**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**GALVESTON DIVISION**

JEFFREY MOATS,

Plaintiff,

v.

NATIONAL CREDIT UNION ADMINISTRATION BOARD, a federal administrative agency; TODD M. HARPER, KYLE S. HAUPTMAN, AND RODNEY E. HOOD, in their official capacity as Members of the National Credit Union Administration Board; and JENNIFER WHANG, in her official capacity as an Administrative Law Judge and Inferior Officer of the United States,

Defendants.

Civil Action No. 3:23-cv-147

Assigned to:
Hon. Jeffrey V. Brown

Oral Argument Requested
(Per LR7.5.A)

**PLAINTIFF'S COMBINED**
**(1) REPLY IN SUPPORT OF**
**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT;**
**(2) OPPOSITION TO DEFENDANTS'**
**CROSS-MOTION TO DISMISS OR,**
**IN THE ALTERNATIVE,**
**FOR SUMMARY JUDGMENT**

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## Glossary

| | |
|---|---|
| ALJ | Administrative Law Judge |
| CEO | Chief Executive Officer |
| CFPB | Consumer Financial Protection Bureau |
| FDIC | Federal Deposit Insurance Corporation |
| FHFA | Federal Housing Finance Agency |
| FTC | Federal Trade Commission |
| INS | Immigration and Naturalization Service |
| OFIA | Office of Financial Institution Adjudication |
| MSPB | Merit Systems Protection Board |
| NCUA | National Credit Union Administration |
| PCAOB | Public Company Accounting and Oversight Board |
| PMSJ | Plaintiff's Motion for Summary Judgment (Doc. 27) |
| SEC | Securities and Exchange Commission |
| XMSJ | Defendants' Cross-Motion to Dismiss or in the alternative for Summary Judgment (Doc. 28) |

## Argument

The Court should grant summary judgment to Mr. Moats on all four counts. *See* Docs. 26, 27. The Court should declare NCUA agency adjudication unconstitutional and enjoin NCUA from proceeding administratively against Mr. Moats. The Court should deny NCUA's cross-motion to dismiss and deny summary judgment that NCUA asks for in the alternative (*see* Doc. 28).

### I. Removal Protections for NCUA ALJs Violate Article II

The Defendants (together, NCUA) do not dispute that ALJ Whang is an executive officer of the United States. *See* PMSJ pt. I-A, 4–6. Nor can they, given *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022). *Lucia* held that SEC ALJs, whose functions and duties mirror those of NCUA ALJs (*see* PMSJ at 4–6), are "officers" of the United States. *Id.* at 2053–55. And *Jarkesy*, applying *Lucia* and precedent, held that "[t]wo layers of for-cause" "removal restrictions for SEC ALJs are unconstitutional." *Id.* at 463; *see also* PMSJ at 4–8

NCUA instead suggests that two or more layers of removal protection for executive officers is constitutional, XMSJ 14–15, and that these removal protections have not harmed Mr. Moats, XMSJ 16–17. Neither has merit.

#### A. At Least Two Layers of Removal Protection for ALJ Whang Violates Article II

NCUA does not dispute there are at least two layers protecting ALJ Whang (*see* PMSJ at 7): ALJ Whang "can only be removed … if good cause is found by the Merit Systems Protection Board" and "MSPB members can only be removed by the President for cause." *Jarkesy*, 34 F.4th at 464. So, ALJ

Whang is "insulated from the President by at least two layers of for-cause protection from removal, which is unconstitutional." *Id.*

With ALJ Whang, there is a third layer of removal protection: the interagency 2018 ALJ Agreement. Doc. 22-1; Doc. 26 at 44–58. The heads of three banking agencies plus NCUA must *unanimously* agree to remove ALJ Whang from their pool of ALJs. PMSJ at 7–8. NCUA does not dispute this either. This is all that is needed for this Court to conclude that the "at least two layers of for-cause protection from removal" for NCUA ALJs "is unconstitutional." *Jarkesy*, 34 F.4th at 464; *see also Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492 (2010) (holding that two layers of removal protection for executive officers runs afoul of the Appointments Clause). The Court should so declare.

NCUA instead says it stipulated that NCUA board members "are removable by the President at will." Doc. 22 ¶ 1. Mr. Moats, of course, agrees. But NCUA then concludes that the "President can therefore exert control over NCUA ALJs by exercising his removal authority over the NCUA Board." XMSJ at 15. In arguing so, NCUA does not address *Jarkesy*, which held that removal for good cause by *MSPB* is one layer of protection enjoyed by ALJs and *MSPB members'* for-cause protection from removal, the second. 34 F.4th at 464. True, SEC commissioners also enjoy for-cause removal protection. *Id.* And if that were the case with NCUA, that'd be yet another layer of removal protection that ALJ Whang enjoys. Given SEC commissioners' insulation, *Jarkesy* was careful to note that SEC ALJs "are insulated from the President by *at least* two layers of for-cause protection from removal, which is unconstitutional." *Id.*

(emphasis added). The same is true here. At-will removal of NCUA board members does not resolve the removal question because they cannot unilaterally remove ALJ Whang without going through the MSPB procedure, which system supplies two layers of removal protection—and having a two-layered protection violates Article II.

To distract the Court from the straightforward application of *Jarkesy*, NCUA cites one "NCUA Board Action Bulletin." XMSJ at 15 (citing 2018 WL 9960807 (Sept. 20, 2018)). That Bulletin (issued about three months after *Lucia* was decided on June 21, 2018, 138 S. Ct. 2044) only addressed the *appointment* issue under *Lucia*. To address the *Lucia* appointment issue, the Bulletin states that the "NCUA Board … approved the appointment of two administrative law judges … in the Office of Financial Institution Adjudication." 2018 WL 9660807, at *2.

The Bulletin does not address the *removal* question at issue here. As the Bulletin correctly notes, "*Lucia* … held that administrative law judges must be appointed by the head of the agency in order to comply with the Constitution's Appointments Clause." 2018 WL 9960807, at *2. The Bulletin *does not* disturb the 2018 ALJ Agreement (fully executed in December 2017, Doc. 22-1 at 7–10), which, as NCUA admits in the Joint Stipulation, "is currently in effect and, other than some minor changes to office space allocations not relevant in this action, has not been modified since it was executed by the parties to the agreement." Stip. ¶ 4 (Doc. 22 at 2).

The 2018 ALJ Agreement adds an *additional* layer of removal protection. NCUA's answer to that is to cite 12 U.S.C. § 1789(a)(4), which states that the

NCUA Board has discretion—the "Board may"—to "dismiss at pleasure such officers or employees." But the 2018 ALJ Agreement (Doc. 22-1) cabins NCUA's discretion, providing that "[*a*]*ny change*"—which would include dismissing ALJ Whang from presiding over NCUA's administrative case against Mr. Moats—"*shall be* subject to the prior written approval of all Agencies." Doc. 22-1 at 4 (emphasis added).

And even assuming NCUA could "dismiss at pleasure," 12 U.S.C. § 1789(a)(4), an ALJ, it does not follow that, under the plain words of the statute, such dismissal would be case-by-case. When interpreting statutes, courts "give words their ordinary or natural meaning." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (simplified). The ordinary meaning of "dismiss … such officers," 12 U.S.C. § 1789(a)(4), is to remove the officer from office: "release or discharge (a person) from employment." *Black's Law Dictionary* 589 (Deluxe 11th ed. 2019) (defining "dismiss"). And such dismissal would not be truly "at [NCUA Board's] pleasure" anyway because NCUA does not dispute, nor can it, that ALJ Whang can only be removed if MSPB finds "good cause," 5 U.S.C. § 7521(a), and MSPB members themselves are shielded from the President's at-will removal power, 5 U.S.C. § 1202(d). That's two layers of removal protection *Jarkesy* held unconstitutionally shielded ALJs inside SEC. 34 F.4th at 464.[1]

[1] NCUA says "dismiss at pleasure," 12 U.S.C. § 1789(a)(4), means it can "preclude" ALJ Whang or any other ALJ from hearing NCUA's case against Mr. Moats. XMSJ at 15. But that would mean simply that NCUA cannot then proceed administratively against Mr. Moats because (1) ALJ Whang appears to be the only ALJ currently at the Office of Financial Institution Adjudication, OFIA, *Our Judges*, https://www.ofia.gov/who-we-are/our-judges.html; and (2)

ALJ Whang is plainly insulated by three layers of removal protection—good cause found by MSPB; MSPB members removable only for cause; the 2018 ALJ Agreement (Doc. 22-1) requiring unanimous consent of NCUA plus three other banking agencies, the heads of one of which enjoy for-cause removal protection (PMSJ at 7–8 (citing 12 U.S.C. § 242)). *Jarkesy*, a Fifth Circuit decision that is directly binding on this Court, decided that the two layers of "good cause" found by MSPB and MSPB members' insulation from removal violate Article II. 34 F.4th at 464. That is all that is needed for this Court to declare the removal protection enjoyed by NCUA ALJs unconstitutional. It should do so and enjoin NCUA from proceeding with its in-house action against Mr. Moats.

### B. *Collins II* Does Not Govern Here

This case concerns the constitutionality of ALJ removal restrictions and prospective declaratory and injunctive relief. NCUA argues that the Court should not enjoin NCUA from proceeding administratively against Mr. Moats. In support, NCUA cites *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (*Collins II*).[2] *Collins II* is inapplicable. *Collins II* deals with agency-head removal

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NCUA argues elsewhere in the same brief that it can only administratively litigate the case against Mr. Moats: "neither [12 U.S.C. §] 1786 nor any other applicable statute authorizes NCUA to file charges in district court like those asserted against Mr. Moats." XMSJ at 29.

[2] The Supreme Court "affirmed in part, reversed in part, and vacated in part" the judgment of the Fifth Circuit in *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (*en banc*) (*Collins I*) and "remanded for further proceedings." 141 S. Ct. at 1789. On remand, the Fifth Circuit remanded to the district court, whose decision is reported at *Collins v. Lew*, 642 F. Supp. 3d 577 (S.D. Tex. 2022) (*Collins III*). On appeal from that decision, the Fifth Circuit decided, six days after NCUA filed its brief, *Collins v. Dep't of Treasury*, __ F.4th __, 2023 WL 6630307 (5th Cir. Oct. 12, 2023) (*Collins IV*).

restriction, not ALJ removal restriction at issue here. And *Collins II* deals with retrospective relief for classic pocketbook injuries whereas here, for now, Mr. Moats seeks declaratory and injunctive relief, Doc. 26 (Am. Compl.), ¶ 56, both of which are prospective in nature.

The Supreme Court in *Collins II* declared that the statute imposing a for-cause removal restriction on the President's ability to remove the single director of the Federal Housing Finance Agency (FHFA) "violates the separation of powers." 141 S. Ct. at 1783. *Collins II* does not say anything about the ALJ-removal issue. And neither the Supreme Court nor the Fifth Circuit has applied *Collins II* in cases challenging ALJ removal restrictions. *See Jarkesy*, 34 F.4th at 463 n.17; *Community Financial Services Ass'n v. CFPB*, 51 F.4th 616 (5th Cir. 2022) (applying *Collins II* in a case challenging the for-cause removal protection for CFPB director).

The shareholder plaintiffs in *Collins II* asked for declaratory relief, which they obtained.[3] The shareholders had also alleged a classic "pocketbook injury." *Collins II*, 141 S. Ct. at 1779. By the time the Supreme Court decided the case, FHFA amended for the fourth time the FHFA–Treasury agreement that gave rise to the complaint, which action the Supreme Court held precluded "prospective relief" as a factual matter but not "retrospective relief." *Id.* at 1780. So, the *only* "remedial question" *Collins II* decided was what, if any,

[3] *Compare* Complaint, No. 4:16-cv-03113, 2016 WL 6158956, ¶ 190(a) (S.D. Tex. Oct. 20, 2016) ("Declaring … that FHFA's structure violates the separation of powers") *with Collins I*, 938 F.3d at 587 (Act's "for-cause removal protection infringes Article II."), *affirmed in part by Collins II*, 141 S. Ct. at 1783, 1789 ("The Recovery Act's for-cause restriction on the President's removal authority violates the separation of powers.").

"retrospective relief" can be given after the Court declared the director's for-cause removal protection unconstitutional. *Id.* at 1787. The Court noted that "an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment)"; that is, unconstitutional provisions are void *ab initio*. *Id.* at 1788–89. But it remanded (since the case came up from a motion to dismiss) because it is "possible for an unconstitutional provision to inflict compensable harm," and the Court was not prepared to "rul[e] out" based on the complaint alone "the possibility that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect." *Id.* at 1789. So, the Court remanded because facts that would prove or disprove entitlement to retrospective monetary relief against FHFA "should be resolved in the first instance by the lower courts." *Id.* On remand, shareholders amended the complaint and the government moved to dismiss. *Collins III*, 642 F. Supp. 3d at 580. The district court correctly noted that the Supreme Court "directed lower courts to determine whether 'retrospective relief' is available based on 'compensable harm'" and concluded that the shareholders "fail to plausibly demonstrate compensable harm." *Id.* at 584. The Fifth Circuit affirmed. *Collins IV*, 2023 WL 6630307, at *9–*10.

*Collins II*'s holding regarding retrospective compensable harm does not reach the question presented here. Mr. Moats seeks prospective declaratory and injunctive relief to *prevent* a constitutional violation, which if granted, would simply prospectively enjoin NCUA from proceeding administratively

against Mr. Moats. Such relief is neither retrospective nor does it require NCUA to compensate Mr. Moats monetarily. Indeed, a holding otherwise would mean there is no prospective remedy for a clear constitutional infirmity, which cannot be the case here, despite *Collins II* limiting compensatory retrospective relief.[4]

## II. NCUA Agency Adjudication Violates the Seventh Amendment

*Jarkesy*, 34 F.4th at 451–59, is controlling and fully resolves the Seventh Amendment question against NCUA here. NCUA's entire suit against Mr. Moats should have been brought in federal court where he would have had the option to demand a jury trial. But knowing Mr. Moats cannot demand a jury trial in its home tribunal, NCUA dragged him into agency adjudication instead. The Court should declare that NCUA's procedural antics deprived Mr. Moats of a trial by jury and enjoin NCUA from proceeding against him administratively.

NCUA resists *Jarkesy*'s controlling weight. All of the arguments NCUA makes here are ones that SEC made in *Jarkesy* and which the Fifth Circuit rejected in their entirety. Ounce for ounce, *Jarkesy* controls here.

NCUA correctly notes that "when *Congress properly assigns* a matter to adjudication in a non-Article III tribunal, the Seventh Amendment poses no independent bar." XMSJ at 18 (emphasis added; simplified). But it fails to address an earlier question and that failure waives any argument NCUA could

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[4] *See Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. … [I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.") (simplified).

have made on that point. The earlier premise that is at the heart of the jury-trial issue is: Congress has no power to assign private-rights cases to agency adjudication.

The pertinent inquiry is whether Congress has "properly assigned" a category of cases to agency adjudication. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53–54 (1989)). Congress "lacks the power" to assign private-rights cases, that is, "causes of action" that "possess a long line of common-law forebears" to non-Article III jury-less adjudication. *Id.* at 52.

NCUA does not dispute that the causes of action it brought against Mr. Moats "possess[es] a long line of common-law forebears." *Id.* NCUA's causes of action against Mr. Moats, Doc. 26 at 20, are based on its allegations that Mr. Moats committed "unsafe or unsound practice," or "breach[ed] … fiduciary duty" in "conducting the affairs of" the credit union of which he was CEO. 12 U.S.C. §§ 1786(e), (g), (k). The first page of NCUA's notice of charges alleges Mr. Moats committed "[b]ank [f]raud," and "[e]mbezzlement." Doc. 26 at 20. NCUA admits as it must that "NCUA's focus is on how Mr. Moats's alleged conduct may have harmed the financial institution he was charged with managing." XMSJ at 21. Such claims "are quintessentially about the redress of private harms." *Jarkesy*, 34 F.4th at 458. Suits seeking relief from private wrongs arising out of the principal–agent relationship as existed between Mr. Moats and the Edinburg Teachers Credit Union is a "type of action [that] was commonplace at common law,"[5] "jury trial rights are consistent and compatible

[5] *See* III William Blackstone, *Commentaries on the Laws of England* 115–16 (discussing suits seeking remedies for private wrongs are suits at common law).

with the statutory scheme," and "such actions are commonly considered by federal courts with or without the federal government's involvement." *Id.* at 459.

NCUA's bald assertion that its case against Mr. Moats is somehow a public-rights case does not pass the smell test. NCUA attempts to simultaneously assert that "fraud plays a bit part in the claims against Mr. Moats," while admitting on the same page that the "basis for NCUA's civil-penalty claim" "may also constitute fraud." XMSJ at 21. Nor does NCUA attempt to explain (nor can it) why *Jarkesy* does not dictate the outcome here. Instead, NCUA cites one Fifth Circuit opinion that pre-dates *Jarkesy*,[6] concerning a cease-and-desist order dissimilar from the fraud claims at issue here. XMSJ at 21 (citing *Akin v. Office of Thrift Supervision*, 950 F.2d 1180 (5th Cir. 1992)).

NCUA fails to substantively respond to Mr. Moats's arguments explaining why suits for civil monetary penalties require a jury trial, PMSJ at 8–10, because the law is clear.

NCUA's agency adjudication violates Mr. Moats's Seventh Amendment rights, and therefore this Court should enjoin NCUA from proceeding administratively against Mr. Moats. The remedy does not "hamstring" NCUA, XMSJ at 22; it leaves open the option (to the extent the statute of limitations, laches, and other defenses do not bar it) for NCUA to file suit in federal district court where Mr. Moats can (and will) demand a jury trial.

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[6] Indeed, it appears from a Westlaw search that *Akin* has not been cited by the Fifth Circuit in over 20 years.

## III. Administratively Proceeding Against Mr. Moats Deprives Him of the Due Process of Law

NCUA first says that the "consolidation of prosecutorial and adjudicative functions in one agency does not violate due process." XMSJ at 22–26. And then it says Mr. Moats improperly raised a new claim at the summary-judgment stage. XMSJ at 26–27. Neither argument is persuasive.

NCUA does not dispute that executive, legislative, and judicial functions are consolidated inside NCUA. *See* PMSJ at 13–14 (explaining NCUA's "multiple roles—employer firing an employee, prosecutor, jury, judge, appellate court, executor of an award of monies payable by Mr. Moats, and judgment collector"). And NCUA admits that rules applicable in Article III proceedings "do not govern agencies," XMSJ at 27, and therefore, NCUA can create any number of self-serving legislative rules giving itself a distinct litigating advantage in its home tribunal. PMSJ at 17–18 (discussing 12 C.F.R. §§ 747.16, 747.36(a)(3), 747.100(a)–(b)). These NCUA-written rules supply the factual predicate for the structural due-process claim.

Instead, NCUA argues that commingling "prosecutorial and adjudicative" functions does not violate the Fifth Amendment's Due Process Clause. XMSJ at 22. To so argue, NCUA cites *Withrow v. Larkin*, 421 U.S. 35 (1975). But *Withrow* does not help NCUA because *Withrow* did not involve a constitutional challenge to a federal agency's structure and existence based on the commingling of the federal government's legislative, executive, and judicial powers in one federal executive-branch agency.

*Caperton v. A.T. Massey Coal Co.* is closer to the challenged NCUA agency adjudication than *Withrow*. *Caperton* concluded that "due process is violated" when there is "executive abuse of power," 556 U.S. 868, 887 (2009). Applying *Withrow*, *Caperton* held that where there is an appearance of partiality, "due process requires recusal" of the adjudicator. *Id.* at 872 (citing *Withrow*). Agency adjudication inside NCUA is just such an abuse of power by an executive-branch agency because NCUA can freely choose to file this case in federal court but chose to file this case with its ALJ instead. And it creates such an appearance of partiality to let the ALJ adjudicate, and after that for NCUA itself to decide the appeal however it wishes. So, it is appropriate for this Court to enjoin NCUA's adjudication of NCUA's statutory claims against Mr. Moats, leaving NCUA free to perform all of its other functions.

NCUA argues that the Court should not reach other aspects of the due-process problem, asserting that they were not pleaded in the First Amended Complaint. XMSJ at 26–27. NCUA's assertion is without support. Mr. Moats's due-process challenge is to the structure and existence of NCUA agency adjudication. *See* Doc. 26 ¶ 44 ("The cumulative effect of the procedural defects inherent in administrative adjudication before the NCUA deprives Mr. Moats of the due process of law guaranteed by the Fifth Amendment."); *see generally id.* ¶¶ 43–47. The due-process question relates to lack of "independen[ce] and impartiality" in NCUA adjudications just as much as it relates to executive officers enjoying "multiple layers of removal protection," lack of "jury" trial in

agency adjudication, and the possibility of deferential appellate judicial review available only after undergoing agency adjudication. *Id.*[7]

NCUA's limited attempt at responding to the merits fails. Beyond *Caperton*, the way to approach that question is to think carefully about the line the Supreme Court has drawn between (1) private-rights cases (where "the right being vindicated is a private one," *Jarkesy*, 34 F.4th at 458, such as the harm NCUA alleges Mr. Moats caused Edinburg Teachers Credit Union), which must be commenced in Article III courts because such suits vindicate private interests, and (2) public-rights cases, which can be assigned by Congress to agency adjudication because they seek to vindicate public rights. Instead of explaining why NCUA's administrative claims against Mr. Moats involve public rights, NCUA simply asserts that its in-house proceedings against Mr. Moats "center on public rights," presumably because the government is the plaintiff. XMSJ at 27. But *Jarkesy* rejected this argument. 34 F.4th at 458 ("*Granfinanciera* … stressed that the government's involvement alone does not convert a suit about private rights into one about public rights.").

Nor does NCUA distinguish the long line of cases that have held that adjudication of core private rights must commence and occur in Article III courts with jury trials. *Stern v. Marshall*, 564 U.S. 462 (2011) ("Congress may

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[7] In eventual appeals from the final NCUA decision to the appropriate federal circuit court, courts review the agency's findings of fact under the deferential substantial-evidence, abuse-of-discretion, or arbitrary-and-capricious standards of review. *Doolittle v. NCUA*, 992 F.2d 1531, 1535 (11th Cir. 1993) (citing 5 U.S.C. § 706). And courts defer to the agency's conclusions of law. *First City Bank v. NCUA*, 111 F.3d 433, 437 (6th Cir. 1997).

not withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.") (simplified); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (explaining that the responsibility of deciding suits made of "the stuff of the traditional actions at common law" rests with Article III judges in Article III courts both as to "issues of fact as well as issues of law"); *Jarkesy*, 34 F.4th at 457–59 (explaining the historical distinction between public rights and private rights); *see also* Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 572 (2007) ("When the government wished to take direct and adverse action against someone's core private rights, however, an exercise of 'judicial' power was necessary."); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1672 (2012) (explaining that the due process of law requires that "government can deprive persons of rights only pursuant to a coordinated effort of separate institutions that make, execute, and adjudicate claims under the law").

It therefore violates the Fifth Amendment's Due Process Clause if NCUA, an executive-branch agency, adjudicates in-house a case alleging one private party harmed another, under deficient self-serving rules of adjudication, without jury trials, and with only eventual deferential review on appeal. The Court should so hold and enjoin NCUA from proceeding administratively against Mr. Moats.

## IV. NCUA's Agency Adjudication Violates the Nondelegation Doctrine

NCUA argues that "neither [12 U.S.C. §] 1786 nor any other applicable statute authorizes NCUA to file charges in district court like those asserted against Mr. Moats." XMSJ at 29. This assertion is self-defeating; 12 U.S.C. § 1786 displaces neither 28 U.S.C. § 1331 nor Article III, § 2, of the Constitution, and if it does, the nondelegation problem is that much sharper.[8]

### A. NCUA Has the Unfettered Choice to Sue Mr. Moats in Federal District Court or in Its Home Tribunal

*Congress* has the power to create and organize lower federal courts. U.S. Const. art. I, § 8, cl. 9; art. III, § 1. Exercising that power, Congress has said, "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; *see also* U.S. Const. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"). Not *may* have jurisdiction, but *shall*. Not *some* civil actions arising under federal law, but *all*. The federal-question-jurisdiction statute, 28 U.S.C. § 1331, is as clear as statutes get, and everyone agrees it encompasses the claims NCUA seeks to adjudicate against Mr. Moats—alleged violations of federal law. NCUA, like any other federal agency, always possesses the power to sue in federal court. Just because an agency ALJ can hear a case does not mean a district court cannot.

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[8] Mr. Moats reserves the right to rely on NCUA's position here in any future proceeding.

When NCUA alleges violations of federal law, federal courts generally have jurisdiction. That much is not in doubt here. NCUA asks a different question: did Congress, by enacting 12 U.S.C. § 1786 *strip* federal district courts of jurisdiction to hear claims arising under federal statutes? The answer: no. Nothing in 12 U.S.C. § 1786 *explicitly* strips courts of federal-question jurisdiction. And no one suggests otherwise. Nor does 12 U.S.C. § 1786 *implicitly* deprive federal courts of federal-question jurisdiction.

NCUA's argument that it has no choice but to administratively proceed against Mr. Moats skips a critical constitutional question. *Congress* can strip federal courts of already granted jurisdiction but only "[w]ithin constitutional bounds." *Bowles v. Russell*, 551 U.S. 205, 212 (2007). Due to 28 U.S.C. § 1331, federal courts start with the presumption that they can decide claims arising under federal law. If Congress wants to overcome the 150-year-old statute, 28 U.S.C. § 1331, courts expect Congress to speak clearly in doing so. Even then, federal courts must doubly ensure that Congress does not limit jurisdiction in a way that clashes with the Constitution's guarantees. Congress cannot, for example, vest the "judicial Power" in the Executive Branch. *See, e.g.*, *Hayburn's Case*, 2 U.S. 408 (1792). Nor can Congress gerrymander jurisdiction such that it tramples on a party's due process rights. *Cf. Stern*, 564 U.S. at 482–84 ("[A]rticle III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III.").

So, absent explicit and constitutional jurisdiction stripping by Congress, federal agencies can always commence litigation of claims arising under federal law in federal district court. That is so for two reasons.

First, the Constitution guarantees the due process of law, which "refer[s] to the guarantee of legal judgment in a case by an authorized *court* in accordance with settled law." Chapman & McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. at 1679 (emphasis added). The Constitution's structural separation of powers and the Due Process Clauses "mea[n] that the executive cannot deprive anyone of a right except as authorized by law, and that to be legitimate, a deprivation of rights ha[s] to be preceded by certain procedural protections characteristic of judicial process: generally, presentment, indictment, and trial by jury." *Id.*

When NCUA seeks to take Mr. Moats's liberty and property (as here, lifetime industry bar, restitution, and civil monetary penalties), the presumption is that it must proceed through *judicial* process in Article III courts.[9] Congress itself cannot, for example, pull core private-rights cases completely from federal courts and place them in the Executive Branch. Statutes like 12 U.S.C. § 1786 must therefore be read with these constitutional baselines in mind. Indeed, the canon of constitutional avoidance compels such

[9] Gary Lawson, *Take the Fifth … Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 B.Y.U. L. Rev. 611, 631–32 (2018) (noting that the "judicial Power" requires independent judges to provide due process of law); Evan Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 Geo. J.L. & Pub. Pol'y 27, 30 (2018) (deferring to agency factfinding in core private rights cases "constitutes an abdication of the duty of independent judgment that Article III imposes upon federal judges; and denies litigants due process of law").

a reading; to adopt NCUA's interpretation of Section 1786 would render it unconstitutional for the same reasons NCUA's efforts to proceed before an ALJ here violate the Constitution.[10] The statute's plain reading preserves the Constitution's structure "to secure liberty"—just as the Founders intended. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Second, Congress has said the following: Congress tracked Article III, § 2's words and vested federal district courts with jurisdiction to hear *all* claims "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Under that statute, federal courts decide "a cause of action created by federal law." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Of course, Congress can pull away that jurisdiction in specific contexts. For example, immigration statutes revoke some jurisdiction from federal courts. *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022). But courts require "irresistible clearness," *United States v. Fisher*, 6 U.S. 358, 390 (1805), a "heightened showing," *Webster v. Doe*, 486 U.S. 592, 603 (1988), and "a clear statement of congressional intent," *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), to defeat federal-question jurisdiction conferred on federal district courts by the Constitution's Article III, § 2 and 28 U.S.C. § 1331.

In 12 U.S.C. § 1786, Congress said any party "may obtain a review of any order" by appealing to a federal circuit court. 12 U.S.C. § 1786(j)(2). That language does not prevent NCUA from commencing suit against Mr. Moats in

[10] *See, e.g.*, *Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743, 753–61 (5th Cir. 2008) (applying the doctrine of constitutional avoidance to Bankruptcy Abuse Prevention and Consumer Protection Act provision to avoid potential constitutional problems).

federal district court under 28 U.S.C. § 1331. If 12 U.S.C. § 1786 means anything, it means that when NCUA chooses to take the agency-adjudication route, it must follow the procedure laid out in 12 U.S.C. § 1786; but if NCUA chooses to sue in federal court, the default rules of civil procedure, evidence, jury trials, etc. apply. NCUA's statutory scheme is thus plain: it has the unfettered choice to drag Mr. Moats into agency adjudication or into federal district court. It is this unfettered choice that violates the nondelegation doctrine.

### B. NCUA's Decision to Proceed Administratively Against Mr. Moats Violates the Nondelegation Doctrine

As noted above, *Congress* has the choice to strip federal courts of federal-question jurisdiction. That is, *Congress* can choose to "assign to agency adjudication" federal-question cases that are "traditionally at home in Article III courts." *Jarkesy*, 34 F.4th at 461. That is quintessential *legislative* power. *See* U.S. Const. art. I, § 8, cl. 9 ("The Congress shall have Power … To constitute Tribunals inferior to the supreme Court."); U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the *Congress* may from time to time ordain and establish.") (emphasis added).

When Congress assigns, as here, *its* power to choose "agency adjudication" or "Article III" litigation to NCUA, it delegates *legislative* power to the agency. *Jarkesy*, 34 F.4th at 461–463. The Fifth Circuit expressly *rejected* SEC's argument that NCUA makes here. *Id.* at 461–62. SEC argued in *Jarkesy* that it "merely exercises a form of prosecutorial discretion—an executive, not legislative, power." *Id.* Here, NCUA says the same thing: "when

NCUA files an administrative action, it exercises quintessentially executive power," and attempts to equate the choice at issue with "prosecutorial discretion." XMSJ at 28–29. *Jarkesy*, which is binding on this Court, resolves the question. Congress did not merely say that NCUA can "bring enforcement actions," or "choose where to bring a case among those district courts that might have proper jurisdiction." 34 F.4th at 462. Instead, it gave NCUA "the power to decide which defendants should receive *certain legal processes* (those accompanying Article III proceedings) and which should not." *Id. That* decision "is a power that Congress uniquely possesses." *Id. Jarkesy* controls.

Having confirmed that the court was dealing with delegation of *legislative* power, *Jarkesy* correctly applied the intelligible-principle test and held that Congress had not supplied any principle to guide SEC's exercise of legislative power. So too here. Congress has supplied no guiding principle to NCUA—neither in 12 U.S.C. § 1786, nor elsewhere. Congress's failure is fatal to NCUA's nondelegation argument.

NCUA counters that 12 U.S.C. § 1786 displaces "any other applicable statute," including 28 U.S.C. § 1331. XMSJ at 29. If it does, the nondelegation problem is even more pronounced. As noted, courts apply the clear-statement rule to evaluate statutes purporting to strip federal courts of jurisdiction. That rule is stricter than the intelligible-principle test. Under either rule, Congress has not supplied an intelligible principle, much less a clear statement, in 12 U.S.C. § 1786 that it overrides 28 U.S.C. § 1331.

The Court should declare that NCUA's selection of agency adjudication violates the nondelegation doctrine and enjoin NCUA from proceeding administratively against Mr. Moats.

## V. This Court Has Subject-Matter Jurisdiction and Mr. Moats's Claims Are Ripe

NCUA argues that 12 U.S.C. § 1786(k)(1) "withdraws" this Court's subject-matter jurisdiction. XMSJ at 6–10. NCUA then argues that even if Mr. Moats's claims "were not expressly precluded" by this statute, they are not ripe. XMSJ at 6, 10–13. Neither argument has merit. The Court should deny NCUA's motion to dismiss and grant summary judgment to Mr. Moats.

### A. This Court Has Subject-Matter Jurisdiction

NCUA posits that 12 U.S.C. § 1786(k)(1) is a jurisdiction-stripping statute. XMSJ at 7. Missing from NCUA's argument is any discussion of *Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890 (2023), except for one throw-away citation buried in the last paragraph of the ripeness section that does not even attempt to describe, distinguish, or address *Axon*. XMSJ at 12. *Axon* plainly resolves this case in Mr. Moats's favor.

*Axon* held that the SEC and FTC statutory-review schemes do not displace a district court's federal-question jurisdiction over claims challenging as unconstitutional the structure or existence of the two agencies. 143 S. Ct. at 900–906. The Supreme Court confirmed that district courts have subject-matter jurisdiction to hear challenges to federal agency actions by way of 28 U.S.C. § 1331. *Id.* at 900. When Congress creates a statutory-review scheme, it "does not necessarily extend to every claim concerning agency action." *Id.*

The statutory-review scheme here, 12 U.S.C. § 1786, lays out the claims *NCUA* can bring against credit unions or private parties. It says nothing about the claims, especially constitutional claims, *private parties* can bring against NCUA. It does not strip this Court from deciding structural constitutional claims brought by private parties against NCUA under 28 U.S.C. § 1331. As noted above, courts require Congress to supply a clearer jurisdiction-stripping language than what's contained in 12 U.S.C. § 1786(k)(1). As a matter of statutory construction, therefore, NCUA's argument falls flat. Because there is no clear jurisdiction-stripping language in Section 1786(k)(1), this Court has jurisdiction under 28 U.S.C. § 1331 to decide Mr. Moats's constitutional challenge to NCUA agency adjudication.

Statutory construction should be the end of the matter. But *Axon* also said that when in doubt, courts should apply the *Thunder Basin* factors. 143 S. Ct. at 900 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)). NCUA's argument also falls apart under those three factors for the same reason that SEC's, FTC's, and PCAOB's arguments fell apart in *Axon* and *Free Enterprise Fund*.[11] This Court should review the four constitutional claims Mr. Moats presents because they (1) cannot otherwise receive meaningful judicial review, (2) are collateral to any decisions NCUA could make in agency adjudication, and (3) fall outside the NCUA's sphere of expertise.

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[11] *Burgess v. FDIC*, 639 F. Supp. 3d 732, 742 (N.D. Tex. 2022) concluded, applying the clear-statement rule, that 12 U.S.C. § 1818(i)(1), which NCUA claims is "identica[l]," XMSJ at 7, to 12 U.S.C. § 1786(k)(1), does not bar federal suits brought under 28 U.S.C. § 1331. *Axon* was not decided until April 2023, so the *Burgess* court did not have the benefit of the Supreme Court's most-recent controlling pronouncement on the matter. *Axon* controls in this Court in this case and *Burgess* remains persuasive authority.

The *Thunder Basin* factors are: (1) "could precluding district court jurisdiction foreclose all meaningful judicial review of the claim?" (2) "is the claim wholly collateral to the statute's review provisions?" (3) "is the claim outside the agency's expertise?" *Axon*, 143 S. Ct. at 900 (simplified). All three factors come out in Mr. Moats's favor.

*Axon* resolved the first factor—could precluding district court jurisdiction foreclose all meaningful judicial review of Mr. Moats's claims against NCUA?—in Michelle Cochran and Axon Enterprises' favor because the "harm Axon and Cochran allege is being subjected to unconstitutional agency authority—a proceeding by an unaccountable ALJ." 143 S. Ct. at 903 (simplified). That harm is a "here-and-now injury" that "is impossible to remedy once the proceeding is over, which is when appellate review kicks in." *Id.* (simplified).[12] Judicial review of a private party's structural constitutional claim about "subjection to an illegitimate proceeding, led by an illegitimate decisionmaker" after that administrative proceeding "has already happened … would come too late to be meaningful." *Id.* at 903–04. The same here. Requiring Mr. Moats to go through agency adjudication and only then present his structural constitutional challenges would "foreclose all meaningful judicial review." *Id.* at 900 (simplified).[13]

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[12] NCUA's ripeness argument also fails for this reason, as will be explained below.

[13] Indeed, NCUA's subject matter jurisdiction and ripeness arguments, combined with its emphasis on the retrospective remedy limitations adopted by *Collins II*, evince its real position: that any constitutional infirmities in agency adjudication can *never* be remedied.

*Axon* also resolved the second factor—is the claim wholly collateral to the statute's review provisions?—in favor of Axon and Cochran. *Id.* at 904–05. They, as Mr. Moats, challenged the agency's "power to proceed at all, rather than actions taken in the agency proceedings." *Id.* at 904. Mr. Moats's constitutional claims are "collateral to any [NCUA] orders or rules from which review might be sought." *Id.* at 905 (simplified). This factor also goes in Mr. Moats's favor.

The third factor—is the claim outside the agency's expertise?—was also resolved by the Supreme Court in favor of Axon and Cochran because constitutional claims such as the ones at issue here ("tenure protections violate Article II," "combination of prosecutorial and adjudicative functions") are outside NCUA's "competence and expertise." *Id.* at 905. "[A]gency adjudications are generally ill suited to address structural constitutional challenges" like Mr. Moats's. *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021). And nothing that can be decided in NCUA agency adjudication would "obviate the need to address [Mr. Moats's] constitutional claims—which … allege injury not from this or that ruling but from subjection to all agency authority." *Axon*, 143 S. Ct. at 906. Mr. Moats's constitutional claims "would remain no matter how much expertise could be brought to bear" on this or other matters. *Id.* (simplified). And NCUA can always give an Article III court access to its expertise by filing thoughtful briefs.

NCUA's arguments based on 12 U.S.C. § 1818(i) and cases that pre-date *Axon* are without merit. *See* XMSJ at 6–10. The statute at issue here, 12 U.S.C.

§ 1786(k)(1), lacks a clear statement stripping this Court's subject-matter jurisdiction. The Court should so hold and deny NCUA's motion to dismiss.

### B. This Case Is Ripe

To skirt *Axon*'s clear holding on jurisdiction, NCUA repackages its argument as one about ripeness. XMSJ at 10–13. But *Axon* resolves that argument as well. As does *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 579–82 (1985), which concluded that a structural separation-of-powers challenge to a statutory scheme of non-Article III adjudication is ripe because such constitutional claims do not depend on the outcome of that non-Article III adjudication. This entire case is ripe. The Court should so hold and deny NCUA's motion to dismiss.

NCUA argues that parties must wait "until an administrative decision has been formalized and its effects felt in a concrete way." XMSJ at 10. However, the "difference here is the nature of the claims and accompanying harms" that Mr. Moats asserts. *Axon*, 143 S. Ct. at 904. Mr. Moats's injury is the "here-and-now … subjection to an unconstitutionally structured decisionmaking process"—that is, "subjection to" NCUA's agency adjudication "irrespective of its outcome, or of other decisions made within it." *Id.* (simplified). Mr. Moats "will lose [his] rights not to undergo the complained-of agency proceedings if [he] cannot assert those rights until the proceedings are over." *Id.*

Mr. Moats challenges the structure and existence of NCUA agency adjudication and being unconstitutionally subjected to it. That is a here-and-now injury that is ripe because it is fit for judicial decision here as it was in

*Axon*. Mr. Moats will be subjected to the very hardship he complains of if this Court were to not decide the constitutionality of NCUA agency adjudication now, before it occurs, and "eventua[l]" review would "foreclose all meaningful judicial review" on the constitutionality of NCUA agency adjudication. *Id.* at 902–04 (noting that when a claim concerns the legitimacy of the proceeding "the court of appeals can do nothing: A proceeding that has already happened cannot be undone."); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (discussing the "fitness" and "hardship" factors of the ripeness doctrine); *see also* note 13, *supra*.

To the extent NCUA wishes to conduct "further factual development," XMSJ at 11, or "further development of the facts," XMSJ at 12, NCUA should not have sought to obtain summary judgment. When NCUA cross-moved for summary judgment, it needed to "sho[w] that there is no genuine dispute as to any material fact," Fed. R. Civ. P. 56(a). If NCUA now wishes factual development to occur on the claims present in this case, it only argues against its own summary-judgment motion. Yet NCUA has acknowledged that the constitutional claims presented here are "purely legal, and will not be clarified by further factual development," precisely as the parties agreed to when they submitted a joint stipulation of facts, Doc. 22, to this Court. *Union Carbide*, 473 U.S. at 581.

NCUA's ripeness argument is wholly without merit. The Court should so hold and deny NCUA's motion to dismiss and grant summary judgment to Mr. Moats on all counts.

## Conclusion

The Court should deny the Defendants' motion to dismiss. The Court should grant summary judgment in favor of Mr. Moats and against Defendants on all counts (Counts 1–4, Doc. 26 at 10–16). The Court should enjoin Defendants from proceeding administratively against Mr. Moats.

DATED: October 27, 2023.

Respectfully submitted,

/s/ Aditya Dynar
ADITYA DYNAR
Ariz. Bar No. 031583*
MOLLY E. NIXON
N.Y. Bar No. 5023940*
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
Telephone: (202) 888-6881
Facsimile: (916) 419-7747
ADynar@pacificlegal.org
MNixon@pacificlegal.org
**Pro Hac Vice*

/s/ Russell Hardin, Jr.
RUSSELL HARDIN, JR.
*Attorney-in-Charge*
State Bar No. 08972800
Federal I.D. No. 19424

OF COUNSEL:
RUSTY HARDIN & ASSOCIATES, LLP
TERRY D. KERNELL
State Bar No. 11339020
Federal I.D. No. 15074
EMILY M. SMITH
State Bar No. 24083876
Federal I.D. No. 1890677
1401 McKinney Street, Suite 2250
Houston, TX 77010
Telephone: (713) 652-9000
Facsimile: (713) 652-9800
rhardin@rustyhardin.com
tkernell@rustyhardin.com
esmith@rustyhardin.com

*Counsel for Plaintiff*

**Certificate of Service**

I hereby certify that on October 27, 2023, a copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Aditya Dynar
ADITYA DYNAR
Ariz. Bar No. 031583*
**Pro Hac Vice*