No. 24-904

IN THE
Supreme Court of the United States

ALPINE SECURITIES CORPORATION,

Petitioner,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,

Respondent,

&

UNITED STATES OF AMERICA,

Intervenor-Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

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 broker-dealer members—before the opportunity for plenary review by the Securities and Exchange Commission. Despite obtaining that relief, Alpine asks this Court to grant interlocutory review to consider additional, broader arguments—several of which the D.C. Circuit did not reach or held that Alpine forfeited below. The questions presented are:

1. Whether certain language in *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023), means that participation in an allegedly unconstitutional proceeding, without more, necessarily constitutes irreparable harm for purposes of preliminary-injunctive relief.

2. 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.

RULE 29.6 STATEMENT

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

RULE 14.1(B)(iii) STATEMENT

In addition to the proceedings identified in the petition, the following proceeding is directly related to the case in this Court:

Alpine Sec. Corp. v. *FINRA*, No. 24A808 (U.S.) (application for a stay denied Mar. 14, 2025).

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BRIEF IN OPPOSITION

Respondent FINRA respectfully submits that the petition for a writ of certiorari should be denied.

STATEMENT

Securities industry self-regulation dates to the Founding, when brokers and dealers met in coffee shops in New York and Philadelphia to agree on ethical rules and enforcement procedures. When Congress first passed the federal securities laws in the 1930s, it embraced that self-regulatory model, while strengthening it by making it subject to the extensive oversight of the Securities and Exchange Commission ("SEC").

In challenging that longstanding regulatory structure, Alpine asks this Court to grant interlocutory review in the face of numerous obstacles to certiorari. In particular, Alpine does not identify any disagreement among the courts of appeals on either of the questions presented, and every circuit to reach these questions has rejected Alpine's positions. Moreover, the case not only arises in an interlocutory posture, but the court of appeals did not even reach the appointment and removal issues that Alpine seeks to raise here—it issued only a "narrow," "limited," and "preliminary" ruling on other points. Pet. App. 28a–29a. And if all these hurdles to review were not enough, Alpine forfeited key arguments below, making its petition an exceedingly poor vehicle for considering the questions presented.

Finally, it is telling that Alpine affirmatively opposed FINRA's earlier request for en banc review, arguing that this case did not warrant that "extraordi-

nary step" because it merely involved "a single enforcement proceeding against a single company," without "broader" implications. C.A. Opp. to Reh'g 6–8. A case so bereft of broader significance is not fit for certiorari, *see* Sup. Ct. R. 10(a), (c)—a point confirmed by the Chief Justice's recent denial of Alpine's application for a stay pending disposition of this petition, 2025 WL 824410.

For all of these reasons, certiorari should be denied.

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). The New York Stock Exchange ("NYSE") is of a similar vintage; it "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"); Pet. App. 4a–6a (same).

For most of our 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" took the position "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. *NYSE*, 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, this "'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 "traditional private governance of exchanges." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973). Under the Securities Exchange Act of 1934 ("Exchange Act"), private self-regulatory organizations continue to exercise a vital 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 national securities associations to register 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"), it 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 NYSE 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 exchange and securities 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 both 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 nearly a century, 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 "preserved and strengthened" this "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).

C. FINRA

FINRA supervises its member securities firms and individuals associated with those firms. *See* Pet. App. 9a–11a. It currently oversees more than 3,000 member firms and 600,000 registered representatives. *See* https://www.finra.org/media-center/statistics.

A private, not-for-profit Delaware corporation, Pet. App. 9a, FINRA was formed in 2007, when its predecessor, the NASD, consolidated its regulation and enforcement functions with the similar functions of the NYSE, *see* Order Approving Proposed Rule Change, 72 Fed. Reg. 42,169 (Aug. 1, 2007).[1] The government does not select any members of FINRA's board, which comprises governors appointed by the Board or chosen by its private broker-dealer members as member representatives. *See* C.A. App. 25 ¶ 58.

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[1] 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* Order Granting Registration Application, 4 Fed. Reg. 3564 (Aug. 9, 1939).

FINRA "receives no funding from" the government; it is funded entirely by member fees and "fines, penalties, and sanctions levied against its members." Pet. App. 9a.

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 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 "appropriately discipline[s]" its members and associated persons for violations of the Exchange Act and FINRA's rules and "provide[s] a fair procedure" in disciplinary proceedings. *Id.* § 78o-3(b)(2), (7), (8). If FINRA does not appropriately discharge these responsibilities, the SEC can impose limitations on its activities or suspend or revoke its status as a self-regulatory organization, among other measures. *Id.* § 78s(h).

Consistent with FINRA's statutory obligation to provide fair disciplinary procedures, its SEC-approved rules provide for multiple layers of "comprehensive" administrative and judicial review of its disciplinary proceedings. *See Scottsdale Cap. Advisors Corp.* v. *FINRA*, 844 F.3d 414, 418, 422 (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; and a *de novo* appeal to the SEC, 15 U.S.C. § 78s(d)(2). Appeals to the SEC automatically stay any sanction other than a bar on associating with

FINRA members or expulsion from FINRA membership, FINRA Rule 9370(a), although parties appealing a bar or expulsion may ask the SEC to stay the sanctions, 17 C.F.R. § 201.401(d). Following the Commission's final order, an aggrieved party has the right to review in a designated U.S. Court of Appeals. 15 U.S.C. § 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* Pet. App. 118a n.8. In addition, FINRA lacks the authority to file its own enforcement proceedings in federal court or to "bring court actions to collect disciplinary fines it has imposed." *Fiero* v. *FINRA*, 660 F.3d 569, 571 (2d Cir. 2011). By contrast, the SEC has broad statutory power to subpoena witnesses, 15 U.S.C. § 78u(b), to bring enforcement actions in federal court, *id.* § 78u(d), and to secure injunctions to compel compliance with SEC orders, *id.* § 78u(e).

D. Alpine

Alpine is a broker-dealer member of FINRA. Pet. App. 11a. Like all FINRA members, Alpine committed to abide by FINRA's rules, including the disciplinary procedures that it now attacks as unconstitutional, when it joined FINRA. 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 affiliates are also repeat federal-court litigants against FINRA (which they have 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 decision 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*, No. 21-82, 142 S. Ct. 461 (2021).

1. This case arises from a 2019 disciplinary proceeding in which FINRA's Department of Enforcement alleged that, in violation of FINRA's rules, Alpine stole more than $54.5 million from its customers by charging excessive fees and converting customer securities without authorization. *See* C.A. App. 208. FINRA did not allege any violation of the federal securities laws.

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 harm to customers. 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, *see* 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 order more than 35,000 times, charging customers millions of dollars in excessive fees and commissions. *See* C.A. App. 250–51. Pursuant to FINRA Rule 9556(h), FINRA initiated an expedited proceeding 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.[2]

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

In March 2025, FINRA's National Adjudicatory Council affirmed in part and modified in part the hearing panel's order in the underlying, nonexpedited

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[2] Alpine claims that FINRA has not alleged violations of any specific provision of the cease-and-desist order, Pet. 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").

proceeding. Among other sanctions, it ordered Alpine's expulsion from FINRA (while staying the expulsion pending the opportunity for plenary SEC review). *See* Decision at 100 & n.218, *Dep't of Enf't* v. *Alpine Sec. Corp.*, FINRA Complaint No. 2019061232601 (Mar. 25, 2025), bit.ly/4i0b775.

2. Earlier, 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 ¶¶ 141–61.[3] 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). Pet. App. 13a. Alpine then renewed its motion for a preliminary injunction. Dist. Ct. D.E. 66.

After a hearing, the district court denied Alpine's motion. Pet. App. 111a. The court ruled that "the facts of FINRA's creation, operation, and oversight structure do not indicate state actor status," Pet. App.

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[3] 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, and they are not at issue here.

114a, which foreclosed Alpine's claims under the Constitution's appointment and removal requirements, Pet. App. 120a. Consistent with the conclusions of "every court to consider the issue," the court further ruled that Alpine's "private nondelegation doctrine claim is unlikely to succeed." Pet. App. 121a–23a.

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. Pet. App. 82a–83a. The court denied rehearing en banc. C.A. Order (Aug. 22, 2023).

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

The court of appeals ultimately reversed in part the district court's 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 a single point: that, under the private-nondelegation doctrine, Alpine is entitled to an opportunity for full SEC review before it is expelled from FINRA in an expedited disciplinary proceeding. Pet. App. 28a–29a. In the court's view, a member's ability to ask the SEC to stay an immediately effective expulsion order was likely constitutionally insufficient. Pet. App. 20a–24a. The court also concluded that Alpine faced irreparable harm to the extent that "it faces a grave risk of being forced out of business before full SEC review." Pet. App. 26a. The court thus directed the district court to issue a "limited preliminary injunction" barring FINRA from "giving effect to any expulsion order" before SEC review (or expiration of the time for seeking review). Pet. App. 3a, 45a.

The D.C. Circuit otherwise "dissolved" the motions panel's injunction pending appeal, as Alpine had not demonstrated that it was entitled to broader injunctive relief halting FINRA's expedited disciplinary proceeding. Pet. App. 45a. The court held that 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." Pet. App. 24a (emphasis omitted). The court did not reach the merits of Alpine's appointment and removal claims, deciding instead that Alpine was not entitled to an injunction on those claims because it "ha[d] not demonstrated that it will suffer irreparable harm." Pet. App. 32a. In so ruling, the court explained that this Court's decision in *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023)—which addressed district court jurisdiction over constitutional challenges to certain ongoing agency proceedings—did not support Alpine's irreparable-harm argument. As the court explained, *Axon* simply "answered a statutory jurisdictional question" and "did not speak to what constitutes irreparable harm." Pet. App. 41a. The court also stressed that Alpine had "ma[de] no argument at all" that *Axon* "effectively overruled" its earlier irreparable-harm precedent. Pet. App. 38a.

Judge Walker concurred in the judgment in part and dissented in part. Pet. App. 46a. 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." Pet. App. 66a–67a (emphasis in original). Nonetheless, he believed Alpine had made a "strong showing" that FINRA vio-

lates "one of" either the private-nondelegation doctrine or Article II. Pet. App. 54a–55a. Judge Walker also made several "arguments on Alpine's behalf" on irreparable harm and nondelegation that, as the majority held, Alpine "forfeited" by failing to advance on appeal. Pet. App. 25a–26a, 39a (majority).

The D.C. Circuit denied Alpine's motion to stay issuance of its mandate. C.A. Order (Feb. 7, 2025). Alpine then filed an emergency application asking this Court to stay the D.C. Circuit's judgment and prevent FINRA from moving forward with the expedited disciplinary proceeding pending disposition of Alpine's petition for a writ of certiorari. The Chief Justice denied Alpine's stay application in chambers. *Alpine Sec. Corp.* v. *FINRA*, No. 24A808, 2025 WL 824410 (U.S. Mar. 14, 2025).

REASONS FOR DENYING THE PETITION

The questions presented are not the subject of a circuit split, are plagued by vehicle problems (including the interlocutory posture of this petition, the absence of a D.C. Circuit ruling on some issues, and forfeiture by Alpine on others) and, in any event, are legally meritless. This Court should deny review.

I. ALPINE'S *AXON* QUESTION DOES NOT IMPLICATE A CIRCUIT SPLIT AND IS RECENTLY DENIED, POORLY PRESENTED, AND MERITLESS.

Alpine's first question presented is 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 preliminary-injunction purposes. Pet. i. But the courts of appeals to address this issue since *Axon* have unanimously

agreed with the D.C. Circuit that the answer is *no*, and this Court recently denied review of the same issue in one such case, cited in the decision below, *see Leachco, Inc.* v. *CPSC*, No. 24-156, 2025 WL 76435 (U.S. Jan. 13, 2025). The Court should likewise deny certiorari here, especially given this case's many serious vehicle problems.

Moreover, in no realistic sense is Alpine's harm here substantial or irreparable. It is commonplace for parties to endure a proceeding even when it might be overturned on appeal. The ordinary assumption is that victory on appeal relieving the party of any adverse ruling on the merits is remedy enough. If merely having to go through a proceeding constituted irreparable harm, interlocutory review would be warranted in every case where a party asserts a defect in the proceeding as a defense. The suggestion answers itself.

A. There is no circuit split on the question whether *Axon* converts every claim of an unconstitutional proceeding into 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* Pet. App. 38a, which affirmed the denial of a preliminary injunction to halt allegedly unconstitutional agency enforcement proceedings. As the Tenth Circuit explained, "*Axon* did not address the issue of irreparable harm, or any other issue regarding entitlement to injunctive relief," and thus did not "create[ ] an entitlement" to "a preliminary injunction in every case" involving "constitutional challenges" to agency proceedings. *Leachco*, 103 F.4th at 758–59.

Likewise, the Sixth Circuit has concluded that "*Axon* 'did not address issues of relief or injury'" and

therefore does not support enjoining an allegedly unconstitutional agency proceeding. *YAPP USA Auto. Sys., Inc.* v. *NLRB*, 2024 WL 4489598, at *3 (6th Cir. Oct. 13, 2024) (denying injunction pending appeal). Other courts agree. *E.g.*, *Spring Creek Rehab. & Nursing Ctr.* v. *NLRB*, 2024 WL 4690938, at *3 (D.N.J. 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 recently "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 ensuing petition for certiorari, *Gray* v. *Jennings*, No. 24-309, 2025 WL 76443 (U.S. Jan. 13, 2025), which presented a question similar to Alpine's, *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."). The Fifth Circuit, too, recently rejected the argument that merely "participating in an unconstitutional proceeding is irreparable harm." *Space Expl. Techs. Corp.* v. *NLRB*, 129 F.4th 906, 910 (5th Cir. 2025).

Thus, as the Solicitor General explained in opposing certiorari in *Leachco*, the Tenth Circuit's reading of *Axon* (which is also the D.C. Circuit's) "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). And three Justices have recently

denied emergency applications raising the same issue—including in this case—without referring any of those applications to the full Court. *Alpine*, No. 24A808, 2025 WL 824410 (Roberts, C.J.); *YAPP USA Auto. Sys., Inc.* v. *NLRB*, No. 24A348, 2024 WL 4508993 (U.S. Oct. 15, 2024) (Kavanaugh, J.); *Leachco, Inc.* v. *CPSC*, No. 23A124, 2023 WL 5728468 (U.S. Aug. 7, 2023) (Gorsuch, J.).

B. Unable to dispute that every court of appeals to address its *Axon* issue has agreed with the D.C. Circuit, Alpine points to solo dissents by three judges on that court: Judge Walker's opinion below, and dissents from motions-panel orders by Judge Rao and then-Judge Kavanaugh. Pet. 15–17; *see also* Pet. App. 72a (Walker, J., dissenting in relevant part) (similarly discussing "our circuit's cases," not any other's). But a circuit judge's dissenting opinion is not a "decision" of "a United States court of appeals" that could give rise to a circuit conflict warranting this Court's review. Sup. Ct. R. 10(a). Even a full-fledged disagreement between "different panels" of the same circuit is generally "not a sufficient basis for granting certiorari." Stephen M. Shapiro et al., Supreme Court Practice 254 (10th ed. 2013). At most, disagreement among individual circuit judges could present grounds to seek rehearing en banc, which Alpine elected not to do.

Moreover, Alpine overstates the extent of the disagreement between these individual judges and the circuit decisions declining to find irreparable harm based on an allegedly unconstitutional proceeding. According to Alpine, "some Circuits have erected a *categorical* bar establishing that [structural constitutional] injuries are not irreparable"—but Alpine con-

spicuously fails to identify any such categorical language in the circuit-court decisions addressing this issue. Pet. 4 (emphasis added); *see id.* at 15 (citing the Tenth, Sixth, and D.C. Circuit cases discussed above). In fact, as Alpine has since admitted in stay briefing before this Court, the Tenth Circuit in *Leachco* "'*held no such thing*'"; it simply "'recognized that separation-of-powers violations *can* cause irreparable harm'" and "'merely concluded that petitioner had not established such harm.'" Alpine Stay Reply 12, No. 24A808, 2025 WL 856066 (U.S. Mar. 12, 2025) (emphases added by Alpine). Likewise, the decision below merely applied *Leachco* in holding that "Alpine has not asserted" the necessary factual predicate for irreparable harm. Pet. App. 38a (citing *Leachco*, 103 F.4th at 754); *accord YAPP*, 2024 WL 4489598, at *3 (rejecting "YAPP's bare claim" but not foreclosing other, stronger claims of injury). These factbound determinations do not support Alpine's claim that some circuits have issued "categorical" holdings.

Retreating to a higher level of generality, Alpine briefly notes a handful of pre-*Axon* cases that involved violations of the Constitution's individual-rights provisions or the Supremacy Clause—not cases where, as here, merely having to participate in proceedings is alleged to violate Article II and the private-nondelegation doctrine. Pet. 17. Those inapposite cases cannot create a split on the specific *Axon* question that Alpine has chosen to present in its petition. Pet. i.

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

First is a serious preservation issue: The D.C. Circuit held 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 *John Doe Co.* v. *CFPB*, 849 F.3d 1129 (D.C. Cir. 2017), articulates the correct standard for assessing irreparable harm in constitutional cases. Pet. App. 39a. Alpine's briefing below 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*. Pet. App. 38a. 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 joined 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." Pet. App. 42a. As the court recognized, this distinguishing feature independently defeats 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." Pet. App. 43a. If and when this Court chooses to review the irreparable-harm standard in cases challenging an allegedly unconstitutional proceeding, 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 14–15. 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 arises at an interlocutory stage. 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." Pet. App. 4a. This Court "generally await[s] final judgment in the lower courts before exercising . . . certiorari jurisdiction," so the courts below can 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* arise in the context of a preliminary posture," Pet. 35, but that is wrong: "'irreparable injury'" is likewise a requirement for any "'permanent injunction,'" *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 156 (2010)—a point that Alpine ultimately (if begrudgingly) admits, Pet. 22 & n.3. Thus, 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 case or "other" cases addressing the same issue), *with Garland* v. *Cargill*, 602 U.S. 406 (2024) (later resolving the issue at the final-judgment stage in another case).

D. Certiorari is also unwarranted because the D.C. Circuit's resolution of the *Axon* question was correct. 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. Pet. App. 41a; *see also* Pet. App. 71a (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 weak because, as the Tenth Circuit explained in *Leachco*, 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." 103 F.4th at 759; *see also Bowsher*, 478 U.S. at 727 n.5 (addressing "'ripe[ness],'" not the availability of a preliminary injunction). 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*," the Court should not credit Alpine's strained effort to pluck language from *Axon*'s discussion of subject-matter jurisdiction, which in turn drew on prior jurisdictional rulings in *Seila Law* and *Bowsher*, and wield it to justify a preliminary injunction. *YAPP*, 2024 WL 4489598, at *3. "As Chief Justice Marshall warned, 'It is a

maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.'" *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 421–22 (2024) (Gorsuch, J., concurring) (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)). Alpine's reading of *Axon* defies that principle.

II. ALPINE'S CONSTITUTIONAL QUESTION DOES NOT WARRANT REVIEW.

The Court should also deny certiorari 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.

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

1. The Article II component of Alpine's constitutional question is not certworthy. As an initial matter, there is no ruling to review. The D.C. Circuit did not reach the merits of Alpine's Article II appointment and removal claims. Pet. App. 45a; *see* Pet. 34 (acknowledging that "the D.C. Circuit majority below rested its ruling entirely on" the threshold irreparable-harm question). Because this Court is "a court of review, not of first view," that makes this case an exceptionally poor vehicle to address those issues. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Moreover, there is no circuit split on the applicability of Article II's appointment and removal requirements to a private entity like FINRA. Alpine does not

argue otherwise—it suggests that review is appropriate "even [though] no circuit split has yet developed." Pet. 19. In fact, Alpine's cases addressing the constitutionality of the Horseracing Integrity and Safety Authority ("HISA"), *id.* at 36, *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 ground in *Walmsley* v. *FTC*, 117 F.4th 1032 (8th Cir. 2024), *pet. for cert. filed* (Oct. 10, 2024). The court expressly agreed "with the Fifth Circuit that the Act does not conflict with the Appointments Clause" because "[t]he *Lebron* standard is not satisfied." *Id.* at 1041. 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.

Other circuits likewise restrict application of Article II to officials employed by the federal government. For example, the Fourth Circuit rejected an Appointments Clause challenge to the Metropolitan Washington Airports Authority ("MWAA") because

MWAA—an interstate-compact entity—is "not a federal instrumentality" under *Lebron*. *Kerpen* v. *MWAA*, 907 F.3d 152, 158 (4th Cir. 2018). Similarly, multiple circuits have rejected Appointments Clause challenges to private *qui tam* relators because "the constitutional definition of an 'officer' encompasses, at a minimum, a continuing and formalized relationship of employment *with the United States Government*." *Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757–58 (5th Cir. 2001) (en banc) (emphasis added); *see also United States ex rel. Stone* v. *Rockwell Int'l Corp.*, 282 F.3d 787, 805 (10th Cir. 2002) (similar).

Alpine also claims support for its Article II arguments from the Office of Legal Counsel. Pet. 28–29. 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 "largely 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. The United States took the same position below, *see* C.A. Br. for Intervenor 41–62, and the Department of Justice continues to take the same position in related litigation involving FINRA, *see* SEC Br. 20–23, *Black* v. *SEC*, No. 3:23-cv-709 (W.D.N.C. Apr. 4, 2025) (D.E. 52).

2. Certiorari is also unwarranted because Alpine's argument lacks merit: 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, 543–46 (2015) (plurality) (explaining *noscitur a sociis* and *ejusdem generis*). 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 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).

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.

This Court has likewise 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). The Court has never applied those structural requirements to the employees of private companies that carry out responsibilities that might otherwise be performed by federal officials.

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 "Government-created" to further governmental "purposes" 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 391–94 (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).

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 NYSE—both private entities—merged their enforcement functions. *Supra* at 5 & n.1. Moreover, 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 5–6. 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." Pet. App. 116a & n.7 (collecting cases).

Indeed, this Court all but resolved the issue in *Free Enterprise Fund*, which expressly distinguished

"*private* self-regulatory organizations in the securities industry—such as 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 reference to the NYSE is particularly significant, as FINRA was created by a merger of the NYSE's regulatory arm with the NASD, and it shares all of its relevant characteristics.

This Court's prior, all-but-dispositive pronouncements foreclose any conceivable basis for review.[4]

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

1. Nor does Alpine's private-nondelegation claim warrant certiorari. Contrary to Alpine's assertion, the courts of appeals have not "diverged" on whether FINRA's disciplinary proceedings violate the private-nondelegation doctrine where, as here, there is an opportunity for SEC review before any expulsion takes effect. Pet. 18. In fact, as the district court recognized below, "every court to consider the issue" —including decisions from the Second, Third, and Ninth Circuits rejecting private-nondelegation challenges to

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[4] 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."

FINRA's predecessor the NASD—has rejected Alpine's nondelegation argument. Pet. App. 122a; *see*, *e.g.*, *Sorrell* v. *SEC*, 679 F.2d 1323, 1325–26 (9th Cir. 1982); *First Jersey Sec., Inc.* v. *Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Todd & Co.* v. *SEC*, 557 F.2d 1008, 1012–13 (3d Cir. 1977); *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir. 1952); NCLA Amicus Br. 10–11 (conceding that courts "have approved of FINRA enforcement as a permissible and constitutional delegation to a private entity").

Alpine invokes cases addressing private-nondelegation challenges to HISA, the horseracing industry's self-regulatory organization, Pet. 36, but the courts in each of those cases uniformly *agreed* that FINRA is constitutional, regardless of their views on HISA. As Chief Judge Sutton explained for the Sixth Circuit: "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*, No. 23-402, 144 S. Ct. 2679 (2024), *pet. for reh'g 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 relationship that "has been widely approved as constitutional").

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 through an expedited proceeding. Pet. App. 28a–29a. That ruling might have provided *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. This Court's "practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed." *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011) (quoting *Bunting* v. *Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from the denial of certiorari)).

Moreover, much like its *Axon* question, Alpine's private-nondelegation argument faces serious preservation issues. *See supra* at 17–18. Alpine now embraces Judge Walker's partial dissent, Pet. 3—which, "unsupported by a single case" from this Court or the courts of appeals, Pet. App. 26a (majority), transplants the "significant executive authority" standard from Appointments Clause jurisprudence to the nondelegation setting, Pet. App. 54a. But the D.C. Circuit held that "Alpine itself ha[d] not advanced," and thus "forfeited," Judge Walker's nondelegation arguments, which went "far beyond" the grounds on which Alpine "request[ed] a preliminary injunction." Pet. App. 24a–26a. This forfeiture creates yet another vehicle problem counseling against review, especially at this interlocutory stage. *See supra* at 19.

Alpine nevertheless urges the Court to ignore these procedural deficiencies because challenges to FINRA's authority are supposedly "rare" and "unlikely to present often." Pet. 35. But an issue's failure to "recur[ ]" is usually a "decisive" reason to *deny* certiorari. Shapiro, *supra*, at 246. Regardless, similar

constitutional claims have already been raised in several other cases against FINRA.[5] Thus, there is no reason for this Court to water down its usual strict certiorari standards here.

2. On the merits, the D.C. Circuit correctly concluded, in line with the circuits' uniform view, 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 a substantial 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 "law-making [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).

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[5] *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*, 125 F.4th 541 (4th Cir. 2025); *Black* v. *SEC*, No. 3:23-cv-709 (W.D.N.C. filed Oct. 30, 2023); *Lukezic* v. *FINRA*, No. 1:25-cv-623 (D.D.C. filed Mar. 3, 2025).

There is no doubt that the SEC-FINRA model satisfies the standard established by *Adkins*. 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, 700 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 also 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, where appropriate, the SEC can further cabin FINRA's enforcement powers by limiting its activities or suspending or revoking its registration, among other measures. *Id.* § 78s(h). The Exchange Act thus ensures that FINRA's enforcement activities are "subordinate to" the SEC. *NHBPA*, 107 F.4th at 426.

In a misguided effort to bolster its nondelegation claim, Alpine incorrectly asserts that "this case" involves the "enforcement of federal law" by FINRA. Pet. 5 (emphasis omitted). In reality, as the court below emphasized, "FINRA is not enforcing any federal law or SEC regulation against Alpine in the underlying proceeding." Pet. App. 24a. Rather, 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 private rules," Pet. App. 2a—not the enforcement of the Exchange Act or any other "federal securities laws." *Contra* Pet. 4–6, 10,

25. Accordingly, *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 2–3, 8–12. This "'[l]ong settled and established practice'" fatally undermines Alpine's historically unmoored constitutional claims. *NLRB* v. *Noel Canning*, 573 U.S. 513, 524 (2014).

III. THERE IS NO REASON TO HOLD THIS PETITION.

There is no basis for Alpine's alternative request that the Court 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 important respects. *Contra* Pet. 36.

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* Tr. of Oral Arg. at 99:14–15, No. 24-354 (Mar. 26, 2025) (counsel observing that the "private delegation piece" of the case "hasn't gotten a lot of play"). 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 "to review NASD orders, make de novo findings, and come to an 'independent

decision on' securities' violations and penalties." 109 F.4th at 770 (quoting *Todd*, 557 F.2d at 1012, 1014 (rejecting constitutional challenge to NASD)). The Fifth Circuit also noted that the Maloney Act amendments to the Exchange Act governing FINRA differ from the FCC scheme because they "specifically authorized registered organizations to self-regulate over-the-counter securities markets," whereas the FCC provision "ma[de] no mention" of delegations to "private entities." *Id.* at 776 & n.20; *see supra* at 3–6. These key distinctions confirm that there is no reason to hold this petition simply because both cases involve "nondelegation" at a stratospheric level of generality.

The same is true with respect to the pending petitions in cases raising constitutional challenges to HISA. This Court has not granted review in any of those cases, which means that Alpine's hold request is based on nothing more than speculation about this Court's future actions. Regardless, as with the statutory scheme in *Consumers' Research*, the only court of appeals to find a constitutional defect in HISA expressly distinguished the statutory provisions governing the relationship between FINRA and the SEC from the statute governing HISA and the FTC. *See NHBPA*, 107 F.4th at 426.

Finally, a hold pending *Consumers' Research* (or any of the HISA cases) is particularly unwarranted given this case's interlocutory posture. The Court typically holds cases to prevent a decision from becoming final before a lower court is able to "reconsider[ ]" its decision based on a forthcoming opinion from this Court. Shapiro, *supra*, at 346. But 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-nondelegation cases

while moving forward with this case on remand, which obviates any possible need for a hold and subsequent GVR order.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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