Torts § 432 illus. 2 (Am. L. Inst. 1965). But-for causation requires a court to ask whether the plaintiff would have suffered this injury (the flooding) in a counterfactual world in which the neighbor did not commit the wrongful act (the negligent construction). *See id.* § 432(1) & cmt. a. And if a once-in-a-century storm would have caused the flooding even if the neighbor had built the dam to perfection, the negligent construction did not cause the harm. *See id.* § 432 illus. 2; *Burrage*, 571 U.S. at 211–12.

Proximate causation arose from the premise that a factual-cause test alone would lead to excessive liability. Prosser, *supra*, § 45, at 312. Courts recognized that, "[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond." *Id.* They thus adopted "proximate cause" rules to cut off liability even if a defendant was a but-for cause of harm. *Holmes v. Secs. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). As one example, a defendant's conduct (say, its failure to keep a ship docked) may set in motion a chain of events that leads another party to negligently cause an injury (say, the captain incompetently runs the ship aground). *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 832–34 (1996). Under a superseding-cause test, courts will not hold the defendant liable if the other party's negligence was unforeseeable. *Id.* at 837. As another example, a defendant's misconduct (say, stock manipulation) may directly harm one person (a stockbroker who goes bankrupt) and indirectly harm third parties (the stockbroker's creditors).

See Holmes, 503 U.S. at 262–63. Under a directness test, courts will not allow the third parties to recover. *Id.* at 271–72.

These common-law rules have significance in this case. The Supreme Court presumes that Congress enacts statutory text with common-law concepts in mind. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014). It thus has long read common-law causation rules into statutes that use causal language like "because of" or "results from." *See Burrage*, 571 U.S. at 213–14; *Nassar*, 570 U.S. at 350–52. Congress used one such phrase ("by reason of") here. The FDIC must prove that the Bank suffered (or will likely suffer) a loss or that Calcutt received a benefit "by reason of" his misconduct. 12 U.S.C. § 1818(e)(1)(B). So I would interpret this statute to require both but-for and proximate causation. *See Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1015 (2020); *Holmes*, 503 U.S. at 265–67.

But the FDIC has not adopted these causation rules. Its enforcement orders have all but ignored but-for cause. In fact, I have found only one such order that even used this phrase. *See In re Adams*, 1997 WL 805273, at *5 (F.D.I.C. Nov. 12, 1997). And it suggested that a "'but for' relationship" was *not* required. *Id.* (quoting *ABKCO Music, Inc. v. Harrisongs Music Ltd.*, 772 F.2d 988, 995–96 (2d Cir. 1983)). The FDIC also failed to mention but-for cause in this case. It simply indicated: "An actual loss is not required; a potential loss is sufficient so long as the risk of loss to the Bank was 'reasonably foreseeable' to someone in [Calcutt's] position." App. 26 (citations omitted). The FDIC is correct that, unlike most statutes imposing liability for harm, this statute does not require a past loss. It also applies if a bank "will probably suffer" a loss in the future "by reason of" the banker's misconduct. 12 U.S.C. § 1818(e)(1)(B)(i). But it incorporates but-for cause all the same. For a past loss, the FDIC must show that it "would not have occurred without" the misconduct. *Nassar*, 570 U.S. at 347 (citation omitted). For a future loss, the FDIC must show that the probability of loss would not have occurred without that misconduct. *See id.* The FDIC's jurisprudence leaves no hint that it adheres to these first-year torts-class concepts.

The FDIC's legal error is all the more pronounced for proximate causation. For years, it has rejected outright any need to prove this causation. *See Adams*, 1997 WL 802573, at *5; *In re*

***, 1985 WL 303871, at *114 (F.D.I.C. Aug. 19, 1985). It did so in this case too, noting that "an individual respondent need not be the proximate cause of the harm to be held liable[.]" App. 26–27. Confusingly, however, the FDIC suggested that the loss needs to be "foreseeable." App. 26, 31. Foreseeability is one component of the proximate-causation requirement that the FDIC said it was rejecting. *See Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 12 (2010). If the FDIC meant to imply that the statute incorporates *only* proximate cause's foreseeability element, it still erred. Proximate causation contains a group of concepts other than foreseeability. *See id.* So the Supreme Court has already rejected this type of argument that a federal statute contains only a foreseeability test. *See Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1305–06 (2017).

*

Maybe we could overlook the FDIC's failure to identify the governing causation law if it correctly applied that law to Calcutt. But it did no such thing. The FDIC held Calcutt responsible for three injuries to the Bank and one benefit to him. The Bank incurred $6.443 million in charge-offs from the Nielson Loans. App. 27–29. It incurred a $30,000 charge-off from the $760,000 Bedrock Transaction. App. 27. And it paid its lawyers and accountants for work related to these loans. App. 29–31. Calcutt lastly received dividends from the Bank's holding company despite the loans' poor condition. App. 31–32. None of these "effects" sufficed.

As an initial matter, I agree with my colleagues that the FDIC failed to explain why the statute should even cover fees paid to lawyers or accountants. The statute reaches "financial loss or other damage" from Calcutt's misconduct. 12 U.S.C. § 1818(e)(1)(B)(i). It would be unusual to describe the money paid for these services as "financial loss" or "other damage." One does not normally use such terms to describe a payment of money for something of commensurate value. *Cf. Summit Valley Indus. Inc. v. Loc. 112, United Brotherhood of Carpenters & Joiners of Am.*, 456 U.S. 717, 722–23 (1982). The payment is more naturally described as an "expense" or "cost." Our country's litigation traditions reinforce this view. We have long followed the "American Rule" in which a plaintiff's legal costs are not recoverable "damages" even if the defendant's conduct is their but-for cause. *See Alyeska Pipeline Serv. Co.*

v. Wilderness Soc'y, 421 U.S. 240, 249–50 (1975) (citing *Arcambel v. Wiseman*, 3 U.S. 306 (1796)). When a statute allows a plaintiff to recover "damages," then, courts do not read that phrase to cover attorney's fees—or other expert fees for that matter. *See Summit Valley*, 456 U.S. at 722–23; *cf. W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88–92 (1991). And the Court has stuck with this rule even if a law uses a phrase ("expenses") that is "capacious enough to include" these fees. *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 372 (2019). So I would not read the text "loss" or "damage" to cover them here.

That leaves the other three "effects." The FDIC did not apply basic causation rules to any of them. Most tellingly, the FDIC held Calcutt responsible for all $6.443 million in charge-offs on the $38 million in Nielson Loans—that is, for the entire loss. App. 27–28; *see id.* at 6–7. But these loans were underwater in the aftermath of the Great Recession *before* Calcutt committed most of the identified misconduct. App. 625–26. As with my hypothetical about the negligently made dam, then, the FDIC needed to ask a "counterfactual" question: How much in charge-offs would the Bank have incurred if Calcutt had not engaged in that misconduct? *Comcast*, 140 S. Ct. at 1015. Suppose that the (hopefully) once-in-a-century recession would have caused $7 million in charge-offs if the Bank started collection efforts immediately because of the collapsed real-estate market. If so, a decision to enter into the Bedrock Transaction would have helped (not harmed) the Bank. And Calcutt's misconduct (for example, the failure to undertake the usual underwriting efforts, *see* App. 19) could not be described as a but-for cause of loss. I see nothing in the record on appeal that would help answer this critical but-for question, confirming that the FDIC did not even ask it.

The same error underlies the FDIC's decision to hold Calcutt liable for the $30,000 charge-off for the Bedrock Transaction. App. 27. The FDIC did not consider the "counterfactual" of what would have occurred if Calcutt had not engaged in misconduct. *Comcast*, 140 S. Ct. at 1015. As a generic matter, the Bank suffered a total of $6.473 million in charge-offs on all Nielson Loans (including the Bedrock Transaction) and the FDIC needed to consider the amount of likely charge-offs without this transaction. Would it have lost more? Less? The FDIC did not ask these questions. More granularly, Calcutt told the FDIC that the administrative law judge had erred "by failing to tether the $30,000 charge-off (and other actual and potential losses) to specific acts of misconduct[.]" App. 27. The judge found, for instance, that Calcutt breached his fiduciary duty of candor to the Bank's directors by failing to seek their preapproval for the Bedrock Transaction. App. 25–26. Suppose the directors would have approved the transaction even if he had done so. How could this specific misconduct have caused this harm? The FDIC responded that it was "unpersuaded" by this causation argument because the Bedrock Transaction was a "main focus" of the hearing and the judge catalogued Calcutt's many misdeeds in approving it. App. 27. This (non)response said nothing about causation—an element distinct from misconduct.

Both but-for and proximate-cause problems undergird the FDIC's decision that Calcutt benefited from his misconduct. He was the largest shareholder of the Bank's holding company, and the FDIC held that his misconduct allowed him to obtain a dividend from this company. App. 31–32. Its conclusion rested on the administrative law judge's finding that the Bank paid its own shareholder (the holding company) a $462,950 dividend in mid-2011 and that the FDIC would not have approved this payment (to the holding company) if it had known that the Nielson Loans were not performing. App. 287, 751. As a matter of but-for causation, the FDIC did not ask whether the holding company would have paid its shareholders the same dividend even if the FDIC had known of the Nielson Loans' true condition. *See Comcast*, 140 S. Ct. at 1015. It cites no testimony from the company's directors about what they would have done. And Calcutt testified that the holding company had sufficient assets to pay the dividend even if the Bank had paid it nothing. A580.

As a matter of proximate causation, the FDIC failed to consider a "directness" issue. If "by reason of" incorporates usual proximate-cause rules, it would require that Calcutt *directly* benefit from his misconduct. Under the FDIC's theory, though, the holding company was the direct beneficiary that received the dividend; Calcutt was an indirect beneficiary as a shareholder of that separate company. Is this a sufficiently "direct" benefit (analogous to a larger salary)? "The general tendency" in the law has been "not to go beyond the first step." *Bank of Am.*, 137 S. Ct. at 1306 (citation omitted). And this theory potentially rests on the "independent" decision of the holding company. *Hemi*, 559 U.S. at 15. But I would leave this question for the FDIC.

All told, I would remand for the FDIC—the fact finder—to apply the correct causation rules to the two charge-offs and the dividend payment in the first instance. My colleagues recognize many of the FDIC's legal errors but say there is no need to remand. I disagree. They first invoke the deferential substantial-evidence test. But that test governs our review of the agency's factual findings. *See Dickinson*, 527 U.S. at 162. I do not quibble with those. I take issue with the FDIC's failure to follow the proper causation law. The substantial-evidence test has nothing to say on that subject. And even the FDIC does not claim that we should defer to its legal views. *See Grant Thornton*, 514 F.3d at 1331; *cf. Epic*, 138 S. Ct. at 1629–30.

If anything, my colleagues' analysis runs afoul of basic administrative-law principles. When an agency's decision rests on a collapsed legal foundation, we cannot affirm the decision on the ground that the agency might have reached the right outcome under a correct legal view. We must let the agency apply the proper law in the first instance. *See Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943); Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199, 209–10. But my colleagues all but find facts by applying their view of the law to the record. Recall, for example, that the FDIC held Calcutt liable for all $6.443 million in charge-offs on the Nielson Loans—a finding that leaves no doubt that the agency erred. My colleagues do not defend this finding. They nevertheless say that the FDIC "could have" found that Calcutt's misconduct caused some *unquantified* percentage of the losses. Maj. Op. 48. But this "judicial judgment cannot be made to do service for an administrative judgment." *Chenery*, 318 U.S. at 88.

Even if we could now find Calcutt liable for an (unknown) loss amount on a good-enough-for-government-work approach, I would still remand. The statute says that the FDIC "may" seek to remove a banker—not that it *must* do so—when the other requirements are met. 12 U.S.C. § 1818(e)(1). It thus leaves the FDIC with discretion over whether to bar Calcutt "from working in his chosen profession for the remainder of his career." *Doolittle*, 992 F.2d at 1538. The amount of harm properly chargeable to Calcutt should influence its discretionary decision. The FDIC found removal proper after holding Calcutt responsible for well over $8 million (including professional fees and charge-offs). If, on remand, the FDIC were to find that Calcutt's conduct caused a tiny fraction of this harm, it might reconsider its "draconian" sanction. *Id.* In fact, this logic led the Eleventh Circuit to remand a similar removal order so that a related agency could reconsider the order after the court jettisoned part of its reasoning. *Id.* Even a case that my colleagues cite issued this type of remand when it upheld only part of the FDIC's order—given the "extraordinary" nature of the sanction. *De la Fuente v. FDIC*, 332 F.3d 1208, 1227 (9th Cir. 2003). Because the FDIC's order is riddled with legal error, I find it inexplicable that we are not doing so here.

* * *

For these reasons, I respectfully dissent.

No. 20-4303

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 05, 2021
DEBORAH S. HUNT, Clerk

HARRY C. CALCUTT, III,)
)
Petitioner,)
)
v.) ORDER
)
FEDERAL DEPOSIT INSURANCE CORPORATION,)
)
Respondent.)

Before: GUY, SILER, and GRIFFIN, Circuit Judges.

Harry C. Calcutt III, petitions for review of an order of removal and prohibition issued by the Federal Deposit Insurance Corporation ("FDIC") Board of Directors ("Board") adopting the Administrative Law Judge's ("ALJ") finding that Calcutt engaged in unsafe or unsound banking practices and breaching his fiduciary duties and prohibiting him from participating in the banking industry, beginning January 14, 2021. He moves to stay enforcement of the order pending the disposition of his petition.

The FDIC objects to a stay because Calcutt did not first seek relief before it. "A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order." Fed. R. App. P. 18(a)(1). A motion to stay may be made to this court if the movant can "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." Fed. R. App. P. 18(a)(2)(A).

Calcutt points to the request for a stay made to the FDIC in his exceptions to the ALJ's Recommended Order and argues that it would be "impracticable and abusive" to require him to seek a stay from the FDIC now. Although this court has not addressed whether a stay request included in the exceptions would satisfy Rule 18(a), the FDIC maintains that that it would not. The FDIC's regulations limit the content of exceptions "to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception." 12 C.F.R. § 308.39(c)(1). But the FDIC "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." 12 C.F.R. § 308.41. Here, Calcutt requested that "if the Board determines to issue an order of prohibition, it should stay that order pending judicial review. See 12 C.F.R. § 308.41." We need not decide whether this would satisfy Rule 18(a), however, because it is not a jurisdictional bar and exceptions lie. Given that the FDIC acknowledges that it would not have opposed a stay if Calcutt had made such a motion, there is no benefit to having the FDIC consider the request first.

This court has the discretion to grant a stay pending consideration of a petition for review of an agency action. *In re EPA*, 803 F.3d 804, 806 (6th Cir. 2015) (order of stay), *vacated on other grounds sub nom. In re United States Dep't of Def.*, 713 F. App'x 489 (6th Cir. 2018); *see also Nken v. Holder*, 556 U.S. 418, 426 (2009). This court considers the following factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal" and "(2) the likelihood that the moving party will be irreparably harmed absent a stay," as well as "(3) the prospect that others will be harmed if the court grants the stay" and "(4) the public interest in granting the stay." *EPA*, 803 at 806 (quoting *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken*, 556 U.S. at 433–34. Ultimately, "[t]hese factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Griepentrog*, 945 F.2d at 153 (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

Calcutt alleges numerous legal and factual errors in the FDIC's decision with accompanying analysis and citation to authority. The FDIC summarily concludes that he is unlikely to succeed on the merits, but leaves the arguments largely uncontroverted. Calcutt also argues that he will be irreparably harmed if he is removed from the bank and prohibited from participating in the banking industry and that it will harm the bank he is presently working for. Finally, he asserts that the remaining factors do not weigh against him. The FDIC has "broad powers to identify potential risks and enjoin banks from engaging in unsafe and unsound practices." *In re Matter of Frontier State Bank Okla. City, Okla*, No. FDIC-07-288b, 2011 WL 2574394, at *3 (FDIC May 11, 2011). Here, however, the FDIC does not deny that the harms alleged by Calcutt are significant and affirmatively states 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." Under these circumstances, the risk of harm to others or the public interest is low.

Accordingly, the motion to stay is **GRANTED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of HARRY C. CALCUTT III, Individually and as an Institution- Affiliated Party of NORTHWESTERN BANK, TRAVERSE CITY, MICHIGAN (Insured State Nonmember Bank)	DECISION AND ORDER TO REMOVE AND PROHIBIT FROM FURTHER PARTICIPATION AND ASSESSMENT OF CIVIL MONEY PENALTIES FDIC-12-568e FDIC-13-115k

I. INTRODUCTION

This matter is before the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") following the issuance on April 3, 2020, of a Recommended Decision on Remand ("Recommended Decision" or "R.D.") by Administrative Law Judge Christopher B. McNeil ("ALJ"). The ALJ found that Respondent, Harry C. Calcutt III ("Respondent"), the President and Chief Executive Officer ("CEO") of Northwestern Bank ("Bank"), engaged in unsafe and unsound banking practices and breached his fiduciary duties to the Bank by increasing the Bank's exposure to its largest borrower relationship to enable the borrowers to make payments on their existing loans, while concealing the true nature of the transactions from the Bank's board of directors and its regulators.

The ALJ recommended that the Respondent be subject to an order of removal and prohibition pursuant to section 8(e) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(e), and be assessed a civil money penalty ("CMP") pursuant to section 8(i) of the FDI Act, 12 U.S.C. § 1818(i). For the following reasons, the Board affirms the Recommended Decision and issues against Respondent an Order of Removal and Prohibition and Order to Pay a CMP in the amount of $125,000.

II. REQUEST FOR ORAL ARGUMENT

After considering the Respondent's Request and the entire record in this matter, the Board finds that (1) the factual and legal arguments are fully set forth in the parties' voluminous submissions, (2) no benefit would be derived from oral argument, and (3) Respondent will not be prejudiced by the lack of oral argument. Therefore, the Board declines to exercise its discretion under section 308.40 of the FDIC's Rules (12 C.F.R. § 308.40) and denies Respondent's Request for Oral Argument.

III. PROCEDURAL HISTORY AND BACKGROUND

The FDIC initiated this action on August 20, 2013, when it issued against Respondent Harry C. Calcutt III, William Green, and Richard Jackson, individually, and as institution-affiliated parties of the Bank, a Notice of Intention to Remove From Office and Prohibit From Further Participation, and Notice of Assessment of Civil Money Penalties, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing ("Notice").[1] The charges in the Notice focused primarily on (a) the extension of additional credit to a group of entities controlled by the same family, the Nielsons, after the borrowers announced they were unable to service their existing loans; (b) the failure to obtain updated financial information from the Nielson entities before extending additional credit to them and renewing their maturing loans; (c) falsely stating in a loan write up for the Bank Board that a $760,000 loan to the Nielsons was to provide for working capital requirements when in fact it was to enable the Nielsons to make payments on their other loans; (d) violations of the Bank's loan policy which, among other things, requires Board approval for loans in excess of $750,000; (e) the release of cash-equivalent collateral to

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[1] William Green was a commercial loan officer at the Bank and Richard Jackson was an Executive Vice President and a member of the Bank's Board. R.D. at 11. In 2015, before the first hearing in this proceeding commenced, Messrs. Green and Jackson stipulated to the entry of Orders prohibiting them from engaging in regulated banking activity. *Id.* at 11-12. Mr. Jackson also consented to the assessment of a $75,000 civil money penalty. *Id.* at 12.

allow the Nielsons to make payments on their loans; (f) the active concealment of the impaired status of the Nielson loans from bank examiners; and (g) the filing of false Call Reports that failed to recognize impairment on any of the Nielsons' loans. R.D. at 13-118; Notice ¶¶ 7-107.[2] The Notice charged that Respondent engaged in unsafe or unsound banking practices and breached his fiduciary duties to the Bank. Notice ¶¶ 122-23. The Notice also alleged that, as a result, the Bank suffered financial loss or other damages, while Respondent received a financial gain or other benefit. *Id.* ¶¶ 124-25. The Notice further alleged that Respondent demonstrated personal dishonesty and a willful or continuing disregard for the safety or soundness of the Bank. *Id.* ¶ 126.

The FDIC sought to remove and prohibit Respondent from further participation in the banking industry. R.D. at 2; Notice at 2. The FDIC also sought to impose a CMP of $125,000 against Respondent pursuant to 12 U.S.C. § 1818(i). Notice at 27. On October 4, 2013, Respondent filed a timely answer to the Notice. On December 9, 2014, Respondent filed a First Amended Answer, and on May 22, 2019, he filed a Second Amended Answer ("Answer"), in which he denied or attempted to minimize many of the FDIC's material allegations and advanced seven affirmative defenses. R.D. at 2. For example, Respondent argued that any misconduct that occurred at the Bank was perpetrated by others without his knowledge and approval, that the hearing before ALJ McNeil did not comply with the Board's remand order, that this proceeding was unconstitutional because ALJ McNeil is shielded from removal by the President, and

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[2] The Board conducted an independent review of the record, including the underlying supporting evidentiary documents and transcripts. The Board cites to either the numbered pages in the R.D., to the exhibits ("FDIC Exh." or "JT. Exh." (joint exhibits)), the 2019 hearing transcripts ("Tr."), and the 2015 hearing transcripts ("2015 Tr."). Respondent's Exceptions to the R.D. are cited, respectively, as "R. Exceptions" and exhibits, as "Resp. Exh."

because the proceeding assertedly was barred by the statute of limitations and laches, among other contentions.

Following extensive discovery, an eight-day hearing was held in Grand Rapids, Michigan, between September 15 and 24, 2015. At the hearing, the ALJ received sworn testimony from more than 12 witnesses including Respondent, and thousands of pages of exhibits were admitted into evidence.

On June 6, 2017, the ALJ who was originally assigned to this matter, C. Richard Miserendino, issued a 102-page Recommended Decision. In 2018, before the Board issued a final decision, the case was stayed pending the Supreme Court's decision in *Lucia v. Securities & Exchange Commission*, 138 S. Ct. 2044 (2018), which challenged the Securities and Exchange Commission's ("SEC") reliance on ALJs who had not been appointed consistent with the Appointments Clause of the United States Constitution. After the Supreme Court held that the SEC's ALJs were "inferior officers" who required appointment under the Appointments Clause, 138 S. Ct. 2044, the FDIC Board adopted a Resolution appointing its ALJs and reassigned pending cases to newly appointed and different ALJs. *See* FDIC Resolution Seal No. 085172, Order in Pending Cases (July 19, 2018).

This case was reassigned to ALJ McNeil. *Id.* On March 19, 2019, ALJ McNeil issued an Order Regarding New Oral Hearing advising the parties that he would conduct a new hearing based on the transcripts from the original evidentiary hearing together with limited additional testimony from Respondent. March 19 Order, at 2. Respondent sought interlocutory review of the March 19 Order by the Board, arguing that *Lucia* entitled him to an entirely new proceeding beginning with a new or amended Notice, a new answer, new motions practice, new discovery, and a new evidentiary hearing. By Order entered June 20, 2019, the Board granted Respondent's motion for interlocutory review in part and remanded the matter with instructions to afford

Respondent "a new oral hearing on all issues that were considered at the prior hearing." The Board's June 20 Order denied Respondent's motion in all other respects, including his request that he be granted an entirely new proceeding.

In accordance with the June 20 Order, ALJ McNeil conducted a seven-day hearing between October 29 and November 6, 2019. Twelve witnesses, including Respondent, testified at the new hearing, and more than 1,000 pages of exhibits were admitted into evidence. On April 3, 2020, ALJ McNeil issued a Recommended Decision recommending that Respondent be subject to an order of removal and prohibition and assessing a CMP in the amount of $125,000. Respondent filed timely exceptions on August 3, 2020. Pursuant to 12 C.F.R. § 308.40(c)(2), the Executive Secretary on September 22, 2020, transmitted the record in the case to the Board for final decision.

IV. FACTS

The following discussion summarizes Respondent's misconduct as alleged in the Notice and corroborated by supporting testimonial and documentary evidence in the record.

A. General Background.

Northwestern Bank, of Traverse City, Michigan, was a state-chartered financial institution whose primary federal regulator was the FDIC. Answer ¶ 1. Respondent was President, CEO, and Chairman of the Board of Directors of the Bank from 2000 until 2013. R. Proposed FOF and Conclusions of Law at ¶¶ 3, 5. Respondent also was a member of the Bank's Senior Loan Committee ("SLC"). *Id.* ¶ 3. He retired from the Bank in 2013. *Id.*

Respondent described the Bank as having a "flat" management structure with 20 employees reporting directly to Respondent. R. Proposed FOF and Conclusions of Law at ¶ 5 (citing Tr. 249, 251, 296). Among them was Richard Jackson, who was an Executive Vice President and who served on the Bank's Board, the SLC, the Classified Assets Committee

("CAC"), and the Asset Liability Committee. R.D. at 13; JSOF ¶ 6. In addition, Michael Doherty was head of Credit Administration for commercial lending and was a member of the SLC. R. Proposed FOF and Conclusions of Law at ¶ 5 (citing Tr. 1193). William "Bill" Green served as a commercial loan officer for the Bank and was a member of the CAC. R.D. at 13; Answer ¶ 5.

B. Overview of the Bank's Relationship with the Nielson Family.

The claims against Respondent arise out of the Bank's lending relationship with a group of business entities controlled by the Nielson family ("Nielson Entities"). Answer ¶ 8. The Nielson Entities were centrally managed by one entity called Generations Management, LLC. Tr. at 930 (Nielson). Generations Management, in turn, was managed by Cori Nielson and Keith Nielson. R. Proposed FOF and Conclusions of Law at ¶ 6. Autumn Berden served as the CFO of Generations Management from 2008 to at least 2012. Tr. at 25, 35 (Berden). The Nielson Entities engaged in a variety of business activities, including holding vacant and developed real estate, engaging in commercial and residential property rentals and development, and holding oil and gas interests. Tr. at 29 (Berden).

As of August 2009, the Nielson Entities had $38 million in loans at the Bank ("Nielson Loans") and collectively represented the Bank's largest loan relationship. Answer ¶ 8. Any lending relationship that exceeds 25 percent of the Bank's Tier 1 capital is considered a concentration of credit. JT. Exh. 2, at 18. The Bank's Reports of Examination ("ROE") for 2008 and 2009 treated the Nielson Entities as a single borrower and identified the Nielson Loans as a concentration of credit because they exceeded the 25 percent threshold. JT. Exh. 2, at 20, 37-39. The 2010 ROE again identified the Nielson Loans as a concentration of credit because together they represented approximately 47 percent of the Bank's Tier 1 capital. FDIC Exh. 19, at 11.

A concentration of credit, like a large loan to a single borrower, has the potential to threaten the safety and soundness of a bank in the event the loan or loans stop performing. Tr. at 888 (Miessner); 2015 Tr. at 797-98 (Bird). The Nielson Loans, in addition to making up nearly half the Bank's Tier 1 capital, posed additional risks to the Bank. First, although the Bank's loan policy required the Bank to obtain personal guarantees from the borrowing entity's principals, the Bank did not require any members of the Nielson family to sign a personal guarantee. Tr. at 946-47 (Nielson); FDIC Exh. 86, at 5; JT. Exh. 2, at 36-37. Second, the Nielson Loans were not cross-collateralized, which precluded the Bank from using the collateral of one Nielson Entity to satisfy the obligation of another Nielson Entity in the event of a default. 2015 Tr. 1861-1863 (Calcutt).

C. The Nielson Entities Default in 2009.

In the second quarter of 2009, several of the Nielson Loans were past due, and a number of the Nielson Loans were due to mature on September 1, 2009. FDIC Exh. 3, at 70-77; Joint Stipulation ¶ 10. In the weeks leading up to the September 1 maturity date, representatives of the Nielsons advised the Bank that the Nielson Entities were seeing a slowdown in their respective businesses and would have trouble paying their loans for the foreseeable future. Tr. at 932-33 (Nielson). On August 10, 2009, Generations Management's CFO, Ms. Berden, informed the Bank that the Nielson Entities needed to restructure their loans. FDIC Exh. 3, at 78. When the Bank did not respond favorably to that overture, Cori Nielson sent an email to Respondent on August 21, 2009, advising that the Nielson Entities "will not make our September payment or any further payments until we have the necessary meetings and discussions to reach an overall restructuring of the relationship." Tr. at 936-37 (Nielson); FDIC Exh. 3, at 82. Ms. Nielson was not bluffing. All of the Nielson Entities stopped paying their loans on September 1, 2009. Tr. at 937 (Nielson).

During the fall of 2009, Ms. Nielson continued to communicate with the Bank about options for restructuring the Nielson Loans. Tr. at 938-42 (Nielson). Most of her communications were with Respondent, whom she understood to be the decision-maker for the Bank. Tr. at 934 (Nielson). In a September 21, 2009 email to Respondent, Ms. Nielson proposed that the Bank "suspend [the Nielson Entities'] monthly payments . . . until our cash flow improve[s]." Tr. at 941 (Nielson); FDIC Exh. 3, at 39. She explained that "[t]he real estate market had dropped so dramatically that a lot of our loans were underwater," with no equity left in them, and with little "potential for equity recovery in the near term." *Id.* Respondent testified that he thought the Nielsons merely were "posturing," and that they "did have the funds" to pay their loans. Tr. at 1296 (Calcutt). Yet, Respondent did not do anything to evaluate the financial condition of the Nielson Entities, Tr. at 1382 (Calcutt), and he in fact declined Ms. Nielson's offer to provide updated financial information for the Nielson Entities, Tr. at 938-39 (Nielson).

According to Ms. Nielson, a recurring theme during her discussions with Respondent about a restructuring of the Nielson Loans was that Respondent did not want the Bank to enter into any new agreements that might be "red flags" to the regulators, leading them to scrutinize the Bank's loan relationship with the Nielson Entities. Tr. at 934-35, 986-87 (Nielson). For example, Respondent expressed concern that any loan modifications that reduced the Nielson Entities' debt service would act as "red flags," as would a transaction in which the Bank accepted an assignment of deeds as satisfaction of certain of the loans. Tr. at 934, 947, 987 (Nielson).

D. The Bank Consummates the "Bedrock Transaction" With the Nielson Entities.

While negotiating with the Bank about a restructuring of their loans, none of the Nielson Entities was making loan payments. Joint Stipulation ¶¶ 10, 11. By mid-November 2009, many of the Nielson Loans were about to become 90 days past due; a milestone that had important ramifications for the Bank because it meant that the loans would be placed on non-accrual status. Joint Stipulation ¶ 11; Tr. at 1377 (Calcutt). Despite this pressure, the Bank and the Nielsons were unable to agree on a workout transaction until November 30, 2009, by which point most of the Nielson Loans had become 90 days past due and were placed on nonaccrual status. Joint Stipulation ¶ 17.

The workout consummated on November 30, 2009, referred to as the "Bedrock Transaction," had several components:

- **<u>Bedrock Loan</u>.** The Bank extended a new loan of $760,000 ("Bedrock Loan") to one of the Nielson Entities, Bedrock Holdings LLC. Answer ¶ 17. The Bedrock Loan was disbursed to Bedrock Holdings on December 1, 2009, after which the proceeds were transferred into deposit accounts that the Bank established for the Nielson Entities, with the understanding that the funds would be used to make payments on each of the Nielson Loans. Joint Stipulation ¶ 15. The Bank and the Nielsons believed that the funds from the Bedrock Loan would be sufficient to cover all loan payments for all of the Nielson Entities through April 2010. Answer ¶ 18.
- **<u>Release of Pillay Collateral</u>**. Pillay Trading LLC, a Nielson Entity, had previously granted the Bank a security interest in certain investment-trading funds when it obtained a loan from the Bank. As part of the Bedrock Transaction, the Bank agreed to release $600,000 of this collateral and bring current all of the past-due Nielson Loans. Answer ¶ 17.
- **<u>Renewal of All Past-Due Nielson Loans</u>**. The Bank granted renewals of all of the matured Nielson Loans. Joint Stipulation ¶ 20. One of the renewed loans was a $4,500,000 loan to Bedrock Holdings. Answer ¶ 30.

To carry out the Bedrock Transaction, the Bank released its interest in $600,000 of the Pillay Collateral, the funds from which were used to cure the arrearages on all past-due Nelson Loans. Joint Stipulation ¶¶ 13, 18. On December 1, 2009, the Nielson Loans were removed from the Bank's nonaccrual list. Joint Stipulation ¶ 19.

Respondent consented to the Bedrock Transaction and was aware of its purpose. Joint Stipulation ¶¶ 14, 16.

E. The Bedrock Transaction Was Tainted By Numerous Irregularities, Including Violations of the Bank's Commercial Loan Policy.

The Bank wholly disregarded its Commercial Loan Policy ("CLP") and safe and sound lending practices when it entered into the Bedrock Transaction. Section 13 of the CLP mandated that "all commercial loans are to be supported by a written analysis of the net income available to service the debt and by written evidence from the third parties supporting the collateral value of the security." FDIC Exh. 86, at 5. Even in the absence of a policy, Mr. Jackson acknowledged that prudent bankers "generally" would want to have financial statements, global cash flow analyses, and current appraisals before approving these loans. 2015 Tr. 1662-63 (Jackson). Yet, the Bank did not gather the required financial information from the Nielsons, nor did it perform the required cash flow analyses and collateral appraisals before funding the Bedrock Loan and releasing the Pillay Collateral. 2015 Tr. 1659-1661 (Jackson); Tr. at 829 (Miessner).

Section 3 of the CLP instructed that "any loans where the total aggregate exposure is between 15 and 25 percent of the Bank's Regulatory Capital, require a 2/3rd majority approval from the Board." FDIC Exh. 86, at 1-2. As of April 2009, the Nielson Loans collectively represented approximately 53 percent of the Bank's Tier 1 capital. Tr. at 733 (Miessner); JT. Exh. 2. The Bedrock Loan, which further increased the Bank's exposure to the Nielson Entities, therefore required the approval of a 2/3rd majority of the Board. 2015 Tr. at 1669 (Jackson). The

Bank nevertheless did not seek Board approval for the Bedrock Loan or any other part of the Bedrock Transaction until March 2010, months after the transaction had been consummated.

Draft findings from the examiners conducting the August 1, 2011, examination flagged the after-the-fact approval of the Bedrock Loan as a "Lending Limit Violation." FDIC Exh. 52, at 1. In response to this draft finding, the Bank claimed that a "documentation oversight" had occurred, in which "[t]he Board was fully aware of this loan prior to the disbursement of the loan, but documentation was lacking supporting the Board's approval in 2009." FDIC Exh. 52, at 2. Respondent, for his part, hewed to this explanation in his testimony. *See* R.D. at 79-80. ALJ McNeil found this explanation to be unworthy of credence, based on evidence that the Bedrock Transaction was not mentioned in any Board minutes during the period September 2009 through March 2010, and based on the testimony of two Board members, Ronald Swanson and Bruce Byl, that the Bedrock Transaction had not been discussed with them before March 2010. R.D. at 79-81 & n.596 (citing Resp. Exhs. 22-24, Tr. at 486-87 (Swanson); *id.* at 1023-25 (Byl)).

Section 12 of the CLP provides that "it is the policy of the [Bank] to require the personal guarantee of the debt by all parties holding a major equity interest in the business enterprise when the borrower is other than a personal entity." FDIC Exh. 86, at 5. In contravention of this provision, the Bank did not obtain a personal guarantee from any of the Nielson family members to support the Bedrock Loan or any of the other loans to the Nielson Entities. Tr. at 273-74 (Gomez). During the 2019 hearing, Respondent testified that the Bank's failure to obtain personal guarantees for the Nielson Loans was not an exception to the CLP. Tr. at 1375 (Calcutt). ALJ McNeil did not credit that testimony because it was squarely contradicted by the plain language of Section 12 of the CLP. R.D. at 70.

The loan write-up for the Bedrock Transaction, presented to the Board after the fact in March 2010, reveals a startling lack of candor. Answer ¶ 31. The write-up seeks approval for the renewal of Bedrock's existing $4,500,000 loan. *Id.* Inconspicuously placed in the middle of the description for this transaction, the loan write-up states that "[a]s part of this renewal, $600,000 of [collateral] funds will be released" and "[i]n addition a new loan of $760,000 is requested to provide for working capital requirements." JT. Exh. 6, at 2; Answer ¶ 31. The write-up does not disclose that the $4,500,000 loan already had been renewed, that the $600,000 of Pillay Collateral already had been released, and that the new loan in the amount of $760,000 already had been funded in December 2009. JT. Exh. 6. Furthermore, the write-up fails to disclose that: (i) the Nelson Entities had informed the Bank that they were having severe cash flow problems, (ii) all of the Nelson Entities had stopped making payments on their loans in September 2009, and (iii) the proceeds from the new $760,000 loan to Bedrock would be used to make payments on the various Nielson Loans through April 2010. JT. Exh. 6; Answer ¶ 36. The statement in the write-up that the $760,000 loan would be used for "working capital requirements" was materially false because making payments on other loans does not meet the Bank's general definition of the term "working capital." Answer ¶ 32.

Bank credit analyst Ian Hollands prepared the loan write-up. Answer ¶ 31. Respondent, in his capacity as a member of the SCC, received a copy of the loan write-up before it was presented to the Board, and he initialed it. Answer ¶ 38. At the time, Respondent knew that the Bedrock Transaction had been completed three months before the loan application was presented to the Board, and he knew that at least a portion of the proceeds from the $760,000 loan would be used to make payments on all of the Nielson Loans through April 2010. Answer ¶¶ 33, 35.

F. The Nielson Entities Default Again on All of Their Loans in 2010

Many of the Nielson Loans were due to mature in September 2010 but the financial condition of the Nielson Entities had not improved during the preceding 12 months. Accordingly, Cori Nielson contacted the Bank and "tried to initiate renewal discussions." Tr. at

958-59 (Nielson). She sent a series of letters addressed to Respondent to alert him that the Nielson Entities "cannot make their debt service payments," Tr. at 960-61 (Nielson); FDIC Exh. 3 at 31-42, and that they "needed significant loan modifications," Tr. at 958-59 (Nielson).

The Nielsons and the Bank did not reach an agreement before the Nielson Loans began maturing in September 2010. Tr. at 962 (Nielson). All of the Nielson Entities stopped making payments on their loans, effective September 1, 2010. Answer ¶ 42; Tr. at 959 (Nielson). In December 2010, the parties reached an agreement pursuant to which the Nielson Loans were renewed, the Nielson Entities were given interest rate reductions and other concessions, and the Bank released $690,000 in additional Pillay collateral to fund five months of payments, from September 2010 to January 2011. Tr. at 962-64 (Nielson); FDIC Exh. 3 at 165-67; Answer ¶¶ 44, 45. In January 2011, all of the Nielson Entities stopped paying their loans a third time, and all of the Nielson Loans, including the $760,000 Bedrock Loan, have been in default since then. 2015 Tr. 1775-1776 (Calcutt); Joint Stipulation ¶ 29.

G. Respondent Concealed the Problems with the Nielson Loans from the Examiners.

Respondent understood at least as early as 2009 that the Bank's regulators had rated the Nielson relationship as a "special mention" and were closely scrutinizing the Nielson Loans. JT. Exh. 2, at 20, 37-39. Instead of taking steps to address the regulators' concerns, Respondent embarked on a course of conduct designed to conceal the deteriorating financial condition of the Nielson Entities. ALJ McNeil found that Respondent engaged in the following deceptive acts and omissions, among others:

- **Direction to the Nielsons to Mask Inter-Company Transfers**. A number of the Nielson Entities had insufficient cash flow to cover their operating expenses. Tr. at 36 (Berden); FDIC Exh. 135_002. As a result, they were required to sell assets or borrow from other Nielson Entities. Tr. at 37 (Berden). Historically, these transfers would be reflected on the two company's balance sheets as an intercompany loan. Tr. at 39 (Berden). During a meeting held on April 29, 2008, however, Respondent and Mr. Green requested that the Nielson family's representatives, Cori Nielson and Autumn Berden "not show those inter-company notes on the Borrower's balance sheets anymore." *Id.* at 39 (Berden). Instead, Respondent and Mr. Green asked Ms. Berden to report that, for example, "instead of loaning money to Artesian, [Bedrock] would make a distribution to its members" and "the members would either loan it to Artesian or make a capital contribution as the owners to the other entity." Tr. at 39, 151 (Berden); *see also id.* at 1277 (Calcutt). At some point in time, Ms. Berden learned that Respondent and Mr. Green were concerned that the Nielson Entities' inter-company loans could be construed by bank regulators as a "common use of funds." Tr. at 157 (Berden). Yet Respondent testified that he was not attempting to conceal the interrelatedness of the Nielson Entities from the Bank's regulators; instead, he claimed he was merely providing advice to the Nielsons while wearing his "CPA hat" and his "tax hat." Tr. at 1277, 1308-09 (Calcutt). ALJ McNeil rejected this explanation on the basis of evidence showing that the Bank had a compelling reason to conceal the common ownership of the Nielson Entities. R.D. at 42. For example, Mr. Green informed Ms. Berden in a February 11, 2009 email that "[o]ne item [Respondent] noticed was the inter-company debt was increasing[,] which was the primary item the examiners caught and had a major problem with." Rd. at 47 (quoting Tr. at 55-56 (Berden); FDIC Exh. 3, at 60).

- **<u>2010 Loan Sales & Repurchases</u>**.

On or about April 30, 2010, shortly before examiners were to arrive on site for the Bank's 2010 examination, the Bank arranged to sell a number of Nielson Loans to two affiliate banks, State Savings Bank and Central State Bank. Tr. at 855, 858-59 (Miessner); Resp. Exhs. 42, 44. Respondent was the Chairman of the Board at both banks and at their respective holding companies. Tr. at 884 (Miessner); 2015 Tr. at 167 (O'Niell). Mr. Jackson testified that the Bank was attempting to reduce its exposure to the Nielson relationship, and he denied that the timing of the sale had any connection to the FDIC examination that was about to commence. 2015 Tr. at 1622 (Jackson). Notwithstanding the loan sale, Mr. Green informed Ms. Berden that he and Respondent would continue to be "[the Nielson Entities'] points of contact and that we [the Nielsons] would work directly with them when it came time for renewals in September." Tr. at 113-114 (Berden). The fact that the Bank expected to maintain control of the loans after selling them suggested to examiners—who learned of the transactions the following year—that the loan sale was a sham. 2015 Tr. 831-832 (Bird); Tr. at 857 (Miessner).

Respondent and Mr. Jackson made the decision to sell the loans in question. 2015 Tr. 1621-1622, 1691-1693 (Jackson); 2015 Tr. at 1766 (Calcutt); Joint Stipulation ¶ 36. In late September 2010, the Bank repurchased each of the Nielson Loans that had been sold prior to the examination. Joint Stipulation ¶ 38. At the time of repurchase, the loans were delinquent and past maturity. *Id.* The Bank's 2011 ROE cited the repurchase transaction as a violation of the Federal Reserve Act because the Bank was acquiring low quality assets from affiliates despite the borrowers' lengthy history of financial problems and delinquent loan payments. FDIC Exh. 48, at 27-29; 2015 Tr. at 163 (O'Niell).

- **2010 Officer's Questionnaire**. In preparation for its 2010 examination of the Bank, the FDIC required Respondent to complete an Officer's Questionnaire. The first question requested a list of "all extensions of credit and their corresponding balances which, since the last FDIC examination, have been renewed or extended . . . without full collection of interest due[,] [or], with acceptance of separate notes for the payment of interest." FDIC Exh. 18, at 2. Respondent answered, "None to the best of my knowledge." *Id.*; Answer ¶ 79. That response was false because, through the Bedrock Transaction, loan proceeds were "used specifically to make interest payments on . . . all of the entities' loans within that relationship." Tr. at 745

(Miessner). Question 3 required Respondent to "[l]ist all extensions of credit made for the accommodation or direct benefit of anyone other than those whose names appear either on the note or on other related credit instruments." FDIC Exh. 18, at 2. Respondent answered, "None to the best of my knowledge." *Id.* This answer also was false because the Bedrock Loan was made for the benefit of other Nielson Entities. Tr. at 746 (Miessner). Respondent conceded that his answers to Questions 1 and 3 were incorrect, but he asserted that the misstatements were "inadvertent[] and unintentional[]." Tr. at 1311 (Calcutt).

- **<u>September 14, 2011 Meeting with Examiners</u>**. On September 14, 2011, FDIC and Michigan examiners met with Respondent and other Bank officials to discuss a number of issues, including the Bedrock Loan. Tr. at 1334-35 (Calcutt); FDIC Exh. 110. During the meeting, the examiners asked Respondent to describe his understanding of how the proceeds of the $760,000 Bedrock Loan were to be used. Respondent told them that Bedrock had purchased Team Services, which had been a Bedrock customer, and that "Bedrock then needed working capital, which was what the loan was for." JT. Exh. 11, at 3. Respondent's explanation was false because he knew that the Bedrock Loan was not going to be used for working capital in connection with an acquisition but, rather, to make payments on the Nielson Loans. Joint Stipulation ¶¶ 14, 16.

During the September 14 meeting, the examiners also asked Respondent to state when the Bank released the Pillay Collateral and to identify the purpose for which the funds were to be used. Respondent answered, "I thought we still had them." JT. Exh. 11, at 4; 2015 Tr. at 591-92 (O'Niell). That statement also was false. Respondent authorized the release of $600,000 in Pillay Collateral in December 2009 and he authorized the release of an additional $690,000 in December 2010. Tr. at 623-24 (Smith); Joint Stipulation ¶¶ 14, 16; Answer ¶¶ 44, 45.

Finally, the examiners asked Respondent where the Nielson Entities obtained the necessary funds to bring current all of their past due loans in December 2010. JT. Exh. 11, at 4. Respondent had authorized the release of $690,000 of the Pillay Collateral in December 2010 so that the Nielson Entities could bring their loans current. Answer ¶¶ 44, 45. Nevertheless, Respondent falsely told the examiners that the Nielson Entities satisfied the arrearages using "[t]heir vast resources between oil, gas, and rentals." JT. Exh. 11, at 4. While testifying during the 2015 hearing, Respondent admitted that his statement was untrue. 2015 Tr. at 1794-95 (Calcutt).

Inaccurate Call Reports. The Bank's 2011 ROE noted that the Bank's Call Reports from December 2009 forward were misstated because they failed to appropriately report the Nielson Loans as nonaccrual since December 2009 and they failed to analyze these loans for impairment, "result[ing] in a material overstatement in earnings both in the form of falsely inflated interest income and of grossly understated provision expense." FDIC Exh. 48, at 42. The 2011 ROE explains that the "Nielson relationship should have been reported as nonaccrual on quarterly Call Reports beginning no later than December 2009 with no interest income recognized subsequent to the payments made in August 2009. *Id.* Respondent signed each of the Call Reports in question. 2015 Tr. at 1724, 1757 (Calcutt). He claimed that he had no involvement in preparing them, Tr. at 1300 (Calcutt); 2015 Tr. at 1724, 1757 (Calcutt), but Respondent could not delegate his responsibility for ensuring the accuracy of the Call Reports, Tr. at 861-62 (Miessner). As a result of the 2011 examination, the Bank was required to restate its earlier Call Reports going back to December of 2009. 2015 Tr. 1082 (Smith).

V. ANALYSIS

A. A Removal and Prohibition Order is Warranted.

The Board may impose a prohibition order if a preponderance of the evidence shows that Respondent engaged in prohibited conduct (misconduct); the effect of which was to cause the Bank to suffer financial loss or damage, to prejudice or potentially prejudice the Bank's depositors, or to provide financial gain or other benefit to the Respondent (effects); and that Respondent acted with personal dishonesty or a willful or continuing disregard for the safety and soundness of the Bank (culpability). 12 U.S.C. § 1818(e)(1); *Dodge v. Comptroller of Currency*, 744 F.3d 148, 152 (D.C. Cir. 2014) (citing *Proffitt v. FDIC*, 200 F.3d 855, 862 (D.C. Cir. 2000)). The Board finds that Respondent's actions during the relevant period satisfy each of these three elements and concludes that a prohibition order is warranted.

1. Misconduct

As noted in the Recommended Decision, misconduct under section 8(e) encompasses participation in activity deemed to be an unsafe and unsound banking practice or in breach of a party's fiduciary duty. 12 U.S.C. § 1818(e)(1)(A); R.D. at 122. The record clearly establishes Respondent's unsafe and unsound practices and breaches of fiduciary duty.

a. Unsafe and Unsound Conduct

An unsafe or unsound banking practice is one that is "contrary to generally accepted standards of prudent operation" whose consequences are an "abnormal risk of loss or harm" to a bank. *Michael v. FDIC*, 687 F.3d 337, 352 (7th Cir. 2012); *see also Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 932 (3d Cir. 1994) ("imprudent act" posing an "'abnormal risk of [financial] loss or damage to an institution, its shareholders, or the agencies administering the insurance funds'" is an unsafe and unsound practice) (citation omitted). Because of their inherent danger, breaches of fiduciary duty also constitute unsafe and unsound practices. *See*

Hoffman v. FDIC, 912 F.2d 1172, 1174 (9th Cir. 1990). As noted in the Recommended Decision, the record in this matter overwhelmingly establishes that Respondent engaged in numerous unsafe or unsound practices while serving as the Bank's President and CEO.

i. Violations of the Commercial Loan Policy ("CLP")

Extending credit in violation of the institution's loan policy constitutes an unsafe or unsound practice. *See Matter of Haynes*, FDIC-11-370e, 11-371k, 2014 WL 4640797 (July 15, 2014); *Matter of Stephens Security Bank*, FDIC-89-234b, 1991 WL 789326 (Aug. 9, 1991); *see also Matter of * * * Bank (Insured State Nonmember Bank)*, FDIC-87-203b, 2 FDIC Enf. Dec. ¶ 5120.3 (1988) (upholding FDIC examiner's classification of two loans that, in violation of the Bank's loan policy, were not collateralized). In violation of Section 13 of the CLP, Respondent approved the Bedrock Transaction without performing (or even reviewing) a written analysis of the net income available to service the debt and without obtaining an appraisal or other evidence from third parties supporting the collateral value of the security. *See* Section IV.E, *supra*. In violation of Section 3 of the CLP, Respondent authorized and funded the Bedrock Loan without securing the approval of a two-thirds majority of the Board, notwithstanding the fact that the Nielson relationship already exceeded 25 percent of the Bank's Tier 1 capital. *See id.* And in violation of Section 12 of the CLP, Respondent did not solicit or obtain personal guarantees from any of the Nielson family members, nor did he document his rationale for failing to do so. *See id.* ALJ McNeil found Respondent's explanations and justifications for these acts and omissions to be insubstantial as a matter of law and belied by the greater weight of the evidence. *See id.*

ii. Imprudent Lending Practices

Even if the CLP did not establish minimum requirements for the approval of commercial loans, Respondent's management of the Nielson borrowing relationship entailed numerous acts and omissions that consistently have been found to be unsafe or unsound lending practices. For example, extending credit without adequate credit analysis, extending credit without evaluating the borrower's ability to repay the loan, extending credit without assessing the value of the collateral, extending credit to pay off past due loans, and capitalizing unpaid interest (*i.e.*, extending additional credit for the amount of interest owed when loans are renewed), all have been determined to be unsafe or unsound practices. *See First State Bank of Wayne Cty. v. FDIC*, 770 F.2d 81, 82 (6th Cir. 1985) (recognizing that "extending unsecured credit without first obtaining adequate financial information" and "extending secured credit without obtaining complete supporting documentation" constitute unsafe and unsound practices); *Gulf Fed. Sav. & Loan Ass'n v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981) (concluding, based on the legislative history of section 1818(e), that "disregarding a borrower's ability to repay" is an unsafe and unsound practice); *Matter of Grubb*, FDIC-88-282k & 89-111e, 1992 WL 813163, at *29 (Aug. 25, 1992) (approving loans without determining the borrower's ability to repay constitutes an unsafe and unsound practice); *Matter of * * * Bank (Insured State Nonmember Bank)*, FDIC-85-42b, 1 FDIC Enf. Dec. ¶ 5062.3 (1986) (recognizing that "[i]mprudent practices include ... the propensity to permit borrowers to capitalize unpaid interest, that is to extend additional credit for the amount of interest owed when loans are renewed"); *Matter of Stephens Security Bank*, FDIC-89-234b; 1991 WL 789326 (Aug. 9, 1991) (capitalizing interest and failing to adequately analyze and document loan transactions are unsafe or unsound practices).

As discussed above, and as described in greater detail in the Recommended Decision, Respondent jeopardized the safety and soundness of the Bank by failing to properly manage the risks posed by the Nielson borrowing relationship. Respondent allowed the Nielson relationship to grow from approximately $31 million in 2008 to approximately $36 million in 2009, even though it already was the Bank's largest borrower. JT. Exh. 2, at 38; Joint Stipulation ¶ 11. In the summer of 2009, the Nielsons informed Respondent that they were in financial distress and that many of the Nielson Entities would be unable to continuing making loan payments. R.D. at 19-21. A prudent lender would have investigated the matter, but when the Nielsons offered to provide their financial information to the Bank, Respondent, remarkably, declined their offer. R.D. at 21. In September 2009, all the Nielson Entities stopped paying their loans. R.D. at 20 (citing Tr. at 937 (Nielson)). Once the Nielson Loans were 90 days past due, as many of them were by November 30, 2009, they should have been placed on non-accrual status, Tr. at 1377 (Calcutt), and a prudent lender would have begun collection efforts, Tr. at 1296 (Calcutt).

Respondent did not begin collection efforts. He testified that he had every confidence that the Nielson Entities would pay off their loans in full, explaining that he felt certain that the Nielsons "did have the funds" and that they were merely "posturing." R.D. at 23 (quoting Tr. 1296 (Calcutt)). Instead of calling their bluff, however—by, among other things, reviewing the financial records they offered to provide—Respondent approved an additional loan to Bedrock Holdings in the amount of $760,000 and he authorized the release of Pillay Collateral worth $600,000. Answer ¶¶ 17, 18, 20. Again, prior to approving the Bedrock Transaction, Respondent did not perform or review any analysis of the Nielson Entities' ability to repay their loans, he did not obtain appraisals of the collateral securing the loans, and he did not obtain personal guarantees from any of the Nielson Entities' principals. Respondent's acts and omissions were unsafe or unsound by any standard.

iii. <u>Efforts to Mislead Regulators</u>

It is well settled that concealing information from bank examiners and attempting to mislead them constitute unsafe or unsound practices. *See Dodge v. Comptroller of Currency*, 744 F.3d 148, 156 (D.C. Cir. 2014) (misrepresenting bank's financial condition to regulators was unsafe or unsound practice); *Lindquist & Vennum v. F.D.I.C.*, 103 F.3d 1409, 1417 (8th Cir. 1997) (recognizing that lying to bank examiners is an unsafe or unsound practice); *De La Fuente*

II v. FDIC, 332 F.3d 1208, 1224 (9th Cir. 2003) (failing to disclose information concerning problem loans is an unsafe or unsound practice).

As summarized above, and as described in greater detail in the Recommended Decision, the record in this matter confirms that Respondent repeatedly concealed material information about the Nielson Loans from the Bank's regulators. *See* Section IV.G, *supra*; R.D. at 38-39, 41-49, 73-81. Among other deceptive acts and omissions, Respondent failed to inform the examiners that the Nielson Entities had stopped making loan payments in September 2009 and again in September 2010; he arranged for the Bank to sell some of the Nielson loans to affiliate banks shortly before the examiners arrived to conduct the 2010 examination, and he arranged for the Bank to repurchase the loans shortly after the examiners left; he directed the Nielsons to disburse the proceeds of the Bedrock Loan to individual Nielson principals instead of making distributions to other Nielson Entities and recording them as inter-company loans; he made misleading statements to examiners during meetings and in his response to the 2010 Officer's Questionnaire, and he caused the Bank to file inaccurate Call Reports that later had to be amended. *See* Section IV.G, *supra*. An FDIC examiner testified that "through his actions of concealing facts about the Nielson Loans, [Respondent] did materially obstruct our ability to effectively supervise an examination in the institution." Tr. at 808 (Miessner).

Respondent attempted to avoid responsibility for the false and misleading statements he made and the deceptive actions he took by attributing them to a failure of memory, inadvertence, or to his reliance on other Bank employees. *See* Tr. at 1300, 1308 (Calcutt); R.D. at 36 (citing Respondent's testimony). ALJ McNeil did not find Respondent's explanations to be credible or legally sufficient, R.D. at 42, 73-77, 84-85, 99-101, and the Board also is unpersuaded. To the extent Respondent sought to lay the blame on other Bank employees, such deflection is not a colorable defense. *See Matter of Leuthe*, FDIC-95-15e, 95-16k, 1998 WL 438324, at *39 (Feb.

13, 1998) (explaining that "abdication of duty by directors to officers is not a defense," and that "Respondent's duty as a board member, and particularly as Chairman of the Board, was to monitor the activities of bank management, to ensure compliance with laws, regulations, cease and desist orders and the Bank's own loan policy").

c. Breach of Fiduciary Duty

As President and CEO, Respondent owed a duty of care, a duty of loyalty, and a duty of candor to the Bank. *See Seidman*, 37 F.3d at 933. At their most basic, these duties include an obligation to act in good faith and in the best interests of the Bank. *See Matter of* ***, FDIC-85-356e, 1988 WL 583064, at *9 (Mar. 1, 1988). As President and CEO, Respondent was also required to adequately supervise his subordinates. *Id*. "The greater the authority of the director or officer, the broader the range of his duty; the more complex the transaction, the greater the duty to investigate, verify, clarify and explain." *Matter of* ***, 1988 WL 583064, at *9; *Matter of Baker*, FDIC-92-86e, 1993 WL 853599 (July 27, 1993). The duty of candor requires a corporate fiduciary to disclose "everything he knew relating to the transaction," even "if not asked." *De La Fuente II v. FDIC*, 332 F.3d 1208, 1222 (9th Cir. 2003) (fiduciary duty breached by failure to disclose relevant information to bank's board of directors when it was considering a loan even though the bank's board did not ask); *Michael*, 687 F.3d at 350; *Seidman*, 37 F.3d at 935 n.34.

i. <u>Duty of Care</u>

The record in this case establishes that during the relevant period, Respondent engaged in multiple breaches of his duty of care by failing to properly manage the Bank's relationship with the Nielson Entities and by failing to ensure the employees who worked directly for him were not engaging in unsafe or unsound practices in connection with the Nielson Loans. In the summer of 2009, Cori Nielson informed Respondent and others at the Bank that the Nielson

Entities were having financial difficulties and that they would not be able to continue paying all of their loans. *See* Section IV.C, *supra.* In September 2009, all of the Nielson Entities stopped paying their loans, and by the end of November, many of the loans were at least 90 days past due. *See* Section IV.D, *supra.* Instead of initiating collection efforts, Respondent authorized the Bedrock Transaction, which increased the Bank's exposure to what already was its largest borrower relationship. *See id*. While negotiating the Bedrock Transaction with the Nielsons, Respondent failed to comply with the Bank's loan policy. Specifically, he did not perform any credit analysis, he did not secure the approval of the Bank's board, and he did not obtain personal guarantees from the Nielson Entities' principals. *See* Section IV.E, *supra*. Respondent did not demonstrate a higher level of care and attention when the Nielson Entities stopped paying their loans again in September 2010. Without making any effort to evaluate the Nielson Entities' ability to service their loans, Respondent authorized the renewal of all of their loans, the release of additional Pillay Collateral, and granted them lower interest rates and other concessions. *See* Section IV.F, *supra*.

Respondent attempted to shift responsibility for the mishandling of the Nielson Loans onto his subordinates, including Mr. Green (the lender assigned to the Nielson relationship) and the Credit Administration department. *See, e.g.*, Tr. at 1281, 1304-05 (Calcutt) (arguing that Mr. Green and the Credit Administration department were responsible for reviewing the Nielson Entities' financial statements); Tr. at 1353 (Calcutt) (denying that he had any responsibility for ensuring that the Bank's loan files were maintained in a safe and secure manner despite having previously admitted that this was his responsibility during the first evidentiary hearing in 2015); Tr. at 1270 (Calcutt) (arguing that overall responsibility for regulatory compliance rested with a number of people in the Commercial area, Credit Administration, and the individual lenders). Even if one were to accept the premise that certain of these activities were not Respondent's direct responsibility, Respondent's duty of care obligated him, at a minimum, to ensure that his subordinates were handling these tasks in a competent and careful way. The record amply shows that Respondent failed to do even that much.

ii. Duty of Candor

Respondent breached his duty of candor by failing to provide the Bank's board with timely, accurate, and complete information about the status of the Nielson Loans. Given their concentration of credit, the Nielson Entities represented the Bank's largest borrower relationship. When the Nielsons announced in the summer of 2009 that they were having financial difficulties that would prevent their companies from making loan payments, the problem was a big one for the Bank, and Respondent should have disclosed it to the Bank's board. Instead he kept silent. Tr. at 778-79 (Miessner) (Bank board members stated that they were not aware of the problems with the Nielson Loans described in the 2010 ROE); Tr. at 1026-27 (Byl) (stating that, prior to March 2010, no one discussed the Nielson Loans at any of the Bank board meetings he attended, nor did anyone speak with him individually about them); FDIC Exh. 48, at 40 (concluding that "management has actively concealed the accurate condition of [the Nielson] relationship from regulators and from the Bank's board through the failure to maintain complete loan files and through false or misleading verbal and written statements"). When the Nielson Entities stopped paying their loans in September 2009, Respondent did not inform the Bank's board. *See id.* When many of the Nielson Loans became more than 30 days past due, Respondent failed to inform the Bank's board. *See id.* These are all violations of Respondent's duty of care and candor. *See De La Fuente II*, 332 F.3d at 1222 (recognizing that the duty of candor requires a corporate fiduciary to disclose "everything he knew relating to the transaction," even "if not asked"); *Matter of Massey*, FDIC-91-211e, 1993 WL 853749, at *11 (May 24, 1993) (concealment of information from bank's loan committee constituted breach of fiduciary duty).

Respondent's lack of candor in connection with the Bedrock Transaction was particularly egregious. The transaction required Bank board approval, but Respondent did not seek it. In March 2010, months after the new Bedrock Loan had been funded, the Pillay Collateral released, and the original $4.5 million loan to Bedrock renewed, Respondent approved a Bank board presentation concerning the Bedrock Transaction that was materially misleading. In particular, the document did not inform the Bank's board that, in violation of the CLP, the Bank already had consummated the transaction. In addition, the presentation falsely stated that the proceeds of the Bedrock Loan would be used for "working capital" when, as Respondent well knew (having negotiated the transaction with the Nielsons), the funds would be routed to the other Nielson Entities so that they could make payments on their loans. Third, the presentation failed to disclose that all of the Nielson Entities had stopped paying their loans in September 2009 and had refused to resume making payments unless the Bank entered into the Bedrock Transaction. These facts were material, and Respondent's failure to disclose them to the Bank's board was a breach of his duty of candor. *See, e.g., Matter of* ***, 1988 WL 583064, at *9.

2. Effects

To show that misconduct had the required "effect" to impose a prohibition order, the evidence must establish that (1) the bank "has suffered or will probably suffer financial loss or other damage;" (2) the interests of the bank's depositors "have been or could be prejudiced;" or (3) the respondent "received financial gain or other benefit" from his misconduct. 12 U.S.C. § 1818(e)(1)(B)(i)-(iii). An actual loss is not required; a potential loss is sufficient so long as the risk of loss to the Bank was "reasonably foreseeable" to someone in Respondent's position. *See Pharaon v. Bd. of Governors*, 135 F.3d 148, 157 (D.C. Cir. 1998); *De La Fuente II*, 332 F.3d at 1223; *Kaplan v. Office of Thrift Supervision*, 104 F.3d 417, 421 (D.C. Cir. 1997). There may be more than one cause of harm to a bank; an individual respondent need not be the proximate cause of the harm to be held liable under section 8(e). *See Landry*, 204 F.3d at 1139 (explaining that the fact that other IAPs may have been "more guilty" does not absolve respondent from responsibility for his actions); *Matter of Adams*, 1997 WL 805273, at *5 (recognizing that "multiple factors, and individuals, may contribute to a bank's losses," and that a respondent cannot escape liability simply because others have contributed to the bank's loss as well).

The Board finds ample evidence in the record to support a determination that, as a result of Respondent's misconduct, the Bank suffered or likely will suffer financial loss or other damages, and that Respondent received gain or other financial benefit from his misconduct. First, the Bank recorded a $30,000 charge-off against the $760,000 Bedrock Loan as of July 31, 2012. R.D. at 88 (citing FDIC Exh. 81, at 70). Respondent argues in his Exceptions that "a $30,000 charge-off does not mean that the Bank 'has suffered' a financial loss" within the meaning of 12 U.S.C. § 1818(e)(1)(B). R. Exceptions, at 133. But the Board previously has held that loan charge-offs represent a loss to the bank as a matter of law. *See Matter of Leuthe*, FDIC-95-15e, FDIC-95-16k; 1998 WL 438323, *15 (June 26, 1998); *Matter of Sunshine*, 1 P-H FDIC Enf. Dec. (Bound) at A-581-2 (Aug. 19, 1985). As a fallback, Respondent contends that ALJ McNeil violated his procedural rights by failing to tether the $30,000 charge-off (and other actual and potential losses) to specific acts of misconduct by Respondent. R. Exceptions, at 133. The Board is unpersuaded. The $760,000 Bedrock Loan was one of the main focuses of the 2019 hearing, and the Recommended Decision described at length Respondent's multiple acts of misconduct in approving the loan. *See* R.D. at 5-6, 14, 36-38, 59-63, 69-70, 75-77, 111-12, 123.

The Recommended Decision found that Respondent's misconduct also caused the Bank to suffer $6.443 million in losses on other Nielson Loans. R.D. at 4-5; FDIC Exh. 48 (2011 ROE), at 43, 52, 83-93, and 124; Tr. at 147-48 (Berden). Respondent argues that the $6.443 million in losses on Nielson Loans should not be held against him because the amount merely represents charge-offs that the FDIC "ordered the Bank" to recognize following the 2011 examination. R. Exceptions at 135. According to Respondent, the charge-offs do not necessarily equate to an "amount owed to the Bank that it was unable to collect from the Neilson [sic] Entities." *Id.* The Board is unpersuaded by this contention. First, as discussed above, the Board has recognized that loan charge-offs constitute a loss to the Bank as a matter of law. Second, Respondent's argument—that charge-offs do not represent losses—leads to the absurd result that banks may avoid losses, and bankers may avoid the consequences for making unsafe and unsound loans, through the simple expedient of not charging off uncollectible loans. At the end of the day, examiners' decision to classify loans as loss is an expert judgment that receives significant deference from the Board and from the courts. *See Sunshine State Bank v. FDIC*, 783 F.2d 1580, 1584 (11th Cir. 1986). Given that the Nielson Loans have been in default since January 2011, Joint Stipulation ¶ 29, Respondent has not presented the Board with any colorable justification for second-guessing the examiners' classifications of the Nielson Loans.

A portion of the $6.443 million in losses could have been avoided had Respondent not released the $1.2 million in Pillay Collateral that secured some of the loans. Specifically, in 2011, $190,000 of the Bank's loans to a Nielson entity called AuSable LLC were classified as loss, as were $712,000 of the Bank's loans to Moxie, LLC, another Nielson entity. FDIC Exh. 48, at 83, 90. The AuSable and Moxie loans were secured by the Pillay Collateral. R.D. at 4-5, 49-51 (citing FDIC Exh. 3, at 59; Tr. 155 (Berden); Resp. Exh. 3). Thus, had Respondent not authorized the release of Pillay Collateral, it would have been available to mitigate the Bank's losses on the AuSable and Moxie loans. Respondent calls this conclusion "specious[]," arguing that because the Bank ***received*** the proceeds of the Pillay Collateral when other Nielson Entities used the funds to make loan payments, it necessarily follows that the release of the Pillay Collateral could not have caused the Bank to ***lose*** money. Although Respondent's argument has a certain superficial appeal, the fact remains that the Bank suffered losses on the AuSable and Moxie loans that it could have mitigated if the Pillay Collateral had not been released. The AuSable and Moxie losses are sufficient to satisfy the effects element.

ALJ McNeil found that the effects prong also was satisfied by evidence showing that Respondent's misconduct in connection with the Bedrock Transaction caused the Bank to incur other damages in the form of investigative and auditing expenses. *See* R.D., Findings of Fact 4.a & 4.b; R.D. at 5 & nn.20, 21; R.D. at Part II, Sections 5.P–V; Conclusion of Law 6; R.D. at 122. Respondent initially objects to this finding on the ground that "there are no allegations in the Notice that Respondent caused 'other damage' to the Bank." R. Exceptions at 138. In fact, however, the Notice specifically alleges that Respondent's misconduct caused the Bank to "suffer[] significant investigation expense costs and defense costs," Notice ¶ 113, including the retention of a "third-party consulting firm," *id.* ¶ 114, and "nearly $1.7 million in legal fees and expenses," *id.* ¶ 115. At the 2019 hearing, FDIC Enforcement Counsel introduced evidence showing that the Board hired the regional CPA firm of Plante & Moran to perform an "independent loan review of the Nielson relationship," Tr. at 588, 590 (Smith) & FDIC Exh. 77, which cost $281,121, Tr. at 610-614 (Smith) & FDIC Exh. 116, at 1. In addition, FDIC Enforcement Counsel established that the Bank paid $171,122 to the Kus, Ryan law firm for legal services provided to the Bank with respect to regulatory issues involving the Nielson Loans. Tr. at 610-614 (Smith) & FDIC Ex. 116, at 1. Respondent cannot claim to have been surprised that these expenses would be used to establish that the Bank suffered losses as a result of his misconduct; after all, the same evidence was introduced during the 2015 hearing for the same purpose. Furthermore, when the evidence was offered during the 2019 hearing, Respondent did not object that the Plante & Moran and Kus, Ryan expenses were outside the scope of the Notice. *See* 12 C.F.R. § 308.20(b) ("When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required.").

Respondent also contends that the investigative expenses and legal fees incurred by the Bank "were caused directly by the Consent Order issued by the FDIC and the threats of Civil Money Penalties made by the FDIC to the Bank's board and not by any lack of candor by the Respondent." R. Exceptions, at 139-140. But the Consent Order, by its terms, required only that the Bank commission a management study, *see* FDIC Exh. 70, at 5-7, a project undertaken by the FinPro firm, *see* Tr. at 594-95 (Smith) & FDIC Exhs. 83-84. The Consent Order did not require the Bank to hire a CPA firm to perform a loan review nor did it mandate the retention of counsel. The Board previously has recognized that similar types of professional fees constitute losses within the meaning of Section 8(e). *See Matter of Shollenburg*, FDIC-00-88e; 2003 WL 1986896, at *12 (Mar. 11, 2003) (concluding that additional auditing costs and fees paid to tax consultants as a result of the Respondent's misconduct were cognizable losses). The Board rejects Respondent's reliance on *Matter of Proffitt*, 1998 WL 850087, at *10 n.11 (Oct. 6, 1998), for the proposition that the expenses incurred by the Bank "are not legally cognizable as effects because they are simply the normal cost of investigating conduct that has not yet been determined to be wrongful." R. Exceptions, at 140. In that matter, the Board explained that the payment of legal fees "standing alone cannot be assumed to be enough to support a removal action" because legal fees presumptively are a normal cost of doing business. *Matter of Proffitt*, 1998 WL 850087, at *9 n.11 (Oct. 6, 1998). That presumption of regularity drops away, however, when the legal fees are coupled with other "non-neutral indicia of loss." *Id.* Here, the legal fees incurred by the Bank were accompanied by other losses, including the fees of a CPA firm (an expense that was not a normal business expense for the Bank) and loan charge-offs.

The applicable test, as Respondent is the first to point out, is that the "effect be a reasonably foreseeable consequence of the misconduct." R. Exceptions, at 139 (citing cases). In the criminal law context, courts applying the felony murder rule have not hesitated to find that it is reasonably foreseeable to a common criminal that when an armed robbery occurs, the police may be called to investigate, the intended victim of the crime may resist, and someone may be fatally shot in the ensuing fracas. *See Santana v. Kuhlmann*, 232 F. Supp. 2d 154, 158 (S.D.N.Y. 2002) (concluding that the evidence was sufficient to support felony murder conviction notwithstanding the fact that "neither the defendant nor his co-defendant fired the gun that killed the police officer"); *Dixon v. Moore*, 318 Fed. Appx. 316, 319 (6th Cir. 2008) (unpublished) ("[e]very robber or burglar knows when he attempts his crime that he is inviting dangerous resistance," and therefore, the death of the appellant's accomplice at the hands of the putative victim "was a natural, logical, and reasonably foreseeable consequence of the armed robbery that Dixon and Lightfoot were committing at the time, when viewed in the light of ordinary human experience"). "As every bank director should reasonably be aware, federal and state regulation of the banking industry is intense," requiring banks to "constantly be dealing with the government and with government inquiries." *Gimbel v. FDIC*, 77 F.3d 593, 600 (2d Cir. 1996). Furthermore, every banker is "deemed to understand that if his bank becomes insolvent or is operated in violation of laws or regulations," the regulators not only will investigate but also may seize control of the institution. *Branch v. U.S.*, 69 F.3d 1571, 1575 (Fed. Cir. 1995). If it is foreseeable to a robber that his crime may result in the death of an innocent person, surely it was foreseeable to Respondent—the President and CEO of a bank—that his misconduct might trigger an investigation that in turn would cause the Bank to incur professional fees.

ALJ McNeil determined that the effects requirement was satisfied for the independent reason that Respondent received a financial benefit from his misconduct in the form of dividends that would not have been paid, or which would have been reduced in amount, if the true condition of the Nielson Loans had been properly reported. For example, the funds disbursed through the Bedrock Transaction and the second release of Pillay collateral artificially increased the Bank's earnings and resulted in the issuance of a dividend to the Bank's holding company in 2011 that otherwise would not have been warranted. Tr. at 783-87, 895 (Miessner); FDIC Exh. 48, at 65; FDIC Exh. 105, at 9. Respondent, as a large shareholder in the holding company, benefited from the payment of this dividend. Tr. at 895 (Miessner)

In sum, the Board concurs with ALJ McNeil's determination that the Bank suffered losses and Respondent derived personal benefits as a result of Respondent's misconduct.

3. Culpability

Culpability, for purposes of section 1818(e), can be shown by "personal dishonesty" or a "willful or continuing disregard" for the safety and soundness of the financial institution. 12 U.S.C. § 1818(e)(1). "Personal dishonesty" can be established through evidence that an IAP disguised wrongdoing from the institution's board and regulators, or failed to disclose material information. *See Dodge v. Comptroller of Currency*, 744 F.3d 148, 160 (D.C. Cir. 2014) (citing *Landry*, 204 F.3d at 1139-40; *Greenberg v. Bd. of Governors of the Fed. Reserve Sys.*, 968 F.2d 164, 171 (2d Cir. 1992); *Van Dyke v. Bd. of Governors of the Fed. Reserve Sys.*, 876 F.2d 1377, 1379 (8th Cir. 1989)). "Willful disregard" is "deliberate conduct that exposes 'the bank to abnormal risk of loss or harm contrary to prudent banking practices.'" *Michael*, 687 F.3d at 352 (quoting *De La Fuente II*, 332 F.3d at 1223). "Continuing disregard" is "conduct that has been 'voluntarily engaged in over a period of time with heedless indifference to the prospective consequences.'" *Id*. at 353 (quoting *Grubb v. FDIC*, 34 F.3d 956, 962 (10th Cir. 1994)). "Although inadvertence alone is not sufficient to establish culpability, recklessness suffices." *Id*.

(citation omitted). An IAP "cannot claim ignorance by turning a blind eye to obvious violations of his statutory and fiduciary duties." *Id*. at 352.

ALJ McNeil made the following findings with respect to Respondent's personal dishonesty:

> Respondent persistently concealed 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 Respondent's efforts in dealing with the Nielson Family's decision to stop making payments on the loans in that portfolio, first in 2009, then in 2010, and finally in 2011. Respondent falsely answered questions presented to him during examinations in 2009, 2010, and 2011, concealed documents showing the true condition of the loans during that period, and falsely testified that Board members had been fully apprised of the nature of the Nielson Loan portfolio.
>
> Respondent envisioned and then implemented the means by which proceeds apparently earmarked for the Bedrock Fund LLC would in fact be distributed to multiple Nielson Entities, using bookkeeping protocols that would withhold from the Bank's own auditors and its examiners the true common nature of the Entities and their loan portfolio.

R.D. at 6. The Board concludes that these findings are well supported by the testimony and exhibits in the record.

Respondent's exceptions to these findings are not well taken. For example, Respondent admits that he advised the Nielsons to "upstream" payments to the principals of other Nielson Entities instead of reporting inter-company transfers on the companies' respective books. R. Exceptions, at 146-147. Respondent argues that because he made this recommendation in April 2008, it could not have been his intention to mask how the Nielson Entities distributed the proceeds of future transactions with the Bank, such as the 2009 Bedrock Transaction. *See id.* The fact that this was a standing instruction to the Nielsons, rather than a directive specific to the Bedrock Transaction, is immaterial. Respondent also renews his arguments that the misstatements and acts of concealment attributed to him were either unintentional or the fault of other bank personnel on whom Respondent relied. *See id.* at 145-154. ALJ McNeil determined that Respondent's testimony in support of these points was not credible and was squarely contradicted by other record evidence. The Board reaches the same conclusion.

The Board also finds that Respondent's behavior exhibited willful and continuing disregard for the safety and soundness of the Bank. During the relevant period, Respondent took steps to conceal the interrelatedness and the precarious financial condition of the Nielson Entities from the Bank's board, thereby frustrating its efforts to perform its oversight role. Similarly, Respondent actively concealed the same information from the examiners, thereby obstructing them from performing their supervisory role. In violation of the Bank's CLP, Respondent authorized the release of Pillay Collateral and the disbursement of the Bedrock Loan without first obtaining the approval of a 2/3rd majority of the Bank's board. This course of conduct, spanning a period of years, undertaken by the President and CEO of the Bank, constitutes a continuing and willful disregard for the safety and soundness of the Bank.

B. The CMP Assessment is Appropriate.

The ALJ recommended a second tier CMP of $125,000,[3] and the Board concludes that the evidence in the record supports a CMP in that amount. Respondent has not taken exception to the amount of the CMP, arguing only that there is no legal basis for a CMP order for the same reasons that there is no legal basis for a prohibition order. R. Exceptions, at 156-58. The Board rejects that argument for the reasons set forth previously.

A second tier CMP may be imposed against a party who (1) commits any violation of law, regulation, or certain orders or written conditions imposed by regulators; (2) recklessly engages in an unsafe or unsound practice in conducting the affairs of the institution; or (3) breaches any fiduciary duty, and whose "violation, practice, or breach . . . is part of a pattern of misconduct; causes or is likely to cause more than a minimal loss" to the institution; or "results

[3] *See* R.D. at 125.

in pecuniary gain or other benefit" to the party. 12 U.S.C. § 1818(i)(2)(B). The FDI Act authorizes up to $25,000 for each day the violation, practice, or breach continues, subject to adjustments for inflation. 12 U.S.C. § 1818(i)(2)(B); 12 C.F.R. § 509.103.

The Board already has discussed Respondent's breaches of fiduciary duty and unsafe or unsound banking practices, as well as the effects of those acts and omissions. Respondent is subject to a second tier CMP as a result of his breaches of fiduciary duty. Although the breaches of fiduciary duty standing alone would be sufficient to support the recommended CMP, the Board also finds that Respondent's unsafe and unsound practices were committed recklessly, providing an independent basis to support a second tier CMP.

Recklessness is established by acts committed "in disregard of, and evidencing conscious indifference to, a known or obvious risk of a substantial harm." *Cavallari v. OCC*, 57 F.3d 137, 142 (2d Cir. 1995); *see also Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1425 (9th Cir. 1994) (similar definition of "reckless[ness]"). Conduct that demonstrates willful or continuing disregard under Section 8(e) has been held to satisfy the recklessness requirement. *See Dodge*, 744 F.3d at 162. For the reasons set forth previously, the Board finds that Respondent's conduct reflected a willful or continuing disregard for the safety and soundness of the Bank.

Because Respondent's misconduct persisted throughout the relevant period, the $125,000 penalty recommended by the ALJ is well within the authorized limit. The Board agrees with the ALJ's analysis of the statutory mitigating factors in 12 U.S.C. § 1818(i)(2)(G), which include: (1) the gravity of the violation, (2) history of previous violations, and (3) the Respondent's financial resources and lack of good faith. R.D. at 7. The gravity of the violations and Respondent's efforts to conceal them support a significant CMP, and the record does not support a finding that Respondent acted in good faith. The Board therefore adopts the ALJ's recommendation of a $125,000 CMP.

C. Respondent's Remaining Exceptions

Respondent has challenged virtually every aspect of the ALJ's findings of fact and legal conclusions. The Board has addressed many of Respondent's exceptions in the relevant sections above and concludes that they lack merit or have no impact on the Board's decision. The Board also is unpersuaded, as discussed below, by Respondent's remaining exceptions. Any exceptions not addressed here or previously are denied.

1. The ALJ Is Not Improperly Shielded from Removal.

Respondent argues that the ALJ is unconstitutionally shielded from removal by the President of the United States. R. Exceptions, at 158-59. As Respondent recognizes, the Board rejected this argument in *Matter of Sapp*, 2019 WL 5823871 (Sept. 17, 2019). R. Exceptions, at 158. Specifically, in *Matter of Sapp*, the Board found:

> In *Lucia*, the Supreme Court remanded the enforcement proceeding to the agency with instructions to reassign the matter to an ALJ directly appointed by the SEC itself—a constitutionally appointed ALJ—and that the ALJ not be the same ALJ who presided over the original proceeding. *Lucia*, 138 S. Ct. at 2055. That is precisely what the FDIC did here. The FDIC Board directly appointed ALJ McNeil and reassigned this matter to him (as noted earlier, a different ALJ had presided over the original hearing). ALJ McNeil then afforded the parties ample time to request a rehearing, which neither party did, and then proceeded to decide the case on the papers. Regardless of whether or not the *Lucia* decision applies to FDIC-appointed ALJs, the FDIC's actions following *Lucia* are entirely consistent with that opinion.

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> Moreover, the ALJ was appointed by a vote of the FDIC Board, the governing body of the FDIC. The FDIC Board possesses the authority to appoint its ALJs, and the FDIC is not subordinate to or contained within any other component of the Executive Branch. 12 U.S.C. § 1812(a) ("The management of the [FDIC] shall be vested in a Board of Directors …."); 12 U.S.C. § 1819 (prescribing corporate powers, including the power to appoint officers); 5 U.S.C. § 3105 (permitting agencies to appoint their own ALJs). Thus, the FDIC is a "Department" for purposes of the Appointments Clause. *See Free Enter. Fund*, 561 U.S. at 510-11 (a component of the Executive Branch that is "not subordinate to or contained within any other such component … constitutes a 'Departmen[t]' for the purposes of the Appointments Clause"); 5 U.S.C. § 105 (an "Executive Agency" under Title 5 includes a Government corporation and an independent establishment, such as the FDIC).

Id. at *19. Respondent has not shown that *Matter of Sapp* was wrongly decided. Accordingly, the Board rejects Respondent's argument for the reasons set forth in *Matter of Sapp*.

2. The Hearing on Remand Complied with *Lucia*.

After the Supreme Court decided *Lucia*, the Board adopted a Resolution appointing its ALJs and reassigned this case from ALJ Miserendino to ALJ McNeil. Respondent asserts that he was "'entitled' to a 'new hearing' before a constitutionally-appointed ALJ." R. Exceptions, at 164 (quoting *Lucia*, 138 S. Ct. at 2055). Although he was granted a new hearing before ALJ McNeil—who had been appointed by the FDIC Board and who had not presided over the earlier proceeding—Respondent argues that he should have been afforded "the full panoply of procedures for a hearing to which he was entitled the first time," including document discovery and depositions. R. Exceptions, at 164-66. Respondent's primary grievance seems to be that that ALJ McNeil considered his testimony from the 2015 hearing along with that of certain other witnesses, and also considered a joint stipulation of facts that the parties entered into in 2015. *See* R. Exceptions, at 18-24. According to Respondent, ALJ McNeil's consideration of these materials "irreparably tainted Respondent's supposedly new hearing." *Id.* at 20. The Board rejects this argument for three reasons.

First, the same argument was presented in *Matter of Sapp* and, as Respondent acknowledges, the Board rejected it there. *See* R. Exceptions, at 162. Respondent has not persuaded us that *Matter of Sapp* was wrongly decided.

Second, Respondent previously presented his demand for an entirely new proceeding to ALJ McNeil, who denied it on November 28, 2018. *See* Decision and Order on Interlocutory Review, at 5 (FDIC June 20, 2019). Four months later, Respondent sought interlocutory review of ALJ McNeil's decision, but the Board denied that portion of his motion as untimely. *See id.* at 5-6. Although the Board has discretion to reconsider its previous rulings in the same matter, it exercises that power sparingly in deference to the "strong policy favoring finality" of such rulings. *U.S. v. Adegbite*, 877 F.2d 174, 178 (2d Cir. 1989); *accord LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (observing that "the same issue presented a second time in the same case in the same court should lead to the same result"); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995) ("When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court."). Here, the policy favoring finality weighs against reconsideration of the Board's prior ruling.

Third, Respondent's "entirely new proceeding" argument cannot be reconciled with the Federal Rules of Evidence nor the FDIC's own rules. *See* 12 C.F.R. § 308.36(a)(3) (permitting the introduction of evidence that would be inadmissible under the Federal Rules of Evidence so long as it is "relevant, material, reliable and not unduly repetitive"). Respondent complains, for example, that ALJ McNeil discounted his 2019 testimony that he "may have signed" a Call Report "once in a blue moon," by "impermissibly reach[ing] back to Respondent's 2015 testimony" that Call Reports were prepared by others and "simply presented to me for signature." R. Exceptions, at 19. In other words, Respondent contends that he should have been free to present a new and different narrative in 2019, unencumbered by his prior testimony at a hearing where he was under oath and represented by counsel. Respondent emphasizes that he did not consent to the use of his 2015 testimony, R. Exceptions, at 19, but his consent was not required. When a case is remanded for a new trial, it is well established that the defendant may be impeached with his prior testimony and the prior testimony also can be used as substantive evidence against him. *See Harrison v. U.S.*, 392 U.S. 219, 222 (1968) (finding it unnecessary to "question the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings"); *U.S. v. Daniels*, 377 F.2d 255, 258 (6th Cir. 1967)

("Statements which are contradictory to statements given in an earlier trial or in a deposition are clearly admissible."); *see also Bondie v. Bic Corp.*, 947 F.2d 1531, 1534 (6th Cir. 1991) (recognizing that, under Federal Rule of Evidence 801(d)(2)(A), "a party's own statement offered against the party is, by definition, not hearsay").

Along the same lines, Respondent complains that, over his objection, ALJ McNeil "improperly admitted and relied upon the Joint Stipulation of Fact entered into between Respondent, former respondents Bill Green and Dick Jackson, and Enforcement Counsel prior to the 2015 hearing." R. Exceptions, at 22. Respondent argues that when the Board remanded this matter for a new hearing, it "necessarily" intended that the parties enter into new stipulations. *Id.* No Order of the Board expresses such an intention, however, and Respondent conspicuously fails to cite any authority for the proposition that stipulations of fact entered into before the first trial of a case become inadmissible in the event of a retrial. Federal courts consistently have held to the contrary. *See, e.g., U.S. v. Boothman*, 654 F.2d 700, 703 (10th Cir. 1981) (holding that the district court did not abuse its discretion by admitting, over the defendants' objection, a joint stipulation of facts that the parties entered into before the first trial of the case); *U.S. v. Marino*, 617 F.2d 76, 82 (5th Cir. 1980) ("No authority is cited for the proposition that such a stipulation may not be used in a subsequent trial. We find none.").

Next, Respondent takes exception to ALJ McNeil's use of the 2015 testimony of another witness, Michael Doherty, while questioning Mr. Doherty. R. Exceptions, at 21. Respondent does not cite any cases holding that this use of prior testimony was improper, whether ALJ McNeil was refreshing Mr. Doherty's recollection or, as Respondent would have it, cross-examining him. *See id.* Mr. Doherty's prior testimony properly could be used to refresh his recollection or to impeach him. *See Freudeman v. Landing of Canton*, 702 F.3d 318, 329 (6th Cir. 2012) (recounting district court's explanation to the jury that a witness may be referred to prior testimony “to refresh the witness’s recollection or to impeach the witness’s credibility”); *U.S. v. Foster*, 376 F.3d 577, 591 (6th Cir. 2004) (recognizing that Federal Rule of Evidence 613(b) permits the impeachment of a witness by “[e]xtrinsic evidence of a prior inconsistent statement” if “the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon”); *see also U.S. v. Smith*, 776 F.2d 892, 897 (10th Cir. 1985) (holding that prior inconsistent statement was admissible as substantive evidence Federal Rule of Evidence 801(d)(1)(A) because it was originally given under oath and the witness was subject to cross-examination concerning the statement). In the event of a conflict between Mr. Doherty’s 2015 testimony and his 2019 testimony, it would be perfectly reasonable for the finder of fact to give more credence to the former. *See U.S. v. Bigham*, 812 F.2d 943, 946 (5th Cir. 1987) (explaining that the drafters of Federal Rule of Evidence Rule 801 believed that the prior statement of a witness “is more likely to be true as it was made closer in time to the event”); *U.S. v. Distler*, 671 F.2d 954, 959 (6th Cir. 1981) (observing that the Senate, when discussing the adoption of Federal Rule of Evidence Rule 801(d)(1)(A), emphasized the benefits of “allowing the jury to consider testimony given ‘nearer in time to the events, when memory was fresher and intervening influence had not been brought into play’”) (internal citation omitted).

In sum, the Board finds that Respondent received the new hearing contemplated by the Board’s July 19, 2018, Order in Pending Cases.

3. This Proceeding Was Commenced Within the Statute of Limitations.

Respondent argues that this proceeding should be dismissed as untimely because it supposedly was not commenced within the applicable five-year statute of limitations. R. Exceptions, at 166-167. This exception borders on the frivolous. The premise is that many commencement statutes have only one requirement, such as Federal Rule of Civil Procedure 3, which provides that "[a] civil action is commenced by filing a complaint with the court." R. Exceptions, at 166 (quoting Fed. R. Civ. P. 3). By contrast, according to Respondent, "[t]o commence an enforcement proceeding" under the FDIC's regulations, the FDIC must comply with ***three*** requirements; it "must issue a Notice, serve the Notice upon Respondent, and file the Notice with OFIA." *Id.* (citing 12 C.F.R. § 308.18(a)). ("OFIA" is the acronym for Office of Financial Institutions Adjudication). That is simply incorrect. By its terms, Section 308.18(a)(i) expressly provides that "a proceeding governed by this subpart ***is commenced by issuance of a notice by the FDIC***." 12 C.F.R. § 308.18(a)(i) (emphasis added). The notice must be served on the respondent and filed with OFIA, *see* 12 C.F.R. § 308.18(a)(ii), (iii), just as a federal summons and complaint must be served on the defendant in a civil case, but an FDIC enforcement proceeding "is commenced" upon the FDIC's issuance of the notice, just as a civil case "is commenced" when the complaint is filed with the court. In other words, the FDIC's regulation is not "[u]nlike other commencement statutes." R. Exceptions, at 166. It is effectively just like them for this purpose in the sense that only one requirement must be fulfilled to commence an FDIC enforcement action.[4]

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[4] Respondent does not argue, nor could he, that because Section 308.18(a) is entitled "Commencement of Proceeding," it necessarily follows that all three subparts of that section—the FDIC's issuance of a notice, service of the notice on the respondent, and filing of the notice with OFIA—must be accomplished to "commence" a proceeding. Such an argument would run afoul of the settled rule that section headings in a statute or regulation "cannot undo or limit that which the text makes plain." Brotherhood of R. R. *Trainmen v. Baltimore & O.R. Co.,* 331 U.S. 519, 528-29 (1947) (explaining that section headings are merely "a short-hand reference to the general subject matter involved," and "are not meant to take the place of the detailed provisions of the text); accord *Spurr v. Pope, 936 F.3d 478, 488* (6th Cir. 2019) ("[A] title or heading should never be allowed to override the plain words of a text.") (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 222 (2012). Here, the text of 12 C.F.R. § 308.18(a)(i) makes plain that an FDIC enforcement proceeding "is commenced by issuance of a notice by the FDIC." 12 C.F.R. § 308.18(a)(i). Section 308.18(a)'s heading cannot be used to undo those plain words.

When Section 308.18(a)(i) is applied according to its terms, it is apparent that Respondent's statute of limitations argument is wholly without merit. The Bedrock Transaction took place in December 2009. The FDIC issued its Notice with respect to Respondent's misconduct on August 13, 2013. Because the Notice was issued well within the five-year limitations period, this proceeding was timely "commenced" within the meaning of Section 308.18(a)(i). Even if the Board were to accept Respondent's suggestion that an FDIC enforcement action is not commenced until the notice is issued, served on the respondent, and filed with OFIA, *see* R. Exceptions, at 166, it is undisputed that all of those steps took place within the five-year limitations period.

As ALJ McNeil noted in the Recommended Decision, Respondent's limitations defense attempts to engraft an additional provision onto Section 308.18(a) that purportedly requires the FDIC to file the Notice with a "valid tribunal." R.D. at 121-22. According to Respondent, because the FDIC's ALJs were not "constitutionally appointed when the Notice was issued, served, and filed on August 28, 2013," the proceeding was not "commenced" at that time. R. Exceptions, at 166-67. During the proceedings before ALJ McNeil, Respondent did not cite any authority for the proposition that the status of the FDIC's ALJs in 2013, when the Notice was issued, has some bearing on the statute of limitations. Respondent did not address that omission in his Exceptions. Furthermore, he has not offered authority for the proposition that a defect in the appointment process for the ALJs somehow negated the existence of the OFIA as a whole.

The Board notes that Respondent does not attempt to bolster his limitations defense with a policy argument extolling the important purposes served by statutes of limitations. The Supreme Court has explained that statutes of limitations protect defendants from being surprised by "the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Burnett v. New York Cent. R. Co.*, 380

U.S. 424, 428 (1965). Here, Respondent cannot claim to have been unfairly surprised by the FDIC's Notice because it is undisputed that he received it in 2013 long before the statute of limitations expired. R. Exceptions, at 167. Nor could Respondent claim that he was disadvantaged because evidence was lost, memories faded, or witnesses disappeared. To the contrary, his grievance is that documentary and testimonial evidence was ***preserved*** during the 2015 hearing and then used against him during the 2019 hearing. In short, no public policy interest would be advanced by accepting Respondent's statute of limitations defense.

For all of the above reasons, the Board concludes that the proceeding against Respondent was "commenced" within the limitations period.

4. The ALJ's Evidentiary Rulings Were Not an Abuse of Discretion.

A substantial number of Respondent's exceptions focus on ALJ McNeil's evidentiary rulings. *See* R. Exceptions, at i-iii (Nos. 1-9, 23). Among other things, Respondent argues that the ALJ admitted certain exhibits, excluded other exhibits, allowed certain testimony, limited other testimony, permitted FDIC witnesses to offer expert testimony, and denied Respondent's motions *in limine*. *See id.* As a threshold matter, FDIC Rule 308.5 provides the ALJ with broad authority to oversee the proceedings in a fair, impartial, and efficient manner. *See* 12 C.F.R. § 308.5. In particular, the ALJ has broad discretion to "rule upon the admission of evidence and offers of proof." 12 C.F.R. § 308.5(b)(3). When ruling on the admissibility of evidence, the ALJ is not bound by the Federal Rules of Evidence. *See Matter of Michael*, 2010 WL 3849537, at *15 (FDIC Aug. 10, 2010). Instead, the ALJ may receive evidence that would be inadmissible under the Federal Rules of Evidence, provided it is, in the ALJ's estimation, "relevant, material, reliable and not unduly repetitive." 12 C.F.R. § 308.36(a)(3) (permitting the introduction of evidence that would be inadmissible under the Federal Rules of Evidence so long as it is "relevant, material, reliable and not unduly repetitive"). The Board reviews the ALJ's evidentiary rulings for abuse of discretion. *See Matter of Haynes*, 2014 WL 4640797, at *13-17 (FDIC July 15, 2014). Upon review of Respondents' specific exceptions, the Board is not convinced that ALJ abused his discretion in making any of the evidentiary rulings to which Respondent objected.

5. ALJ McNeil Was Not Biased Against Respondent.

Respondent contends that he was denied a fair hearing for the independent reason that ALJ McNeil was biased against him. R. Exceptions, at 5, 15, 62-77. Respondent raised this issue in the post-hearing brief that he filed with the ALJ on January 31, 2020, and he renews the issue in his Exceptions. Under the Administrative Procedure Act, claims of bias against a "presiding or participating employee" must be supported by the "filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification." 5 U.S.C. § 556(b)(3). Because Respondent did not file such an affidavit, his claim of bias is "not entitled to consideration on the merits by the Board." *Matter of The Bartlett Farmers Bank*, 1994 WL 711717, at *3 (FDIC Nov. 8, 1994); *accord Keating v. Office of Thrift Supervision*, 45 F.3d 322, 327 (9th Cir. 1995) (declining to consider claim that agency head should have recused himself because appellant "failed to accompany his request with a timely and sufficient affidavit stating the grounds for recusal"); *Pfister v. Director, Office of Workers' Compensation Progs.*, 675 F.2d 1314, 1318 (D.C. Cir. 1982) (refusing to consider claim that ALJ was biased because "no affidavit setting forth specific evidence of prejudice [on the part of the ALJ] was ever filed"); *Gibson v. Federal Trade Comm'n*, 682 F.2d 554, 565 (5th Cir. 1982) ("[F]ailure to submit affidavits is thus an independently sufficient basis to deny [the] petitions [alleging bias].") (internal citation omitted).

Even if Respondent had filed the required affidavit, the Board would reject his claim of bias. Respondent, in his exceptions, does not identify any credible evidence demonstrating that

ALJ McNeil harbored some unfair bias against him. Instead, Respondent complains that the ALJ reached "unsupported" conclusions, misstated facts, "discounted or outright ignored evidence supportive of Respondent," raised and sustained objections, elicited testimony adverse to Respondent, and made credibility determinations that Respondent regards as unnecessary or improper. R. Exceptions, at 5. At bottom, the contention is that "because the ALJ ruled against [Respondent], he had to have been biased" against him. *Matter of The Bartlett Farmers Bank*, 1994 WL 711717, at *3 (FDIC Nov. 8, 1994); *accord Marcus v. Director, Office of Workers' Compensation Progs.*, 548 F.2d 1044, 1051 (D.C. Cir. 1976) ("The mere fact that a decision was reached contrary to a particular party's interest cannot justify a claim of bias, no matter how tenaciously the loser gropes for ways to reverse his misfortune. While this proposition may appear self-evident, petitioner's enumerated contentions collapse to little more.").

V. CONCLUSION

After a thorough review of the record in this proceeding, and for the reasons set forth previously, the Board finds that an Order of Removal and Prohibition and Assessment of a CMP is warranted against Respondent. The record demonstrates that Respondent put the Bank at risk by failing to prudently manage the Bank's relationship with its largest borrower. The record further demonstrates that Respondent actively concealed the borrower's financial problems and loan defaults from the FDIC and the Bank's board and that he made material misrepresentations to both the FDIC and the Bank's board. In light of Respondent's unsafe and unsound practices and breaches of his fiduciary duties, the Board is persuaded that Respondent should be barred from the banking industry. In addition, and also in light of the record, the Board finds that the CMP imposed is appropriate and consistent with the statute's purpose.

ORDER TO REMOVE AND PROHIBIT

The Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC"), having considered the entire record of this proceeding and finding that Respondent Harry C. Calcutt III, formerly the Chief Executive Officer and President of Northwestern Bank ("Bank"), Traverse City, Michigan, engaged in unsafe or unsound banking practices and breaches of his fiduciary duties resulting in loss to the Bank, and that his actions involved willful and continuing disregard for the safety and soundness of the Bank, hereby ORDERS and DECREES that:

1. Harry C. Calcutt III shall not participate in any manner in any conduct of the affairs of any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

2. Harry C. Calcutt III shall not solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent or authorization with respect to any voting rights in any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

3. Harry C. Calcutt III shall adhere to all voting agreements with respect to any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), except as otherwise permitted, in

writing, by the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

4. Harry C. Calcutt III shall not vote for a director, or serve or act as an institution-affiliated party, as that term is defined in section 3(u) of the FDI Act, 12 U.S.C. § 1813(u), of any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

5. This ORDER shall be effective thirty (30) days from the date of its issuance.

6. The provisions of this ORDER will remain effective and in force except in the event that, and until such time as, any provision of this ORDER shall have been modified, terminated, suspended, or set aside by the FDIC.

SO ORDERED.

IT IS FURTHER ORDERED that copies of this Decision and Order shall be served on Harry C. Calcutt III, FDIC Enforcement Counsel, the Administrative Law Judge, and the Office of Financial and Insurance Regulation for the State of Michigan.

By Order of the Board of Directors.

Dated at Washington, D.C. this 15th day of December, 2020.

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation

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ORDER TO PAY CIVIL MONEY PENALTY

The Board, having considered the entire record in this proceeding, and taking into account the appropriateness of the penalty with respect to the size of the financial resources and good faith of Respondent, the gravity of the violations, and such other matters as justice may require, hereby ORDERS and DECREES that:

1. A civil money penalty is assessed against Harry C. Calcutt III in the amount of $125,000 pursuant to 12 U.S.C.
§ 1818(i).

2. This ORDER shall be effective and the penalty shall be final and payable thirty (30) days from the date of its issuance.

The provisions of this ORDER will remain effective and in force except to the extent that, and until such time as, any provision of this ORDER shall have been modified, terminated, suspended, or set aside by the FDIC.

IT IS FURTHER ORDERED that copies of this Decision and Order shall be served on Respondent Harry C. Calcutt III, FDIC Enforcement Counsel, the Administrative Law Judge, and the Office of Financial and Insurance Regulation for the State of Michigan.

By Order of the Board of Directors.

Dated at Washington, D.C. this 15th day of December, 2020.

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation

FEDERAL DEPOSIT INSURANCE CORPORATION 1933

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