No. 24A808

# In The Supreme Court of the United States

ALPINE SECURITIES CORPORATION,

*Applicant*,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY,

*Respondent*,

&

UNITED STATES OF AMERICA,

*Intervenor-Respondent.*

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

## REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI

March 12, 2025


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## CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, Applicant 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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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE D.C. CIRCUIT:

FINRA poses a constitutional problem that this Court can and should address. FINRA wields federal executive power derived from a federal statute and the SEC, yet it expressly disclaims any obligation to adhere to the constitutional constraints on federal executive power. Using power borrowed from the Government, FINRA insists that it can do that which the Government cannot. For example, while this Court has squarely held that SEC administrative law judges must be appointed in conformity with the Appointments Clause and that an agency's leaders cannot enjoy double for-cause removal protection, FINRA insists that it can adjudicate the same claims of violations of the federal securities laws without regard for constitutional law because it is "private." Assuming FINRA can be delegated federal power at all, it surely cannot exercise federal power with less constraint than if the Government kept the power for itself. To believe otherwise is to sanction a "constitutional loophole" by which the Government can circumvent core guarantees of government accountability to the People. App.78 (Walker, J., concurring).

In their joint attempt to establish that no reasonable probability exists that four justices would vote to grant review of this constitutional problem, FINRA and the Government together collect scattershot alleged vehicle issues. But these scattered shots fail to land. None of the alleged vehicle issues would actually preclude

or inhibit the Court's review of: (1) the import of a Separation of Powers injury in the preliminary injunction analysis, and (2) FINRA's constitutional status.

These are the kinds of questions over which this Court has repeatedly granted review even without a crisp and well-balanced Circuit Split. Indeed, awaiting an even deeper split on the question whether the Nation's single front-line regulator of the securities industry is wielding federal power unconstitutionally would result in unfairness to market participants and sow nothing but chaos. This Court should resolve the uncertainty, not await more of it.

Further, these questions are critically important. They implicate core constitutional protections fundamental to the Separation of Powers and our guarantee of a government accountable to the People. Regulated parties, the public, and FINRA itself need clarity about whether FINRA's operations and structure are unconstitutional. And because of FINRA's unusually aggressive regulation tactics—threatening expulsion and exorbitant fines when a private party questions FINRA's interpretation of applicable laws or rules—this important issue is unlikely to reach this Court often.

A stay will preserve the status quo and allow this Court the time to decide how to handle Applicant's currently pending petition before Applicant is made to suffer the irreparable constitutional injury it has sought throughout this litigation to avoid. "Perhaps the most compelling justification" to "upset an interim decision by a court of appeals would be to protect this Court's power to entertain a petition for certiorari[.]" *N.Y. Nat. Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307 (1976)

(Marshall, J., in Chambers) (citing ROBERT STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE § 17.19 (4th ed. 1969)). Just so here.[1]

## I. It Is Reasonably Probable that Four Justices Will Vote To Grant Certiorari.

### A. This Court Has Already Granted Certiorari This Term on a Related Question.

This Court has already granted a similar Petition this Term in *FCC v. Consumers' Research*, No. 24-354 (cert. granted Nov. 22, 2024, oral argument scheduled for Mar. 26, 2024). FINRA and the Government seek to avoid the obvious connection between the two cases—which arise from the same fundamental question whether (and if so, how) the federal government may outsource its powers to a private body. Because the Court is likely to provide some guidance on the private non-

[1] In the D.C. Circuit, the Government stated that it was "not clear," Intervenor's Opp'n to Mot. to Stay Mandate at 10 (D.C. Cir. Jan. 27, 2025), whether the D.C. Circuit motion panel's injunction pending appeal (which enjoined FINRA's Expedited Proceeding entirely) was immediately dissolved by the D.C. Circuit's later opinion, or could be reinstated if the D.C. Circuit's mandate were stayed. Now, before this Court, the Government argues that a stay of the D.C. Circuit's judgment would not halt FINRA's Expedited Proceeding because the D.C. Circuit already dissolved its earlier injunction. Gov't Br. at 11 n.*. But the Court has previously granted similar relief under similar procedural circumstances. In *Lonchar v. Thomas*, for example, the Court vacated an order from the court of appeals that had itself vacated a stay. 517 U.S. 314, 314 (1996). *See also La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 26 (1959) (reversing a court of appeals order that had vacated a stay and thus reinstating the district court's stay).

In any case, this Court could avoid any potential ambiguity by phrasing its stay as applying to FINRA's Expedited Proceeding, rather than the D.C. Circuit's judgment. *See* Alpine App. for Emergency Relief at 3 n.1. The Government asserts that the latter would require a higher showing, *See* Gov't Br. at 11 n.*, but this Court has in the past stayed (not enjoined) a non-court decision in an analogous matter. *See NFIB. v. OSHA*, 595 U.S. 109, 121 (2022) (majority op.) (staying the vaccine mandate pending petition for review and certiorari). Regardless, Applicant satisfies any of the standards for interim relief in this Court.

delegation doctrine, the resolution of this matter would benefit from that important guidance.

Implicitly recognizing the impact of *Consumers' Research*, the Government claims that Applicant "barely addresses" private non-delegation. But the Petition squarely raises the private nondelegation doctrine as an integral part of the broader suite of FINRA's structural constitutional flaws. *See, e.g.*, Cert. Pet. at 26–27, No. 24-904 (U.S. Feb. 20, 2025) ("Pet.") ("Assuming FINRA may exercise federal governmental power over other private parties at all, it is insufficiently supervised by the SEC in doing so. FINRA is empowered to exercise unchecked prosecutorial discretion—it decides *independently* who to investigate, prosecute, adjudicate, and ultimately punish.").

The Government next critiques the "obvious analytic overlap" between Applicant's structural claims; namely, private non-delegation and Article II, Gov't Br. at 14, and speculates that FINRA *could* amend its rules in response to the D.C. Circuit's decision from last November, *id.* Notably, FINRA does not indicate that it has any intention of changing its rules. Nor would it make much sense for FINRA to take those steps *before* any guidance from the Court. Regardless, the Government never explains what this "analytic overlap" is or what makes it so "obvious." An Appointments Clause or presidential removal claim could lie, for example, even if FINRA were properly supervised by the SEC so long as FINRA continues to be unaccountable to the *President* and if its officers continue to exercise significant government authority without proper appointment. Some SEC oversight as a general

matter, although relevant to the private non-delegation issue, would not save either of those exercises of federal power. Short of a FINRA rule change requiring that FINRA officers be appointed constitutionally and appropriately supervised by the president, any future FINRA rule change would not meaningfully change the Article II questions.

FINRA, for its part, claims that *Consumers' Research* is distinguishable because the Fifth Circuit below remarked that NASD, FINRA's predecessor, has been deemed sufficiently supervised. FINRA Br. at 32. Even if that dicta from a lower court is relevant to this Court's decision, FINRA has changed drastically from the days of the NASD, as Applicant has explained. *See* Pet. at 7 ("FINRA's predecessor, the National Association of Securities Dealers ('NASD'), was originally created as a voluntary and member-run collaborative association . . . . In recent decades, FINRA replaced the NASD and transformed the private regulation of the securities industry from a collaborative, member-run enterprise into a full-fledged enforcement agency in which membership is compelled, external non-industry governance is mandated, and aggressive enforcement and imposition of devastating penalties comparable to those imposed by the SEC are backed by the force of federal law."). As SEC Commissioner Hester Peirce put it: "on the strength of a government mandate and carrying out a regulatory mission using government-like tools, FINRA is difficult to distinguish from its patron agency." Hester Peirce, *The Financial Industry Regulatory Authority: Not Self-Regulation After All* at 20, GEO. MASON UNIV. (Mercatus Ctr., Working Paper 2015), *available at* https://perma.cc/AD9Y-RSH9. So

this dicta about the NASD of yore is worth even less than usual, and certainly should not preclude this Court granting relief and review here.

FINRA also discusses the Court's rationale behind its practice of holding petitions; namely, in FINRA's view, so that cases do not become final while the Court decides a related case. To the extent we can or should speculate about the Court's internal rationales, that may be *one* of the reasons the Court might hold a Petition for an already-granted case. Another could be, for example, the efficient use of the resources of this Court, the lower courts, and the parties. For example, the Court may hold a petition in order to later grant, vacate, and remand. FINRA's speculation that the Court only holds petitions so that they do not reach final judgment is belied by this Court's actual practice. In reality, the Court has apparently held notable petitions (some of which were later granted) despite their preliminary posture with final resolution not yet at risk. It appears likely, for example, that the petition in *Collins v. Yellen*, No. 19-422 (vide 19-563), was held for this Court's decision in *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020), before it was ultimately granted. *See also*, *e.g.*, *Gilardi v. HHS*, 573 U.S. 956 (2014) (apparently held for *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), and later granted, vacated, and remanded).

Still, FINRA's claimed rationale for the Court's hold practice applies just as well here. A case can become final in many ways. It can reach final judgment, of course, but it can, in some cases, end when a party suffers the injury of which it has complained. So whatever the Court's justifications for a hold in the abstract, in *this* case, the Court should grant relief and hold the Petition for *Consumers' Research* so

that the FINRA Expedited Proceeding of which Applicant has complained does not occur and inflict further damage on Alpine while this Court decides *Consumers' Research*. Especially so where Applicant raises a claim under the same legal theory this Court may clarify in *Consumers' Research*.

### B. Even Putting Aside the Overlap with *Consumers' Research*, the Questions Presented Here Are Independently Certworthy.

The federal Courts of Appeals have diverged on whether the FINRA-SEC relationship passes constitutional muster under the private non-delegation doctrine. *Compare Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2679 (Mem.) (2024) (petition for reh'g pending) ("In case after case, the courts have upheld th[e] arrangement, reasoning that the SEC's ultimate control over the rules and their enforcement makes the SROs permissible aides and advisors."); *and Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 434 (5th Cir. 2024) ("[C]ircuit cases concluding that FINRA's enforcement role presents no private nondelegation problem . . ."), *with* App.4 (holding that FINRA's procedure that allows it to expel Applicant from the securities industry without any SEC review violated the private non-delegation doctrine). FINRA tries to narrow the relevant question to render the 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, by contrast, regulated parties face no such assurance, and the SEC-FINRA relationship has been

generally blessed. *See Oklahoma*, 62 F.4th at 229 (collecting cases). That is a split, and one with real consequences.

But even accepting that no crisp split exists over the questions of FINRA's constitutionality and the import of a Separation of Powers injury to the preliminary injunction analysis, this Court has long granted review over structural constitutional questions in important cases 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. Indeed, as Applicant explained, *Free Enterprise Fund* is indistinguishable from this case in the ways that matter. That case likewise 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) ("[W]hile there is no split in the lower federal courts concerning the constitutional status of the recently created Board, none of the Court's cases on the Constitution's structural protections have, so far as we can discern, involved such a split. This reflects not only the rarity of such splits, but the need for the judiciary to be vigilant in policing . . . efforts to impinge on coordinate branches.").

This makes sense where, as here, awaiting a crisp and well-balanced Circuit Split would leave market participants subject to a regulatory body that operates nationwide with no accountability to the executive and employing federal power in a manner which, in the view of the D.C. Circuit, violates the private non-delegation doctrine. Waiting for the Circuits to deepen the split would only cause extreme

confusion in the securities markets. Will the same regulatory body—FINRA—be constitutional in the States of one circuit but not in another? How will that work for broker-dealers who operate nationwide? Already, the District of Columbia courts have assured protection from FINRA's frequent (and formerly *unilateral*) permanent industry bans while others have generally blessed the FINRA-SEC relationship. Given the nationwide operation of the securities markets and importance of this critical industry, a state of confusion is unworkable. This Court should seek to resolve the confusion now, not await more of it.

### C. No Vehicle Issues Would Preclude This Court's Review.

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 favor form over function. Focusing on what matters, this case presents an excellent vehicle for this Court to resolve the questions presented. The other parties' arguments to the contrary are unavailing.

1. The Government claims that Applicant changed positions on whether FINRA is "private" or "a governmental entity" because it made arguments in the Court of Appeals in the alternative. Gov't Br. at 13–15. To the extent this matters, it is simply not true, and evinces a misunderstanding or mischaracterization of Applicant's arguments. In fact, Applicant has consistently argued against this dichotomy, explaining that it is the *nature* of the power exercised that is important for constitutional purposes. Indeed, Applicant accused FINRA and the Government of engaging in "labelism" by focusing on the arbitrary and non-substantive fact that

FINRA is technically "private." 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. More than anything, FINRA's focus on labels misses the point. That FINRA is nominally 'private' is the *beginning* of the inquiry, not the end."). 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. That has been Applicant's consistent argument at every stage of this litigation. The Government is quite mistaken in asserting that the well-established maxim that the "party that prevails by assuming one position in litigation generally may not later assume a contrary position in that litigation" has any bearing here. Gov't Br. at 14–15.

2. Nor does it preclude this Court's review that Applicant secured some partial relief from the D.C. Circuit, as Applicant did not obtain complete relief. At every point, Applicant 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. As is obvious from the existence of this Application, 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 avoid this Court's review of important issues.

3. The other parties emphasize that the D.C. Circuit majority opinion rejected Applicant's structural claims on *Axon* irreparable-injury grounds and declined to analyze the merits. But that too should not prevent review. If the Court takes up the *Axon* question presented, it will likely be appropriate to either affirm or reverse the D.C. Circuit's holding contrary to Applicant's argument. *See id*. at 15 (conceding that "the irreparable-injury claim is squarely presented") (emphasis omitted). Even if this Court decided to forgo the *Axon* question and only consider the question of FINRA's constitutional status, the Court could still vacate the D.C. Circuit's opinion and remand for further proceedings consistent with its opinion. That the majority panel chose not to reach the issues Applicant 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).[2] Here, again, Applicant pressed at every stage that FINRA is unconstitutionally structured and not sufficiently supervised and that Applicant is

[2] Indeed, it would create perverse incentives if a lower federal court could simply decline to reach a party's core arguments and instead decide on other grounds to evade this Court's review.

irreparably harmed by being subjected to an illegitimate proceeding by an illegitimate decisionmaker.

4. Applicant's alleged "forfeitures" of D.C. Circuit caselaw that predated *Axon* in the lower court—which, even there, Applicant had no reason to discuss because (1) FINRA did not invoke these cases and (2) they predated *Axon* and Applicant argued that *Axon* applied, *see* App.65–66 (Walker, J., concurring in the judgment in part and dissenting in part)—are of no relevance whatsoever. "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 Applicant raised the *Axon* irreparable injury argument and has raised it consistently at every single stage of this litigation.

5. 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 grounds for denial not present here. As the Solicitor General there explained, although Petitioner sought review over whether "separation-of-powers violations never cause irreparable harm. . . . 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. "That holding follows directly from this Court's decision in *Collins* [*v. Yellen*, 594 U.S. 220 (2021)]," *id.*, which does not impact Applicant's claims.

Here, by contrast, the Acting Solicitor General admits that "the irreparable-injury claim *is* squarely presented." Gov't Br. at 15 (emphasis in original). Thus, the recent denial of a critically different Petition is inapposite.

6. The other parties fixate on the fact that this case concerns an alleged violation of FINRA's rules, not of the Exchange Act, which FINRA also enforces. The intended import of this point is not clear. In any case, FINRA's rules carry the force of federal law, as Applicant has explained. Were there any doubt, the Court can take FINRA's word for it. 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) ("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) ("FINRA's rules . . . have the force of federal law. FINRA rules are not mere contracts that member firms and associated persons can modify.").

7. The preliminary injunction posture of this case is no barrier where the question presented is about the standard for issuing a preliminary injunction. FINRA suggests that Applicant could just wait and come back to this Court at some later stage of proceedings; for example, after a permanent injunction. But by that point, absent relief staying FINRA's enforcement action, Applicant will have already been forced to participate in the illegitimate proceeding led by an illegitimate

decisionmaker. And the cards are entirely in FINRA's hands. Such will often be the case for regulated parties seeking to present a similar question to this Court. Further, it is unclear how that uncertainty and delay would benefit this Court's resolution of the questions posed.

8. Finally, FINRA makes the audacious argument that Applicant "consented" to joining FINRA and being subjected to its disciplinary procedures, FINRA Br. at 21, and that somehow complicates this Court's review. A more fitting descriptor would be that Applicant was forced—by the threat of federal law—to join FINRA, the only registered securities exchange in the United States. And Applicant 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. Surely, this show of coercive power makes the constitutional problem (and the need for this Court's relief and review) worse, not better.

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While the other parties' alleged vehicle issues are largely irrelevant or overstated, the vehicle questions that *could* actually matter in a case like this one all cut in favor of this Court's review. The questions are purely legal and, as they concern (1) the nature of a separation of powers injury in the preliminary injunction context and (2) FINRA's constitutional status, they are properly framed at a high level. Nor is this a facial challenge in which it would be necessary to develop a record about all possible applications of FINRA's powers. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 724 (2024). Quite the opposite—this is an as-applied challenge to a FINRA

enforcement proceeding which directly implicates broad questions about FINRA's enforcement powers.

### D. This Case Is Exceedingly 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 or not it has done so and continues to do so consistent with the structural Constitution, either under the private non-delegation doctrine or under the Appointments Clause or under the president's removal powers, is of utmost importance to regulated parties who are forced by federal law to join FINRA, the general public, the SEC, the President, and FINRA itself.

FINRA cannot escape this fact by labelling this case as "narrow." FINRA Br. at 2, 12, 15, 31, 35. True, perhaps the *procedural posture* of this case is narrow; Applicant challenged a specific enforcement proceeding FINRA brought against it. *See id*. at 15 (citing Applicant's language that this case involves "a single enforcement proceeding against a single company" (quotation marks omitted)). But that is a feature, not a bug. Applicant's arguments and their implications, meanwhile, are broad and always have been. Indeed, FINRA must admit as much when it makes the all-too-familiar arguments that enforcing constitutional protections would open the floodgates to unwanted (by FINRA) practical consequences.

## II. There Is a Fair Prospect that Five Justices Will Rule in Applicant's Favor on at Least One of the Questions Presented.

### A. There Is a Fair Prospect This Court Will Hold that a Structural Injury Can Give Rise to Injunctive Relief.

This Court's precedent strongly supports—indeed, should dispositively decide—this question presented. This Court stated that subjection to an illegitimate proceeding by an illegitimate decision maker constitutes "a here-and-now injury," because "a proceeding that has already happened cannot be undone," *Axon Enterprise Fund, Inc. v. FTC*, 598 U.S. 175, 191 (2023). 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 specific facts. But the *Axon* Court used awfully clear language which, without some indicator that it *cannot* apply in the context of injunctive relief, should apply just as well in the preliminary-injunction context. As Judge Walker put it: "To be sure, *Axon* was answering a question about whether a district court had jurisdiction, not whether a court should grant a preliminary injunction. But I struggle to see how an injury that is completely 'impossible to remedy' (the standard there) meaningfully differs from an injury that is 'beyond remediation' (the standard here)." App.64 (Walker, J., concurring in the judgment in part and dissenting in part) (citations omitted). Reading that unqualified language to mean what it says is hardly reading a judicial opinion like a statute. *See* Gov't Br. at 18.

The Government also emphasizes that then-Judge Kavanaugh's opinion in *John Doe*, which is entirely in accord with Applicant's position here, predates *Axon*. Quite right, and that only strengthens Applicant's case. Even if FINRA and the

Government are right that *Axon* was limited to its precise context despite the lack of any language indicating so, there are *still* good reasons to believe that a Separation of Powers injury can constitute irreparable harm. *See John Doe Co. v. CFPB*, 849 F.3d 1129, 1136 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("Irreparable harm occurs almost by definition when a person or entity demonstrates a likelihood that it is being regulated on an ongoing basis by an unconstitutionally structured agency that has issued binding rules governing the plaintiff's conduct and that has authority to bring enforcement actions against the plaintiff.").

The Government further argues that *John Doe* is distinguishable because the agency there had "final authority." Gov't Br. at 18 (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. Then-Judge Kavanaugh explained that irreparable harm occurs "when a person or entity demonstrates a likelihood that it is being regulated on an ongoing basis by an unconstitutionally structured agency that has issued binding rules governing the plaintiff's conduct and that has authority to bring enforcement actions against the plaintiff." *Id.* Here, FINRA can and does issue binding rules against Applicant and can and *did* bring an enforcement action against Applicant. Thus, then-Judge Kavanaugh's position is directly on point here. Were there any doubt about FINRA's remaining power in light of the D.C. Circuit's injunction, FINRA retains *significant* power even though it may no longer unilaterally and without SEC review force the closure of Applicant. *See*

App.76 (Walker, J., concurring) ("[L]ike *Lucia*'s ALJs, hearing officers demand testimony, rule on motions, regulate the course of a hearing, decide the admissibility of evidence, and enforce compliance with discovery orders by punishing contempt.") (citing FINRA Rules 8210, 9252, 9235, 9263, 9280); *see also* App.54–56 (Walker, J., concurring in the judgment in part and dissenting in part) (listing FINRA's unsupervised powers).

### B. There Is a Fair Prospect This Court Will Hold that FINRA's Exercise of Federal Power Violates the Constitution.

FINRA's structure and exercise of federal power is unconstitutional under a straightforward application of this Court's Separation of Powers precedents. *See* App.61–63 (Walker, J., concurring in the judgment in part and dissenting in part) (FINRA's structure violates both the Appointments Clause and Article II's protections on presidential removal). As to presidential removal, FINRA's structure is unconstitutional under *Free Enterprise Fund*.

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 29 (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. The Court's offhand use of the adjective "private" cannot bear the weight that FINRA gives it.

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 rigid proposition that FINRA seeks to establish: that entities that *do not* satisfy the *Lebron* test (which Applicant in no way concedes is true here) need not follow the structural constitutional rules that ordinarily apply to those who exercise significant Executive Power.

As to the Appointments Clause, FINRA's structure is unconstitutional under a straightforward application of *Lucia*. A FINRA Hearing Officer—the decisionmaker who would conduct FINRA's Expedited Proceeding against Applicant if it is permitted to go forward—is "indistinguishable from the administrative law judges in *Lucia* and the special trial judges in *Freytag*." *See* App.60 (Walker, J., concurring in the judgment in part and dissenting in part). With power comes constraint; because

FINRA officers exercise the same type of powers as the Judges in *Lucia* and *Freytag*, they too must be appointed consistent with the Constitution's Appointments Clause.

The other parties believe these precedents do not apply because FINRA is "private." But that view would allow FINRA to do what the SEC cannot *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. 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. Because FINRA exercises executive power, it must be subject to the supervision and control of the President, as required by Article II and the Court's precedents interpreting it. FINRA prefers, instead, a "constitutional loophole." App.78 (Walker, J., concurring). As Judge Walker put it: "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." App.77 (Walker, J., concurring).

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. For good reason—the artificial distinction FINRA and the Government propose would allow Congress or the Executive to subvert the Constitution's structural protection by simply labelling officers as "private." *See* App.78 (Walker, J., concurring) (This "would suggest that Congress was free to fix the constitutional infirmity with the ALJs in *Lucia* simply by moving them outside of the Executive Branch. But that wouldn't cure the basic defect motivating the Supreme Court.").

Founding-era evidence is in line with this understanding. "In the Founding era, the term 'officer' was commonly understood to encompass *any individual* who had ongoing responsibility for a governmental duty." Jennifer L. Mascott, *Who Are 'Officers of the United States'?*, 70 STAN. L. REV. 443, 450 (2018) (emphasis added); *see id.* at 454 ("If a statute authorizes the federal government to complete a task or exercise a power, the individual who maintains ongoing responsibility for the task or power is an officer."). Indeed, President Washington himself "protested upon learning that a private citizen had been participating in treaty negotiations." Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 92 (2007).

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 26, 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 such an oblique way, FINRA's argument by implication is defeated by the same text it invokes. 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 (in January of this year) from its earlier position consistent with Applicant's view is not particularly persuasive. Although FINRA claims that OLC stated that its positions have been "consistent," FINRA Br. at 25–26, that is not quite right. The more recent OLC opinion stated that its earlier opinions were "largely consistent both 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,' Officers of the United States, 31 Op. O.L.C. at 121, and at least one published opinion has viewed our 2007 and 1996 writings as disagreeing on this point, see Appointment and Removal of Federal Reserve Bank Members of the Federal Open Market Committee, 43 Op. O.L.C. __, at *7–8 (Oct. 23, 2019)." *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. Applicant submits that the 2007 opinion is more persuasive.

Finally, adopting Applicant's position would not threaten the ordinary use of federal contractors. Most contractors are not officers for an entirely different reason: because they do not occupy a "continuing" position; that is, an office that is neither "occasional" nor "temporary." *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890); *see also* Mascott, *supra*, at 463 n.99 (collecting cases). That long-settled rule is consistent with Applicant's arguments.

## III. Applicant Will Be Irreparably Harmed Without a Stay.

Unless this Court enters a stay, Applicant will be irreparably harmed, sustaining an injury in the Expedited Proceeding that "cannot be undone." *Axon*, 598 U.S. at 191. Applicant would be subject to an illegitimate decision-making process by an illegitimate decision-maker *before* the Court could decide whether to weigh in on whether that injury is enough to justify injunctive relief, to say nothing of Applicant's private non-delegation and Article II claims.

It is the relatively rare case in which an Applicant can point to a direct precedent of this Court *stating* that its alleged harm is an injury, and an irreparable one at that. The other parties try to diminish the import of the straightforward conclusion that Applicant has established an *Axon* injury by simply bleeding their merits arguments on *Axon* into the irreparable harm inquiry.

In any case, the other parties do little to undermine the other irreparable injury Applicant faces—FINRA's ability to potentially moot Applicant's

constitutional injury by resuming and concluding the Expedited Proceeding whenever it chooses.

Even besides the *Axon* injury and FINRA's ability to attempt to potentially moot Applicant's constitutional injury, Applicant will suffer real-world practical harm by being forced to undergo FINRA's Expedited Proceeding. FINRA chooses who to prosecute and how aggressively to prosecute them; the fact of being publicly accused by FINRA is alone an irreparable harm to Applicant's business.

## IV. The Balance of Harms and the Public Interest Favor a Stay.

"In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

The public interest is aligned, always, with the constitutional exercise of federal power against the American people. It is no answer to an unconstitutional exercise of government power to say that the body exercising that power reaches good policy outcomes. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government . . . will not save it if it is contrary to the Constitution." *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)). "Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Id.*

Nor is it acceptable to say that the person on the receiving end of unconstitutional government force deserved it. The injury is to the public and to our constitutional system, not only to the party being targeted with unconstitutional

government force. Anyway, FINRA continues to assume the truth of its own unproven and vigorously contested allegations. Allegations that, as the other parties emphasize, simply say that Applicant violated FINRA's own directives and a general FINRA "obey the law" order. True, FINRA and Applicant are not fast friends. FINRA has made a concerted policy effort, through the exercise of its enforcement powers, to extinguish the microcap industry. Applicant has resisted that effort at great cost and remains one of the last surviving firms to have done so. Sometimes Applicant has prevailed in the disputes; sometimes it has not, as FINRA notes in overheated terms, *see* FINRA Br. at 8 (citing *SEC v. Alpine*, 413 F. Supp. 3d 235, 245–47 (S.D.N.Y. 2019)) (discussing Applicant's failure to file certain reports).

As to FINRA's delay in bringing the Expedited Proceeding against Applicant, FINRA claims it did not delay because it expeditiously brought the Expedited Proceeding *after* its lengthy investigation. Although convenient, that explanation fails to explain why it took FINRA so long to investigate alleged conduct it now claims is so egregious that FINRA can label Applicant a "bad actor[]" to this Court before it has even feigned to adjudicate its case against Applicant.[3] FINRA Br. at 16. This blatant, public pre-judgment and extraordinary abandonment of any semblance of fair process demonstrates that FINRA is, as Applicant has always argued, an

[3] FINRA's timing is notable for other reasons besides FINRA's delay. As the district court in the Middle District of Florida, before transferring the matter to D.C., aptly questioned: "[W]hy did FINRA within days of *Axon* being decided spin off to an emergency proceeding in the face of an impending PI proceeding in this Court to essentially axe Alpine so that it would not have any ability to defend itself in a District Court case?" D.C. Cir. Appendix at App.88 (D.C. Cir. Aug. 28, 2023).

illegitimate decisionmaker. App.42 (Walker, J., concurring in the judgment in part and dissenting in part).

Nor does FINRA explain why the non-final decision Applicant is accused of violating has not been addressed by FINRA's own appellate tribunal in the almost three years since its appeal, thereby depriving Applicant of meaningful internal FINRA review and undercutting FINRA's insistence that it must resolve its allegations against Applicant before this Court can review Applicant's constitutional claims.

As to the volume of imaginary water behind imaginary floodgates, FINRA Br. at 24, such arguments are nothing new in Separation of Powers cases. Parties have made similar arguments where this Court upheld the structural constitution. The SEC, the FHFA, and the PCAOB all survived their encounters with Article II. In one stark example, President Biden fired the FHFA Director the *same day* the Court recognized his power to do so in *Collins v. Yellen*; yet the FHFA continues to operate. And the SEC continues to operate despite the Court's holding that its ALJs are Officers subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. 237, 247–52 (2018). FINRA can find a way to do the same.

Finally, the public interest strongly supports orderly resolution of these important questions, which implicate core constitutional guarantees and fundamental questions of government accountability. This Court should consider—in *this* case, which presents the issues in a rare live FINRA enforcement proceeding—whether FINRA and the Government should be allowed to continue to outsource the

Federal Government's securities regulation to a private party with its own agenda, policies, powers, rules, decisionmakers, and unchecked prosecutorial discretion.

Regulated parties, the public, and even FINRA itself should know whether FINRA may continue as it has to "exercise[] power in the people's name." *Free Enter. Fund*, 561 U.S. at 497.

## CONCLUSION

The Court should have the opportunity to consider this important matter while it is certain to remain live and before Applicant is made to face the threatened constitutional harm.

To that end, Applicant respectfully requests that this Court temporarily stay FINRA's Expedited Proceeding pending the disposition of Applicant's currently pending petition for writ of certiorari and, should certiorari be granted or the petition held, resolution on the merits. In the alternative, the Court could treat the application as a petition for certiorari, either grant review or hold the petition for *Consumers' Research* or the HISA cases if those petitions are granted and grant a stay pending resolution of the merits.

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