No. 24-904

In the
Supreme Court of the United States

ALPINE SECURITIES CORPORATION,
Petitioner,
v.
FINANCIAL INDUSTRY REGULATORY AUTHORITY, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, Petitioner is wholly owned by SCA Clearing LLC, an Arizona limited liability company. Scottsdale Capital Advisors is wholly owned by Scottsdale Capital Advisors Holdings LLC, an Arizona limited liability company. No publicly held company owns 10% or more of either entity's stock.

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Whether a "private" corporation can continue to prosecute alleged violations of our nation's securities laws while it disclaims any obligation to adhere to the accompanying constraints on federal executive power is a question worthy of this Court's review.

The related issue of whether requiring a market participant to undergo an allegedly unconstitutional enforcement action while it pursues a structural constitutional challenge against the purported enforcer constitutes irreparable harm is an equally critical issue for those who face agency and "private" enforcement actions that would deprive them of their livelihood.

In their attempts to establish the contrary, FINRA and the Government rely primarily on scattershot alleged vehicle issues. But these alleged issues prioritize form over substance, and none would actually preclude or inhibit the Court's review of the questions presented.

I. Courts and jurists have diverged on the questions presented.

Courts of appeals judges have disagreed about whether separation-of-powers harms are sufficient to meet the irreparable-injury standard. *See* Pet. at 15–18. The federal courts have also diverged on whether FINRA's operations and conduct comply with the Constitution. *See id*. at 18–19.

As to the question of its constitutionality, FINRA tries to narrow the question to render this division illusory. But make no mistake: in the District of Columbia, regulated parties are assured that FINRA,

a private party, cannot unilaterally ban them from their chosen industry. In other Circuits, though, regulated parties face no such assurance, and the SEC-FINRA relationship has been generally accepted. *See Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023) (collecting cases). That is a split, and one with real consequences.

The conflict will persist absent review by this Court, made only worse by the question whether and how recent precedents recognizing constitutional protections in SEC proceedings will apply to FINRA, which derives its power from the SEC and often enforces the same provisions. *See, e.g.*, *SEC v. Jarkesy*, 603 U.S. 109 (2024) (holding that when the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial).

Given their importance, this Court has previously reviewed structural constitutional questions like this one—especially those implicating Article II—even where no circuit split has yet developed. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015); *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010); *Morrison v. Olson*, 487 U.S. 654 (1988). The other parties do nothing to distinguish these cases. *Free Enterprise Fund* in particular is indistinguishable in the ways that matter. That case similarly involved a separation of powers challenge to a quasi-private body, and no split was alleged. *See* Cert. Pet., *Free Enter. Fund v. PCAOB*, No. 08-861, 2009 WL 52297, at *13 (U.S. Jan. 5, 2009).

This interest is heightened by the nationwide operation and importance of the securities markets. This Court should address and resolve the conflict.

II. The decision below erred.

This Court's precedent strongly supports—indeed, dispositively decides—the first question presented. This Court in *Axon* held that being subjected to an illegitimate proceeding by an illegitimate decision maker constitutes "a here-and-now injury," where the party subject to the hearing raises a structural challenge to the agency's authority. *Axon Enter. Fund, Inc. v. FTC*, 598 U.S. 175, 191 (2023). This is because "a proceeding that has already happened cannot be undone." *Id*. The other parties, and the Court below, believe that this language is wholly inapplicable in the context of injunctive relief, and would cabin *Axon* to its facts. But the *Axon* Court used clear language that on its face should apply to the issue of irreparable harm in the context of injunctive relief. Lower courts should not be permitted to read that language out of existence without any indicator from this Court that its holding was cabined to its facts.

The Government argues that then-Judge Kavanaugh's opinion in *John Doe*, which supports Alpine's position even beyond *Axon*'s language, is distinguishable because the agency there had "final authority." U.S. Br. at 14 (emphasis omitted). It is not clear why that distinction would make any difference when the question turns on the power to institute and force participation in an allegedly unconstitutional enforcement action, not an objection to any final penalty imposed. Here, FINRA can and does issue

binding rules against Petitioner and can and *did* bring an enforcement action against Petitioner. Thus, then-Judge Kavanaugh's position is directly on point. *John Doe Co. v. CFPB*, 849 F.3d 1129, 1136 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). After all, FINRA retains *significant* power even though it may no longer unilaterally and without SEC review force the closure of Petitioner. *See* Pet.App.59a–62a (Walker, J., concurring in the judgment in part and dissenting in part) (listing FINRA's unsupervised powers).

So too, FINRA's structure and exercise of federal power is unconstitutional under a straightforward application of this Court's Separation of Powers precedents. *See* Pet.App.59a–70a (Walker, J., concurring in the judgment in part and dissenting in part). In attempting to overcome *Free Enterprise Fund*, FINRA focuses on the Court's passing reference to "*private* self-regulatory organizations" in that opinion. FINRA Br. at 26–27 (quoting *Free Enter. Fund*, 561 U.S. at 484–85). This was an offhand *description*—hardly even dictum. The Court in no way analyzed the issue of whether FINRA or other "self-regulatory organizations" exercise federal government power when adjudicating alleged violations of federal law. And that—not whether FINRA is "private"—is the relevant question. Nothing in *Free Enterprise Fund* suggests that when a "private" entity exercises quintessential executive powers, it is somehow immunized from the Constitution's mandates.

FINRA also cites *Free Enterprise Fund* as having made the *Lebron* test a threshold barrier anytime a "private" party exercises government power. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374,

398 (1995). But there, the Court was only describing the view of the *parties*: "Despite the provisions specifying that Board members are not Government officials for statutory purposes, *the parties agree* that the Board is 'part of the Government' for constitutional purposes." *Free Enter. Fund*, 561 U.S. at 485–86 (citing *Lebron*, 513 U.S. at 397). Moreover, even if one accepts this description of the parties' position as binding, at most it shows that an entity that satisfies the *Lebron* test is subject to Article II's appointments and removal requirements. This does not support the converse and troubling proposition that FINRA seeks to establish: that even where there is plainly the grant and exercise of Executive Power, entities that *do not* fall within the *Lebron* test (which Petitioner in no way concedes is true here) are immune from structural constitutional rules. "It would be odd if the Constitution *prohibits* Congress from vesting significant executive power in an unappointed and unremovable government administrator but *allows* Congress to vest such power in an unappointed and unremovable private hearing officer." Pet.App.90a (Walker, J., concurring) (emphasis original).

The other parties believe that the Court's Appointments Clause and presidential removal precedents do not apply because FINRA is "private." That view would allow FINRA to ignore the safeguards that apply to the SEC's actions against market participants despite FINRA operating on the very same borrowed power derived from the SEC and, originally, delegated to the SEC by Congress. The enforcement of federal law is federal action—no matter the actor's label. The Vesting Clause of Article

II vests the President with the entire reserve of executive power. And the core, perhaps classic, exercise of executive power is the enforcement of federal law. FINRA engages in just that—enforcing its own rules, the SEC's rules, and the Exchange Act against private parties. In particular, FINRA exercises unfettered prosecutorial discretion to decide *who* should be investigated, adjudicated, and punished.

Rather, the Constitution constrains government action "by whatever instruments or in whatever modes that action may be taken," *Ex parte Virginia*, 100 U.S. 339, 346–47 (1879). The key input is the nature of the power exercised, not the label attached to the actor. FINRA fails to identify a basis in the Constitution's text for finding a "private" delegation exception to the Appointments Clause. FINRA invokes the *ejusdem generis* canon (wrongly labeled as *noscitur a sociis*), FINRA Br. at 24, reasoning that because the enumerated officers in the Appointments Clause *are* government officials, the "final catchall phrase" of "all other Officers" must be read to exclude non-government officials. *Id.* (cleaned up). Even accepting that the Appointments Clause could be limited in this oblique way, FINRA's argument by implication is defeated by the very same text. The Clause covers: "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. CONST. art. II, § 2, cl. 2. If FINRA were right that the enumerated examples impliedly exclude all "private" officers from the catch-all phrase, there would be no need whatsoever for the Clause to specify "*public* Ministers and Consuls." *Id.* (emphasis added).

The OLC's recent retreat just before the change in Administrations (in January of this year) from its earlier position consistent with Petitioner's view is not persuasive. Although FINRA claims that OLC stated that its positions have been "consistent," FINRA Br. at 23, that is not right. The more recent OLC opinion stated that its earlier opinions were "largely consistent . . . with each other," but acknowledged that "[t]o be sure, our 2007 opinion suggested that the Office had fallen into 'error' in 1996 by 'concluding that the Appointments Clause does not apply to persons who are not employees of the federal government,' . . . and at least one published opinion has viewed our 2007 and 1996 writings as disagreeing on this point." *The Test for Determining 'Officer' Status Under the Appointments Clause* at 8, OLC (Jan. 16, 2025), https://perma.cc/V9BT-4NCB. Thus, OLC has thus published opinions adopting both positions. The 2007 opinion is more persuasive.

III. The questions presented are exceptionally important.

The staggering importance of this case is plain. FINRA—a purportedly private body—acts as the front-line regulator of the American securities industry. Whether it has done so and continues to do so consistent with the structural Constitution is of utmost importance to regulated parties who are forced by federal law to join FINRA, the public, the SEC, the President, the coordinate branches, and FINRA itself.

FINRA cannot escape this fact by labelling this case "narrow." FINRA Br. at 1, 11, 28. True, perhaps the *procedural posture* of this case is narrow; Petitioner challenged a specific enforcement

proceeding FINRA brought against it. *See id*. at 1–2 (citing Petitioner's language that this case involves "a single enforcement proceeding against a single company" (citation omitted)). The impact of this case is broad and always has been, and FINRA has acknowledged as much. *See* FINRA Pet. for Reh'g at 6 (D.C. Cir. Aug. 3, 2023) ("Nor can the implications of this case be confined to 'FINRA's unique status.' "); *id*. ("[T]he Injunction Order has far-reaching real-world implications.").

IV. This case presents an ideal vehicle to resolve these questions.

FINRA and the Government largely ignore the key vehicle points that would actually implicate this Court's review. Instead, they amass a collection of alleged "vehicle issues" that elevate form over substance. Focusing on what matters, this case presents an excellent vehicle for this Court to resolve the questions presented. The arguments to the contrary are unavailing.

1. It does not preclude this Court's review that Petitioner secured some partial relief from the D.C. Circuit, as Petitioner did not obtain complete relief. At every point, Petitioner asked the district court and then two panels of the D.C. Circuit to enjoin FINRA's Expedited Proceeding to prevent the substantial harm that would result from an unconstitutional process and from an order of expulsion. That relief was not awarded, and the Expedited Proceeding has not been enjoined. The other parties cite no authority for the extraordinary proposition that a party who obtains some but not all relief in the lower courts is barred from seeking this Court's relief and review over what

remains. For good reason—such a rule would make it all too easy for lower courts to evade this Court's review of important issues.

2. FINRA emphasizes that the D.C. Circuit majority opinion rejected Petitioner's structural claims on *Axon* irreparable-injury grounds and declined to analyze the merits. That the majority panel chose not to reach the issues Petitioner pressed at every stage of the extensive proceedings—in the district court, including supplemental briefing, before the motions panel of the D.C. Circuit, and before the D.C. Circuit main panel (also including supplemental briefing)—does not inhibit this Court's review. Even in the context of this Court's review of a federal question in a state court judgment—for which the Court applies a much higher standard for whether an issue was pressed or passed upon—a question need only be pressed *or* passed upon. *Illinois v. Gates*, 462 U.S. 213, 219 (1983). Petitioner pressed at every stage that FINRA is unconstitutionally structured.

3. Petitioner's alleged "forfeiture" of D.C. Circuit caselaw that predated *Axon* in the lower court—which, even *there*, Petitioner had no reason to discuss for several reasons. First, FINRA did not invoke those cases. Second, some of the pre-*Axon* D.C. Circuit cases were unpublished. And third, all of the cases predated *Axon*, and Alpine argued that *Axon* applied. *See* Pet.App.72a–76a & n.101 (Walker, J., concurring in the judgment in part and dissenting in part). In any case, pre-*Axon* Circuit cases are of no relevance here. "Once a federal claim is properly presented, a party can make any argument in support of that claim." *Hemphill v. New York*, 595 U.S. 140, 149 (2022) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

No one can dispute that Petitioner raised the *Axon* irreparable injury argument and has raised it consistently at every single stage of this litigation.

4. Although FINRA claims that this Court recently denied a petition raising the same *Axon*-related question, the Solicitor General's Brief in Opposition in that case makes clear that the petition involved several critical grounds for denial not present here. Although Petitioner there sought review over whether "separation-of-powers violations never cause irreparable harm," the Solicitor General explained that "the court of appeals *held no such thing*." Br. in Opp'n, *Leachco, Inc. v. Consumer Prod. Safety Comm'n*, No. 24-156, 2024 WL 4817360, at *16 (U.S. Nov. 14, 2024) (cleaned up) (emphasis added). The Court "recognized that separation-of-powers violations *can* cause irreparable harm; [and] merely concluded that petitioner had not established such harm." *Id.* at *17. The recent denial of a critically different Petition is inapposite. Denial of emergency relief likewise may be attributed to any number of factors besides certworthiness.

5. FINRA fixates on the fact that this case concerns an alleged violation of FINRA's rules, not of the Exchange Act, which FINRA also enforces. But FINRA's rules carry the force of federal law. Were there any doubt, FINRA has repeatedly claimed in litigation, enforcement proceedings, and public guidance that its rules are federal law. *See, e.g.*, *In re Dep't of Enf't v. Charles Schwab & Co.*, 2014 WL 1665738, at *16 (FINRA Bd. Apr. 24, 2014) ("FINRA rules have the force and effect of a federal regulation."); FINRA's Mot. to Dismiss at 4, *Empire Fin. Grp., Inc. v. FINRA*, No. 9:08-cv-80534-KLR (S.D.

Fla. May 21, 2008), ECF 2 ("Once approved by the SEC, FINRA rules enjoy the status of federal law."); *see also* FINRA Regulatory Notice 16-25 at 3 (July 22, 2016), https://perma.cc/G8KG-745C ("FINRA's rules . . . have the force of federal law. FINRA rules are not mere contracts that member firms and associated persons can modify.").

6. The preliminary injunction posture of this case is no barrier where a question presented is about the standard for issuing a preliminary injunction.

7. The United States argues briefly that Alpine is "poorly positioned to press an argument" that "FINRA [i]s a governmental entity" since Alpine prevailed on its alternative private non-delegation claim in the court below. U.S. Br. at 17. This evinces a misunderstanding of Alpine's arguments. Alpine has consistently argued against this government versus private entity dichotomy. *See, e.g.*, Alpine Opening Br. at 4–5 (D.C. Cir. Aug. 28, 2023) ("FINRA insists that it is simply not subject to the Constitution because it is 'private.' This question begging, circular reasoning fails to engage with the real issues in this case, prioritizes labels over substance, and attempts to enshrine a loophole to the Constitution."). Whether FINRA is "private," "part of the Government," or something in between, if it exercises federal government power, assuming it may do so at all, it must be bound by the constraints on federal government power. And if the application of that rule is unwieldy, the solution is simple: do not endow private and unaccountable entities with Executive Power. When a private party conducts any act at the delegation of the government, it must be properly supervised. And where a private party exercises

Federal Executive power, assuming it may do so at all, it must abide by the structural constraints on that power. There is nothing internally contradictory about these propositions. That has been Alpine's consistent argument at every stage of this litigation.

8. Finally, FINRA audaciously argues that Petitioner "consented" to joining FINRA and being subjected to its discipline, FINRA Br. at 18, and that somehow complicates this Court's review. A more fitting descriptor would be that Petitioner was forced—by the threat of federal law—to join FINRA, the only registered securities exchange in the United States. And Petitioner is not alone. Since 1983, nearly every broker-dealer in the securities industry has been compelled to join FINRA as a condition of doing business. This coercive power makes the constitutional problem worse, not better.

CONCLUSION

The Court should grant the petition for certiorari. In the alternative, the Court should hold the petition for *Consumers' Research* or one of the pending non-delegation petitions.

Respectfully submitted,

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