No. 24A808

IN THE

Supreme Court of the United States

ALPINE SECURITIES CORPORATION,

Applicant,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,

Respondent,

&

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Application For Stay Of Judgment Pending
Petition For A Writ Of Certiorari To The United States Court Of Appeals For
The District Of Columbia Circuit

OPPOSITION OF FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC. TO APPLICATION FOR STAY OF JUDGMENT PENDING PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that the Financial Industry Regulatory Authority, Inc. is a not-for-profit, non-stock Delaware corporation, and no publicly held company has a 10% or greater ownership in it.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

STATEMENT 3

A. The Securities Industry's Tradition Of Self-Regulation 3

B. The Exchange Act's Preservation Of Self-Regulation 4

C. FINRA 6

D. Alpine 8

E. The D.C. Circuit's "Narrow" Decision Below 12

REASONS FOR DENYING A STAY 15

I. Alpine Fails To Show That The Court Is Likely To Grant Certiorari And Reverse The D.C. Circuit's Judgment 16

A. Alpine's *Axon* Question Does Not Implicate A Circuit Split And Is Recently Denied, Poorly Presented, And Meritless 16

B. Alpine's Constitutional Question Does Not Warrant Review And Is Meritless 24

1. Alpine's Article II Claims Were Not Addressed Below, Are Concededly Not Subject To Any Split, And Are Meritless 24

2. Alpine's Private-Nondelegation Claim Does Not Implicate A Split And Is Meritless 30

II. The Remaining Equitable Factors Weigh Against A Stay 35

CONCLUSION 38

TABLE OF AUTHORITIES

Page(s)

Cases

Alpine Sec. Corp. v. *FINRA*,
2021 WL 4060943 (D. Utah Sept. 7, 2021) 8

Alpine Sec. Corp. v. *SEC*,
142 S. Ct. 461 (2021) 8

Alpine Sec. Corp. v. *SEC*,
2024 WL 4681816 (D. Utah Nov. 5, 2024) 9

Aslin v. *FINRA*,
704 F.3d 475 (7th Cir. 2013) 34

Axon Enter., Inc. v. *FTC*,
598 U.S. 175 (2023) 1, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23, 33, 36

Bernstein v. *Lind-Waldock & Co.*,
738 F.2d 179 (7th Cir. 1984) 4

Bivens v. *Six Unknown Fed. Narcotics Agents*,
403 U.S. 388 (1971) 19

Blankenship v. *FINRA*,
2024 WL 4043442 (E.D. Pa. Sept. 4, 2024)..... 37

Bowsher v. *Synar*,
478 U.S. 714 (1986) 23

CFPB v. *Nat'l Collegiate Master Student Loan Tr.*,
96 F.4th 599 (3d Cir. 2024) 19

Collins v. *Yellen*,
594 U.S. 220 (2021) 23

Conkright v. *Frommert*,
556 U.S. 1401 (2009) 15

Consumers' Rsch. v. *FCC*,
109 F.4th 743 (5th Cir. 2024)..... 32, 33

Currin v. *Wallace*,
306 U.S. 1 (1939) 34

Cutter v. *Wilkinson*,
544 U.S. 709 (2005) 24

Del. State Sportsmen's Ass'n v. *Del. Dep't of Safety & Homeland Sec.*,
108 F.4th 194 (3d Cir. 2024) 18

Dep't of Transp v. *Ass'n of Am. R.R.s*,
575 U.S. 43 (2015) 28

Fiero v. *FINRA*,
660 F.3d 569 (2d Cir. 2011) 7

Free Enter. Fund v. *PCAOB*,
561 U.S. 477 (2010) 26, 28, 29

Garland v. *Cargill*,
602 U.S. 406 (2024) 22

Garraway v. *Ciufo*,
113 F.4th 1210 (9th Cir. 2024) 19

Gray v. *Jennings*,
No. 24-309, 2025 WL 76443 (U.S. Jan. 13, 2025) 18

Guedes v. *ATF*,
140 S. Ct. 789 (2020) 22

Hollingsworth v. *Perry*,
558 U.S. 183 (2010) (per curiam) 22, 36

Hurry v. *FINRA*,
782 F. App'x 600 (9th Cir. 2019) 8

Hurry v. *FINRA*,
140 S. Ct. 2668 (2020) 8

John Doe Co. v. *CFPB*,
849 F.3d 1129 (D.C. Cir. 2017) 20

Kim v. *FINRA*,
698 F. Supp. 3d 147 (D.D.C. 2023) 37

Leachco, Inc. v. *CPSC*,
No. 23A124, 2023 WL 5728468 (U.S. Aug. 7, 2023) 18

Leachco, Inc. v. *CPSC*,
103 F.4th 748 (10th Cir. 2024) 17, 21, 23

Leachco, Inc. v. *CPSC*,
No. 24-156, 2025 WL 76435 (U.S. Jan. 13, 2025) 2, 17, 18

Lebron v. *Nat'l R.R. Passenger Corp.*,
513 U.S. 374 (1995) 25, 28, 29

Lucia v. *SEC*,
585 U.S. 237 (2018) 24, 25, 27

Monsanto Co. v. *Geertson Seed Farms*,
561 U.S. 139 (2010) 22

Nat'l Collegiate Master Student Loan Tr. v. *CFPB*,
No. 24-185, 2024 WL 5112295 (U.S. Dec. 16, 2024) 19

NHBPA v. *Black*,
107 F.4th 415 (5th Cir. 2024) 25, 31, 33, 35

OBB Personenverkehr AG v. *Sachs*,
577 U.S. 27 (2015) 21

Oklahoma v. *United States*,
62 F.4th 221 (6th Cir. 2023) 31

Pee Pee Pop Tr. v. *FINRA*,
2019 WL 4723788 (D. Nev. Sept. 26, 2019) 8

Saad v. *SEC*,
873 F.3d 297 (D.C. Cir. 2017) 4

SCAP 9, LLC v. *FINRA*,
2024 WL 1574348 (9th Cir. Apr. 11, 2024) 8

Scottsdale Cap. Advisors Corp. v. *FINRA*,
844 F.3d 414 (4th Cir. 2016) 7, 8

Scottsdale Cap. Advisors Corp. v. *FINRA*,
811 F. App'x 667 (D.C. Cir. 2020) 8

SEC v. *Alpine Sec. Corp.*,
413 F. Supp. 3d 235 (S.D.N.Y. 2019) 8

SEC v. *Alpine Sec. Corp.*,
982 F.3d 68 (2d Cir. 2020) 8

SEC v. *Jarkesy*,
603 U.S. 109 (2024) 24, 37

Seila Law LLC v. *CFPB*,
591 U.S. 197 (2020) 23

Silver v. *N.Y. Stock Exch.*,
373 U.S. 341 (1963) 4

Spring Creek Rehab. & Nursing Ctr. v. *NLRB*,
2024 WL 4690938 (D.N.J. Nov. 6, 2024) 17

Sunshine Anthracite Coal Co. v. *Adkins*,
310 U.S. 381 (1940) 34

Todd & Co. v. *SEC*,
557 F.2d 1008 (3d Cir. 1977) 32

United States v. *Biden*,
2024 WL 4541448 (3d Cir. May 9, 2024) 19

United States v. *NASD*,
422 U.S. 694 (1975) 34

United States v. *Rock Royal Co-op.*,
307 U.S. 533 (1939) 34

United States v. *Solomon*,
509 F.2d 863 (2d Cir. 1975) 4

United States v. *Vaello Madero*,
596 U.S. 159 (2022) 28

United States ex rel. Polansky v. *Exec. Health Res., Inc.*,
599 U.S. 419 (2023) 30

Va. Mil. Inst. v. *United States*,
508 U.S. 946 (1993) 22

Walmsley v. *FTC*,
117 F.4th 1032 (8th Cir. 2024) 25, 31

YAPP USA Auto. Sys., Inc. v. *NLRB*,
2024 WL 4489598 (6th Cir. Oct. 13, 2024) 17, 18, 21, 23

YAPP USA Auto. Sys., Inc. v. *NLRB*,
No. 24A348, 2024 WL 4508993 (U.S. Oct. 15, 2024) 18

Yates v. *United States*,
574 U.S. 528 (2015) 26

Constitutional Provisions

U.S. Const. art. II, § 2, cl. 2 26

Statutes

15 U.S.C. § 78c(a)(3)(B) 8

15 U.S.C. § 78f(b)(5) 5

15 U.S.C. § 78o-3(b)(2) 7

15 U.S.C. § 78o-3(b)(4) 4

15 U.S.C. § 78o-3(b)(6) 5, 37

15 U.S.C. § 78o-3(b)(7) 7

15 U.S.C. § 78o-3(b)(8) 7

15 U.S.C. § 78s(a) 5

15 U.S.C. § 78s(b) 5

15 U.S.C. § 78s(b)(1) 7, 35

15 U.S.C. § 78s(b)(2) 7

15 U.S.C. § 78s(c) 7, 35

15 U.S.C. § 78s(d)(1) 35

15 U.S.C. § 78s(d)(2) 7, 35

15 U.S.C. § 78s(g)(1)(A) 4, 5

15 U.S.C. § 78s(g)(1)(B) 4, 5

15 U.S.C. § 78s(g)(1)(C) 4

15 U.S.C. § 78s(h) 7, 35

15 U.S.C. § 78u(b) 8

15 U.S.C. § 78u(d) 8

15 U.S.C. § 78u(e) 8

15 U.S.C. § 78y(a)(1) 7

28 U.S.C. § 1292(b) 19

28 U.S.C. § 1404(a) 11

Act of Feb. 25, 1791, ch. 10, 1 Stat. 191 27

Pub. L. No. 98-38, 97 Stat. 205 (1983) 5

Rules

FINRA Rule 9261 7

FINRA Rule 9311 7

FINRA Rule 9311(b) 9

FINRA Rule 9556(h) 10

FINRA Rule 9559(r) 10

S. Ct. R. 10(a) 16, 20

Other Authorities

Aditya Bamzai, *Tenure of Office and the Treasury*,
87 Geo. Wash. L. Rev. 1299 (2019) 27

4 Fed. Reg. 3564 (Aug. 9, 1939) 6

H.R. Rep. No. 106, 98th Cong., 1st Sess. (1983) 6

H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934) 4

The History of NYSE 3

Jennifer L. Mascott, *Who Are 'Officers of the United States'?*
70 Stan. L. Rev. 443 (2018) 27

Gillian E. Metzger, *The Constitutional Duty to Supervise*,
124 Yale L.J. 1836 (2015) 27

Donna M. Nagy, *Playing Peekaboo with Constitutional Law*,
80 Notre Dame L. Rev. 975 (2005) 6

OLC, *The Test for Determining 'Officer' Status Under the Appointments Clause*
(Jan. 16, 2025) 26

Order Approving Proposed Rule Change,
72 Fed. Reg. 42,169 (Aug. 1, 2007) 6

S. Rep. No. 75, 94th Cong., 1st Sess. (1975) 5

S. Rep. No. 1455, 75th Cong., 3d Sess. (1938) 5

SEC Concept Release Concerning Self-Regulation,
69 Fed. Reg. 71,256 (Dec. 8, 2004) 3, 6

Marianne K. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws*, 62 N.C. L. Rev. 475 (1984) 3

Howard C. Westwood & Edward G. Howard, *Self Government in the Securities Business*, 17 L. & Contemp. Probs. 518 (1952) 3

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE D.C. CIRCUIT:

Alpine Securities Corporation ("Alpine") sought preliminary-injunctive relief to prevent its possible expulsion from membership in the Financial Industry Regulatory Authority, Inc. ("FINRA")—a private self-regulatory organization that oversees its member broker-dealer firms—before the opportunity for review by the Securities and Exchange Commission ("SEC"). The D.C. Circuit granted Alpine that relief. App. 40–41. Thus, FINRA is currently "enjoined from expelling" Alpine prior to the opportunity for SEC review. Dist. Ct. D.E. 100.[1]

Even though it no longer faces the risk of immediate expulsion, Alpine seeks to stay the D.C. Circuit's judgment (and to bar FINRA from resuming the expedited disciplinary proceeding against it) pending the disposition of its petition for a writ of certiorari. But Alpine comes nowhere close to satisfying any of the requirements for a stay.

To start, Alpine has not shown any reasonable probability that this Court will grant certiorari and reverse. On the first question presented, Alpine identifies no circuit split over whether the "'here-and-now injury'" language of *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175, 191 (2023), applies to the irreparable-harm element of preliminary-injunctive relief: It points only to solo dissents and two inapposite Third Circuit cases that did not even address preliminary injunctions. Nor does Alpine

[1] "App." refers to the appendix to Alpine's stay application in this Court. "C.A. App." refers to the appendix in the court of appeals. Doc. 2014467, *Alpine Sec. Corp.* v. *FINRA*, No. 23-5129 (D.C. Cir. Aug. 28, 2023). "Dist. Ct. D.E." refers to the district-court docket. *Scottsdale Cap. Advisors Corp.* v. *FINRA*, No. 1:23-cv-1506 (D.D.C.).

acknowledge this Court's recent denial of certiorari on the same issue in *Leachco, Inc.* v. *CPSC*, No. 24-156, 2025 WL 76435 (U.S. Jan. 13, 2025). The Court is likely to deny review again for the same reasons it did in January, which are compounded here by additional vehicle problems. And even if the Court granted review, it would likely affirm the D.C. Circuit's holding, which tracks the circuits' emerging consensus.

On the second question presented, the D.C. Circuit did not even reach the merits of Alpine's appointment and removal claims, which have been *rejected* by every court of appeals that has considered whether to extend those structural constitutional requirements to private parties. Similarly, no court has held that FINRA's disciplinary proceedings violate the private-nondelegation doctrine where, as here, there is an opportunity for SEC review before any expulsion. Nor is there any merit to Alpine's speculation that this Court may hold its petition pending review of distinct regulatory schemes that the lower courts have uniformly distinguished from FINRA.

Alpine has also failed to demonstrate either that it will suffer irreparable harm absent a stay or that the balance of equities and public interest favor that extraordinary relief. As the D.C. Circuit explained, there will be no irreparable harm to Alpine if FINRA's disciplinary proceeding resumes because Alpine is no longer at risk of immediate expulsion. And equity favors permitting FINRA to move forward with its congressionally sanctioned enforcement responsibilities.

In short, there is no reasonable prospect that this Court will review and reverse the D.C. Circuit's "narrow and limited" ruling, App. 26, and the injunction entered

below ensures that Alpine will not suffer irreparable harm—whereas a stay would harm both FINRA and the investing public. The application should be denied.

STATEMENT

A. The Securities Industry's Tradition Of Self-Regulation

"Self-regulation in the securities industry is nearly as old as the federal government," dating back to the Philadelphia Stock Exchange's founding in 1790. Marianne K. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws*, 62 N.C. L. Rev. 475, 480 (1984). Nearly as old, the New York Stock Exchange "traces its origins to the Buttonwood Agreement signed by 24 stockbrokers on May 17, 1792," which responded to "the first financial panic in the young nation" by "set[ting] rules" to "ensure that deals were conducted between trusted parties." *The History of NYSE*, bit.ly/3F5UyG1; *see also* SEC Concept Release Concerning Self-Regulation, 69 Fed. Reg. 71,256, 71,257 (Dec. 8, 2004) (recounting self-regulation's "long tradition in the U.S. securities markets"); App. 5–6 (same).

For most of the nation's history, securities exchanges and other self-regulatory organizations disciplined their members with little or no government oversight. Well into the twentieth century, courts "unanimously t[ook] the attitude that exchange members, as parties to a voluntary contract with the exchange, must abide by their agreement," and consistently "uph[eld] suspensions or expulsions of stock exchange members for infractions of exchange rules." Howard C. Westwood & Edward G. Howard, *Self Government in the Securities Business*, 17 L. & Contemp. Probs. 518, 519–21 (1952). "[H]istorically," exchanges were "treated by the courts as private clubs"

and "given great latitude by the courts in disciplining errant members." *Silver* v. *N.Y. Stock Exch.*, 373 U.S. 341, 350–51 (1963).

B. The Exchange Act's Preservation Of Self-Regulation

When Congress adopted the modern securities laws in the 1930s, the "'traditional process of self-regulation' was not displaced." *United States* v. *Solomon*, 509 F.2d 863, 869 (2d Cir. 1975) (Friendly, J.) (quoting H.R. Rep. No. 1383, 73d Cong., 2d Sess. 15 (1934)). Rather, Congress preserved and built upon the self-regulatory framework that "preexisted federal regulation." *Bernstein* v. *Lind-Waldock & Co.*, 738 F.2d 179, 186 (7th Cir. 1984) (citing *Solomon*, 509 F.2d at 869). Under the Securities Exchange Act of 1934 ("Exchange Act"), private self-regulatory organizations continue to exercise a primary supervisory role over their members, subject to comprehensive SEC oversight. *See Saad* v. *SEC*, 873 F.3d 297, 299–300 (D.C. Cir. 2017).

Currently, nearly 50 separate self-regulatory organizations are registered with the SEC. The Exchange Act, as amended by the Maloney Act of 1938, provides for the registration of national securities associations as self-regulatory organizations whose purpose is to set ethical standards for, and supervise the conduct of, their broker-dealer members. FINRA is currently the only registered national securities association, and, like its predecessor the National Association of Securities Dealers, Inc. ("NASD"), serves as the private frontline regulator for its broker-dealer members. 15 U.S.C. § 78o-3(b)(4). Other categories of self-regulatory organizations include national securities exchanges like the New York Stock Exchange and registered clearing agencies like The Depository Trust Company. *Id.* § 78s(g)(1)(A), (B), (C).

The Exchange Act imposes extensive obligations on self-regulatory organizations. For example, every securities exchange and association must register with the SEC, submit its proposed rule changes to the SEC, and "enforce compliance" with the Exchange Act and "its own rules" by its members and persons associated with its members. 15 U.S.C. § 78s(a), (b), (g)(1)(A), (B). And the rules of exchanges and securities associations must be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade," and "to protect investors and the public interest." *Id.* §§ 78f(b)(5), 78o-3(b)(6).

This framework, refined over nine decades, reflects Congress's consistent preference for private self-regulation of the securities industry over exclusively direct governmental regulation, which would threaten "a pronounced expansion of the organization of the Securities and Exchange Commission," with all the attendant "evils of bureaucracy." S. Rep. No. 1455, 75th Cong., 3d Sess. 3–4 (1938). Congress has repeatedly sought to "preserve[ ] and strengthen[ ]" the "self-regulatory" model. S. Rep. No. 75, 94th Cong., 1st Sess. 23 (1975). For example, in 1983, Congress eliminated an alternative "SEC only" program of direct SEC regulation for broker-dealers who were not members of a national securities association and required these broker-dealers to join a national securities association, unless exempted by the SEC. *See* Pub. L. No. 98-38, § 3, 97 Stat. 205, 206–07 (1983). Congress believed that "self-regulation for all broker-dealers is preferable to direct regulation by the Commission for several reasons," including that "any attempt" to place direct SEC regulation "on a par with that provided by the NASD would require significant expenditures by the

Commission for additional staff and administrative costs." H.R. Rep. No. 106, 98th Cong., 1st Sess. 6–7 (1983). SEC staff later concluded that "'the resources necessary for the Commission to assume [self-regulatory organization] functions directly and effectively are not realistically attainable.'" SEC Concept Release, 69 Fed. Reg. at 71,267.

C. FINRA

FINRA oversees member securities firms and individuals associated with those firms. *See* App. 9–11. A private, not-for-profit Delaware corporation, App. 9, FINRA was formed in 2007, when its predecessor, the NASD, consolidated its regulation and enforcement functions with the similar functions of the New York Stock Exchange, *see* Order Approving Proposed Rule Change, 72 Fed. Reg. 42,169 (Aug. 1, 2007).[2] "FINRA's Board is selected by FINRA's members," not the government, and includes ten member representatives. C.A. App. 25 ¶ 58. FINRA "receives no funding from" the government; it is funded by member fees and "fines, penalties, and sanctions levied against its members." App. 9.[3]

FINRA exercises its regulatory authority in accordance with the Exchange Act's requirements and under the SEC's close supervision. For example, the SEC reviews rules proposed by FINRA, approves those rules if "consistent with the

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[2] The NASD "owes its origins to a trade group founded in 1912," Donna M. Nagy, *Playing Peekaboo with Constitutional Law*, 80 Notre Dame L. Rev. 975, 1023–24 (2005), and was approved by the SEC in 1939 as the first national securities association, *see* 4 Fed. Reg. 3564 (Aug. 9, 1939).

[3] FINRA currently oversees over 3,000 member firms and over 600,000 registered representatives. *See* https://www.finra.org/media-center/statistics.

requirements of [the Exchange Act]," 15 U.S.C. § 78s(b)(1), (2), and can "abrogate, add to, and delete from" those rules, *id.* § 78s(c). The SEC also examines FINRA to ensure that it "enforce[s] compliance" with the Exchange Act and FINRA's rules and that it "appropriately discipline[s]" its members and associated persons for violations, pursuant to rules that "provide a fair procedure." *Id.* § 78o-3(b)(2), (7), (8). If FINRA does not appropriately discharge these responsibilities, the SEC can impose limitations on its activities, suspend or revoke its status as a self-regulatory organization, or remove its officers or board members. *Id.* § 78s(h).

Consistent with FINRA's obligation to provide fair disciplinary procedures, its SEC-approved procedural rules provide for multiple layers of administrative and judicial review of its disciplinary proceedings. *See Scottsdale Cap. Advisors Corp.* v. *FINRA*, 844 F.3d 414, 418 (4th Cir. 2016). FINRA's disciplinary proceedings generally include, among other procedural safeguards, an evidentiary hearing, FINRA Rule 9261; an appeal to FINRA's National Adjudicatory Council, FINRA Rule 9311; a *de novo* appeal to the SEC, 15 U.S.C. § 78s(d)(2); and a right to review in a designated U.S. Court of Appeals, *id.* § 78y(a)(1).

FINRA's disciplinary authority is also subject to other limitations. For example, FINRA has no subpoena power to secure testimony or documents from uncooperative parties or witnesses. *See* App. 97 n.8. In addition, FINRA "lacks the authority" to "bring court actions to collect disciplinary fines it has imposed," *Fiero* v. *FINRA*, 660 F.3d 569, 571 (2d Cir. 2011), or to file its own enforcement proceedings in federal court. By contrast, the SEC has broad statutory power to subpoena witnesses,

15 U.S.C. § 78u(b), to secure injunctions to compel compliance with SEC orders, *id.* § 78u(e), and to bring enforcement actions in federal court, *id.* § 78u(d).

D. Alpine

Alpine is a broker-dealer member of FINRA. App. 11. Like all member broker-dealers, Alpine committed to obey FINRA's rules, including the FINRA disciplinary procedures that it now attacks as unconstitutional. 15 U.S.C. § 78c(a)(3)(B).

Over the past decade, FINRA has disciplined Alpine numerous times for violating its rules. *See* BrokerCheck Report at 16–111, bit.ly/3hjvcLU. Alpine and its affiliated businesses are also repeat federal-court litigants against FINRA (which they have now sued seven times since 2014) and the SEC (which they have sued twice and been sued by twice). In every suit to reach a final decision, the courts have ruled for FINRA or the SEC and against Alpine or its affiliates. These decisions include a 2019 opinion finding that Alpine engaged in "egregious" "illegal conduct on a massive scale" by failing to submit reports required under the Bank Secrecy Act, and imposing a $12 million penalty. *SEC* v. *Alpine Sec. Corp.*, 413 F. Supp. 3d 235, 245–47 (S.D.N.Y. 2019), *aff'd*, 982 F.3d 68 (2d Cir. 2020), *cert. denied*, 142 S. Ct. 461 (2021).[4]

[4] *See also Hurry* v. *FINRA*, 782 F. App'x 600 (9th Cir. 2019) (affirming judgment for FINRA), *cert. denied*, 140 S. Ct. 2668 (2020); *Scottsdale*, 844 F.3d at 424 (affirming dismissal of Scottsdale's complaint), *cert. denied*, 137 S. Ct. 1838 (2017); *Scottsdale Cap. Advisors Corp.* v. *FINRA*, 811 F. App'x 667 (D.C. Cir. 2020) (per curiam) (same); *Pee Pee Pop Tr.* v. *FINRA*, 2019 WL 4723788 (D. Nev. Sept. 26, 2019) (dismissing affiliated company's complaint); *Alpine Sec. Corp.* v. *FINRA*, 2021 WL 4060943 (D. Utah Sept. 7, 2021) (dismissing Alpine's complaint); *SCAP 9, LLC* v. *FINRA*, 2024 WL 1574348 (9th Cir. Apr. 11, 2024) (affirming dismissal of affiliate's complaint); Order, *Alpine Sec. Corp.* v. *SEC*, No. 22-9579 (10th Cir. Apr. 18, 2023) (dismissing

1. ***Underlying FINRA proceedings.*** This case arises from a 2019 disciplinary proceeding in which FINRA's Department of Enforcement alleged that Alpine violated FINRA's rules by stealing more than $54.5 million from its customers through excessive fees and the unauthorized conversion of customer securities. *See* C.A. App. 208.

In March 2022, following an evidentiary hearing, a FINRA hearing panel found that Alpine had violated FINRA rules by engaging in "intentional and egregious" misconduct: Alpine "converted and misused customer funds and securities, engaged in unauthorized trading," charged unreasonable fees, and "made an unauthorized capital withdrawal." C.A. App. 163, 240. Citing a "high[ ] likel[ihood]" of future violations, the panel found that "expulsion is an appropriate sanction and the only alternative for protecting the investing public." C.A. App. 240. It also imposed a permanent cease-and-desist order to prevent further customer harm. C.A. App. 246–47. After Alpine appealed to FINRA's National Adjudicatory Council, C.A. App. 252, the panel's expulsion order was automatically stayed, but its cease-and-desist order remained in force, FINRA Rule 9311(b).

While the appeal was pending, FINRA's Department of Enforcement received customer reports that Alpine was violating the cease-and-desist order, prompting a multi-month investigation. The investigation revealed that Alpine had violated the

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Alpine's petition for review); Minutes of Proceedings, *SEC* v. *Alpine Sec. Corp.*, No. 2:22-cv-1279, D.E. 39 (D. Nev. Aug. 15, 2023) (denying Alpine's motion to dismiss); *Alpine Sec. Corp.* v. *SEC*, 2024 WL 4681816 (D. Utah Nov. 5, 2024) (granting SEC's motion to dismiss).

order more than 35,000 times, charging customers millions of dollars in unreasonable and excessive fees and commissions. *See* C.A. App. 250–51. Therefore, in April 2023, FINRA initiated an expedited proceeding pursuant to FINRA Rule 9556(h) to accelerate Alpine's expulsion from FINRA, halt Alpine's ongoing misconduct, and obtain restitution for Alpine's customers. *See* C.A. App. 249. FINRA's disciplinary complaint alleged violations of the cease-and-desist order, not the federal securities laws.[5]

The hearing before a FINRA hearing officer began on June 5, 2023, but, as discussed below, was later preliminarily enjoined by the D.C. Circuit. If the expedited proceeding resumes and ultimately results in an order adverse to Alpine, including an expulsion order, Alpine may appeal directly to the SEC. *See* FINRA Rule 9559(r).

2. ***This Litigation.*** In October 2022—during FINRA's investigation that later culminated in the expedited proceeding—Alpine and an affiliate filed this suit in the Middle District of Florida. Dist. Ct. D.E. 1. The United States intervened to defend the constitutionality of the self-regulatory provisions of the Exchange Act.

Alpine alleges violations of the Appointments Clause, the Constitution's removal requirements, and the private-nondelegation doctrine. C.A. App. 46–49

[5] Alpine claims that FINRA has not alleged violations of any specific provision of the cease-and-desist order, Appl. 10, but that is false. For example, FINRA has alleged in the expedited proceeding that Alpine violated Section 3 of the cease-and-desist order by continuing to charge a prohibited "1% per day illiquidity and volatility fee" that Alpine simply "re-branded" as the "Alpine Capital Allocation Charge." C.A. App. 257–59; *see also* C.A. App. 260–61 (alleging that, contrary to the cease-and-desist order prohibiting Alpine from charging a "'2.5% market-making and/or execution fee,'" "in 5,598 instances, Alpine has charged its introduced customers a 'market-making' fee, generally 2.5% of the trade principal").

¶¶ 141–61. According to Alpine, "FINRA's very existence . . . violates the Constitution," and it seeks a declaration that FINRA "is presently constituted and operating in a manner that violates the Constitution." C.A. App. 45 ¶ 138, 52.[6]

In May 2023, Alpine filed an emergency motion for a preliminary injunction to prevent FINRA from moving ahead with the expedited disciplinary proceeding. Dist. Ct. D.E. 45. Following briefing and a hearing, the district court transferred the case to the District Court for the District of Columbia under 28 U.S.C. § 1404(a). App. 13. Alpine then renewed its motion for a preliminary injunction. Dist. Ct. D.E. 66.

After a hearing, the district court denied Alpine's motion. App. 92. The court ruled that "the facts of FINRA's creation, operation, and oversight structure do not indicate state actor status," App. 94, which foreclosed Alpine's claims under the Constitution's appointment and removal requirements, App. 99. The court further ruled, consistent with the conclusions of "every court to consider the issue," that Alpine's "private nondelegation doctrine claim is unlikely to succeed." App. 100–01.

Although the district court stated that the irreparable-harm factor "tips in Alpine's favor"—because, in the court's view, "being subjected to an adjudicatory process that a plaintiff claims is constitutionally flawed is 'impossible to remedy'" later, App. 105, 107 (quoting *Axon*, 598 U.S. at 191)—it concluded that "the balance of equities and public interest disfavor any injunctive relief" given the "overwhelming

[6] Alpine also alleged claims under the First, Fifth, and Seventh Amendments, C.A. App. 49–52 ¶¶ 162–80, which the district court rejected in denying a preliminary injunction, C.A. App. 400–11. Alpine did not raise these additional claims on appeal to the D.C. Circuit, and they are not at issue here.

interest" in "protecting the public from the harms caused by broker-dealers engaging in securities violations," App. 107.

Alpine appealed and asked the D.C. Circuit to enjoin the expedited FINRA disciplinary proceeding pending appeal. A divided motions panel granted Alpine's motion in an unpublished order. App. 72–73. The majority did not explain its reasoning, but Judge Walker's solo concurrence expressed his tentative view "[a]t this early stage" of the litigation that there "may be a constitutional problem" with FINRA's structure. App. 75, 78. Judge Garcia dissented without opinion. App. 72 n.**. The court denied rehearing en banc. Order, Doc. 2013570 (Aug. 22, 2023).

E. The D.C. Circuit's "Narrow" Decision Below

The court of appeals ultimately reversed in part the denial of a preliminary injunction. In a "narrow and limited" opinion that was "necessarily preliminary" and based on a "limited record," it concluded that Alpine had shown a likelihood of success on its argument that the lack of opportunity for full SEC review before expulsion from FINRA in an expedited proceeding violates the private-nondelegation doctrine. App. 26–27. In the court's view, a member's ability to seek a stay from the SEC of an immediately effective expulsion order was likely constitutionally insufficient. App. 19–22. The court also concluded that Alpine faced irreparable harm to the extent "it faces a grave risk of being forced out of business before full SEC review." App. 24. The court therefore concluded that Alpine was entitled to a "limited preliminary injunction" and directed the district court to enjoin FINRA from "giving effect

to any expulsion order" prior to SEC review (or expiration of the time for seeking review). App. 4, 40–41.

The D.C. Circuit otherwise "dissolved" the motions panel's injunction pending appeal because Alpine had not demonstrated that it was entitled to broader injunctive relief. App. 41. The court held the private-nondelegation doctrine likely is not violated when FINRA "enforces its own private rules against a member and seeks remedies against that member that run only to FINRA, and not to the government." App. 23 (emphasis omitted). And the court ruled that Alpine was not entitled to an injunction on its Article II appointment and removal claims because it "has not demonstrated that it will suffer irreparable harm." App. 29–30.

In so ruling, the D.C. Circuit reasoned that certain language in this Court's decision in *Axon*—stating that "an alleged Appointments Clause violation is 'a here-and-now injury' that 'is impossible to remedy once the administrative proceeding is over'"—did not support Alpine's claim of irreparable harm from being required to participate in FINRA's disciplinary proceeding. App. 36–37 (brackets omitted) (quoting *Axon*, 598 U.S. at 191). As the D.C. Circuit explained, "*Axon* answered a statutory jurisdictional question about whether Congress intended to 'oust district courts of jurisdiction'"; it "did not speak to what constitutes irreparable harm for purposes of the extraordinary remedy of a preliminary injunction." App. 37–38 (brackets omitted). The D.C. Circuit further reasoned that "FINRA is not a government agency like those at issue in *Axon*" and that "[n]othing in *Axon* addressed an asserted injury from a member of a private organization having to go through a hearing process before

such an entity" or required a departure from circuit precedent defining irreparable harm—and "Alpine tellingly has not argued to the contrary." App. 38–39.

Judge Walker concurred in the judgment in part and dissented in part. App. 42. As relevant, he agreed that "FINRA probably is *not* part of the government": "It was not created by the government. It is not controlled by the government. It is not funded by the government. All these facts point in the same direction: FINRA is a private entity." App. 60. Nonetheless, he believed Alpine had made a "strong showing" that FINRA violates "one of" either the private-nondelegation doctrine or Article II. App. 49. Judge Walker also made several novel "arguments on Alpine's behalf" on irreparable harm and nondelegation, which the panel majority held that Alpine "forfeited" by failing to advance on appeal. App. 22–24, 35 (majority op.).

On February 7, the D.C. Circuit denied Alpine's motion to stay issuance of its mandate. *See* Appl. 7. The mandate issued on February 18. Dist. Ct. D.E. 99. On remand, the district court entered a limited preliminary injunction as directed by the D.C. Circuit. Dist. Ct. D.E. 100.

As of now, there is no schedule in place for resumption of FINRA's expedited disciplinary proceeding. Nevertheless, after filing an unsuccessful application for a 60-day extension of time to file its petition for certiorari (No. 24A786), Alpine filed this "emergency" stay application on February 18 and a petition for certiorari (No. 24-904) two days later.

REASONS FOR DENYING A STAY

To obtain a stay, "the applicant must demonstrate (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; "(2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (brackets and internal quotation marks omitted). "In addition, in a close case it may be appropriate to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* (internal quotation marks omitted).

Here, Alpine cannot show a likelihood of review or reversal on either of its questions presented, which do not implicate disagreement among the circuits and seek review of questions that the D.C. Circuit decided correctly. Moreover, the case's interlocutory posture, the absence of a D.C. Circuit ruling on one of the principal issues Alpine presents for this Court's review, and Alpine's waiver of key arguments make its petition a poor vehicle for considering these questions. And the "narrow and limited" nature of the D.C. Circuit's ruling further underscores the slim odds of review. App. 26. In fact, Alpine affirmatively opposed FINRA's request for en banc review at the motions-panel stage, arguing that this case did not warrant that "extraordinary step" because it merely involved "a single enforcement proceeding against a single company," without "broader" implications. Opp. 6–8, Doc. 2010366

(July 31, 2023). A case so bereft of broader implications is an unlikely candidate for certiorari in this Court. *See* S. Ct. R. 10(a).

The remaining equitable factors also weigh heavily against a stay. The D.C. Circuit correctly held that Alpine does not face any imminent irreparable harm from the resumption of the FINRA disciplinary proceeding in light of the preliminary-injunctive relief that the lower courts have *already entered*, which prevents FINRA from expelling Alpine before the opportunity for SEC review. App. 39. And the balance of equities and public interest firmly favor permitting FINRA to continue carrying out its congressionally sanctioned self-regulatory responsibilities to protect investors from victimization by bad actors like Alpine, whose longstanding pattern of misconduct has been documented by FINRA, the SEC, and courts. Based on Alpine's past actions, including thousands of violations of a cease-and-desist order, unnecessary delay creates grave risk for its customers.

I. Alpine Fails To Show That The Court Is Likely To Grant Certiorari And Reverse The D.C. Circuit's Judgment.

A. Alpine's *Axon* Question Does Not Implicate A Circuit Split And Is Recently Denied, Poorly Presented, And Meritless.

The Court is not likely to grant review or reverse on the first question presented in Alpine's petition: whether certain language in *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023), means that being required to participate in an allegedly unconstitutional proceeding necessarily constitutes irreparable harm for purposes of

preliminary-injunctive relief. Pet. i.[7] Certiorari is unwarranted because the few courts of appeals to address this issue since *Axon* have unanimously agreed with the D.C. Circuit below that the answer is *no*. Indeed, this Court very recently denied review of the same issue in *Leachco, Inc.* v. *CPSC*, No. 24-156, 2025 WL 76435 (U.S. Jan. 13, 2025), and is likely to do the same here, especially given this case's vehicle problems. Moreover, even if review were granted, the Court would likely affirm, in line with the growing consensus among courts of appeals that *Axon*, a case about statutory jurisdiction, does not compel the conclusion that constitutional claims like Alpine's automatically establish the degree of irreparable harm required to justify the extraordinary relief of a preliminary injunction.

1. There is no circuit split on the question whether *Axon* converts every claim of an unconstitutional process into an irreparable harm for purposes of an injunction. The D.C. Circuit approvingly cited the Tenth Circuit's recent decision in *Leachco, Inc.* v. *CPSC*, 103 F.4th 748 (10th Cir. 2024), *see* App. 34, which affirmed denial of a preliminary injunction while explaining that "*Axon* did not address the issue of irreparable harm, or any other issue regarding entitlement to injunctive relief." 103 F.4th at 758. The Sixth Circuit recently agreed in an unpublished order denying an injunction pending appeal. *See YAPP USA Auto. Sys., Inc.* v. *NLRB*, 2024 WL 4489598, at *3 (6th Cir. Oct. 13, 2024) ("*Axon* 'did not address issues of relief or injury.'"); *see also*, *e.g.*, *Spring Creek Rehab. & Nursing Ctr.* v. *NLRB*, 2024 WL 4690938, at *3 (D.N.J.

[7] FINRA discusses the questions presented in the order set forth in Alpine's subsequently filed petition for certiorari.

Nov. 6, 2024) ("Based upon controlling Third Circuit precedent, this Court arrives at the same conclusion reached by the Sixth Circuit [in *YAPP*]."), *injunction pending appeal denied*, No. 24-3043 (3d Cir. Nov. 6, 2024).

More generally, relying on longstanding precedent, the Third Circuit "decline[d]" to adopt the argument that "all constitutional harm is supposedly irreparable." *Del. State Sportsmen's Ass'n* v. *Del. Dep't of Safety & Homeland Sec.*, 108 F.4th 194, 198, 203 (3d Cir. 2024). This Court denied the petition for certiorari, which raised a question presented similar to Alpine's here. *Gray* v. *Jennings*, No. 24-309, 2025 WL 76443 (U.S. Jan. 13, 2025); *see* Pet. i, No. 24-309, 2024 WL 4243918 (U.S. Sept. 16, 2024) ("Whether the infringement of Second Amendment rights constitutes *per se* irreparable injury.").

Thus, as the Solicitor General explained in opposition to certiorari in *Leachco*, the Tenth Circuit's (and D.C. Circuit's) reading of *Axon* "does not conflict with any decision of another court of appeals." Br. in Opp. 17, No. 24-156, 2024 WL 4817360 (U.S. Nov. 14, 2024). The Court denied certiorari in *Leachco* without recorded dissent. No. 24-156, 2025 WL 76435 (U.S. Jan. 13, 2025). Two Justices have also recently denied emergency applications raising the same issue, without calling for a response. *Leachco, Inc.* v. *CPSC*, No. 23A124, 2023 WL 5728468 (U.S. Aug. 7, 2023) (Gorsuch, J.); *YAPP USA Auto. Sys., Inc.* v. *NLRB*, No. 24A348, 2024 WL 4508993 (U.S. Oct. 15, 2024) (Kavanaugh, J.).

2. Alpine incorrectly asserts that its irreparable-harm question is "certworthy" because "[t]he Courts of Appeals have meaningfully differed in their approaches

to" the "proper reading of this Court's *Axon* decision in the context of injunctive relief." Appl. 19–20. In fact, none of the three cases that Alpine invokes involved a preliminary injunction or addressed the irreparable-harm factor for injunctive relief on constitutional claims, let alone disagreed with the D.C. Circuit.

Alpine first cites *CFPB* v. *National Collegiate Master Student Loan Trust*, 96 F.4th 599 (3d Cir. 2024), *cert. denied*, No. 24-185, 2024 WL 5112295 (U.S. Dec. 16, 2024), which came to the Third Circuit on certification under 28 U.S.C. § 1292(b)—not a preliminary-injunction appeal. *See id.* at 608. In that distinct context, the court merely cited *Axon* once (*id.* at 615 & n.162) to distinguish it as inapposite to the issues in *National Collegiate*, which concerned "[r]atification" of *already completed* "agency action." *Id.* at 613. That has nothing to do with Alpine's argument about the standard for preliminarily enjoining "'ongoing'" proceedings. Appl. 3. Equally far afield is *United States* v. *Biden*, 2024 WL 4541448 (3d Cir. May 9, 2024), an unpublished *per curiam* order dismissing a criminal appeal for lack of appellate jurisdiction. *Biden* cited *Axon* only in a footnote and only to distinguish it as irrelevant to criminal appeals. *Id.* at *2 n.1.

Finally, Alpine quotes a dissenting opinion in *Garraway* v. *Ciufo*, 113 F.4th 1210, 1224–25 (9th Cir. 2024) (Bumatay, J., dissenting), without identifying it as a single judge's separate writing. Appl. 21. Even on its own terms, this opinion is inapposite, as it merely cites *Axon* in support of an argument about appellate jurisdiction in *Bivens* cases—again, not in the context of preliminary-injunctive relief. *See Garraway*, 113 F.4th at 1224–25.

Alpine's asserted circuit split is thus entirely illusory.

3. In place of a genuine circuit split, Alpine points to Judge Walker's concurrence in the motions panel's injunction order in this case, his partial dissent from the court's opinion on the merits, a pre-*Axon* dissent from then-Judge Kavanaugh in *John Doe Co.* v. *CFPB*, 849 F.3d 1129 (D.C. Cir. 2017), and a statement by the district judge below. Appl. 19–20; *see also* App. 65 (Walker, J., concurring in the judgment in part and dissenting in part) (similarly discussing "our circuit's cases," not any other's). But a circuit judge's opinion speaking only for himself in concurrence or dissent—like the opinion of a lone district judge—is not a "decision" of "a United States court of appeals" that could give rise to a circuit split worthy of this Court's review. S. Ct. R. 10(a). At most, disagreement among circuit judges could present grounds to seek rehearing en banc, which Alpine elected not to do below.

4. Additionally, three case-specific obstacles make this case a particularly poor vehicle for the Court to consider the irreparable-harm standard.

First is a serious preservation issue: The D.C. Circuit held below that Alpine "has forfeited" the irreparable-harm arguments that Judge Walker made on its behalf, including the argument that then-Judge Kavanaugh's dissent in *Doe* articulates the correct standard for assessing irreparable harm in constitutional cases. App. 35. Alpine's briefing on appeal made "no argument at all that [the D.C. Circuit's pre-*Axon*] precedent has been effectively overruled or that there is any other basis on which th[e] panel could depart from it"; "[i]n fact, Alpine ignore[d] all three of" the D.C. Circuit's controlling cases, including *Doe*. App. 35. Absent unusual

circumstances—none of which is present here—this Court will not entertain arguments not made below. *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 38 (2015).

Second, FINRA's private status renders this an atypical *Axon* challenge, especially because Alpine is a member of this private organization and consented to its disciplinary procedures. The D.C. Circuit aptly observed that, "as Alpine's *private* nondelegation argument suggests, FINRA is not a government agency like those at issue in *Axon*," but a "corporation" with "private employees." App. 38. And the D.C. Circuit correctly held that this distinguishing feature is an independent reason to reject Alpine's irreparable-harm argument, as "[n]othing in *Axon* addressed an asserted injury from a member of a private organization having to go through a hearing process before such an entity." App. 38. If and when this Court chooses to review the irreparable-harm standard for preliminary injunctions on constitutional claims, it will have every reason (and ample opportunity) to do so in a routine challenge to an actual government agency, like the CPSC in *Leachco* or the NLRB in *YAPP*. *See supra* at 17–18. Indeed, if the *Axon* question really proves as confounding to judges as Alpine contends, then that is all the more reason to avoid encumbering it with the additional complications created by FINRA's private status.

Third, this case has not yet reached final judgment. Because "this case comes . . . in a preliminary-injunction posture," the D.C. Circuit emphasized that its decision "necessarily d[id] not resolve the ultimate merits of any of Alpine's" claims and "is based only on the early record in this case." App. 5. This Court "generally await[s] final judgment in the lower courts before exercising . . . certiorari jurisdiction" in

order to allow the courts below to fully consider the issues in the first instance. *Va. Mil. Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (statement of Scalia, J., respecting the denial of certiorari). Alpine asserts that its irreparable-harm question "would *only* ever arise in a preliminary posture," Appl. 24, but that is wrong: "'irreparable injury'" is also a requirement for any "'permanent injunction,'" *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 156 (2010). This Court should follow its usual practice and decline review now, leaving for another day whether to grant review if and when Alpine (or another party) litigates this issue to final judgment. *Compare*, *e.g.*, *Guedes* v. *ATF*, 140 S. Ct. 789, 791 (2020) (statement of Gorsuch, J.) (voting to deny review of "preliminary ruling" that "might yet be corrected before final judgment" in this or "other" cases on the same issue), *with Garland* v. *Cargill*, 602 U.S. 406 (2024) (later resolving the issue at the final-judgment stage in another case).

5. Even if Alpine could overcome all these obstacles to certiorari, it still could not show any likelihood that "a majority of the Court will vote to reverse the judgment below," as separately required to "obtain a stay" pending this Court's review. *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). As the courts of appeals to address the issue have uniformly recognized, the "'here-and-now injury'" language in *Axon* that Alpine "[s]eiz[es] on" arose in a different context and did not purport to change longstanding principles governing the irreparable-harm requirement for injunctive relief. App. 37; *see also* App. 64 (opinion of Walker, J.) (agreeing that "*Axon* was answering a question about whether a district court had jurisdiction, not whether a court should grant a preliminary injunction").

Indeed, Alpine's argument is especially implausible because, as the Tenth Circuit explained, the "here-and-now" language at issue was not even new to *Axon*: It was drawn from a passage in *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 212 (2020)—in turn, quoting *Bowsher* v. *Synar*, 478 U.S. 714, 727 n.5 (1986)—that "concerned standing, *not* entitlement to injunctive relief." *Leachco*, 103 F.4th at 759.[8] And this Court underscored that "key distinction" between jurisdiction and remedies in *Collins* v. *Yellen*, 594 U.S. 220, 258 n.24 (2021), which "clarified" that the "'here-and-now injury' language from *Seila Law*" was a "holding on standing" and "should not be misunderstood" to require particular relief. *Leachco*, 103 F.4th at 759 (some internal quotation marks omitted). "Because *Axon* did not overrule *Collins*," this Court is likely to affirm on the same ground and reject Alpine's strained effort to pluck language out of context from *Axon*'s discussion of subject-matter jurisdiction, which in turn drew on prior jurisdictional rulings in *Seila Law* and *Bowsher*, and wield it in the preliminary-injunction context. *YAPP*, 2024 WL 4489598, at *3.

Finally, as a practical matter, the notion that completing a disciplinary proceeding that might have a constitutional defect is "irreparable injury" warranting a stay from this Court would come as a surprise to the thousands of broker-dealers who have gone through the same process, receiving full due process from an organization made up of fellow members of their industry. Or the tens of thousands of parties who have gone through administrative proceedings before administrative courts that

[8] Similarly, the original language in *Bowsher* addressed the jurisdictional question of "'ripe[ness],'" not a preliminary injunction. 478 U.S. at 727 n.5.

could, with greater plausibility, be challenged on constitutional grounds. *See Lucia* v. *SEC*, 585 U.S. 237 (2018); *SEC* v. *Jarkesy*, 603 U.S. 109 (2024). Floodgate arguments may be overdone, but there is an immense amount of water behind this floodgate.

B. Alpine's Constitutional Question Does Not Warrant Review And Is Meritless.

The Court is also unlikely to grant review or to reverse on Alpine's second question presented: Whether the structure and enforcement powers of FINRA, a private corporation carrying on a centuries-old tradition of securities self-regulation, violate Article II's appointment and removal requirements or the private-nondelegation doctrine. Pet. i.

1. Alpine's Article II Claims Were Not Addressed Below, Are Concededly Not Subject To Any Split, And Are Meritless.

a. The Article II component of Alpine's constitutional question is not certworthy. As an initial matter, the D.C. Circuit below did not reach the merits of Alpine's Article II appointment or removal claims. App. 40. And since this Court is "a court of review, not of first view," that makes this case an exceedingly poor vehicle to address those issues. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Moreover, Alpine concedes that there is "no circuit split" on the applicability of Article II's appointment and removal requirements to a private entity like FINRA. Appl. 23. In fact, the cases that Alpine cites addressing the constitutionality of the Horseracing Integrity and Safety Authority ("HISA"), Appl. 4, *rejected* Alpine's position that the Constitution's appointment and removal requirements can apply to

private parties. In *NHBPA* v. *Black*, 107 F.4th 415 (5th Cir. 2024), *pet. for cert. filed* (Oct. 16, 2024), the Fifth Circuit, applying *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), rejected an Appointments Clause challenge to HISA, a private self-regulatory organization "modeled on . . . FINRA," because the plaintiff did not clear "*Lebron*['s] . . . insuperable hurdle" for demonstrating that "a private entity qualifies as part of the government for constitutional purposes." 107 F.4th at 434, 437–39.

The Eighth Circuit rejected an Appointments Clause challenge to HISA on the same grounds in *Walmsley* v. *FTC*, 117 F.4th 1032 (8th Cir. 2024), *pet. for cert. filed* (Oct. 10, 2024), agreeing "with the Fifth Circuit that the Act does not conflict with the Appointments Clause" because "[t]he *Lebron* standard" for deeming a nominally private company part of the government "is not satisfied." *Id.* at 1041; *accord id.* at 1041–42 (Gruender, J., concurring in part and dissenting in part) (concurring with majority's Appointments Clause analysis). And both courts expressly rejected the challengers' arguments, also advanced by Alpine here, that *Lucia* v. *SEC*, 585 U.S. 237 (2018), should be extended to private entities that are not part of the government under *Lebron*. *See NHBPA*, 107 F.4th at 439; *Walmsley*, 117 F.4th at 1041.

According to Alpine, certiorari is nevertheless warranted because this Article II analysis "directly contradicts the considered views of the Office of Legal Counsel." Appl. 23. But Alpine neglects to mention OLC's most recent opinion on the topic, which confirms OLC's agreement with FINRA that the Appointments Clause does not apply to officers of a private entity unless that nominally private entity is actually

"part of the government." OLC, *The Test for Determining 'Officer' Status Under the Appointments Clause* 7 (Jan. 16, 2025), bit.ly/3CW1dF6. Alpine's position misreads a 2007 OLC opinion that, as the 2025 OLC opinion explains, is "consistent" with both OLC's earlier (1996) and later (2025) opinions on this topic, "and with [this] Court's view that the Appointments Clause only applies to persons and entities that are part of the federal government for constitutional purposes." *Id.* at 8.

b. Even if this Court were to grant review and decide Alpine's Article II claims in the first instance, it is likely to hold that Alpine is not entitled to relief because Article II's appointment and removal requirements apply only to officers of the United States government, not private companies.

The Appointments Clause provides that the President "shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all *other* Officers of the United States" who hold principal offices "established by Law." U.S. Const. art. II, § 2, cl. 2 (emphasis added). The first four listed examples are all plainly federal government officials, which confirms that the final catchall phrase likewise refers to officials employed by the federal government. *See Yates* v. *United States*, 574 U.S. 528, 543 (2015) (explaining *noscitur a sociis*). And the President's removal power—implicit in Article II and the separation of powers—is similarly limited to "executive officers," whom the President is "empower[ed]" to keep "accountable[ ] by removing them." *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 483 (2010).

Founding-era sources and scholarship analyzing the Constitution's original meaning confirm that "'Officers of the United States'" refers only to "federal civil

officials with responsibility for an ongoing statutory duty." *Lucia*, 585 U.S. at 253 (Thomas, J., concurring) (some internal quotation marks omitted) (citing Jennifer L. Mascott, *Who Are 'Officers of the United States'?* 70 Stan. L. Rev. 443, 564 (2018)). The Founding-era "evidence suggests that 'of the United States' in the Appointments Clause . . . is a descriptive phrase indicating that the officers are *federal*, and not state or *private*, actors." Mascott, *supra*, at 471 (emphases added).[9]

Consistent with the constitutional text, original understanding, and historical practice, this Court has applied the Constitution's appointment and removal requirements *only* to "'Officers of the United States,' *a class of government officials*" employed by the federal government. *Lucia*, 585 U.S. at 241 (emphasis added). It has never applied those structural requirements to the employees of private companies that carry out responsibilities that might otherwise be performed by federal officials. After all, courts are "'not free to disregard those aspects of the constitutional design'"

[9] This reading is borne out by historical practice. For example, when the first Congress constituted the Bank of the United States, *see* Act of Feb. 25, 1791, ch. 10, 1 Stat. 191, "numerous individuals involved with its operation"—including its directors—"were not appointed in accordance with Article II's requirements," Mascott, *supra*, at 531, even though the Bank exercised delegated federal powers to maintain the national currency, *see* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 Yale L.J. 1836, 1883 (2015) (discussing Congress's historically "widespread delegation of responsibility to nongovernmental actors, such as the . . . reliance on the Bank of the United States to control the money supply"). And although Washington, Hamilton, Madison, Jefferson, and Randolph all considered the Bank's constitutionality—and all but Washington made statements on it—*none* raised concerns about the appointment or removal of Bank officers. *See* Aditya Bamzai, *Tenure of Office and the Treasury*, 87 Geo. Wash. L. Rev. 1299, 1342 (2019). The most "probable explanation" is that they, like "Congress[,] saw the bank" as a "nongovernmental entity" that was not subject to Article II. Mascott, *supra*, at 531.

that "'apply . . . only to the federal government'" and extend them to private parties. *United States* v. *Vaello Madero*, 596 U.S. 159, 171 (2022) (Thomas, J., concurring).

To be sure, in exceptional circumstances, nominally private entities may actually constitute part of the "Government itself" under *Lebron*—which asks whether a company was created by the government to further governmental objectives and is subject to the government's permanent control of its board—and thus be subject to the Constitution's structural requirements. 513 U.S. at 378 (deeming Amtrak to be part of the government for constitutional purposes). In *Free Enterprise Fund*, the Court applied the Constitution's removal requirements to the PCAOB, a nominally private, "Government-created" entity whose members are appointed by the SEC, because "the parties agree[d] that the Board is 'part of the Government' for constitutional purposes" under *Lebron* and that "its members are 'Officers of the United States.'" 561 U.S. at 485–86 (quoting *Lebron*, 513 U.S. at 397); *see also Dep't of Transp.* v. *Ass'n of Am. R.R.s*, 575 U.S. 43, 55 (2015) (identifying potential Appointments Clause issue to be addressed on remand given Amtrak's status as "a governmental entity, *not a private one*," under *Lebron*) (emphasis added). But neither this Court nor any circuit has ever sustained an appointment or removal challenge to an entity that qualified as private under *Lebron*. And for good reason: Under Alpine's view, Congress could never rely on private entities to support the government in carrying out its objectives, as any private entity carrying out delegated federal responsibilities would have to be entirely restructured to make its officers subject to

presidential appointment and removal. This would eliminate a practice that is centuries old and has benefited business, government, and the public alike.

Because FINRA is not part of the government under *Lebron*, Article II does not apply to its directors or employees. FINRA was not created by Congress; it was privately incorporated when the NASD and New York Stock Exchange—both private entities—merged their enforcement functions. *Supra* at 6 & n.1. When Congress enacted the modern securities laws, it specifically approved and preserved the long-established system of industry self-regulation, instead of creating a new enforcement bureaucracy. *See id.* at 3–6. And the government has never had power to appoint FINRA officials, let alone "permanent authority to appoint a majority of the directors." *Lebron*, 513 U.S. at 400; *see also supra* at 6. Thus, as the district court recognized below, *every* court to consider the question has held that "FINRA is a private entity wholly separate from the SEC or any other government agency." App. 96 & n.7 (collecting cases).

Indeed, this Court all but resolved the issue in *Free Enterprise Fund*, which expressly invoked *Lebron* in distinguishing "*private* self-regulatory organizations in the securities industry"—like FINRA and the New York Stock Exchange—from the PCAOB, which, "[u]nlike the self-regulatory organizations," is a "*Government-created, Government-appointed* entity" and is therefore subject to the Constitution's removal requirements. 561 U.S. at 484–85 (emphases added); *see id.* at 486–87 (again discussing "private" self-regulatory organizations). This Court's prior

pronouncement on this issue confirms both that certiorari is unwarranted and that this Court would likely reject Alpine's Article II claims, if it reached the merits.[10]

Alpine is also wrong to assert that "'executing'" the "'laws'" is "exactly what FINRA is seeking to do" against Alpine. Appl. 23. In reality, the expedited disciplinary proceeding that Alpine seeks to enjoin concerns *only* Alpine's violations of FINRA's cease-and-desist order—which, in turn, was based on Alpine's violations of FINRA's rules—not the enforcement of the Exchange Act or any other "federal securities laws." *Contra* Appl. 1, 6, 8–9, 11, 19, 25, 27; *see* App. 22 (majority opinion emphasizing "that FINRA is not enforcing any federal law or SEC regulation against Alpine in the underlying proceeding"). Thus, this case concerns only the kind of private rule violations that self-regulatory organizations have adjudicated with respect to their members for centuries. *Supra* at 3–4, 9–10.

2. Alpine's Private-Nondelegation Claim Does Not Implicate A Split And Is Meritless.

a. Nor does Alpine's nondelegation claim present a substantial question warranting certiorari. Contrary to Alpine's assertion, the courts of appeals are not divided on the question whether FINRA's disciplinary proceedings violate the private-nondelegation doctrine where, as here, there is an opportunity for SEC review before

[10] Several Justices have questioned the constitutionality of *qui tam* relators "represent[ing] the United States' interests in civil litigation." *E.g.*, *United States ex rel. Polansky* v. *Exec. Health Res., Inc.*, 599 U.S. 419, 450 (2023) (Thomas, J., dissenting). But even if that view were ultimately to prevail, it would only underscore why FINRA personnel—who lack that power, *supra* at 7—are not "Officers of the United States."

any expulsion takes effect. Appl. 18. In fact, as the district court observed below, "every court to consider the issue" has rejected Alpine's argument. App. 100.

Alpine invokes (at 17) a series of cases challenging HISA, the horseracing-industry self-regulatory organization, on private-nondelegation grounds, but the courts of appeals in each of those cases have uniformly *agreed* that FINRA is constitutional, regardless of their views on HISA. As Chief Judge Sutton explained for the Sixth Circuit in one of those cases: "In case after case, the courts have upheld [the SEC-FINRA] arrangement, reasoning that the SEC's ultimate control over the rules and their enforcement makes the [securities self-regulatory organizations] permissible aides and advisors." *Oklahoma* v. *United States*, 62 F.4th 221, 229 (6th Cir. 2023) (collecting prior cases), *cert. denied* (June 24, 2024), *pet. for rehearing filed* (July 18, 2024); *accord NHBPA*, 107 F.4th at 426 (reasoning that the SEC's rulemaking authority "with respect to FINRA" makes FINRA properly "subordinate" to the SEC for private-nondelegation purposes); *Walmsley*, 117 F.4th at 1039 (rejecting nondelegation challenge to HISA, which was "modeled" on the SEC-FINRA structure that "has been widely approved as constitutional"). These courts' consensus that FINRA is constitutional confirms the irrelevance of the separate HISA circuit split.

Indeed, the decision below is more favorable to Alpine's nondelegation position than any other, because it recognized a private-nondelegation issue, at least on a "preliminary" basis, on the "narrow" and "limited" ground that the opportunity for SEC review is required before FINRA may expel a member. App. 26–27. That might

provide *FINRA*—as the party that disagreed with that aspect of the D.C. Circuit's decision—a ground to petition for certiorari, but not Alpine.

Nor is a stay warranted based on Alpine's speculation that the Court may hold this case for *FCC* v. *Consumers' Research*, No. 24-354, a case involving a different statutory scheme and issues that are distinguishable in several respects. *Consumers' Research* primarily concerns whether federal communications laws violate the *public*-nondelegation doctrine, which has nothing to do with Alpine's challenge under the *private*-nondelegation doctrine. *See* Pet. i, No. 24-354, 2024 WL 4371883 (U.S. Sept. 30, 2024) (two of three questions presented addressing public nondelegation).

Although *Consumers' Research* also presents, secondarily, a private-nondelegation issue, that issue arises in the context of an "unprecedented" statutory scheme that "stands alone" and is "unlike other[s]" in multiple respects. *Consumers' Rsch.* v. *FCC*, 109 F.4th 743, 766–67, 779 (5th Cir. 2024) (en banc). Notably, the Fifth Circuit's decision in *Consumers' Research* expressly distinguished the "role in securities regulation" of the NASD—FINRA's predecessor—which the court recognized had been upheld because the "SEC was obliged to 'insure fair treatment of those disciplined by' NASD" and "was statutorily required to review NASD orders, make de novo findings, and come to an 'independent decision on' securities' violations and penalties." *Id.* at 770 (quoting *Todd & Co.* v. *SEC*, 557 F.2d 1008, 1012, 1014 (3d Cir. 1977) (rejecting constitutional challenge to NASD)). The Fifth Circuit also noted that the Maloney Act governing FINRA differs from the FCC scheme because it "specifically authorized registered organizations to self-regulate over-the-counter securities

markets." *Id.* at 776 n.20; *see supra* at 4. These key distinctions—like those the Fifth Circuit identified between HISA and FINRA, *see NHBPA*, 107 F.4th at 426—undermine Alpine's assertion that its petition should be held simply because these cases involve "nondelegation" at a stratospheric level of generality.

In addition, a hold pending *Consumers' Research* (or any of the HISA cases that this Court might ultimately grant) would be particularly unwarranted given the interlocutory posture of this case. This Court holds cases so that they do not become final before the Court considers the underlying issue. Here, the lower courts will be free, in the ordinary course, to consider the impact of this Court's decision in *Consumers' Research* and any other private-delegation cases while moving forward with this case on remand, which obviates any possible need for a hold and subsequent GVR order.

Finally, Alpine's private-nondelegation argument also faces serious preservation issues, much like Alpine's *Axon* question. *See supra* at 20–21. Although Alpine now seeks to embrace Judge Walker's partial dissent, Appl. 3, the panel majority held that "Alpine itself has not advanced" and so "forfeited" the nondelegation arguments on which Judge Walker relied, which went "far beyond" the grounds on which Alpine "request[ed] a preliminary injunction" below, App. 22–24. This forfeiture creates yet another vehicle problem counseling against review of Alpine's nondelegation argument, especially at this interlocutory stage. *See supra* at 21–22.

b. If this Court grants review, it is unlikely to depart from the consensus view of the D.C. Circuit and other courts that the SEC-FINRA model does not violate the

private-nondelegation doctrine where the SEC has an opportunity to review any expulsion before it takes effect.

This Court has long held that Congress may give a private company some role in a regulatory program, provided it "function[s] subordinately" to, and is under the "authority and surveillance" of, a governmental body. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 399 (1940). In *Adkins*, for example, Congress did not unconstitutionally "delegate[ ] its legislative authority to the [coal] industry" in authorizing industry boards to propose regulations subject to a government agency's "approv[al]," because the agency's ultimate "authority" over those regulations meant that "lawmaking [was] not entrusted to the industry." *Id.* at 388, 399; *see also Currin* v. *Wallace*, 306 U.S. 1, 14–16 (1939) (upholding statute requiring industry members to ratify the government's regulations before they took effect); *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 577–78 (1939) (similar).

Applying this body of precedent, every court to consider the issue has concluded that the SEC-FINRA model does not violate the private-nondelegation doctrine, at least as long as there is an opportunity for SEC review of expulsions before they take effect. *See supra* at 31. As this Court has recognized, the Exchange Act "authorizes the SEC to exercise a significant oversight function over the rules and activities of the registered associations," which are subject to the SEC's "pervasive supervisory authority." *United States* v. *NASD*, 422 U.S. 694, 701 n.6, 733 (1975). Specifically, the SEC "must approve" FINRA's rules and "may abrogate, add to, and delete from all FINRA rules as it deems necessary." *Aslin* v. *FINRA*, 704 F.3d 475, 476 (7th Cir.

2013) (citing 15 U.S.C. § 78s(b)(1), (c)). FINRA must notify the SEC of any final disciplinary action, which is subject to *de novo* review by the Commission acting *sua sponte* or in response to a petition from the aggrieved party. *See* 15 U.S.C. § 78s(d)(1)-(2). And the SEC can further cabin FINRA's enforcement powers by limiting its activities, suspending or revoking its registration, or removing its board members and officers. *Id.* § 78s(h). Thus, the Exchange Act ensures that FINRA's enforcement activities are appropriately "subordinate to" the SEC. *NHBPA*, 107 F.4th at 426.

In sum, Alpine offers nothing to support a departure from the well-reasoned consensus that FINRA's structure satisfies the private-nondelegation doctrine, outside the narrow context of immediately effective expulsion orders (which the D.C. Circuit has already preliminarily enjoined and so is not presented here).

II. The Remaining Equitable Factors Weigh Against A Stay.

Finally, Alpine's stay application should be denied because it cannot show that it would be irreparably harmed by the denial of a stay or that the balance of the equities supports its request for relief.

A. The D.C. Circuit held that Alpine will not suffer irreparable harm from the FINRA disciplinary proceeding now that FINRA is enjoined from expelling Alpine before the SEC can review FINRA's decision. App. 29-41. As the court explained, "being investigated by, or participating in a proceeding before, an unconstitutionally appointed officer is not, without more, an injury that necessitates preliminary injunctive relief." App. 34. Because Alpine has not shown that any further "harm will result

from the denial of a stay," it is not entitled to that "extraordinary relief." *Hollingsworth*, 558 U.S. at 190, 197.

Alpine's irreparable-harm argument depends entirely on its tendentious reading of *Axon* and its outlier position that FINRA's disciplinary proceeding is unconstitutional. *See* Appl. 24–25 (citing *Axon*, 598 U.S. at 191). Alpine insists that merely "be[ing] subject to" FINRA's disciplinary proceeding would require it to "face the very constitutional harm it has always sought to avoid," Appl. 24—*if* its reading of *Axon* is correct and *if* FINRA proceedings are actually unconstitutional. But those two big "ifs" are both wrong. In fact, the D.C. Circuit's decision below persuasively disposes of both contingencies: It holds that alleged constitutional injury is *not* "irreparable harm to Alpine that necessitates the exceptional remedy of a preliminary injunction against the proceeding itself," and it identifies no likely constitutional deficiency in FINRA's disciplinary proceeding other than the now-enjoined possibility of an immediate expulsion before SEC review. App. 39. In nevertheless contending that it will "be subject to an illegitimate decision-making process by an illegitimate decision-maker," Appl. 24, Alpine is putting the remedial cart before the constitutional-violation horse.

In the introduction to its application (but not elsewhere), Alpine erroneously asserts that it "face[s] the independent harm of potentially losing its chance to challenge FINRA's enforcement action on separation of powers grounds in this Court." Appl. 5. That is doubly wrong: Alpine could seek this Court's review again either on certiorari from final judgment in this suit or from a decision of a court of appeals on

a petition for review from an SEC order upholding a FINRA sanction imposed at the conclusion of the disciplinary proceeding. *See*, *e.g.*, *Jarkesy*, 603 U.S. at 119 (deciding constitutional question in petition-for-review posture). In short, Alpine will have an opportunity to return to this Court.

B. The balance of equities and public interest also weigh heavily against awarding Alpine the extraordinary remedy of a stay. A stay would impair FINRA's critical statutory responsibility to "protect investors and the public interest," 15 U.S.C. § 78o-3(b)(6), by preventing FINRA from moving forward with its disciplinary proceeding against Alpine and by enabling Alpine—which has already stolen millions of dollars from its customers, *see supra* at 9—to continue to exact massively outsized fees and commissions from investors in the penny-stock market.

Moreover, Alpine's customers are not the only ones who would face the risk of continued victimization. A stay would invite every other respondent in a FINRA disciplinary proceeding (among the thousands of FINRA members, *supra* at 6 n.3) immediately to seek injunctive relief in federal court. Similar constitutional claims have already been raised in several other cases.[11] Granting Alpine a stay would inevitably generate a further flood of copycat litigation, paralyzing FINRA's frontline enforcement functions, overwhelming the SEC's limited resources, and leaving investors susceptible to fraud, deceit, and theft.

[11] *See*, *e.g.*, *Kim* v. *FINRA*, 698 F. Supp. 3d 147 (D.D.C. 2023); *Blankenship* v. *FINRA*, 2024 WL 4043442 (E.D. Pa. Sept. 4, 2024), *appeal filed*, No. 24-2860 (3d Cir.); *Black* v. *SEC*, No. 3:23-cv-709 (W.D.N.C. filed Oct. 30, 2023); *Smith* v. *FINRA*, No. 1:25-cv-447 (D.D.C. filed Feb. 15, 2025).

Alpine is thus wrong to conclude that FINRA and others "will not be harmed by" a stay. Appl. 25. Alpine claims this is so because FINRA "delayed the Expedited Proceeding for years," Appl. 5, which is false. In fact, FINRA expeditiously initiated the proceeding as soon as it determined in April 2023, after an investigation based on complaints from Alpine's customers, that Alpine had flagrantly violated FINRA's March 2022 cease-and-desist order—some 35,000 times—over a period in which Alpine attempted to conceal its violations by mislabeling fees and making false representations to FINRA staff. C.A. App. 252–65; *supra* at 9–10. Alpine professes innocence against "unproven allegations," Appl. 26, but this Court's equitable balancing can and should consider Alpine's extensive history of misconduct, including a final judgment in "an earlier SEC enforcement action against Alpine for violation of federal securities laws that culminated in a $12 million civil penalty against Alpine for 'egregious'" and "'illegal conduct on a massive scale.'" App. 11; *supra* at 8. Equity does not favor Alpine's unclean hands.

CONCLUSION

The application for a stay should be denied.

Respectfully submitted.

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