ORAL ARGUMENT NOT YET SCHEDULED
No. 23-5129

In the United States Court of Appeals For the District of Columbia Circuit

ALPINE SECURITIES CORPORATION,
Plaintiff-Appellant,

SCOTTSDALE CAPITAL ADVISORS CORPORATION,
Plaintiff,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY,
Defendant-Appellee,

UNITED STATES OF AMERICA,
Intervenor for Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, 1:23-Cv-01506-BAH

[CORRECTED] BRIEF OF *AMICUS CURIAE* PUBLIC INVESTOR ADVOCATE BAR ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amicus* Public Investor Advocate Bar Association ("PIABA") states as follows:

A. Parties and *Amici*. Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellant. PIABA, supporting Appellee; the Municipal Securities Rulemaking Board, supporting neither party; the New Civil Liberties Alliance, supporting Appellant; and the American Free Enterprise Chamber of Commerce, supporting Appellant.

B. Rulings Under Review. References to the rulings at issue appear in the Brief for Appellant.

C. Related Cases. The case on review was not previously before this Court, except for the resolution of the motion for an injunction pending appeal. See JA417. Counsel for PIABA is unaware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C). A notice of appeal was recently filed with this Court in a different case, *Kim v. Financial Industry Regulatory Authority, Inc.*, No. 23-7136, that involves a different plaintiff and legal issues that are in part similar.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1(a), PIABA states that it is a not-for-profit corporation established in 1990 and organized under the laws of Texas, has no parent

corporation, and no publicly held company has a ten percent or greater ownership interest in it.

CERTIFICATE OF COUNSEL

Pursuant to Circuit Rule 29(d), counsel certifies that this brief is being filed separately from any other *amicus* brief because PIABA, an organization whose members represent public investors in disputes with financial industry members and whose mission includes advocating for the protection of public investors, brings a unique perspective and expertise on issues raised in this appeal, and seeks to address only those issues for which that perspective and expertise are most relevant. *Amicus* believes that a separate brief is required to offer its unique perspective and expertise.

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GLOSSARY OF ABBREVIATIONS

ALJ	Administrative Law Judge(s)
FINRA	Financial Industry Regulatory Authority
NAC	[FINRA's] National Adjudicatory Council
NASD	National Association of Securities Dealers
PCAOB	Public Company Accounting Oversight Board
PIABA	Public Investor Advocate Bar Association
SEA	Securities Exchange Act of 1934
SEC	Securities and Exchange Commission
SRO	Self-regulatory organization

INTEREST OF *AMICUS CURIAE*

Public Investors Advocate Bar Association ("PIABA") respectfully submits this brief as *amicus curiae* in support of Defendant/Appellee Financial Industry Regulatory Authority ("FINRA").

PIABA is an international organization of attorneys who advocate on behalf of savers, investors, and retirees in disputes with their financial professionals. Part of PIABA's mission is to protect savers, retail investors, and retirees ("public investors") and create a level playing field for them in securities and commodities disputes. PIABA has appeared as an *amicus curiae* before the United States Supreme Court, Federal Circuit Courts of Appeals, and state supreme courts throughout the nation in cases involving issues important to public investors.

PIABA submits its brief in this case to support FINRA's position. FINRA and its predecessors have played a vitally important role in protecting retail investors since at least the 1930s. A ruling that would foreclose FINRA's ability to continue to enforce its rules for investor protection as to its members and their associated persons would have dire consequences. The result Appellant seeks would erode essential guardrails which have existed for decades to protect the public from securities violations committed by bad actors such as Appellant.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Amicus certifies that no counsel for either party authored this brief in whole or in part, that no party or party's counsel contributed money intended to fund the preparation or submission of the brief, and that no one other than *amicus* contributed money intended to fund the preparation or submission of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

FINRA and its predecessors have served a vital role in regulating securities broker-dealers and their associated persons since at least the 1930s. These proceedings arose because FINRA found that Plaintiff-Appellant Alpine Securities Corporation ("Alpine") should be expelled from FINRA membership for its repeated violations of FINRA rules, which included the victimization of numerous investors who were customers of that firm. FINRA made that determination to prevent Alpine from continuing to harm the investing public, as Alpine has done for years. Instead of accepting responsibility for its misconduct, Alpine now seeks to have FINRA declared unconstitutional in its entirety, and to shut down FINRA's ability to regulate brokers and broker-dealers and police their conduct. The result that Alpine envisions would create market chaos and eviscerate meaningful protections for the investing public.

As discussed further herein, FINRA serves a critically important and necessary function in overseeing and regulating the conduct of its securities broker-dealer member firms and their associated persons, and enforcing securities industry rules and regulations applicable to its members. Congress's delegation of such powers to FINRA does not violate the Constitution's nondelegation doctrine because FINRA's authority is subordinate to the SEC, which exercises extensive authority and surveillance over all aspects of FINRA's relevant operations and activities.

Further, FINRA's hearing officers and board members are not subject to the appointments clause because they are not hired pursuant to any statute, and their disciplinary decisions are subject to the SEC's full and independent review upon the request of the aggrieved party. Lastly, if FINRA's board of directors is subject to the Constitution's removal requirement[1], then the for–cause restriction on their removal can be severed from the Securities Exchange Act of 1934 (the "Exchange Act").

For these reasons and as further discussed below, PIABA joins in and supports FINRA's position. FINRA should be allowed to continue to enforce its rules, as it and its predecessors have done for nearly ninety years.

ARGUMENT

I. FINRA Performs the Essential Functions of Regulating and Policing Financial Industry Participants. It Must Be Afforded the Ability to Continue Performing Those Functions to Protect Public Investors

A. FINRA's Regulatory and Enforcement Powers Over Financial Industry Members Are Intended, in Part, to Protect the Investing Public

FINRA is a self-regulatory organization ("SRO") created through a merger between the National Association of Securities Dealers ("NASD") and the regulatory arm of the New York Stock Exchange ("NYSE"). See Press Release, FINRA, NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority (July 30, 2007), available at https://www.finra.org/media-center/news-

[1] Alpine's removal and appointments clause arguments would only apply if FINRA is actually part of the Government.

releases/2007/nasd-and-nyse-member-regulation-combine-form-financial-industry. FINRA regulates virtually every aspect of the securities business including registrations, rulemaking, enforcement, and dispute resolution. See *id*. While announcing the merger, FINRA's then–Chair, Mary Shapiro, repeatedly emphasized FINRA's investor protection goal, stating that "[w]ith investor protection and market integrity as our overarching objectives, FINRA will be an investor-focused and more streamlined regulator … we will enhance investor protection while increasing the competitiveness of our financial markets." *Id*.

In 1939, FINRA's predecessor, NASD, registered with the SEC to act as an SRO and monitor the securities market, as prescribed by the Securities Exchange Act of 1934. See 15 U.S.C. § 78a *et seq*. While it began as a professional organization, NASD was designed to function like a regulator. See *Nat'l Ass'n of Sec. Dealers, Inc. v. SEC*, 431 F.3d 803, 804 (D.C. Cir. 2005). Indeed, the government delegated power to NASD so that NASD could function as a regulator. *Id*. (citing *Merrill Lynch v. Nat'l Ass'n of Sec. Dealers, Inc.*, 616 F.2d 1363, 1367 (5th Cir. 1980) ("As a registered securities association, [NASD] has been 'delegated governmental power . . . to enforce . . . the legal requirements laid down in the Exchange Act.'").

The creation and development of NASD and its successor, FINRA, illustrates Congress' intent to protect small, "retail" investors from unethical conduct by securities industry members and ensure fair dealing. See *Merrill Lynch, Pierce, Fenner & Smith,*

Inc. v. Ware, 414 U.S. 117, 130 (1973). In the wake of the Great Depression, Congress sought to enact a federal regulatory scheme applicable to the country's capital markets, intended to foster "the highest ethical standards" in the securities industry. *In re Venator Materials PLC Sec. Litig.*, 547 F. Supp. 3d 624, 648 (S.D. Tex. Jul. 7, 2021) (quoting *Securities and Exchange Commission v Capital Gains Research Bureau, Inc*, 375 US 180, 186-87, 84 S. Ct. 275 (1963)). In 1934, Congress passed the Exchange Act, intended to limit market manipulation. *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988). The Exchange Act authorizes SROs within the securities industry, such as FINRA, to self-regulate their members subject to ongoing and "extensive oversight, supervision and control by the Securities and Exchange Commission." *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097, 1101 (N.D. Cal. Apr. 22, 2003) (citing 15 U.S.C. § 78s and *Austin Mun. Securities, Inc. v. Nat'l Ass'n of Securities Dealers, Inc.*, 757 F.2d 676, 680 (5th Cir. 1985) Under the Exchange Act, SROs have a "duty to promulgate and enforce rules governing the conduct of [their] members." *NetCoalition & Secs. Indus. & Fin. Mkts. Ass'n v. SEC*, 715 F.3d 342, 345 (D.C. Cir. 2013). In 1938, Congress expanded the SROs' powers to also apply to the over-the-counter markets, enacting the Maloney Act in 1938 as an amendment to the Exchange Act. The Maloney Act allowed associations of broker-dealers to register as national securities associations if they were "designed to prevent fraudulent and manipulative acts and practices." 15 U.S.C. § 78o-3(6) (2006).

The Exchange Act was amended again in 1975, giving the SEC greater authority to regulate and supervise NASD. See Pub. L. No. 94-29, 89 Stat. 97 (1975). The 1975 amendment gave the SEC the power to initiate and approve SRO rulemaking. See 15 U.S.C. § 78k-1; 15 U.S.C. § 78s(c). Starting in 1983, all securities broker-dealer firms registered with the SEC were required to become members of a national securities association. See 15 U.S.C. § 78o(b)(8). Under the Exchange Act, as amended, FINRA serves a regulatory function, adopting – with the SEC's approval – and enforcing rules for its members. See *Credit Suisse First Bos. Corp. v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005) (relying on *City of New York v. FCC*, 486 U.S. 57, 63-64, 108 S. Ct. 1637 (1988) and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127, 94 S. Ct. 383, 390 (1973)).

SROs such as FINRA exercise important public policy functions in the financial industry, including efforts designed to protect public investors and limit fraudulent and deceptive practices in the marketplace. See *Nat'l Ass'n of Sec. Dealers, Inc.*, 431 F.3d at 803. As an SRO, FINRA is part of the Exchange Act's comprehensive plan for regulating the securities markets. See 15 U.S.C. §§ 78q, 78s; *Desiderio v. NASD*, 191 F.3d 198, 201 (2d Cir. 1999), cert. denied, 531 U.S. 1069 (2001); see also *PennMont Sec. v. Frucher*, 586 F.3d 242, 245 (3d Cir. 2009), cert. denied, 559 U.S. 972 (2010).

FINRA's regulatory duties as mandated by Congress require it to conduct the daily regulation of the securities markets. Among its regulatory obligations, the

Exchange Act requires FINRA to establish rules "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade . . . and, in general, to protect investors and the public interest." *Nat'l Ass'n of Sec. Dealers, Inc.*, 431 F.3d at 805; see also 15 U.S.C. § 78o-3(b)(6). The '34 Act also requires FINRA to investigate and discipline member firms and their associated persons for violating FINRA rules or the federal securities laws. See *id*. When FINRA determines that its members or associated persons have violated FINRA rules or federal securities law, FINRA has both the authority and the obligation to initiate disciplinary action. See 15 U.S.C. § 78o-3(b)(7).

FINRA's SRO designation carries with it the authority to engage in rulemaking, oversight, and supervision, as well as enforcement as to its member firms' conduct. Specifically, FINRA writes its own rules, governing everything from registration requirements to broker-dealers' communications with the public, to capital requirements. These rules must be approved by the SEC before becoming effective. See FINRA Rules, https://www.finra.org/rules-guidance/rulebooks/finra-rules (last visited Nov. 2, 2023). FINRA also oversees and enforces its broker-dealer members' compliance with the Exchange Act, SEC implementing regulations, and FINRA's own rules. See *Saad v. SEC*, 718 F.3d 904, 907 (D.C. Cir. 2013) (citing 15 U.S.C. § 78o-3 (b)(2)); 15 U.S.C. § 78s(g)(1). FINRA does so in part by conducting regular "examinations" of firms to assess issues that present the greatest regulatory risk to

investors or the market. See FINRA, FINRA Examination and Risk Monitoring Programs, available at https://www.finra.org/rules-guidance/key-topics/finra-examination-risk-monitoring-programs (last visited Nov. 2, 2023). FINRA also brings disciplinary proceedings against its members, wielding the power to impose suspensions or bars to practice, fines, and orders for investor restitution. See 15 U.S.C. § 78o-3(b)(7).

FINRA "touches virtually every aspect of the securities business, from registering and educating all industry participants to examining securities firms; writing rules; [and] enforcing those rules and the federal securities laws," among other things. FINRA, 2022 TRACE Fact Book p.5, available at https://www.finra.org/sites/default/files/2023-02/Trace-Factbook-2022.pdf.

B. FINRA's Inability to Continue to Conduct Its Regulatory and Enforcement Functions Would Have Calamitous Effects Upon the Investing Public

Simply put, if FINRA's regulatory and enforcement power were taken away, there would be no government agency or SRO with regulatory and enforcement powers over the securities industry members that could readily take over FINRA's functions. FINRA exercises oversight over the thousands of securities broker-dealer firms and hundreds of thousands of securities professionals associated with those firms. FINRA also handles a massive volume of enforcement actions to ensure that broker-dealer firms and their associated persons follow the industry rules and deter them from victimizing public investors. Given the substantial number of firms and individuals

whom FINRA oversees, and the volume of industry misconduct that FINRA investigates and prosecutes every year, a sudden cessation of FINRA's enforcement actions, as Appellant seeks, would likely result in widespread misconduct in the financial markets.

Based on the PIABA members' experience as attorneys who represent investors and often interact with state and federal securities regulators, no government regulator currently has the budget, personnel, rules, tools, or systems in place to monitor, regulate, or sanction the conduct of hundreds of thousands of firms and individuals, as FINRA does. It is also our members' experience that federal and state regulators do not have the budgets to readily acquire such resources and be able to quickly step in and avoid disruption in the national markets due to lack of oversight.

Without effective regulation of securities broker-dealers and their personnel, public investors' confidence would plummet, thereby dealing a serious blow to the integrity and reputation of our country's securities markets, which have hitherto been widely considered to be the premier markets in the world. Alpine's current attempt to get away with yet another blatant violation of the securities industry rules and regulations – the most recent in a long list of violations by that firm[2] – by seeking to take away the badge and weapon of the industry's watchdog would set the industry

[2] See BrokerCheck Report, Alpine Securities Corporation, available at https://files.brokercheck.finra.org/firm/firm_14952.pdf (last visited Nov. 2, 2023).

back to its pre–1934 days of unethical, fraudulent, and manipulative acts and practices that Congress, the SEC, and NASD/FINRA have sought to eradicate.

A few statistics illustrate the above concerns. As of last year, FINRA oversaw nearly 3,400 securities broker-dealer firms, about 150,600 branch offices, and approximately 621,000 registered securities representatives who are associated persons of those firms. See FINRA, Statistics, https://www.finra.org/media-center/statistics (last visited Nov. 2, 2023).

In 2022, FINRA barred or suspended 555 individuals over whom it exercised oversight, for violations of the securities rules and regulations – the equivalent of more than ten individuals every week. See *id*. That same year, FINRA referred for prosecution 665 fraud and insider trading cases, imposed fines of over $54 million, and ordered member firms and/or their associated persons to pay over $26 million in restitution to investors. See *id*. It expelled seven securities broker-dealer firms from the securities industry and suspended three firms. See *id*. During that same year, FINRA received 11,180 complaints from investors, and filed 743 new disciplinary actions – the equivalent of more than fourteen disciplinary actions filed every week. See *id*. Lastly, during 2022, FINRA reviewed 66,085 advertisements and sales communications, as part of its regulatory actions. See *id*. Given such substantial volume of regulatory and enforcement related activities, it is not difficult to predict what would happen in the

financial industry and securities markets if FINRA lost its regulatory and enforcement powers and how investors would be impacted.

An additional, serious concern for public investors stems from FINRA's current powers to enforce arbitration awards obtained by investors in arbitration cases they brought against financial industry members and/or their associated persons, if those industry members or associated persons do not promptly pay such awards to the prevailing investors. Specifically, FINRA Rule 12904(j) requires that monetary arbitration awards in cases brought by investors against financial industry members be paid within 30 days of the award, unless a motion to vacate is filed. If FINRA became unable to enforce the securities industry's rules, it would no longer be able to enforce its members and associated persons' obligation to timely pay those arbitration awards to the prevailing investors. Without the risk of losing their securities license for non-payment of the awards, those firms and/or their associated persons may decide to attempt to avoid, or at least delay, payment by forcing the prevailing investors to pursue a potentially lengthy and expensive process of confirming and enforcing such arbitration awards in court. Given that the FINRA rules mandate arbitration, the investors' inability to promptly obtain payment of an award after prevailing in such arbitration proceedings would further undermine investor confidence in the fairness and integrity of the financial markets.

II. Congress Has Validly Delegated Regulatory and Enforcement Authority to FINRA

The delegations of regulatory and enforcement powers to FINRA are valid because, under the applicable regulatory framework, the SEC retains final reviewing authority over such powers.

Delegations by federal agencies to private parties are valid "when the federal agency … retains final reviewing authority." *United Black Fund, Inc. v. Hampton*, 352 F. Supp. 898, 904 (D.D.C. 1972) (no unlawful delegation of authority when chairman of the U.S. Civil Service Commission retained authority to review policies "to make sure they … meet federal requirements"); see also *R. H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952), *cert. denied* 344 U.S. 855, 97 L. Ed. 664, 73 S. Ct. 94 (1952) (holding that SEC did not unconstitutionally delegate powers to NASD, because it retained power to approve or disapprove rules, and to review disciplinary actions); *Texas v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021) ("Agencies may subdelegate to private entities so long as the entities 'function subordinately to' the federal agency and the federal agency 'has authority and surveillance over [their] activities.'") (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399, 60 S. Ct. 907 (1940)); *Am. Horse Prot. Ass'n v. Veneman*, 2002 U.S. Dist. LEXIS 29097, *14, 2002 WL 34471909 (D.C. Dist. Jul. 9, 2002) ("an agency has not engaged in unlawful delegation if it retains 'final reviewing authority' over the private party's actions."); *National Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 19 (D.D.C. 1999).

"By virtue of its statutory authority, [FINRA] wears two institutional hats: it serves as a professional association . . . and it serves as a quasi-governmental agency, with express statutory authority to adjudicate actions against members who are accused of illegal securities practices and to sanction members found to have violated the ['34 Act or SEC] regulations issued pursuant thereto." *Nat'l Ass'n of Sec. Dealers, Inc.*, 431 F.3d at 804 (citing 15 U.S.C. § 78o-3(b)(7); quoting *Merrill Lynch v. Nat'l Ass'n of Sec. Dealers, Inc*., 616 F.2d 1363, 1367 (5th Cir. 1980) (stating that "[a]s a registered securities association, [NASD] has been 'delegated governmental power . . . to enforce . . . the legal requirements laid down in the Exchange Act.'")).

FINRA "must notify the SEC of any final disciplinary action it takes against a member. 15 U.S.C. § 78s(d)(1). The Commission may then act *sua sponte*, or pursuant to a petition from the aggrieved member, to review NAC's decision *de novo*." *Nat'l Ass'n of Sec. Dealers, Inc.*, 431 F.3d at 804 (citing 15 U.S.C. § 78s(d)-(e)).[3] "A statutory system authorizing self-regulatory organizations to act as quasi-governmental agencies in disciplining members for federal securities law violations has existed for almost 70 years. In every statutory iteration of this authority, Congress has specified that adjudicatory actions of self-regulatory organizations like NASD are subject to plenary review by the SEC." *Id*. (citing 15 U.S.C. § 78s(d)-(e) (2000)). In *Nat'l Ass'n of Sec.*

[3] The National Adjudicatory Council ("NAC") is FINRA's appeals board. An aggrieved member may appeal a FINRA hearing panel's findings and proposed sanctions to NAC, or the NAC may review that decision *sua sponte*. See FINRA Rule 9311.

Dealers, Inc., this Court has stated that NASD is "a first-level adjudicator in disciplinary actions." *Id.*, 431 F.3d at 805. "The SEC closely scrutinizes the disciplinary process and must be satisfied the rules provide a fair procedure for disciplinary hearings." *Austin Mun. Sec., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 680 (5th Cir. 1985) (citing 15 U.S.C. §§ 78o-3(b)(8), 78s(b)(1), (2)).

Although a national securities association such as FINRA "is a self-regulatory entity, it remains subject to the SEC's oversight and control. For example, any proposed change in the association's rules must be filed with the SEC and '[n]o proposed rule change shall take effect unless approved by the [SEC].' The SEC may 'abrogate, add to, and delete from . . . the rules of a self-regulatory organization . . . as the [SEC] deems necessary or appropriate to insure the fair administration of the self-regulatory organization [or] to conform its rules to requirements of this chapter." *Karsner v. Lothian*, 532 F.3d 876, 880 (D.C. Cir. 2008) (citing 15 U.S.C. § 78s(b)-(c)); see also *United States v. NASD*, 422 U.S. 694, 700-01 n.6, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (1975) (The Exchange Act "authorizes the SEC to exercise a significant oversight function over the rules and activities of the registered associations."); *Swirsky v. NASD*, 124 F.3d 59, 62 (1st Cir. 1997) ("The NASD is also subject to extensive, ongoing oversight and control by the SEC. With few exceptions, the SEC must approve all rules, policies, practices, and interpretations before they are implemented. Consistent with the

requirements of the Exchange Act, the SEC may abrogate or add rules as it deems necessary.").

By adopting the concept of self-regulation by entities like FINRA, the Exchange Act "reveals a deliberate and careful design for regulation of the securities industry." *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114 (D.C. Cir. 2008). Under this "regulatory model," the SEC delegates "certain governmental functions to private SROs," including FINRA. *Id*. Congress adopted this model in part because it "concluded that self-regulation with federal oversight would be more efficient and less costly to taxpayers" than having the SEC regulate all market participants directly. Government Accountability Office (GAO), Securities Regulation: Opportunities Exist to Improve SEC's Oversight of the Financial Industry Regulatory Authority (2012) (GAO Report), available at http://www.gao.gov/assets/600/591222.pdf.

The cases cited by Appellant fail to support its argument. Specifically, in *Amtrak I*, this Court criticized the "unprecedented" regulatory powers delegated to Amtrak because they granted Amtrak the ability to enact final regulations that the government could not change "without Amtrak's permission." *Ass'n of Am. R.R. v. United States DOT*, 721 F.3d 666, 671 (D.C. Cir. 2013). This Court distinguished the improper delegation of powers to Amtrak from the delegations of powers to other private entities including NASD, and stated with approval, as to those delegations of powers, that in

none of those other instances "did a private party stand on equal footing with a government agency." *Ass'n of Am. R.R.* 721 F.3d at 671, fn.5.

Similarly, in *Amtrak III*, the critical reason why this Court found the delegation of "regulatory power to private individuals" to be improper is because those individuals were delegated the power to "render a ***final*** decision." *Ass'n of Am. R.R. v. United States DOT*, 821 F.3d 19, 37 (D.C. Cir. 2016) ("*Amtrak III*") (emphasis supplied). Indeed, this Court quoted Justice Alito's concurrence in *Dep't of Transp*., stating that "nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it." *Dep't of Transp v. Ass'n of Am. R.R.,* 135 S. Ct. 1225, 1239 (2015). By contrast, here, FINRA does not have the ability to render any "final decisions" that are not subject to SEC review, nor the ability to promulgate rules that are not subject to SEC review. The SEC retains that ability as to both enforcement and regulatory activities.

Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869 (5th Cir. 2022), relied upon by Appellant, does not support its position. In *Nat'l Horsemen's*, the Fifth Circuit rejected the delegation of authority to the Horseracing Integrity and Safety Authority (the "Authority") because the Authority "has been given final say" on regulatory matters. See *Nat'l Horsemen's,* 53 F.4th at 872. The Fifth Circuit explained that the act that created the Authority "restricts FTC review of the Authority's proposed rules. If those rules are 'consistent' with [the act's] broad principles, the FTC *must*

approve them. And even if it finds inconsistency, the FTC can only suggest changes." *Nat'l Horsemen's*, 53 F.4th at 872. That is not the case with respect to FINRA because the SEC has the right and the authority to reject and/or revise FINRA's rules.

Likewise, *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023) does not support Appellant's position. In *Oklahoma*, the Sixth Circuit Court of Appeals distinguished the "impermissible delegation of unchecked lawmaking power to private entities" from the "illuminating example" that "comes from the securities law," which the Court quoted with approval and described as follows:

> The Securities and Exchange Commission regulates the securities industry with the assistance of private, self-regulatory organizations called SROs. The SROs propose rules for the industry, and they initially enforce the rules through internal adjudication. The SEC oversees both the rulemaking and the enforcement. As to the rules, the SEC approves proposed rules if they are consistent with the Maloney Act, and may "abrogate, add to, and delete from" an SRO's rules "as the Commission deems necessary or appropriate." … As to enforcement, the SEC applies fresh review to the SRO's decisions and actions. ... In case after case, the courts have upheld this arrangement, reasoning that the SEC's ultimate control over the rules and their enforcement makes the SROs permissible aides and advisors.

Oklahoma, 62 F.4th at 229 (citations omitted). In short, *Oklahoma* eloquently explains why Congress's delegation of powers to FINRA is proper.

Appellant repeatedly labels FINRA's disciplinary proceedings against it as a "corporate death penalty" and "death sentence." Appellant Brief pp. 3, 40, 41. This is a grossly exaggerated and inaccurate analogy that this Court ought not take seriously. The more accurate characterization would be that of a temporary pause. Specifically, if

the SEC does not grant a stay, Appellant's ability to conduct its business would be suspended while the SEC conducted its *de novo* review of Appellant's case. See 15 U.S.C. § 78s(d)-(e). If the SEC disagrees with FINRA, it could simply reverse FINRA's decision, and reinstate Appellant, thereby bringing the supposed death penalty victim back to life.[4] The SEC's power to review and reverse FINRA's enforcement action shows that the delegation of powers to FINRA is valid because the SEC has retained final reviewing authority. See *United Black Fund, Inc.*, 352 F. Supp. at 904.

Consequently, there cannot be any reasonable argument that a suspension by FINRA is an "irreversible" action and a "death penalty," as Appellant calls FINRA's decision to expel. Appellant Brief p.40. In short, Appellant's argument that the delegation of powers to FINRA is invalid fails because FINRA's decisions are subject to SEC review.

III. FINRA's Structure Does Not Violate the Separation of Powers

A. FINRA's Hearing Officers and Board Members Are Not Subject to the Appointments Clause

1. FINRA's Hearing Officers and Board Members Are Not Subject to the Appointments Clause Because They Are Not Hired in Accordance with Any Statute

[4] Under Appellant's analogy, if FINRA had the power to administer the corporate death penalty, then the SEC must have the remarkable power to revive the corporate dead. Preposterous analogies aside, the point is that – critical to the constitutional analysis – the SEC can review and reverse FINRA's actions, fatally rebutting Appellant's claim that FINRA "seeks to take binding, irreversible" action. Appellant Brief p. 40. FINRA cannot impose "corporate death sentence[s]" as Appellant claims, *id*. p. 41, because FINRA's actions are subject to SEC review.

Appellant argues that the FINRA hearing officers were not constitutionally appointed. Specifically, Appellant contends that there is no difference between FINRA's hearing officers and the SEC administrative law judges ("ALJ") who were found to be subject to the appointments clause in *Lucia v. SEC,* 138 S. Ct. 2044 (2018). This argument fails because FINRA's hearing officers are not similarly situated in any material respect.

An individual must occupy a continuing position established by law to qualify as an officer who is subject to the appointments clause. *Id*. at 2051. In *Lucia,* the SEC's ALJs were held to be subject to the appointments clause because they received a career appointment to a position that was created by statute. *Id.* at 2047-2048, 2053. Every aspect of the ALJs' position was set forth by statute, including their job duties, their salary, and the means of their appointment. *Id*. at 2053.

The foregoing is clearly not the case with respect to the FINRA hearing officers. There is no statute which creates the position of a FINRA hearing officer. Likewise, there is no statute which sets forth the job duties, or salary, or means of appointment for FINRA hearing officers. The FINRA hearing officers are also not appointed to career positions with the government but rather are at will employees of FINRA. Accordingly, *Lucia* is wholly inapposite. Indeed, Appellant has not identified any statute which it claims created the position of the FINRA hearing officers or governs any aspect of that position, or which states that FINRA hearing officers are entitled to

career appointments. Simply put, Appellant has not met its burden of showing that the FINRA hearing officers occupy a continuing position that was established by a statute. Accordingly, the entire premise for Appellant's appointments clause argument fails.

Appellant's argument that FINRA's board members are subject to the appointments clause is equally infirm. There is no statute which creates the position of a FINRA board member, or which states that it is a continuing position, or which provides a mechanism for the SEC to appoint FINRA board members. Consequently, FINRA's board members are not subject to the appointments clause. *Free Enter. Fund* is distinguishable because the PCAOB was created pursuant to a statute, the Sarbanes-Oxley Act, which sets forth the rules by which the SEC appoints members of the PCAOB. No comparable statute exists with respect to FINRA's board.

2. FINRA's Hearing Officers and Board Members Are Not Subject to the Appointments Clause Because They Have No Significant Independent Decision Making Power

Appellant also argues that the FINRA hearing officers are "carbon copies" of the ALJs in *Lucia* with respect to their authority and powers. Appellant's assertions are not accurate. The SEC ALJs who were at issue in *Lucia* do not merely preside over administrative hearings. Their decisions are also final and binding and may serve as the last word in an enforcement action unless the SEC decides to review those decisions. See *Lucia,* 138 S. Ct. 2048-2049. The SEC's review of an ALJ's decision is elective. *Id.* If the SEC exercises its right to not review an ALJ's decision, then the ALJ's

decision becomes final and is deemed to be the action of the SEC. *Id*. Further, no other governmental body performs a full and independent review of the ALJ's decisions. *Id.*

Review of FINRA hearing officer decisions, by contrast, is mandatory if the aggrieved party appeals. Accordingly, all of FINRA's disciplinary determinations are subject to independent, *de novo* review by the SEC, either *sua sponte* or if it is requested by the aggrieved member.

Specifically, the SEA mandates a three-tiered process of administrative and judicial review of FINRA disciplinary proceedings. *Swirsky,* 124 F.3d at 61. Once FINRA formally charges a member with a violation by filing a complaint, a FINRA hearing panel conducts a full hearing to determine if FINRA regulations were violated and, if so, to issue findings of fact and impose sanctions. See 15 U.S.C. § 78o-3(h)(1)(A); FINRA Rule 9268; *Turbeville v. Fin. Indus. Regulatory Auth.*, 874 F.3d 1268, 1271 (11th Cir. 2017). The aggrieved member may then appeal the hearing panel's findings and proposed sanctions to FINRA's appeals board, the National Adjudicatory Council ("NAC"), or the NAC may review that decision *sua sponte*. See FINRA Rule 9311; *Turbeville*, 874 F.3d at 1271. FINRA must then notify the SEC of the NAC's determination. See 15 USC s 78s(d)(1). If the member is dissatisfied with the NAC's determination, then it may, as of right, obtain the SEC's de novo review of that decision, or the SEC may review the determination *sua sponte*. See 15 USC Section 78s(d)(2); *Turbeville*, 874 F.3d at 1271.

The SEC has plenary review power over FINRA's disciplinary decisions. See 15 USC section 78s(d)(e); *Nat'l Assn. of Sec. Dealers, Inc.* 431 F.3d at 804. The SEC is authorized to make an independent determination as to whether the violations found by FINRA occurred, and to change FINRA's proposed sanctions in whatever way it deems appropriate. See 15 USC Section 78s(e); *Nat'l Assn. of Sec. Dealers, Inc.*, 431 F.3d at 806. The SEC is not limited to the record that was presented in the FINRA proceedings and may adduce and consider additional evidence. See Commission Rule of Practice 452; 17 CFR section 201.452; *Nat'l Assn. of Sec. Dealers, Inc.*, 431 F.3d at 806. The SEC fully revisits the issue of liability and can completely reject or modify FINRA's decisions as it deems appropriate. *Id*. In other words, FINRA is simply a first-level adjudicator of disciplinary actions. *Id.* at 805, 808. Indeed, FINRA has no right to seek or obtain judicial review of an SEC decision that reverses disciplinary action taken by FINRA. *Id.*

Review of FINRA's decisions does not end with the SEC. The aggrieved member also has an absolute right to obtain judicial review by appealing the SEC's decision to a federal court of appeals. See 15 U.S.C. § 78y(a)(1); *Turbeville*, 874 F.3d at 1271.

As the authorities above hold, the FINRA hearing officers merely conduct a first-level adjudication of disciplinary actions which is then subject to multiple tiers of review upon the request of the aggrieved party, including an independent review by the SEC, and judicial review in federal court. The decisions of the SEC ALJs, by contrast,

are not automatically reviewed by a separate agency. They are only reviewed internally if the SEC decides to exercise that review. In other words, the SEC ALJs' decisions are the last word unless the SEC decides to intervene. FINRA's hearing officers, by contrast, do not exercise that same level of independent authority over disciplinary decisions because the SEC has the authority to conduct a full and independent review of those decisions, and the obligation to do so if the aggrieved member or associated person requests it.

Appellant also argues that FINRA's board members are subject to the appointments clause, but provides no explanation of the role, if any, that they purportedly play in the disciplinary process. Since Alpine has not demonstrated that the FINRA board members exercise significant independent authority over disciplinary matters, there is no valid basis for its argument that they are subject to the appointments clause. In that regard, *Free Enterprise Fund* is distinguishable because the PCAOB board members are empowered to issue severe sanctions.

3. Subjecting FINRA's Hearing Officers and/or Board Members to the Appointments Clause Would Shut Down FINRA's Ability to Enforce Its Rules Because It Would Require Congress to Amend the Securities Exchange Act

This matter also differs from *Lucia* in one other material respect. In *Lucia,* the SEC could and did readily remedy the appointments clause problem by having the SEC commissioners appoint the ALJ. This was an easy fix for the SEC because the SEC has the power to appoint its ALJs. That is not the case here. The SEC does not have the

authority under the SEA to appoint FINRA hearing officers and board members. Accordingly, if Appellant's appointments clause argument is accepted, then Congress would need to amend the SEA to allow the SEC to appoint FINRA hearing officers and board members, a process that could take months or years, if it happens at all. FINRA's ability to enforce its rules and to regulate its members could be completely shut down in the interim. Such a result would allow bad actors such as Appellant to continue to victimize the investing public with virtual impunity. That is precisely what Appellant's end game appears to be here. Appellant wishes to continue its illegal conduct by preventing FINRA from exercising its role as a self-regulatory organization, as FINRA and its predecessors have done for close to ninety years. Appellant should not be allowed to weaponize the appointments clause in this manner.

B. The Provision of the SEA Which Requires Cause in Order for the SEC to Remove FINRA Board Members Is Severable

Appellant argues that FINRA is unconstitutional because the SEC cannot remove FINRA's board members at will. In essence, Appellant seeks to throw the proverbial baby out with the bathwater by effectively ending FINRA's ability to function based on this purported violation of the Constitution's removal requirements. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477 (2010), the case upon which Appellant relies, does not support its far-reaching argument. The opposite is true.

Specifically, in *Free Enter. Fund*, the plaintiff argued that the Public Company Accounting Oversight Board ("PCAOB") was unconstitutional because the SEC could

only remove its board members for good cause. The plaintiff in that matter, like Appellant herein, sought an injunction to prevent the PCAOB from exercising any of its powers. The Court held that the limitation on the SEC's ability to remove PCAOB board members at will was a violation of the President's removal powers, but that this provision was severable from the remainder of the statute. *Id.* at 478-479, 508-509. The Court explained that the unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions, and that partial invalidation is normally the required course. *Id.* The Court found that the remaining provisions of the Sarbanes-Oxley Act, the act which created the PCAOB, were capable of functioning independently, and that there was nothing in the Act's text or historical context which made it evident that Congress would have preferred no PCAOB at all to a PCAOB whose members are removable at will. *Id.* at 481, 508-509. The Court therefore concluded that the PCAOB was constitutional in all respects except for the severable restriction on the SEC's ability to remove its board, and that the PCAOB could continue to function in its role of overseeing public company accountants. *Id.* at 480-481, 508-509.

The same is equally true here. The SEA, as currently written, allows the SEC to remove FINRA board members for cause. If the for–cause limitation is unconstitutional, then it is readily severable from the SEA. The remaining provisions of the SEA are certainly capable of functioning if the SEC is allowed to remove FINRA

board members without cause. Further, there is nothing in the text or historical context of the SEA which makes it evident that Congress would rather have no FINRA, than a FINRA whose board members may be removed at will. Indeed, Appellant has not pointed to any such text or historical context. It has instead demanded that FINRA be dismantled. As discussed above, the *Free Enter. Fund* court definitively rejected a virtually identical argument with respect to the PCAOB. If the President's removal powers apply to FINRA, then there is no valid basis for treating FINRA any differently than the PCAOB in this respect.

CONCLUSION

For the foregoing reasons and authorities, this honorable Court should affirm the district court's decision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rule 29.1(c) and the Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains fewer than 6,500 words. This brief also complies with the typeface and type-style requirements of the Federal Rule of Appellate Procedure because it was prepared using Microsoft Word in Times New Roman 14-point font.

/s/ Alan Rosca
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CERTIFICATE OF SERVICE

I certify that, on November 3, 2023, the foregoing [corrected] brief was served on all parties through the Court's electronic filing system.

/s/ Alan Rosca
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