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WLF Urges Sixth Circuit To Rehear *En Banc* Challenge to FDIC's Structure

(*Calcutt v. FDIC*)

“The panel affirmed despite an unconstitutionally structured agency’s multiple legal errors.”

—John Masslon, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Court of Appeals for the Sixth Circuit to rehear a case in which a three-judge panel affirmed a Federal Deposit Insurance Corporation order. The panel’s decision includes multiple legal errors and splits from other courts of appeals on an important administrative law issue.

The case arises from a lengthy administrative proceeding. The ALJ who heard the case had two layers of for-cause removal protections—something the Constitution forbids. The FDIC eventually adopted the ALJ’s recommended decision barring Mr. Calcutt from further participating in the banking industry and imposing significant financial penalties. As the panel correctly noted, the FDIC’s decision included multiple legal errors. Yet the panel still affirmed, finding that neither any constitutional violations nor legal errors warranted vacating the FDIC’s decision.

In its *amicus* brief supporting Mr. Calcutt, WLF argues that the Sixth Circuit’s decision departs sharply from U.S. Supreme Court precedent and that of other courts of appeals on an important issue of administrative law. Rather than remand the case for the FDIC to apply the facts to the correct law, the panel majority acted as a fact-finder and affirmed the FDIC’s decision based on its searching review of the record. This violated key separation-of-powers principles as it allowed an Article III court to act as policymaker.

WLF’s brief also explains why the panel’s decision on constitutional violations is illogical given Supreme Court precedent. The decisions the panel relies on would have all turned out differently if the Supreme Court had applied the Sixth Circuit’s rule. In short, it’s impossible to “prove” that an agency decision was affected by an Appointments Clause violation. But that does not mean that parties are unentitled to relief. Finally, the brief discusses how the panel’s decision will discourage parties from challenging administrative actions in the Sixth Circuit.

Celebrating its 44th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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