No. 24-904

In the Supreme Court of the United States

ALPINE SECURITIES CORPORATION, PETITIONER

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a regulated entity's allegation that an unconstitutionally appointed decisionmaker is overseeing administrative proceedings, standing alone, establishes irreparable harm for purposes of obtaining a preliminary injunction against those proceedings.

2. Whether the Financial Industry Regulatory Authority, a private entity, is unconstitutionally structured because it does not follow the strictures of the Appointments Clause and other Article II requirements applicable to officers of the United States.

ADDITIONAL RELATED PROCEEDING

United States Supreme Court:

Alpine Securities Corp. v. *Financial Industry Regulatory Authority*, No. 24A808 (Mar. 14, 2025) (Roberts, C.J.) (denying injunction pending certiorari)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-78a) is reported at 121 F.4th 1314. A prior order of the court of appeals (Pet. App. 82a-92a) is available at 2023 WL 4703307. The opinion of the district court (Pet. App. 93a-133a) is reported at 678 F. Supp. 3d 88.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2024. The petition for a writ of certiorari was filed on February 20, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From the Founding to the Great Depression, the securities industry was entirely self-regulated by private associations, such as the New York Stock and Exchange Board (today the New York Stock Exchange)

and similar associations in Boston and Philadelphia. See Pet. App. 4a-5a. In the 1930s, Congress empowered the Securities and Exchange Commission (SEC) to regulate securities brokers through a model of "cooperative regulation," in which the SEC would assume a supervisory role over the existing system of private regulation. *Id.* at 7a (citation omitted). Under that cooperative approach, self-regulatory organizations composed of brokers and dealers ("registered securities associations") must register with the SEC and adopt rules for their members to follow. 15 U.S.C. 78*o*-3. Those associations must "enforce both their own rules and federal securities laws against their members." Pet. App. 7a. They also generally must "submit rule changes to the SEC for approval before [the rules] can go into effect," and the SEC may "'abrogate, add to, and delete from'" those rules. *Id.* at 8a (quoting 15 U.S.C. 78s(c)). The associations must "'provide a fair procedure for' disciplining members." *Id.* at 10a (quoting 15 U.S.C. 78*o*-3(b)(2), (7), and (8)). Joining an association is mandatory for "virtually all securities traders," although the SEC "retains the authority to exempt individual traders." *Id.* at 9a (citing 15 U.S.C. 78*o*(b)(9)).

Respondent Financial Industry Regulatory Authority (FINRA) is a private Delaware nonprofit corporation operated by private individuals and funded solely by its private members. Pet. App. 9a. "Today, FINRA is the only registered securities association in the United States." *Ibid.* FINRA has adopted rules that its members must follow and has developed enforcement procedures to address violations of those rules. *Id.* at 9a–10a. An ordinary disciplinary proceeding is first heard before an internal FINRA panel; the panel's decision is reviewable by an internal FINRA appellate body; and

the appellate body's decision is in turn reviewable by the FINRA Board. *Id.* at 10a. FINRA also may initiate "expedited disciplinary proceedings for certain types of misconduct, including violating a previously issued FINRA order," with shorter timelines and only discretionary internal appellate review. *Id.* at 11a.

Either way, FINRA must notify the SEC of "any final disciplinary sanction," which the SEC may review either "upon application" or on the SEC's "own motion." 15 U.S.C. 78s(d). The SEC's review is de novo; the agency may take additional evidence and is not limited to the record before FINRA; and the SEC may, where appropriate, affirm, modify, set aside, or remand the sanction. 15 U.S.C. 78s(e); 17 C.F.R. 201.452; see *National Association of Securities Dealers, Inc.* v. *SEC*, 431 F.3d 803, 805-806 (D.C. Cir. 2005). A person aggrieved by the SEC's adjudication may seek judicial review in the appropriate court of appeals. 15 U.S.C. 78y(a)(1).

2. Petitioner is a securities broker-dealer and a FINRA member. Pet. App. 11a. In 2017, the SEC filed an enforcement action against petitioner for "egregious and illegal conduct on a massive scale" between 2011 and 2015, which resulted in a $12 million civil penalty. *Ibid.* (brackets, citation, and ellipsis omitted); see *SEC* v. *Alpine Securities Corp.*, 413 F. Supp. 3d 235, 241 (S.D.N.Y. 2019), affirmed, 982 F.3d 68 (2d Cir. 2020), cert. denied, 142 S. Ct. 461 (2021). In 2019, FINRA investigated complaints from petitioner's customers about excessive fees, and FINRA ultimately initiated a disciplinary proceeding in which it charged petitioner with violations of internal FINRA rules. Pet. App. 12a. After finding petitioner's misconduct to have been "intentional and egregious," the FINRA panel imposed vari-

ous sanctions, including (as relevant here) (1) a cease-and-desist order prohibiting the misconduct and (2) an order expelling petitioner from FINRA membership. *Ibid.* (citation omitted).

FINRA's internal appellate body stayed the expulsion order pending petitioner's appeal of that order. See Pet. App. 12a-13a. That appellate body recently affirmed the expulsion order on appeal, but has further extended the stay until 90 days after the time for petitioner to appeal the decision to the SEC has expired or, if an appeal is taken, 90 days after the SEC issues a final order sustaining the expulsion. *In re Alpine Securities Corp.*, No. 2019061232601, at 100 n.218 (FINRA National Adjudicatory Council Mar. 25, 2025).*

Petitioner did not appeal the FINRA panel's cease-and-desist order, which thus became final. Pet. App. 13a. FINRA later received reports that petitioner was continuing to engage in the prohibited misconduct. *Ibid.* FINRA opened a second investigation and ultimately initiated an expedited disciplinary proceeding, charging that petitioner had violated the cease-and-desist order more than 35,000 times. *Id.* at 13a-14a. The complaint sought petitioner's "immediate expulsion from FINRA." *Id.* at 14a.

Meanwhile, after the first disciplinary proceeding, petitioner had filed suit in federal district court to challenge FINRA's constitutionality under the private nondelegation doctrine, the Appointments Clause, the First Amendment, the Fifth Amendment, and the Seventh Amendment. Pet. App. 13a. The United States intervened to defend the constitutionality of the statutory scheme. *Ibid.* When FINRA initiated the expedited

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* www.finra.org/sites/default/files/2025-03/2019061232601-Alpine-Securities-Corp-20250325.pdf.

disciplinary proceeding, petitioner moved for a preliminary injunction against that expedited proceeding. *Id.* at 14a. The district court denied relief, *ibid.*, but a motions panel of the court of appeals ordered that an "injunction pending appeal be granted" and that FINRA "be enjoined from continuing the expedited enforcement proceeding against [petitioner] pending further order of the court," *id.* at 83a. A merits panel of the court of appeals then received briefing and heard argument on the underlying appeal from the district court's order denying a preliminary injunction.

3. The court of appeals reversed the district court's denial of a preliminary injunction in part and remanded with instructions "to enter a limited preliminary injunction enjoining FINRA from giving effect to any expulsion order issued against [petitioner] until either the SEC reviews the order on the merits or the time for [petitioner] to seek SEC review lapses." Pet. App. 45a.

a. The court of appeals concluded that petitioner had demonstrated a likelihood of success on its private nondelegation claim "to the extent that FINRA can unilaterally expel a member * * * without governmental superintendence or control." Pet. App. 16a; see *id.* at 16a-26a.

i. The court of appeals explained that, under the private nondelegation doctrine, a private entity to whom the government has delegated some authority "must act only 'as an aid' to an accountable government agency that retains the ultimate authority to 'approve, disapprove, or modify' the private entity's actions and decisions on delegated matters." Pet. App. 18a (quoting *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 388, 399 (1940)) (brackets omitted). The court observed that "[t]ypically, SEC oversight of FINRA disciplinary

actions involves the SEC['s] 'conducting its own review' of any final decision or sanction," including "an 'independent review of the record,'" and approving, disapproving, or modifying FINRA's decision. *Id.* at 18a-19a (brackets and citations omitted).

The court of appeals found, however, that "expulsions imposed through FINRA's expedited proceedings" are different because, under FINRA's rules, such expulsion orders are not automatically stayed on appeal, but instead by default "take effect immediately, before the SEC can review them." Pet. App. 19a; see *id.* at 11a, 19a-21a (citing 15 U.S.C. 78s(d)(2); 17 C.F.R. 201.420(d); and FINRA Rules 9311(b), 9360, and 9559(*o*)(5), (q)(4)-(5), and (r)). The court observed that federal law generally requires an entity to be "a member of a registered securities association" in order to trade securities, and that "FINRA is the only such association." *Id.* at 20a (citing 15 U.S.C. 78*o*(b)(1)). "As a result," the court explained, "expulsion from FINRA effectively amounts to expulsion from the securities industry," and "many expelled FINRA members could be forced out of business before they can obtain SEC review of the merits of FINRA's decision," potentially making such review "a largely academic exercise." *Id.* at 19a-20a.

The court of appeals acknowledged that "the SEC can stay the effectiveness of an expulsion order." Pet. App. 20a. The court determined, however, that "the SEC's stay authority likely is insufficient to satisfy the constitutional requirements of meaningful SEC merits review" because such stays are discretionary, "the process still takes time," the stay standard "disfavors immediate relief for the expelled member," and the stay proceeding "does not decide the merits." *Id.* at 20a-21a,

23a. The court concluded that review of FINRA expulsion orders through SEC stay proceedings therefore likely "falls short of what the private nondelegation doctrine requires." *Id.* at 23a.

ii. The court of appeals further held that petitioner had satisfied the remaining requirements for preliminary injunctive relief on its private nondelegation claim. The court explained that petitioner "faces irreparable harm" because "expulsion from FINRA will effectively * * * forc[e] it to shutter its operations immediately." Pet. App. 26a-27a. The court held that the interests of FINRA and the public did not outweigh that harm because the court's "opinion is narrow and limited to expedited expulsion proceedings, where the irreversible nature of the underlying sanction prevents review on the merits by the SEC." *Id.* at 28a. The court thus held that petitioner was entitled to a preliminary injunction preventing "FINRA during the pendency of this litigation from expelling [petitioner] (should such an order issue) until after the SEC has reviewed any expulsion order in FINRA's expedited proceeding or the time for [petitioner] to seek SEC review of an expulsion order has elapsed." *Id.* at 29a.

iii. The court of appeals declined to address the merits of petitioner's further claim that FINRA's private hearing officers must be appointed and be removable in conformance with Article II's requirements for "Officers of the United States." Pet. App. 32a-44a. The court found it unnecessary to address the merits of that challenge because petitioner's failure to establish irreparable harm on that claim provided a sufficient basis for denying additional preliminary injunctive relief. *Id.* at 43a-44a.

The court of appeals explained that, in light of its holding with respect to the private nondelegation claim, its injunction preventing FINRA from expelling petitioner until after SEC review fully alleviated petitioner's "asserted harm of forced closure," given that petitioner "does not dispute that the SEC's members are constitutionally appointed and have the authority to expel [petitioner] from the securities industry consistent with the Appointments Clause." Pet. App. 33a–34a. The court explained that circuit precedent foreclosed petitioner's argument that "being forced to litigate before an allegedly unconstitutionally appointed FINRA officer" was a "'per se irreparable harm.'" *Id.* at 35a (citation omitted); see *id.* at 35a-38a.

The court of appeals also rejected petitioner's contention that this Court's decision in *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023), required a different result. Pet. App. 40a-43a. The court explained that *Axon* had held that, "as a matter of statutory jurisdiction, a federal-court challenge to an unconstitutional appointment can begin before the agency acts," but that *Axon* "does not say that every agency proceeding already underway must immediately be halted because of an asserted constitutional flaw." *Id.* at 42a; see *id.* at 41a (explaining that *Axon* "did not speak to what constitutes irreparable harm for purposes of the extraordinary remedy of a preliminary injunction"). The court emphasized that "FINRA is not a government agency like those at issue in *Axon*," and that "[n]othing in *Axon* addressed an asserted injury from a member of a private organization having to go through a hearing process before such an entity." *Id.* at 42a-43a.

Because the court of appeals found that continuation of the FINRA disciplinary proceedings would not irrep-

arably harm petitioner, the court "express[ed] no view on the remaining preliminary-injunction factors, including whether [petitioner] has demonstrated a likelihood of success on the merits of the applicability of the Appointments Clause to FINRA's employees." Pet. App. 43a. The court thus declined to "enjoin[] FINRA's expedited proceeding from going forward." *Id.* at 45a.

b. Judge Walker concurred in the judgment in part and dissented in part. Pet. App. 46a-78a. He would have granted an injunction to prevent the expedited disciplinary proceeding from going forward. He concluded that "FINRA wields significant executive authority when it investigates, prosecutes, and initially adjudicates allegations against a company required by law to put itself at FINRA's mercy," and that "[t]his panoply of enforcement powers requires no contemporaneous oversight by the SEC," all in violation of the private nondelegation doctrine. *Id.* at 46a, 52a. Judge Walker explained that "FINRA is a private entity," but that "if we assume FINRA is a governmental entity," its structure would violate Article II's requirements regarding presidential supervision, appointment, and control of Executive Branch officers. *Id.* at 67a; see *id.* at 66a-70a. He also viewed *Axon* as supporting petitioner's irreparable-harm argument. *Id.* at 70a-76a.

c. The court of appeals entered a judgment ordering that "the injunction pending appeal entered by [the motions panel] * * * be dissolved only to the extent that it enjoins FINRA's expedited proceeding from going forward." Pet. App. 80a. The court further ordered that "the portion of the injunction that would preclude FINRA from giving effect to any expulsion order it might issue against [petitioner] will remain in effect until the district court issues its injunction." *Ibid.*

4. The Chief Justice denied petitioner's subsequent request for a stay or injunction pending this Court's disposition of the petition for a writ of certiorari. See No. 24A808 (Mar. 14, 2025).

ARGUMENT

The petition for a writ of certiorari should be denied. Petitioner largely prevailed before the court of appeals, which agreed that petitioner had established a likelihood of success on the merits of its private nondelegation claim to the extent that FINRA might expel petitioner from its membership before the SEC has an opportunity to review that decision. The court accordingly granted petitioner a limited preliminary injunction preventing FINRA from "giving effect" to any expulsion order "until either the SEC reviews the order on the merits" or the time to "seek SEC review lapses." Pet. App. 45a. Petitioner now urges this Court to grant certiorari to address two different questions. Neither warrants this Court's review.

First, petitioner argues (Pet. 19-24) that this Court should review whether participation in allegedly unconstitutional adjudicative proceedings, standing alone, constitutes irreparable harm for purposes of the preliminary-injunction analysis. But as the court of appeals correctly recognized, petitioner's principal support for that argument, *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023), did not address the required showing for preliminary injunctive relief. And every court of appeals to address the question has rejected petitioner's reading of *Axon*.

Second, petitioner contends that this Court should review whether FINRA's officers must be appointed consistent with Article II's requirements for "Officers of the United States." Pet. 19, 25-29, 33-34. The court

of appeals explicitly declined to address the merits of that claim, and this Court should not address that question in the first instance, particularly in this interlocutory posture.

1. Petitioner contends (Pet. 15-24) that being subjected to an allegedly unconstitutional enforcement proceeding categorically constitutes "per se irreparable injury" (Pet. 30) for purposes of preliminary injunctive relief. The court of appeals correctly rejected that contention, Pet. App. 35a-38a, and its decision does not conflict with any decision of this Court or another court of appeals.

a. "A preliminary injunction is an 'extraordinary' equitable remedy that is 'never awarded as of right.'" *Starbucks Corp.* v. *McKinney*, 602 U.S. 339, 345 (2024) (citation omitted). To obtain such relief, a movant must establish, among other things, a "clear showing" of irreparable harm if relief is not granted. *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008).

This Court has recognized that "the expense and disruption of defending [oneself] in protracted adjudicatory proceedings" is not an irreparable harm, even where "the burden" is "substantial." *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 (1980). The mere fact that a litigant in such an administrative process alleges that it is subject to an unconstitutional decision-maker does not as a matter of course change that calculus and establish irreparable injury. If irreparable harm could routinely be established on that basis, constitutional challenges to administrative proceedings would regularly proceed in a preliminary posture, on "'accelerated and unorthodox' summary review of the merits without a developed factual record." Pet. App. 42a (citation

omitted). That approach would transform the "extraordinary" remedy of a preliminary injunction into a routine "matter of course" so long as a likelihood of success on the merits has been established. *Winter*, 555 U.S. at 24, 32.

b. Petitioner principally relies on this Court's statement in *Axon* that participation in proceedings before an allegedly illegitimate decisionmaker is a "'here-and-now injury'" that "is impossible to remedy once the proceeding is over, which is when appellate review kicks in." 598 U.S. at 191 (citation omitted). In petitioner's view, that statement implies that a regulated party who challenges the decisionmaker's legitimacy *necessarily* has established irreparable injury for the purpose of securing injunctive relief. See Pet. 20, 22.

As the court of appeals recognized, petitioner's reading of *Axon* takes this Court's discussion of injury out of context and transmutes it into a broadly applicable rationale for injunctive relief. Pet. App. 40a-43a. In *Axon*, parties to SEC and FTC proceedings filed suit in federal district court to challenge on constitutional grounds the tenure protections of administrative law judges (ALJs) in those agencies. 598 U.S. at 180. Although constitutional challenges literally "aris[e] under the Constitution," 28 U.S.C. 1331, district courts lack jurisdiction over such challenges to agency action where Congress has erected an alternative review scheme that implicitly precludes the exercise of jurisdiction under Section 1331. See *Axon*, 598 U.S. at 185. One of the factors courts consider in deciding whether district court review is available in a particular case is "whether preclusion of district court jurisdiction 'could foreclose all meaningful judicial review.'" *Id.* at 190 (citation omitted).

In addressing that aspect of the jurisdictional inquiry, the Court in *Axon* recognized that final orders issued in SEC or FTC proceedings are reviewable in the courts of appeals. See 598 U.S. at 181. But the Court observed that "[t]he harm [the plaintiffs] allege is 'being subjected' to 'unconstitutional agency authority'—a 'proceeding by an unaccountable ALJ.'" *Id.* at 191 (citation omitted). "That harm may sound a bit abstract," the Court explained, but "it is 'a here-and-now injury'" that "is impossible to remedy once the proceeding is over, which is when appellate review kicks in." *Ibid.* (citation omitted). Because a "proceeding that has already happened cannot be undone," the Court observed, appellate review of a final order issued in the SEC or FTC proceedings "would come too late to be meaningful." *Ibid.* Accordingly, the Court concluded that the "meaningful judicial review" factor counseled against finding that Congress had precluded district-court jurisdiction to entertain the plaintiffs' constitutional claims there. *Id.* at 191-192.

Petitioner construes *Axon*'s observation that the plaintiffs' alleged injury there was "impossible to remedy once the proceeding is over," 598 U.S. at 191, to mean that any plaintiff raising a similar claim about an unconstitutionally structured agency automatically has established an irreparable injury for purposes of injunctive relief. But as the court of appeals observed, *Axon* "did not speak to what constitutes irreparable harm for purposes of the extraordinary remedy of a preliminary injunction." Pet. App. 41a. The Court's analysis in *Axon* instead focused solely on subject-matter jurisdiction, as evidenced by its emphasis on the plaintiffs' *allegations* and *claims*. See 598 U.S. at 191 (repeatedly referring to the plaintiffs' "claim" and their "allege[d]"

harm). As the Court long ago observed, "[i]t 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." *Cohens* v. *Virginia*, 19 U.S. 264, 399 (1821) (Marshall, C.J.).

c. Every court of appeals to consider the question has rejected petitioner's reading of *Axon*. As petitioner acknowledges (Pet. 15), the Sixth and Tenth Circuits—like the D.C. Circuit below—have expressly rejected that argument. See *YAPP USA Automotive Systems, Inc.* v. *NLRB*, No. 24-1754, 2024 WL 4489598, at *3 (6th Cir. Oct. 13, 2024) (denying injunction pending appeal), application for injunction pending appeal denied, No. 24A348 (Oct. 15, 2024) (Kavanaugh, J.); *Leachco, Inc.* v. *CPSC*, 103 F.4th 748, 758-759 (10th Cir. 2024), cert. denied, No. 24-156 (Jan. 13, 2025).

Faced with the lack of a circuit split, petitioner relies instead on the dissenting opinions of "at least three judges," including Judge Walker's dissenting opinion in this case. Pet. 15. But this Court ordinarily grants certiorari to resolve conflicts among different courts of appeals, not to address intra-circuit disagreements between individual judges. See Sup. Ct. R. 10(a). Petitioner also cites then-Judge Kavanaugh's dissent in *John Doe Co.* v. *CFPB*, 849 F.3d 1129 (D.C. Cir. 2017) (per curiam). Pet. 16, 20–21. But the majority in *John Doe* found no irreparable harm. 849 F.3d at 1134-1135. Moreover, *John Doe* involved an illegitimately structured agency that had *final* authority to regulate the plaintiff's conduct and pursue sanctions. See *id.* at 1136 (Kavanaugh, J., dissenting); cf. *Seila Law LLC* v. *CFPB*, 591 U.S. 197 (2020). Petitioner, in contrast, has not challenged the legitimacy of the SEC, which has final authority here. Instead, petitioner alleges only that

FINRA is insufficiently supervised by the SEC, and petitioner advances that argument in a case involving alleged violations only of FINRA internal rules, not of federal securities laws.

Petitioner's reliance (Pet. 16-17) on Judge Rao's dissenting opinion in *Loma Linda-Inland Consortium for Healthcare Education* v. *NLRB*, No. 23-5096, 2023 WL 7294839 (D.C. Cir. May 25, 2023) (per curiam), likewise is misplaced. There, a D.C. Circuit motions panel declined to enjoin NLRB union-certification proceedings pending appeal, principally on the ground that the district court lacked jurisdiction to review the plaintiff's First Amendment challenge to those proceedings. *Id.* at *5-*11. Judge Rao disagreed because, in her view, the plaintiff had alleged "a here-and-now constitutional injury that cannot be remedied through appellate review of an ultimate order by the [NLRB]." *Id.* at *14 (Rao, J., dissenting); see *id.* at *12-*17. Unlike this case, *Loma Linda* involved an agency (the NLRB) with final authority to regulate the plaintiff's conduct. Also unlike this case, *Loma Linda* involved a First Amendment challenge, not an Article II challenge to the agency's structure.

Finally, petitioner asserts a "deeper" conflict about whether "'an alleged deprivation of a constitutional right'" alone suffices to establish an irreparable injury, with "'no further showing'" necessary. Pet. 17 (citation omitted). But none of the pre-*Axon* cases that petitioner cites (*ibid.*) stands for that broad and categorical proposition, which (if accepted) would improperly transform injunctive relief from extraordinary to commonplace. Instead, each of those cases simply found irreparable injury given the facts in that case. *E.g.*, *Brewer* v. *West Irondequoit Central School District*, 212 F.3d

738, 745 (2d Cir. 2000) (relying on "the unique and somewhat outrageous facts of this case" for "irreparable harm" purposes). Nothing in the cited decisions conflicts with the decision below or with the holdings of the Sixth and Tenth Circuits rejecting petitioner's reading of *Axon*.

2. Petitioner urges this Court to grant review to address whether FINRA's hearing officers must be appointed consistent with Article II's requirements for "Officers of the United States." The court of appeals expressly declined to address the merits of that question, however, and this Court should not review it in the first instance.

The court of appeals denied preliminary injunctive relief on petitioner's Appointments Clause challenge after concluding that petitioner had failed to establish irreparable injury warranting a broader injunction than the one the court had granted on the private nondelegation claim. Pet. App. 33a, see *id.* at 32a-40a. Because the absence of irreparable harm provided a sufficient basis for denying injunctive relief on the Appointments Clause claim, the court "express[ed] no view on the remaining preliminary-injunction factors, including whether [petitioner] has demonstrated a likelihood of success on the merits of the applicability of the Appointments Clause to FINRA's employees." *Id.* at 43a. The court likewise did not address the merits of any other Article II claim regarding presidential supervision or removal of Executive Branch officers. This Court should therefore reject petitioner's invitation to grant certiorari to address such claims in the first instance, given that the Court is one "of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); see, *e.g.*, *Seattle's Union Gospel Mission* v. *Woods*, 142

S. Ct. 1094, 1096-1097 (2022) (Alito, J., respecting the denial of certiorari).

That this case arises in a preliminary-injunction posture makes it a particularly poor vehicle in which to address those questions in the first instance. Because the district court proceedings are still ongoing, the only Article II question properly before this Court is whether petitioner has shown a likelihood of success on its Appointments Clause and related claims—not whether those claims are in fact correct. Cf. *City of Ocala* v. *Rojas*, 143 S. Ct. 764, 765 (2023) (Gorsuch, J., respecting the denial of certiorari). Review on such claims is further complicated by the fact that petitioner prevailed on its private nondelegation claim—an argument that the court of appeals below recognized was made "in the alternative" to the Article II challenge. Pet. App. 16a. Judge Walker likewise appeared to view each of those claims as being dependent on whether FINRA is a private or governmental entity. See *id.* at 55a, 66a-67a; cf. *Department of Transportation* v. *Association of American Railroads*, 575 U.S. 43, 50-55 (2015).

Because petitioner obtained relief below on its private-nondelegation claim—which depends on the premise that FINRA is private—petitioner is poorly positioned to press an argument in this Court that reflects a contrary understanding of FINRA as a governmental entity. Cf. *New Hampshire* v. *Maine*, 532 U.S. 742, 749-751 (2001) (party that prevails by assuming one position in litigation generally may not later assume a contrary position in that litigation). At a minimum, that tension in petitioner's pleadings would complicate this Court's review of the Article II issues in the petition, making this case an especially poor vehicle for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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