

Case No. 22-11172

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

CORNELIUS CAMPBELL BURGESS,

Appellee/Cross-Appellant,

v.

JENNIFER WHANG, in her official capacity as an administrative law judge;
FEDERAL DEPOSIT INSURANCE CORPORATION;

TRAVIS HILL, in his official capacity as Acting Chairman of the FDIC,

Appellants/Cross-Appellees.

On Appeal from the United States District Court for the Northern District of Texas,
No. 7:22-cv-100 – The Honorable Reed O’Connor, U.S. District Judge, Presiding

**APPELLEE/CROSS-APPELLANT CORNELIUS CAMPBELL BURGESS’S
PETITION FOR REHEARING EN BANC**

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DATED: October 9, 2025

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CERTIFICATE OF INTERESTED PERSONS

Cornelius Campbell Burgess v. Jennifer Whang, et al. (No. 22-11172)

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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.

1. **Cornelius Campbell Burgess**, Appellee/Cross-Appellant, represented by:

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Benjamin W. Snyder
Joseph C. Schroeder
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2. **Herring Bank**, a regional bank headquartered in Amarillo, Texas, on whose board of directors Cornelius Campbell Burgess now serves as Vice Chair;

3. **Herring Bancorp, Inc.**, the parent company of Herring Bank, on whose board of directors Cornelius Campbell Burgess now serves as Vice Chair;

4. **Jennifer Whang**, Appellant/Cross-Appellee, in her official capacity as administrative law judge, represented by:

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FEDERAL DEPOSIT INSURANCE CORPORATION

5. **Federal Deposit Insurance Corporation (FDIC)**, Appellant/Cross-Appellee, an independent agency of the United States, represented by:

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6. **Travis Hill**,¹ Appellant/Cross-Appellee, in his official capacity as Acting Chairman of the FDIC, represented by:

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¹ Martin J. Gruenberg, Michael J. Hsu, and Rohit Chopra were previously named as defendants in their official capacities as Chairman of the FDIC (Gruenberg) and Directors of the FDIC (Hsu and Chopra). Gruenberg’s successor in office—Travis Hill, in his official capacity as Acting Chairman of the FDIC—has been automatically substituted as a party to the appeal. *See* Fed. R. App. P. 43(c)(2). As of the date of this filing, neither Hsu and Chopra nor their successors—Rodney E. Hood and Russell Vought, respectively—are Directors of the FDIC; their offices as Directors of the FDIC are vacant.

RULE 40(b)(2) STATEMENT

This case implicates a square conflict about the standard used to decide whether Congress has stripped jurisdiction over structural constitutional claims like the ones raised in *SEC v. Jarkesy*, 603 U.S. 109 (2024), and *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020).

In *Collins v. Department of the Treasury*, 83 F.4th 970 (5th Cir. 2023), this Court recognized “that where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear.” *Id.* at 980 (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)) (brackets omitted). The Court explained that even where Congress plainly intended to strip jurisdiction over *statutory* claims, an additional showing is needed before finding that Congress stripped jurisdiction over *constitutional* claims. Specifically, “[t]his circuit has refused to find the needed congressional intent where the statute in question did not ‘explicitly preclude constitutional claims.’” *Id.* (citation omitted). As Exhibit A of the sort of general jurisdiction-stripping provision that does not bar constitutional claims, *Collins* pointed to 12 U.S.C. § 1818(i), which states that “no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement” of certain orders by the Federal Deposit Insurance Corporation (FDIC). Under the governing clear-statement rule, *Collins* explained, “that language d[oes] not preclude review of constitutional claims.” 83 F.4th at 980.

The panel in this case (Wiener, J., joined by Douglas and Ramirez, JJ.) came to the diametrically opposite conclusion. Dismissing *Collins* as “nonbinding dicta,” Op. 22, the panel found that the general jurisdiction-stripping language of Section 1818(i) *does* preclude review of constitutional claims. The panel accordingly reversed the preliminary injunction entered below, which had barred the FDIC from carrying out an in-house adjudication process that the district court found likely violates the Seventh Amendment. *See id.* at 1-2. Instead, the panel concluded, FDIC enforcement targets must submit to the bureaucratic process for however long it takes, able to seek only after-the-fact review regardless of how clearly their constitutional rights are being violated in the interim.

That decision cries out for en banc review. As this Court recently recognized, when “the injury is the process itself, review after the fact comes too late: ‘A proceeding that has already happened cannot be undone,’ rendering later review ‘too late to be meaningful.’” *Space Expl. Techs. Corp. v. NLRB*, --- F.4th ---, 2025 WL 2396748, at *6 (5th Cir. Aug. 19, 2025) (citation omitted). Because Section 1818(i) contains no clear textual indication that Congress intended to “‘foreclose all meaningful judicial review’” of the structural constitutional claims here, *id.*, the *Collins* court would have reached the merits of those claims. The panel’s refusal to do so in this case warrants rehearing.

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28 U.S.C. § 13313

RULE

Fed. R. App. P. 409

ISSUE WARRANTING REHEARING EN BANC

Whether 12 U.S.C. § 1818(i) explicitly strips district courts of jurisdiction to hear structural constitutional claims challenging the FDIC’s in-house adjudicatory process.

SUMMARY OF PROCEEDINGS AND DISPOSITION

A. Agency and District Court Proceedings

1. This case arises from a decade-long administrative enforcement proceeding that members of the FDIC’s own staff have described as a “witch hunt.” ROA.28; *see* Opening Br. 10-11. From 2000 to 2012, appellee and cross-appellant Cornelius Campbell Burgess served as Chief Executive Officer of Herring Bank. ROA.13. Under Mr. Burgess’s leadership, the bank added 14 branches and increased its assets more than six-fold. *See id.* Mr. Burgess’s peers described him as a “visionary.” *Id.* But as internal agency communications later disclosed, some FDIC bureaucrats strongly disliked Mr. Burgess’s “managerial style” and harbored politically motivated objections to some of the financial services and products that Herring Bank began providing under this leadership. *See* ROA.28.

In 2010, FDIC staff got an excuse to begin investigating Mr. Burgess when they received a tip that he was using bank funds to renovate his home. ROA.13-14. The tip was false, and the agency found no evidence to substantiate it. *See* ROA.14. Unwilling to walk away with nothing to show after four years of unrelenting investigation, however, the agency formally opened an Enforcement Proceeding

against Burgess in 2014 based on unrelated allegations. ROA.28. Mr. Burgess strongly disputed those allegations as well, but in 2017, an ALJ sided with FDIC enforcement staff and recommended that the Board impose a \$200,000 penalty and ban Mr. Burgess from participating in the banking industry for the rest of his life. ROA.331. The Board accepted the ALJ's recommendation and entered a corresponding sanctions order. *Id.*

Mr. Burgess filed a petition for review in this Court under 12 U.S.C. § 1818(h), arguing that the ALJ had been unconstitutionally appointed. After the Supreme Court agreed with a materially similar argument in *Lucia v. SEC*, 585 U.S. 237, 251 (2018), this Court remanded the case to the FDIC. ROA.30, 469.

2. Undeterred, the FDIC pressed forward with the same claims before a new ALJ. ROA.30. After three more years of administrative proceedings, the new ALJ entered a new order recommending the same \$200,000 penalty and lifetime ban that the prior ALJ had recommended. *Id.*

Rather than wade through more proceedings before the same FDIC Board that had already ruled against him in materially identical circumstances, Mr. Burgess filed suit in the Northern District of Texas seeking declaratory and injunctive relief on the ground that the FDIC's ongoing adjudication was unconstitutional in multiple respects. ROA.12-51. Mr. Burgess argued that both the ALJ and the FDIC Board are unconstitutionally insulated from removal by the President, and that requiring

Mr. Burgess to litigate his claims to judgment before the agency would violate his Seventh Amendment jury-trial right. ROA.35-50.

3. The district court determined that Mr. Burgess was likely to succeed on his Seventh Amendment claim and granted a preliminary injunction barring the FDIC from moving forward with the proceeding. ROA.328-351.

The district court first rejected the FDIC's argument that it lacked jurisdiction to consider Mr. Burgess's structural constitutional claims. ROA.334-343. The FDIC based its argument on 12 U.S.C. § 1818(i), which states in relevant part:

[E]xcept as otherwise provided in this section or under section 1831o or 1831p-1 of this title no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

12 U.S.C. § 1818(i).

The district court reasoned that Section 1818(i) "does not directly reference other jurisdictional statutes" (such as the federal question jurisdiction statute, 28 U.S.C. § 1331), which "weighs against it being an explicit bar." ROA.337. The court further noted that "when [Congress] wants to strip district courts of jurisdiction over structural constitutional claims, it will explicitly do so." ROA.338. In the Immigration and Nationality Act, for example, Congress stripped jurisdiction over claims involving the "interpretation and application of constitutional . . . provisions." 8 U.S.C. § 1252(b)(9). But here, "§ 1818(i) does not specifically

mention that the jurisdictional bar encompasses structural constitutional claims.” ROA.338.

The district court determined that *Bank of Louisiana v. FDIC*, 919 F.3d 916 (5th Cir. 2019), and *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021) (en banc), did not establish otherwise. The district court explained that *Bank of Louisiana* had “expressly declined to hold that § 1818(i) is an explicit jurisdictional bar on the court’s jurisdiction to hear any structural claims,” ROA.336 (emphasis omitted); indeed, this Court stated in *Bank of Louisiana* that it “need not resolve [that] issue,” *id.* (quoting 919 F.3d at 924-25 n.10). And while *Cochran* described *Bank of Louisiana* as turning on “an explicit statutory bar,” 20 F.4th at 204, the district court explained that *Cochran*’s passing description was not “necessary to the decision” and did not entail any “explicit preclusion analysis of § 1818(i),” ROA.337.

Turning to the merits, the district court found that preliminary injunctive relief was appropriate on Mr. Burgess’s Seventh Amendment claim in light of this Court’s then-recent decision in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022). See ROA.348. The district court found that the challenged removal protections are likely also unconstitutional, but denied prospective relief on those claims because Mr. Burgess could not prove that the removal provisions would “inflict[] compensable harm” separate from the constitutional violation itself. ROA.344.

B. The *Collins* Decision and the Panel’s Decision in This Case

1. The FDIC appealed, and Mr. Burgess cross-appealed the denial of relief on his removal claims. This Court subsequently granted a stay pending the Supreme Court’s decision in *SEC v. Jarkesy*, 603 U.S. 109 (2024).

While the case was stayed, this Court issued its decision in *Collins v. Department of the Treasury*, 83 F.4th 970 (5th Cir. 2023), concerning the for-cause removal restriction applicable to the Director of the Federal Housing Finance Agency (FHFA). Much as in this case, the government defendants in *Collins* argued that Congress had stripped the district court of jurisdiction to consider such claims through a provision stating that “no court may take any action to restrain or affect the exercise of powers or functions of the [FHFA] as a conservator or a receiver.” 12 U.S.C. § 4617(f). The *Collins* panel disagreed. *See* 83 F.4th at 979-82.

The panel observed that under *Webster v. Doe*, 486 U.S. 592 (1988), “where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear.” 83 F.4th at 980 (quoting *Doe*, 486 U.S. at 603) (brackets omitted). In light of that “interpretive tool of constitutional avoidance,” the *Collins* panel explained, “[t]his circuit has refused to find the needed congressional intent where the statute in question did not ‘explicitly preclude constitutional claims.’” *Id.* (quoting *Ellison v. Connor*, 153 F.3d 247, 254 (5th Cir. 1998)). Of particular significance here, it pointed to Section 1818(i) as a prime example of a jurisdictional

provision that this Court had previously found “did not preclude review of constitutional claims” in *FDIC v. Bank of Coughatta*, 930 F.2d 1122, 1130 (5th Cir. 1991). *Collins*, 83 F.4th at 980.² And because “§ 4617(f) contains language very similar to § 1818(i),” the *Collins* panel concluded that since Section 1818(i) does not speak clearly enough to preclude review of structural constitutional claims, Section 4617(f) must not either. *Id.* at 981.

The *Collins* panel acknowledged that under *Zummer v. Sallet*, 37 F.4th 996 (5th Cir. 2022), application of *Doe*’s clear-statement rule may be inappropriate “where there [a]re ‘countervailing doubts about the constitutionality’ of reviewing” a particular issue (such as because it implicates the President’s authority to control access to classified information, the issue in *Zummer*). *Collins*, 83 F.4th at 981 n.9 (quoting *Zummer*, 37 F.4th at 1009). But the *Collins* panel found no such “‘overriding considerations’ that would counsel against applying *Doe*’s canon of interpretation” to challenges to removal restrictions. *Id.* at 981 (quoting *Zummer*, 37 F.4th at 1009). The panel accordingly proceeded to consider the merits of the challengers’ removal claim. *Id.* at 982-84.

² Although the *Collins* panel concluded that *Coughatta* was not binding on it because there “the FDIC [had] conceded that § 1818(i) did not bar constitutional claims,” the *Collins* panel found that “*Coughatta* is at least persuasive authority” and chose to follow it. *Collins*, 83 F.4th at 980 n.7.

2. On August 25, 2025, the panel in this case reached the opposite conclusion. Rejecting *Collins* as “nonbinding dicta,” it found that Section 1818(i) strips district courts of jurisdiction over structural constitutional claims, Op. 22.

In reaching that conclusion, the panel relied heavily on *Bank of Louisiana* and *Cochran*. Without ever addressing the *Bank of Louisiana* court’s statement that “we need not resolve [the explicit jurisdiction-stripping] issue,” 919 F.3d at 925 n.10, the panel held that *Cochran* had “clarifie[d]” that *Bank of Louisiana* was a case about explicit jurisdiction stripping in Section 1818(i), Op. 13. In the panel’s view, that “clarification is what controls.” *Id.* And because Mr. Burgess could seek after-the-fact review of an FDIC order in this Court, the panel concluded that it does not matter that Section 1818(i) lacks the explicit reference to constitutional claims that would be required under *Doe*. See Op. 15-20.

ARGUMENT

The decision below squarely conflicts with this Court’s earlier decision in *Collins v. Department of the Treasury*, 83 F.4th 970 (5th Cir. 2023). That conflict raises issues of exceptional importance, because prospective challenges like this one are “the only way to provide a “meaningful” avenue of relief” for claims” that contest a federal agency’s “tendency toward exclusive, unimpeded control over the way it investigates and proceeds against its targets.” *Cochran v. SEC*, 20 F.4th 194, 233 (5th Cir. 2021) (Oldham, J., joined by Smith, Willett, Duncan, Engelhardt, and

Wilson, JJ., concurring) (citation omitted). The Court should grant rehearing en banc to ensure that the panel’s decision does not eviscerate essential judicial checks on administrative overreach in this Circuit.

A. Rehearing En Banc Is Necessary to Address the Square Conflict Between the Panel’s Decision and Prior Decisions of This Court

The intra-circuit conflict in this case is clear. In *Collins*, this Court held that “where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear.” 83 F.4th at 980 (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)) (brackets omitted). The Court further observed that “[t]his circuit has refused to find the needed congressional intent where the statute in question did not ‘explicitly preclude constitutional claims.’” *Id.* (citation omitted). Under that standard, the Court found that “§ 1818(i) . . . did not preclude review of constitutional claims.” *Id.* And the Court accordingly held that because the statute before it “contain[ed] language very similar to § 1818(i),” it did not strip jurisdiction over structural constitutional claims either. *Id.* at 981.

The panel here refused to follow *Collins* and instead held that Section 1818(i) *does* strip jurisdiction over structural constitutional claims. In doing so, the panel dismissed the discussion of Section 1818(i) in *Collins* as “nonbinding dicta.” Op 22. That was mistaken: Although Section 1818(i) was not directly at issue in *Collins*, the *Collins* panel’s understanding that Section 1818(i) does not strip jurisdiction over constitutional claims was an essential premise of its holding that the materially

identical statute before it did not strip such jurisdiction either. *See* 83 F.4th at 980-81; *see also United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014) (“A statement is not dictum if it is necessary to the result or constitutes an explication of the governing rules of law.” (citation omitted)). Moreover, even if the *Collins* panel’s discussion of Section 1818(i) were dictum, its discussion of the governing *Doe* standard and its holding as to the “very similar” jurisdiction-stripping language in Section 4617(f) plainly was not. *Collins*, 83 F.4th at 981.

The panel also suggested, as a separate basis for refusing to follow *Collins*, that *Collins* was wrongly decided in light of this Court’s decisions in *Bank of Louisiana v. FDIC*, 919 F.3d 916 (5th Cir. 2019), and *Cochran*, 20 F.4th 194. *See* Op. 22. As discussed below, the panel misread *Bank of Louisiana* and *Cochran*, treating those cases as deciding a question of explicit jurisdiction stripping that this Court in fact went out of its way to avoid. *See* pp. 12-14, *infra*. For present purposes, though, the critical point is that in rejecting *Collins* as wrongly decided, the panel demonstrated that en banc review is necessary to resolve the acknowledged intra-circuit conflict between decisions of this Court.

B. This Case Involves Questions of Exceptional Importance

En banc review is all the more appropriate because the conflict with *Collins* implicates issues of “exceptional importance.” Fed. R. App. P. 40(b)(2)(D).

By holding that Section 1818(i) prevents district courts from considering structural constitutional objections to FDIC proceedings, the panel here effectively immunized the FDIC from meritorious constitutional claims. For example, Mr. Burgess’s complaint raises separation-of-powers challenges to the removal protections that insulate the ALJ and members of the FDIC Board from presidential control. *See* ROA.35-43. Those challenges are indisputably meritorious in light of this Court’s recent decision in *Space Exploration Technologies Corp. v. NLRB*, --- F.4th ---, 2025 WL 2396748 (5th Cir. Aug. 19, 2025) (*SpaceX*), which affirmed a preliminary injunction blocking “ongoing Board proceedings” at the National Labor Relations Board (NLRB) based on materially identical claims. *See id.* at *1. Under the panel’s reasoning, however, courts are powerless to address the obvious constitutional violations at the FDIC.³

The panel suggested that Mr. Burgess could obtain “meaningful review of his constitutional claims” by filing a petition for review after FDIC proceedings

³ As the district court correctly recognized, Mr. Burgess’s Seventh Amendment challenge likewise concerns serious constitutional flaws in the FDIC’s adjudicatory process. *See* ROA.348. But two weeks after issuing its decision in this case, the same panel entered a decision in *Ortega v. OCC*, --- F.4th ---, 2025 WL 2588495 (5th Cir. Sept. 8, 2025), in which it broadly concluded that regulated entities have “no right to a jury trial” in “federal banking enforcement actions.” *Id.* at *11. Like the decision here, the panel’s decision there is clearly wrong and warrants further review by the en banc Court. And just as this Court assigned this case to the same panel as *Ortega* for argument in light of the overlapping issues, *see* ECF No. 174-2 at 2, the Court may also wish to review the cases together at the en banc stage.

conclude. Op. 20. But that suggestion is itself inconsistent with *SpaceX*, which held (over Judge Wiener’s dissent) that “[i]f the injury is the process itself, review after the fact comes too late: ‘A proceeding that has already happened cannot be undone,’ rendering later review ‘too late to be meaningful.’” 2025 WL 2396748, at *6 (quoting *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023)). Instead, as Judge Oldham observed in *Cochran*, “the only way to provide a ““meaningful” avenue of relief’ for claims” like the ones Mr. Burgess has raised here is to consider those claims in a suit for prospective remedies—an option that the panel’s decision forecloses entirely. 20 F.4th at 233 (citation omitted).

Denying FDIC enforcement targets any meaningful judicial review of their claims is especially problematic in light of the FDIC’s history of bias and administrative overreach. As the American Banking Association (ABA) and other groups have explained, FDIC adjudications are “notoriously slanted in the government’s favor,” with the FDIC prevailing in “approximately 85% of its contested in-house proceedings.” ABA Amicus Br. 19. Moreover, the FDIC’s “culture of unreviewable discretion inevitably leads to abuse,” as illustrated by documents in the record here in which FDIC staff called for the agency to ““gear up for war”” and said that Herring Bank was ““a pain in the ass”” and should ““F themselves.”” *Id.* at 21 (citation omitted). If the panel’s decision in this case is permitted to stand, that unaccountable agency culture will only get worse.

C. The Panel Decision Is Wrong

Finally, the panel decision is also wrong.

To start, the panel misread *Bank of Louisiana* and *Cochran*. See Op. 10-14. In both cases, this Court relied on *implicit* jurisdiction-stripping analysis using the multi-factor standard from *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). See *Bank of Louisiana*, 919 F.3d at 923 (“The parties and the district court addressed the question presented under the implicit preclusion analysis, and we therefore do the same.”); *Cochran*, 20 F.4th at 197-98 (“The question presented is whether a provision of the Securities Exchange Act . . . implicitly strips federal district courts of subject-matter jurisdiction to hear structural constitutional claims.”). In this case, however, the FDIC abandoned any argument for implicit jurisdiction stripping after the Supreme Court’s decision in *Axon*, which made clear that the *Thunder Basin* factors would not preclude review in the circumstances here. FDIC Resp. Br. 3 (“*Axon*’s *implicit*-preclusion analysis broke new ground and we therefore clarify that FDIC Appellants are *not* arguing jurisdiction is *implicitly* precluded here.”).

After it became clear that *Bank of Louisiana*’s implicit jurisdiction-stripping analysis would not foreclose jurisdiction here, the panel sought to reconceptualize *Bank of Louisiana* as a case about explicit jurisdiction stripping instead. Pointing to the Court’s statement that the *Thunder Basin* factors “‘reinforce[d] the conclusion that the review scheme precludes district court jurisdiction,’” Op. 13 (quoting *Bank*

of *Louisiana*, 919 F.3d at 925), the panel reasoned that if “the statute did not explicitly preclude jurisdiction . . . there would be nothing to reinforce,” *id.* But that strained reading contradicts the *Bank of Louisiana* panel’s own statement about the grounds for its decision. Specifically, the *Bank of Louisiana* panel observed that while “the FDIC may effectively be arguing that section 1818(i) ‘explicitly’ limits the jurisdiction conferred on federal district courts,” that argument was questionable given “that section 1818(i) does not reference other jurisdictional statutes explicitly.” 919 F.3d at 924-25 n.10. “In any event,” the *Bank of Louisiana* panel concluded, “we need not resolve that issue because of our holding that the statutory scheme withdraws district [court] jurisdiction implicitly.” *Id.*

The panel here never addressed that clear disclaimer. Instead, it observed that *Cochran* distinguished *Bank of Louisiana* as “addressing the explicit statute at issue.” Op. 12 (quoting *Cochran*, 20 F.4th at 204). But that passing statement simply emphasized that because *Cochran* involved a different statute, its implicit jurisdiction-stripping analysis was different from the implicit jurisdiction-stripping analysis in *Bank of Louisiana*. It should not be read to give *Bank of Louisiana* a holding about explicit jurisdiction stripping that the *Bank of Louisiana* panel affirmatively disclaimed.

The panel next invoked *Board of Governors of Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32 (1991), in which the Supreme Court held that

Section 1818(i) barred a bankruptcy court from enjoining agency enforcement proceedings on statutory grounds. Op. 14. As even the panel acknowledged, though, *MCorp* was not “factually analogous to Burgess’s case,” Op. 14 n.6, and involved only statutory claims, *see* 502 U.S. at 36-37. It therefore does not address whether Section 1818(i) speaks with sufficient clarity to strip jurisdiction over constitutional claims under *Doe*.⁴

Finally, the panel invoked the Supreme Court’s decision in *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012), and this Court’s decision in *Zummer v. Sallet*, 37 F.4th 996 (5th Cir. 2022), to argue that because FDIC enforcement targets can raise some constitutional claims in after-the-fact petitions for review, *Doe*’s clear-statement requirement does not apply. *See* Op. 17-20. But neither case supports its analysis. *Elgin* found the clear-statement rule inapplicable only where the statutory scheme provides “meaningful review” later. 567 U.S. at 15-20, 22. As discussed above, however, an after-the-fact challenge cannot provide meaningful review of the constitutional challenges asserted here. And *Zummer* simply concluded that the clear-statement rule can be displaced in unusual circumstances where judicial review would *itself* raise “a significant constitutional question of its

⁴ Justice Gorsuch’s concurrence in *Axon* likewise said nothing about whether Section 1818(i) strips jurisdiction over constitutional claims, as opposed to merely statutory ones. *See* Op. 14 (citing *Axon*, 598 U.S. at 208 (Gorsuch, J., concurring in the judgment)).

own,” such as where a court would be second-guessing the President’s judgment about access to classified information. *See* 37 F.4th at 1009-10. As Judge Smith (who authored *Zummer*) later explained in *Collins*, no such “overriding considerations” exist with respect to structural constitutional claims like the ones at issue here. 83 F.4th at 981 (citation omitted). The panel’s failure to heed *Collins*’ pre-existing discussion of *Zummer* underscores both that it got this case wrong, and that its serial departures from prior precedent warrant review.

CONCLUSION

The petition for rehearing en banc should be granted.

DATED: October 9, 2025

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on October 9, 2025, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit using the appellate CM/ECF system and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

DATED: October 9, 2025

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CERTIFICATE OF COMPLIANCE

1. This Petition for Rehearing En Banc complies with the type-volume limitation of Federal Rule of Appellate Procedure 40(d)(3) because it contains 3,899 words, excluding the parts of the filing exempted by Federal Rule of Appellate Procedure 32(f).

2. This Petition for Rehearing En Banc complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office 365 in Times New Roman, 14-point font.

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