

Case No. 24-40259

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Jeffrey Moats,

Plaintiff-Appellant,

v.

National Credit Union Administration Board, A Federal
Administrative Agency;

Todd M. Harper, In their official capacity as Members of the National
Credit Union Administration Board; Kyle S. Hauptman, In their official
capacity as Members of the National Credit Union Administration
Board; Rodney E. Hood, In their official capacity as Members of the
National Credit Union Administration Board;

Jennifer Whang, In her official capacity as an Administrative Law
Judge and Inferior Officer of the United States,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, Galveston Division
Honorable Jeffrey V. Brown, District Judge
No. 3:23-cv-147

PETITION FOR REHEARING EN BANC

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Statement of Issues Meriting En Banc Consideration

Through an administrative adjudication, the National Credit Union Administration (NCUA), a federal executive-branch agency, seeks imposition of multi-million-dollar monetary penalties and a lifetime industry bar on Plaintiff Jeffrey Moats, which threatens his core private rights to property and liberty. This case presents the “exceptional[ly] importan[t]” question, FRAP 40(b)(2)(D), whether jurisdiction stripping and channeling statutes like 12 U.S.C. § 1786 are unconstitutional as applied. Specifically:

- (1) Whether structural constitutional objections to proceeding administratively against an enforcement target must be resolved by federal district courts in the first instance before that complained-of administrative adjudication occurs.
- (2) Whether full Article III adjudication is necessary to determine whether an executive-branch agency has the judicial power to deprive persons of core private rights before the agency can exercise such judicial power.

The Panel and the district court were asked to, but did not, address the constitutionality of stripping and channeling statutes. AOB.19–25. Courts have a duty to address Article III jurisdiction and Congress’s encroachment on Article III power, *sua sponte*, if necessary. The Panel may choose to do so under FRAP 40(f). But given the Panel’s struggle with this Court’s precedents, the question is better presented to the en

banc Court, as the Panel itself seems to have signaled when it invoked the “rule of orderliness” to avoid overruling another panel of this Court. Burgess Slip Op. 22.¹

Statement of Course of Proceedings and Disposition of the Case

NCUA alleged Jeffrey Moats engaged in fraudulent banking activities, ROA.214, ROA.218, commenced administrative adjudication against him at the Office of Financial Institution Adjudication (OFIA), a separate agency, and sought a lifetime industry bar and \$5 million, ROA.201, ROA.432.

Moats sued NCUA in the Southern District of Texas alleging that proceeding administratively against him is structurally unconstitutional because NCUA seeks to deprive him of liberty (lifetime industry bar) and property (\$5 million), which it can do only via full Article III adjudication. ROA.195–ROA.211.

NCUA asked the court to dismiss Moats’s suit, based on 12 U.S.C. §§ 1786(k)(1), (j)(2). Moats had emphasized: “Congress ... cannot ... pull core private-rights cases completely from federal courts and place them

¹ Attached to this petition for the sake of completeness is the *Burgess v. Whang*, No. 22-11172 (5th Cir. Aug. 25, 2025), opinion because, in lieu of duplicating the discussion of relevant caselaw, the *Moats* Panel held that “[o]ur holding in *Burgess* regarding [12 U.S.C.] § 1818’s explicit jurisdictional preclusion controls here.” Slip Op. 6. *Burgess*, *Moats*, and a third case, *Ortega v. OCC*, No. 23-60617 (5th Cir. Sept. 8, 2025), were argued together, and the former two opinions were issued on the same day.

in the Executive Branch.” ROA.347. “Indeed, the canon of constitutional avoidance compels such a reading; to adopt NCUA’s interpretation of Section 1786 would render it unconstitutional.” ROA.347–ROA.348.

The district court agreed with NCUA that the statutory scheme here “explicitly” precludes “all” federal “district court jurisdiction,” dismissed for lack of jurisdiction, and did not reach the constitutionality question. ROA.433, ROA.439. The district court held that the statutes “expressly preclud[e] district court jurisdiction over all claims, including constitutional ones, that may affect a[n] NCUA proceeding,” ROA.433, and channel NCUA’s claims and Moats’s affirmative defenses (including his constitutional objections) “to the court of appeals at the conclusion of his administrative proceedings,” ROA.439.²

In briefing before the Fifth Circuit Panel, Moats again emphasized that “[c]onstitutional avoidance ... counsels in favor of district court jurisdiction here.” AOB.21.

Agreeing with the district court, the Panel affirmed. Slip Op. 2. The Panel acknowledged Moats’s constitutional argument. Slip Op. 3. But the Panel did not analyze, despite Moats’s request, AOB.19–25, the constitutionality of § 1786 after it concluded that the statute expressly precludes all district court jurisdiction. The Panel opinion is problematic

² 12 U.S.C. § 1786(k)(1) (“no court shall have jurisdiction”); § 1786(j)(2) (“review of any order ... by filing in the court of appeals ... a written petition ... [and] such court shall have jurisdiction”).

because (1) structural constitutional objections to proceeding administratively against an enforcement target like Moats must be resolved by federal district courts in the first instance before that complained-of administrative proceeding occurs, and (2) full Article III adjudication is necessary to determine whether an executive-branch agency has the judicial power to deprive persons of core private rights before the agency can exercise such judicial power.

Statement of Facts

A. NCUA

NCUA is an executive-branch agency with regulatory power over federal credit unions and insured depository institutions. NCUA makes and enforces law and has power to initiate “case[s]” against regulated parties in-house or in federal district court. 12 U.S.C. §§ 1766, 1786. NCUA also has the power to decide in-house cases and impose monetary penalties and lifetime industry bars. *Id.*

NCUA can “delegate” “any and all” of its “duties,” “authority, power, or function[s]” to “such persons as it shall designate or employ ... including any institution operating under [NCUA’s] general supervision.” 12 U.S.C. § 1766(d). NCUA has delegated adjudicative power to OFIA, a separate institution, ROA.238, reserving for itself appellate-style review of OFIA’s decisions, 12 C.F.R. § 747.40, followed by appellate review in federal circuit court, 12 U.S.C. § 1786(j)(1).

B. Jeffrey Moats

Moats served as CEO of Edinburg Teachers Credit Union (Edinburg) for 25 years. ROA.431. In 2021, the Texas Credit Union Department placed Edinburg into conservatorship with NCUA. ROA.199–ROA.200. NCUA immediately fired Moats and seized his personal property and documents. ROA.200, ROA.431. NCUA eventually returned Moats’s property and retirement savings.³

Two years later, NCUA commenced agency proceedings against Moats. ROA.201, ROA.432. NCUA alleged Moats committed fraud, and demanded \$5 million and a lifetime industry bar. ROA.201.

An agreed stay of that administrative matter entered before any substantive or procedural issue could be decided by the ALJ, ROA.201, ROA.432, remains in place.

Argument

I. Structural objections to agency adjudication must be addressed in district court before that agency adjudication occurs.

Just two years ago, this Court in *Collins v. Department of Treasury* (with the benefit of the Supreme Court’s pronouncement in *Axon*), applied the *Thunder Basin* test to hold that an express stripping statute with “language very similar to [12 U.S.C.] § 1818(i)” did not bar district-court jurisdiction to decide structural constitutional claims. 83 F.4th 970,

³ Moats separately sued Edinburg in Texas state court for post-termination benefits he was owed. ROA.201. That state-court matter concluded in August 2025.

981 (5th Cir. 2023); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994); *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023). But the Panel chose to characterize *Collins* “as nonbinding dicta,” even while invoking the “rule of orderliness” to signal that “our en banc court” should decide whether “the *Collins* panel opinion” overruled another panel of this Court. Burgess Slip Op. 22. And despite acknowledging that Moats argued that “§ 1786 [is] unconstitutional as applied to him,” Slip Op. 3 (simplified), the Panel chose not to address the constitutionality of the statute.

Where, as here, the district-court complaint alleges claims about “the structure or very existence of an agency,” then stripping or channeling statutes like 12 U.S.C. § 1786 cannot be read to preclude federal district courts from deciding those structural claims *before* the complained-of agency adjudication occurs. *Axon*, 598 U.S. at 189. In other words, wading anew through the *Thunder Basin* test should not be necessary where *Axon*’s core holding already supplies the answer: the harm of being subject to an “illegitimate proceeding, led by an illegitimate decisionmaker” cannot be meaningfully remedied on appeal because a “proceeding that has already happened cannot be undone.” *Axon*, 598 U.S. at 191. Courts can, thus, “avoid the ‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.” *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). Where, as here, Moats’s structural claims

cannot be “meaningfully addressed in the Court of Appeals” on review of the agency’s decision, the statutes cannot be read to preclude district-court jurisdiction to decide whether NCUA has power to administratively proceed against Moats at all before he can be required to undergo that complained-of agency proceeding. *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 9–10 (2012).

Even assuming that the *Thunder Basin* factors are relevant here, applying those factors should also lead to the same place: the federal district court has jurisdiction to decide whether an agency can administratively proceed against an enforcement target at all before the agency can be allowed to proceed. That is so because (1) the agency has no expertise in deciding such structural constitutional claims, courts do, *Carr v. Saul*, 593 U.S. 83, 93 (2021) (NCUA/OFIA are “powerless” to declare themselves unconstitutional); (2) structural claims are wholly collateral to the statutory claims NCUA is choosing to administratively pursue against Moats; and (3) eventual “judicial review” of such structural constitutional claims “come[s] too late to be meaningful,” *Axon*, 598 U.S. at 191.

II. Article II agencies can exercise no part of Article III power.

Where, as here, the government seeks to deprive Moats of core private rights to liberty (lifetime industry bar) and property (money damages) through in-house adjudication, the Constitution requires full Article III adjudication to decide whether an executive-branch agency

can exercise such judicial power. Congress violates the Constitution's separation of powers and encroaches on Article III in contexts where Congress funnels the adjudication of private rights as well as colorable structural objections to such administrative adjudication through executive-branch agencies to federal circuit courts.

The statute at issue here, 12 U.S.C. § 1786, is the kind of statute that squarely violates Article III. The Panel did not address the constitutionality of the statute after it held that the statute expressly strips district court jurisdiction despite Moats raising that question. AOB.19–25.

Lower federal courts, and this Court, as the Panel took pains to explain, have applied some version of the *Thunder Basin* test (and now, *Axon*) in this context. In doing so, courts have lost sight of the Article III encroachment problem lurking under the floorboards. It is questionable (1) whether the *Thunder Basin* test should be cabined to divining implicit Congressional intent, (2) whether the test should also apply in express-stripping contexts, (3) whether the test has any purchase as a method of construing statutory text, or (4) whether the test is even remotely relevant to determining when if ever Congressional encroachment on Article III is constitutional.

Thunder Basin says courts should consult “many disparate factors,” *Axon*, 598 U.S. at 207 (Gorsuch, J., concurring), including (1) meaningfulness of eventual judicial review, (2) a thorough comparison of

two sets of claims to tease out “collateralism” or “entangle[ment],” *id.* at 193, 195, plus (3) agency expertise. To apply each of these three factors, all a court must do “is ask a few more questions,” *id.* at 206 (Gorsuch, J., concurring)—all to determine whether the district court has jurisdiction to decide whether the agency has any power to act before the agency exercises that complained-of power.

It may be hard to tune out the *Thunder Basin* noise to see the weighty separation-of-powers issue in the storm’s eye. There are two complementary ways to look at the encroachment issue: the claims approach (as discussed in Part I above) and the rights approach. “[S]tructural constitutional *claims*” about whether an agency can exercise the judicial power of depriving persons of liberty or property, the *Axon* majority held, “need not be channeled through the administrative review scheme.” 598 U.S. at 196 (Thomas, J., concurring) (emphasis added). Justice Thomas concurred “in full,” but wrote separately to emphasize the “constitutional [im]propriety of Congress vesting administrative agencies with primary authority to adjudicate core private *rights* with only deferential judicial review on the back end.” *Id.* (emphasis added). That is, whether an agency can be vested with such “core of the judicial power” is a question that the federal district court has jurisdiction to decide before the agency can exercise judicial power. *Id.* at 197, 203.

While “precedent allows Congress to replace Article III district courts with ‘an alternative scheme of review,’” Congress has no power to do so “when private rights are at stake.” *Axon*, 598 U.S. at 196, 198 (Thomas, J., concurring). That is, statutes stripping district-court jurisdiction or channeling whole cases through administrative adjudication to circuit courts, at least where core private rights are at stake, “violate the separation of powers” by encroaching on judicial power. *Id.* at 202.

Justice Thomas asks one simple question on the front end: whether “core” “private rights to life, liberty, and property” “are at stake.” *Id.* at 197–98. If yes, then the Constitution requires “full” or “plenary Article III adjudication.” *Id.* at 198, 203. Justice Thomas looked at the rights at issue in *Axon*, where the regulated parties “face[d] the threat of significant monetary fines,” which “implicate[d] the core private right to property.” *Id.* at 204. Because “permitting administrative agencies to adjudicate what may be core private rights,” by enacting jurisdiction-stripping and channeling statutes would “raise serious constitutional issues,” the private party should “not [be] precluded” from proceeding in federal district court where that private party contests the agency’s exercise of judicial power. *Id.*

Unlike the *Thunder Basin* factors, Justice Thomas’s approach does not require (1) taking a peek at the merits of the underlying claims to see which ones are structural as well as collateral, (2) comparing remedies

that can be eventually meaningfully obtained from the circuit court with remedies that are available in the collateral-attack posture in the district court but would be foreclosed if judicial review is delayed until after agency review, or (3) evaluating whether the agency has enough expertise to fully remedy a structural constitutional violation. And all of this just to determine district-court jurisdiction. *See also* Brian Lipshutz, *Bypassing Agency Adjudication*, 103 Wash. U. L. Rev. __ (2026) (forthcoming), <https://ssrn.com/abstract=5376305> (calling for replacing the *Thunder Basin* approach with traditional ultra vires review).

Justice Thomas’s approach simply requires looking at the administrative complaint. ROA.214–ROA.233. If, as here, the agency seeks to administratively deprive Moats of property (monetary penalties), or liberty (lifetime bar), then 12 U.S.C. § 1786 cannot be construed to strip federal district-court jurisdiction or require channeling. Holding otherwise would permit Congress to unconstitutionally encroach on “the core of the judicial power” by vesting judicial power in the agency. *Axon*, 598 U.S. at 197 (Thomas, J., concurring).

In support, Moats argued based on *Marbury v. Madison*’s holding that “where there is a legal right, there is also a legal remedy by suit or action at law,” because questions about government power are in their “nature, judicial and must be *tried* by the judicial authority.” 5 U.S. 137, 163, 167 (1803) (emphasis added). *Marbury* and Justice Thomas

concurring in *Axon* start and end in the same place: Congress encroaches on Article III and the Constitution’s “separation of powers by placing adjudicatory authority over core private rights—a judicial rather than executive power—within the authority of Article II agencies.” *Axon*, 598 U.S. at 202 (Thomas, J., concurring). Because the NCUA statutory scheme does what the Constitution forbids, such statutes cannot be read to preclude district court jurisdiction to decide questions about the Constitution’s allocation and separation of powers before the Article II agency can be allowed to exercise Article III power. The en banc Court should so hold.

The stripping-and-channeling statutory scheme is unconstitutional under either approach. Both the district court and the Panel erred when they held that § 1786 precludes *all* district-court jurisdiction and compounded that error by not thereafter addressing whether such global preclusion violates Article III.

If 12 U.S.C. § 1786 precludes district-court jurisdiction, the statute is unconstitutional as applied. The Court should grant en banc review because the Article III encroachment questions presented here are of unusual constitutional importance. FRAP 40(b)(2)(D), 5th Cir. R. 40.2.2.4. The Court should hold that 12 U.S.C. § 1786 is unconstitutional as applied where, as here, Congress has purported to take Article III power, vested it in NCUA, and precluded *courts* from deciding whether such transfer of power is constitutional before NCUA can exercise that

power over an enforcement target. Short of that, and with a view to conserve the en banc Court’s resources, the Court could direct either the Panel or the district court to address the question first.

III. The issue is exceptionally important.

The Panel struggled with deciding which case—*Collins* or *Bank of Louisiana*, two precedents of this Court—is closest to the situation here. Neither case grappled with the precise questions presented here: deciding the constitutional propriety of depositing Article III power in an Article II agency, and whether that weighty separation-of-powers objection must be decided *before* the agency is allowed to exercise judicial power. Answering these questions has become ever more urgent after *Axon*.

Collins applied *Axon* to hold that 12 U.S.C. § 4617(f), which contains language “very similar” to 12 U.S.C. §§ 1786(j)(2), (k)(1), did not bar district-court jurisdiction to decide structural constitutional claims. 83 F.4th at 981. *Collins* thus avoided rendering the stripping-and-channeling provision at issue there unconstitutional. The Panel characterized *Collins* “as nonbinding dicta” and declined to apply it in Moats’s case. Burgess Slip Op. 22.

Bank of Louisiana v. FDIC, decided before *Axon* and *Collins*, on the other hand, says nothing about the constitutionality of stripping district court jurisdiction to decide structural constitutional claims. 919 F.3d 916 (5th Cir. 2019). The bank there waited until *after* undergoing the

complained-of administrative proceeding, and it did not argue that the agency proceeding was unconstitutionally structured. Instead, the bank argued that FDIC “committed constitutional violations during the enforcement proceedings” and presented two nonstructural claims: targeted prosecution violates the equal-protection component of the Fifth Amendment, and FDIC’s evidentiary subterfuge during the administrative proceeding violates the Fifth Amendment’s Due Process Clause. *Id.* at 921. Applying the *Thunder Basin* factors, this Court concluded that FDIC’s “review scheme precludes district court jurisdiction over the Bank’s [nonstructural] claims.” *Id.* at 925. Unlike structural claims that are about “subjection to” agency adjudication, the claims at issue in *Bank of Louisiana* were not “wholly disconnected” from “this or that” decision that was made during the agency adjudication. *Axon*, 598 U.S. at 191, 193, 195.

But the Panel considered *Bank of Louisiana* controlling and *Collins* “as nonbinding dicta,” while appropriately feeling constrained to “read the *Collins* panel opinion as overruling the *Bank of Louisiana* panel opinion.” Burgess Slip Op. 22. The confusion and disarray in Fifth Circuit caselaw persists. The situation cries out for en banc review.

The district court and the Panel’s reading of 12 U.S.C. § 1786 only makes the constitutional problem unavoidable. The en banc Court should hold that the district court had jurisdiction here.

Conclusion

The Court should grant en banc rehearing or direct the Panel or the district court to decide whether 12 U.S.C. § 1786 is unconstitutional as applied. If the Court grants en banc review, then the Court should (1) order additional briefing and argument under FRAP 40(e)(2) as needed, (2) hold that the district court has jurisdiction, and (3) remand to the district court for further proceedings as may be consistent with the Court's decision.

DATED: October 9, 2025.

Respectfully submitted,

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Certificate of Service

I hereby certify that on October 9, 2025, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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