No. 23-2297

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRANK HARMON BLACK and SOUTHEAST INVESTMENTS, N.C., INC.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent,

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,
Intervenor.

On Petition For Review Of An Order Of The
Securities And Exchange Commission

BRIEF FOR INTERVENOR

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Intervenor Financial Industry Regulatory Authority, Inc. states that it is a not-for-profit, non-stock Delaware corporation, and no publicly held company has a 10% or greater ownership in it. Intervenor is not a trade association, and no other publicly traded or publicly held entity has any direct financial interest in the outcome of this litigation.

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INTRODUCTION

Long before Congress ever became involved in securities regulation, the industry policed itself through private self-regulation. Beginning in the 1930s, Congress has repeatedly reaffirmed this centuries-old self-regulatory model, which has kept American markets safe, stable, and prosperous.

The Financial Industry Regulatory Authority, Inc. ("FINRA") is a private, not-for-profit corporation that acts as the first-line regulator for broker-dealers under the comprehensive oversight of the Securities and Exchange Commission ("SEC"). It is one of nearly 50 securities self-regulatory organizations that oversee many aspects of the U.S. financial industry and capital markets. Petitioners Southeast Investments, N.C., Inc. ("SEI"), and Frank Black—a disgruntled FINRA member firm and its president—seek to derail an as-yet-incomplete FINRA disciplinary proceeding against them for violating recordkeeping-related obligations and then attempting to cover up those violations. There are a host of jurisdictional, procedural, and substantive obstacles to petitioners' broadside assault on FINRA and the time-tested self-regulatory model.

To start, this Court lacks jurisdiction because the SEC has not issued a "final order" reviewable under the Securities Exchange Act of 1934 ("Exchange Act"). 15 U.S.C. § 78y(a)(1). The SEC order that petitioners challenge expressly "remand[ed] this case to FINRA for further proceedings." JA1076. And, with respect to the portion of the FINRA decision upheld by the SEC, petitioners will not be required to pay the fines imposed by FINRA until after the SEC issues a post-remand order and the courts complete any further judicial review.

Petitioners also failed to exhaust their constitutional claims before the SEC, as the Exchange Act expressly requires. 15 U.S.C. § 78y(c)(1). Petitioners have forfeited any basis for excusing this failure by neglecting even to mention it in their opening brief. But, regardless, any such argument would fail because nothing prevented petitioners from raising their constitutional claims before the SEC.

Even if petitioners' constitutional claims were properly before this Court, they would fail on the merits. Petitioners concede that FINRA is a "private entity," not a government "agency." *E.g.*, Pet. Br. 2, 26. That concession is all but inevitable in light of the extensive body of precedent from this Court and others holding that FINRA is a private corporation engaged in traditionally private conduct, not a federal agency subject to constitutional requirements. *See*, *e.g.*, *Jones v. SEC*, 115 F.3d 1173, 1182-83 (4th Cir. 1997) (rejecting constitutional challenge to FINRA's predecessor the National Association of Securities Dealers ("NASD")).

Additionally, as *every* court to consider the issue has held, petitioners' private nondelegation argument fails because FINRA exercises no regulatory power outside the SEC's close supervision. And petitioners' Seventh Amendment and Article III claims are foreclosed both by FINRA's private status and by the fact that self-regulatory organizations' disciplinary proceedings against members that violate their recordkeeping obligations involve the adjudication of "'public rights,'" which need not be resolved by an Article III court, let alone a jury. *SEC v. Jarkesy*, 2024 WL 3187811, at *10 (U.S. June 27, 2024). Finally, even if the Due Process Clause applied to FINRA's private disciplinary proceedings—which it does not—petitioners have not shown any denial of due process in those extensive proceedings, which provide notice, an opportunity to be heard, a neutral adjudicator, and rights to administrative and judicial review.

Accordingly, the Court should dismiss the petition for lack of jurisdiction. Alternatively, the Court should deny the petition for failure to exhaust or on the merits.

JURISDICTIONAL STATEMENT

The SEC issued the order under review on December 7, 2023, and petitioners filed a timely petition for review on December 19, 2023. However, this Court lacks jurisdiction because the challenged order is not "a final order of the Commission." 15 U.S.C. § 78y(a)(1).

STATEMENT OF ISSUES

Whether this Court should dismiss the petition for lack of jurisdiction because the SEC order remanding petitioners' case to FINRA is not a final order, or alternatively deny the petition because petitioners failed either to exhaust administrative remedies or to show that FINRA's structure and procedures violate the Constitution.

STATEMENT OF THE CASE

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

"Self-regulation in the securities industry is nearly as old as the federal government." Marianne K. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws*, 62 N.C. L. Rev. 475, 480 (1984). For most of the nation's history, securities exchanges and other self-regulatory organizations disciplined their members with little or no government involvement. *See* SEC Concept Release Concerning Self-Regulation, Release No. 34-50700, 69 Fed. Reg. 71,256, 71,257 (Dec. 8, 2004) ("SEC Concept Release") (recounting self-regulation's "long tradition in the U.S. securities markets"); *Kim v. FINRA*, — F. Supp. 3d —, 2023 WL 6538544, at *2-4 (D.D.C. Oct. 6, 2023) (same). When Congress adopted the modern securities laws in the 1930s, it preserved and built upon the self-regulatory framework that "preexisted federal regulation." *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 186 (7th Cir. 1984). Under the Exchange Act, private self-regulatory organizations continue to exercise a primary supervisory role over their members, subject to comprehensive SEC oversight. *See Jones*, 115 F.3d at 1179-82.

Currently, nearly 50 self-regulatory organizations are registered under the Exchange Act. *See* SEC, Self-Regulatory Organization Rulemaking, https://www.sec.gov/rules/sro.shtml. A national securities association is one type of self-regulatory organization. The Exchange Act requires anyone seeking to sell securities to join an association of broker-dealers registered as a national securities association or to associate themselves with a member (unless the person transacts securities solely on a securities exchange of which it is a member, or the SEC exempts the person from registration). *See* 15 U.S.C. § 78o(a)(1), (b)(1), (b)(8)-(9). FINRA is currently the only registered national securities association and, like its predecessor the NASD, serves as the frontline regulator for its broker-dealer members. *Id.* § 78o-3(b)(4).

This framework reflects Congress's consistent and repeatedly reaffirmed preference for preserving private self-regulation of the securities industry in lieu of establishing 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. 75-1455, at 3-4 (1938). Self-regulation enforces "'ethical standards beyond those any law can establish,'" "'effectively reach[ing]'" areas that "'self-government alone'" can monitor. H.R. Doc. No. 88-95, pt. 4, at 694-95 (1963).

Congress has repeatedly sought to "preserve[] and strengthen[]" the "self-regulatory" model. S. Rep. No. 94-75, at 23 (1975). For example, in 1983, Congress eliminated an alternative program of direct SEC regulation—called the "SEC only" program—for broker-dealers who were not members of a national securities association. *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. 98-106, at 6-7 (1983). In a retrospective assessment of the program, SEC staff concluded that "'the resources necessary for the Commission to assume [self-regulatory organization] functions directly and effectively are not realistically attainable.'" SEC Concept Release, 69 Fed. Reg. at 71,267 (quoting Market 2000 Report, at VI-6).

B. FINRA

FINRA, a private, not-for-profit Delaware corporation, oversees its member broker-dealer firms and individuals associated with those firms. *See Scottsdale Cap. Advisors Corp. v. FINRA* (*Scottsdale I*), 844 F.3d 414, 417-18 (4th Cir. 2016); *Kim*, 2023 WL 6538544, at *4. It was formed in 2007, when the NASD consolidated its regulation and enforcement functions with the similar functions of the New York

Stock Exchange. *See* Order Approving Proposed Rule Change To Amend The By-Laws Of NASD, 72 Fed. Reg. 42,169 (Aug. 1, 2007). FINRA is "a private entity," not a federal "agency." *E.g.*, Pet. Br. 31, 48. FINRA's board is selected by FINRA's members, not the government, and FINRA receives no state or federal funding—it is funded by member fees and fines levied against its members. *See* FINRA Board of Governors, bit.ly/3FmyxTr; FINRA By-Laws, Art. VI, § 1, bit.ly/41MMgN5.

FINRA exercises its regulatory authority under the Exchange Act's requirements and 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). In addition, the SEC ensures that FINRA "enforce[s] compliance" with the Exchange Act and FINRA's rules and that it "appropriately discipline[s]" its members and associated persons for violations, pursuant to rules that "provide a fair procedure for the disciplin[ary]" proceeding. *Id.* § 78o-3(b)(2), (7), (8).

Consistent with FINRA's obligation to provide fair disciplinary procedures, its SEC-approved rules provide for multiple layers of administrative and judicial review. *See Scottsdale I*, 844 F.3d at 418; 15 U.S.C. §§ 78s(d)(2), 78y(a)(1). FINRA's disciplinary proceedings generally include, among other procedural safeguards: (1) an evidentiary hearing before a three-person panel at which respondents have the right to introduce evidence and witness testimony, *e.g.*, FINRA Rules 9231-9234, 9261; (2) an appeal to FINRA's National Adjudicatory Council (the "NAC"), FINRA Rule 9311, during which any sanction, including a bar or expulsion, is stayed, FINRA Rule 9311(b); (3) a subsequent *de novo* appeal to the SEC, 15 U.S.C. § 78s(d)(2), (e)(1); and (4) a petition for review to a designated U.S. Court of Appeals, *id.* § 78y(a)(1). *See Scottsdale Cap. Advisors Corp. v. FINRA* (*Scottsdale II*), 678 F. Supp. 3d 88, 96-97 (D.D.C. 2023).

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 Scottsdale II*, 678 F. Supp. 3d at 105 n.8. FINRA also "lacks the authority" to "bring court actions to collect disciplinary fines it has imposed," *Fiero v. FINRA*, 660 F.3d 569, 571 (2d Cir. 2011), or to file its own enforcement proceedings in federal court, *see* 15 U.S.C. § 78o-3(h). By contrast, the SEC has broad statutory power to subpoena witnesses, *id.* § 78u(b), to secure injunctions to compel compliance with SEC orders, *id.* § 78u(e), and to bring enforcement actions in federal court, *id.* § 78u(d).

C. Black and SEI

Frank Black, a securities broker, is the founder and president of SEI, a FINRA member firm. JA1062. In 2012, FINRA conducted an examination of SEI and uncovered evidence that Black not only had failed to conduct required inspections of branch offices but had tried to cover up that failure by providing false documents and testimony to FINRA examiners. JA1062-1064. FINRA further found that SEI failed to maintain sufficient supervisory procedures over business communications by relying on an "honor system" for email retention. JA1064-1065, JA1078. FINRA's Department of Enforcement brought a disciplinary action against SEI and Black in 2015, alleging that these acts violated FINRA's rules, the Exchange Act, and SEC regulations. JA1065.

A FINRA hearing panel held a four-day evidentiary hearing, at which four former SEI representatives testified that no one at SEI had inspected their branch offices during the relevant period—directly contradicting the testimony and documents that Black and SEI had provided to FINRA examiners. JA1065. The panel found against petitioners on all counts, imposing a fine on petitioners and barring Black from associating with FINRA member firms. JA741-742.

Black and SEI appealed to FINRA's NAC. The NAC upheld the hearing panel's findings that, as relevant, petitioners (1) "provided to FINRA fabricated documents and false testimony concerning Black's purported inspections of SEI offices," (2) failed to maintain a sufficient supervisory system for email, and (3) failed to retain 16 business-related emails. JA824-825, JA863. Petitioners objected before the NAC to the failure of FINRA's enforcement staff to produce certain investigatory notes; in response, enforcement staff was unable to locate those notes and thus produced contemporaneous emails and memoranda summarizing the notes, which the NAC concluded was at most "harmless error." JA843. The NAC affirmed the bar on Black's association with FINRA members and imposed a reduced fine. JA863-864.

Petitioners appealed to the SEC and moved to stay the bar pending appeal. JA869-898. The SEC denied a stay, concluding that the public interest "strongly support[ed]" the bar because Black's "propensity for dishonesty" evinced by his violations "poses a risk to investors and the public" that "outweighs any harm to Black." JA934.

In December 2023, the SEC affirmed in part and remanded the case to FINRA for further proceedings. JA1061. The SEC affirmed the NAC's findings that petitioners failed to maintain a reasonable email supervisory system or preserve certain emails, and the fines imposed for those violations. JA1068-1073, JA1077-1081. As to the other violations, the SEC determined that FINRA's failure to preserve investigatory notes was not harmless error (although it did not warrant dismissal of the action). JA1073. The SEC therefore set aside FINRA's findings of false-testimony and document-fabrication violations—as well as the bar and separate fines imposed for those violations—and "remand[ed] this case to FINRA for further proceedings" on those claims. JA1076.

Petitioners then filed a petition for review of the SEC's remand order in this Court. JA1083-1086.[1]

STANDARD OF REVIEW

The factual aspects of the SEC's decision are reviewed for substantial evidence. 15 U.S.C. § 78y(a)(4). "Constitutional challenges and questions of statutory construction are reviewed de novo." *United States v. Claybrooks*, 90 F.4th 248, 255 (4th Cir. 2024). No objection to the SEC's decision may be considered "unless it was urged before the Commission or there was reasonable ground for failure to do so." 15 U.S.C. § 78y(c)(1).

SUMMARY OF ARGUMENT

The Court should dismiss, or alternatively deny, the petition.

I. Petitioners' claims are not properly before the Court. The SEC's remand order is not a "final order" subject to judicial review under the Exchange Act. 15 U.S.C. § 78y(a)(1). This jurisdictional barrier forecloses all of petitioners' claims—or, at a minimum, those arguments addressing the issues now pending

[1] While petitioners' SEC appeal was pending, they sued FINRA and the SEC in the U.S. District Court for the Western District of North Carolina, alleging that FINRA's structure and procedures violate the Appointments Clause, the Constitution's nondelegation requirements, and the Seventh Amendment. JA1093-1096 ¶¶ 61-78. After the SEC issued its remand order, petitioners agreed to stay that suit pending further proceedings before FINRA. JA1098, JA1101.

before FINRA on remand—until the SEC issues a final order ending all aspects of the administrative proceeding.

Moreover, petitioners did not raise their constitutional arguments before the SEC and thus failed to satisfy the Exchange Act's exhaustion requirement. 15 U.S.C. § 78y(c)(1). Petitioners have forfeited any argument to excuse their lack of exhaustion, and any such argument would fail in any event.

II. If the Court reaches the merits, it should reject petitioners' constitutional claims.

The Constitution's Appointments Clause applies only to government officials and to employees of nominally private companies that, under *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 378 (1995), are actually *part* of the government because they were created by the government and are controlled by a government-appointed board. That conclusion is confirmed by the text and original understanding of Article II, Supreme Court precedent, and Congress's longstanding historical practice, dating to the Founding, of delegating governmental responsibilities to private corporations without requiring presidential appointment of their directors.

FINRA falls squarely within that historical tradition. Because FINRA is a private company that is not part of the government under *Lebron*, its board members and employees are not "Officers of the United States" subject to presidential appointment. Petitioners repeatedly concede that FINRA is a "private entity," not a federal "agency," and do not even attempt to satisfy *Lebron*. Nor can petitioners identify *any* case from *any* court applying the Constitution's structural requirements to a private company that was not created by the government and controlled by a government-appointed board. Finally, even if petitioners could surmount these obstacles, FINRA's board members and staff would still not be "Officers of the United States" because their positions are not "established by Law."

Article II's inapplicability to FINRA does not leave Congress free of constraints in this area. Congress's power to delegate federal responsibilities to private companies is cabined by the private nondelegation doctrine, which requires that private parties carrying out delegated federal authority "function subordinately" to the federal government. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). As "every court to consider the issue" has held, *Scottsdale II*, 678 F. Supp. 3d at 107, that standard is easily met here: FINRA performs its self-regulatory responsibilities under the comprehensive oversight of the SEC, which has authority to review, approve, and modify FINRA rules, and to stay and undertake *de novo* review of FINRA disciplinary decisions.

Petitioners' claims that FINRA proceedings violate the Seventh Amendment, Article III, and the Due Process Clause also fail for multiple reasons. Most fundamentally, these constitutional provisions are categorically inapplicable to

FINRA's disciplinary proceedings because FINRA is not part of the government and is not engaged in state action when it carries out its self-regulatory responsibilities. As centuries of self-regulation in the securities industry confirm, those responsibilities have traditionally been *private*, not *governmental*. Moreover, even if the Constitution's requirements did apply here, petitioners could not identify any constitutional violation. FINRA's disciplinary proceeding against petitioners for violating their recordkeeping obligations involves public rights that do not implicate the Seventh Amendment or Article III, and petitioners have not shown any unconstitutional risk of bias or denial of a meaningful opportunity to be heard under FINRA's disciplinary rules, which the SEC has approved as providing "a fair procedure." 15 U.S.C. § 78o-3(b)(8).

Petitioners' unprecedented arguments would eviscerate the self-regulatory framework that has served investors well for centuries, replace private oversight with federal regulation, and inject the Constitution into broad swaths of the private economy. If the Court reaches the merits, it should reject those arguments and their profoundly destabilizing consequences.

ARGUMENT

I. Petitioners' Claims Are Not Properly Before This Court.

Petitioners' claims fail at the outset because there is no final SEC order subject to this Court's jurisdiction and because petitioners failed to exhaust their constitutional claims.

A. The Court Lacks Jurisdiction Because The SEC's Remand Order Is Not Final.

The Court should dismiss the petition for lack of subject-matter jurisdiction. The Exchange Act grants this Court limited jurisdiction to review only the SEC's "final order[s]." 15 U.S.C. § 78y(a)(1). Yet, petitioners seek to challenge an SEC order that is not final because it did not resolve all issues but instead "remand[ed] this case to FINRA for further proceedings." JA1076; *see also* JA1061 ("the case is *remanded*").

In the Exchange Act, as elsewhere, a "final order" is one that conclusively resolves the whole case. Because the "Act does not define the phrase," courts "give it its ordinary meaning," *Burrage v. United States*, 571 U.S. 204, 210 (2014), which indicates that "final" refers to "the end or conclusion," Webster's Second New Int'l Dictionary 948 (1934) ("last; terminating; ultimate"). That is also the settled meaning of finality in federal courts, where an appealable final judgment is one that "dispos[es] of the whole case" and "ends the litigation on the merits." *Catlin v. United States*, 324 U.S. 229, 233 (1945). As the Supreme Court has explained, "'[f]rom the very foundation of our judicial system,' the general rule has been that 'the whole case and every matter in controversy in it [must be] decided in a single appeal.'" *Microsoft Corp. v. Baker*, 582 U.S. 23, 36 (2017) (second alteration in original). When Congress granted courts jurisdiction to review agencies' "final" orders in the Exchange Act and other early-twentieth-century statutes, it "adhere[d] to" the traditional meaning of the final-judgment rule. *Newport News Shipbuilding & Dry Dock Co. v. Director*, 590 F.2d 1267, 1268 (4th Cir. 1978) (per curiam) (applying 28 U.S.C. § 1291 to construe the Longshoremen's and Harbor Workers' Compensation Act's grant of jurisdiction over "final order[s]").

Accordingly, this Court and others have repeatedly held in analogous contexts that an agency's "order of remand does not constitute an appealable order" because it "does not end the litigation" and is therefore "non-final." *Carolina Power & Light Co. v. DOL*, 43 F.3d 912, 914-15 (4th Cir. 1995); *see also*, *e.g.*, *Monterey Coal Co. v. FMSHRC*, 635 F.2d 291, 292 (4th Cir. 1980) (granting motion to dismiss petition for review because "a remand order is not a reviewable final order"); *Fieldcrest Mills, Inc. v. OSHRC*, 545 F.2d 1384, 1385-86 (4th Cir. 1976) (per curiam) (similar); *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1039 (D.C. Cir. 2014) ("An agency remand order is generally considered non-final for the purpose of judicial review." (citing cases)); *Gaskill v. SEC*, 2024 WL 2734998, at *2 (D.C. Cir. May 28, 2024) (per curiam) (dismissing party's petition for review of SEC order remanding his proceeding to FINRA "[b]ecause the SEC has not rendered a final decision" in his case under the Exchange Act). Consistent with the principle that "jurisdictional rules should be clear" to avoid wasteful ancillary litigation, *Lapides v. Bd. of Regents*, 535 U.S. 613, 621 (2002), this Court's precedent adopts a "very clear test"—does the order end the case?—which a remand order "does not satisfy" because it "does not end the litigation; rather, it does the exact opposite by remanding the case for further proceedings," *Carolina Power*, 43 F.3d at 915.

Here, the SEC order under review does not end the administrative proceedings because the SEC remanded the case to FINRA for further proceedings on the false-testimony and document-fabrication counts. Nor does the SEC order impose any immediate consequences on petitioners, who will not have to pay any fines until the completion of remand proceedings and, if petitioners pursue further review, a subsequent administrative appeal and judicial review. *See* FINRA Rule 9370(a) (filing application for SEC review "shall stay the effectiveness of any sanction, other than a bar or an expulsion"); Notice to Members 99-68 (Aug. 10, 1999), https://www.finra.org/rules-guidance/notices/99-68 (announcing FINRA's policy to refrain from enforcing fines until after judicial review). Petitioners must therefore await the conclusion of remand proceedings and only then—if they are ultimately "aggrieved" by the SEC's "final order" resolving the entire case—can they petition for review in this Court. 15 U.S.C. § 78y(a)(1).

The SEC's affirmance of some aspects of FINRA's disciplinary ruling does not make its order final. Longstanding, binding precedent makes clear that a partial remand order is non-final and thus entirely non-appealable—including as to the non-remanded issues, which may also be reviewed by petitioning from the final order entered at the end of the case. "Numerous courts," including this one, "have held that an order of [an agency] affirming in part and remanding in part to the ALJ does not constitute a final order for the purposes of reviewability." *Eggers v. Clinchfield Coal Co.*, 11 F.3d 35, 38 (4th Cir. 1993). In *Newport News*, 590 F.2d at 1269, for example, this Court dismissed as "premature" a petition for review of an agency order affirming in part and remanding in part to an ALJ to reconsider the claimant's permanent-disability claim. The pending remand meant that the entire "decision is not final and, consequently, not reviewable," even though the agency had already "determined that the claimant sustained a compensable injury and that [the petitioner] is liable" on the claimant's temporary-disability claim. *Id.* at 1268.

Other courts agree and have applied *Newport News* to dismiss petitions for review of partial remand orders because they would improperly "engage [courts] in the very piecemeal review that the final order requirement is intended to preclude." *WMATA v. Director*, 824 F.2d 94, 95 (D.C. Cir. 1987) (per curiam) (collecting cases). "In short, all of the interests underlying the finality rule, as well as common sense, instruct [courts] to postpone [their] review" of the entire case "until the [pending] claim is resolved." *Eggers*, 11 F.3d at 39.[2]

Because the challenged SEC order is non-final across the board, this Court lacks jurisdiction over the entire petition for review. Petitioners, in fact, concede that the false-testimony and fabricated-document issues remanded to FINRA "are not before this Court on the merits." Pet. Br. 18 n.9. And, although petitioners simultaneously assert that the validity of the remand proceedings "is at issue," *id.*, they offer no authority for that contention, which contradicts controlling precedent and the statutory requirement that this Court review only "final order[s]," 15 U.S.C. § 78y(a)(1). Thus, at the very least, this Court should decline to reach those portions of petitioners' Seventh Amendment, Article III, and due-process claims resting on issues remanded to FINRA.[3]

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[2] The Ninth Circuit's decision partially dismissing a petition in *Saliba v. SEC*, 47 F.4th 961 (9th Cir. 2022), does not support a contrary result. Although the *Saliba* court asserted jurisdiction over part of a partial remand order, it did so without adversarial briefing because "[b]oth parties" supported jurisdiction, and it did not address any of the contrary authority discussed above. *Id.* at 966. Regardless, *Saliba* is distinguishable because the SEC order in that case (unlike here) yielded an immediately effective bar from FINRA membership, which the court "analogized to an injunction" subject to "interlocutory appeal" under 28 U.S.C. § 1292. *Id.* at 968 n.1. At a minimum, *Saliba* supports dismissal of claims based on remanded issues "still being deliberated by FINRA." *Id.* at 968; *see infra* at 19 n.3.

[3] In particular, the Court, at a minimum, should decline to entertain petitioners' Seventh Amendment, Article III, and due-process arguments concerning "FINRA's counts one and two," which pertain to petitioners' alleged "[p]erjury and forgery,"

B. Petitioners Failed To Exhaust Their Constitutional Claims.

The Court should also reject petitioners' constitutional claims because petitioners failed to exhaust those claims before the SEC. The Exchange Act provides that "[n]o objection to an order" of the SEC "may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so." 15 U.S.C. § 78y(c)(1). Petitioners inexcusably failed to satisfy this exhaustion requirement. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006) ("'courts should not topple over administrative decisions'" based on an "'objection'" not "'made at the time appropriate under [the agency's] practice'") (emphasis omitted).

Petitioners did not raise any constitutional claims before the SEC, only case-specific evidentiary arguments about the facts adjudicated in FINRA's disciplinary proceeding and the appropriateness of FINRA's sanctions. *See* JA935-992. Petitioners' opening brief does not even acknowledge this failure to exhaust, much less carry their burden to make the requisite "showing of reasonable grounds" to excuse it. *Malouf v. SEC*, 933 F.3d 1248, 1256 (10th Cir. 2019). Petitioners have therefore "waive[d]" any argument to excuse exhaustion "by failing to present it in [their] opening brief." *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017).

Pet. Br. 33-34; *see also id.* at 43-46 & n.16 (discussing remanded issues as part of due-process argument). Those counts are concededly "not before this Court on the merits." *Id.* at 18 n.9.

Regardless, petitioners could not show reasonable grounds to excuse exhaustion. Other courts have consistently held that "[a] constitutional argument does not categorically qualify as a 'reasonable ground'" to excuse exhaustion under the Exchange Act. *Springsteen-Abbott v. SEC*, 989 F.3d 4, 9 (D.C. Cir. 2021); *see also*, *e.g.*, *Cooper v. SEC*, 788 F. App'x 474, 474-75 (9th Cir. 2019) (dismissing Appointments Clause claim for failure to exhaust); *Mister Disc. Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 877-78 (7th Cir. 1985) (same for due-process claims). And petitioners cannot plausibly identify any other grounds for failing to raise their arguments before the SEC—in contrast to other litigants' timely exhaustion of similar constitutional claims. *Compare Lucia v. SEC*, 585 U.S. 237, 251 (2018) (awarding relief to petitioner who "timely" raised Appointments Clause claim "before the Commission"), *with Malouf*, 933 F.3d at 1258 (dismissing Appointments Clause claim for failure to exhaust and noting that "the petitioners in *Bandimere* [*v. SEC*, 844 F.3d 1168 (10th Cir. 2016),] and *Lucia*" had properly exhausted similar claims).

This conclusion is not altered by the Supreme Court's recent decision in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023), which did not address exhaustion. *Axon* held only that Congress's enactment of "the review scheme specified in the Exchange Act—'administrative review followed by judicial review in a federal court of appeals'"—did not "'implicitly divest[] district courts of jurisdiction'" over certain structural constitutional claims. *Id.* at 184. But in reaching this holding about Congress's "'implicit[]" intent regarding district court suits, the Court could not and did not purport to override the Exchange Act's *express* exhaustion requirements. *Id.*; *see*, *e.g.*, *Carr v. Saul*, 593 U.S. 83, 95 (2021) (contrasting Exchange Act's review scheme, "in which a statutory issue-exhaustion requirement applies," with Social Security Administration review scheme where issue exhaustion was "not required"); *Probst v. Saul*, 980 F.3d 1015, 1019 (4th Cir. 2020) ("Where Congress has codified an exhaustion requirement—such as in 15 U.S.C. § 78y(c)(1) . . . —courts generally defer to that choice.").

Whether or not petitioners could raise some or all of their constitutional claims in district court under *Axon*—as they have also attempted to do, *supra* at 11 n.1—has no bearing on, and cannot excuse, their failure to comply with the Exchange Act's express exhaustion requirement for *this* petition, which they have brought "under 15 U.S.C. § 78y(a)(1)." Pet. Br. 1. "When litigants *choose* to use a statutory review mechanism" such as the Exchange Act, "they must still meet its strictures," which *Axon* "doesn't excuse." *Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA*, 71 F.4th 59, 65 & n.2 (D.C. Cir. 2023) (denying post-*Axon* constitutional challenge for failure to exhaust).

II. Petitioners' Constitutional Claims Fail On The Merits.

Even if petitioners' claims were properly before this Court, they would fail on the merits. As multiple decisions have recognized in rejecting similar constitutional arguments, petitioners' claims "fall far short of . . . sustainable constitutional challenges to the structure and processes of FINRA." *Scottsdale II*, 678 F. Supp. 3d at 101.

A. FINRA Is A Private Entity Not Subject To The Appointments Clause.

Article II's appointment requirements apply only to agencies or instrumentalities of the United States government, not to private parties. Although petitioners concede FINRA's private status, they argue that FINRA is nevertheless subject to Article II because it allegedly exercises significant executive power when carrying out its self-regulatory responsibilities. *See* Pet. Br. 18-25. But the constitutional text, original understanding, historical practice, and precedent all foreclose the notion that the Constitution's appointment requirements apply to private parties that exercise delegated federal authority.

1. *Lebron* Provides The Governing Standard.

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 must also refer to officials employed by the federal government. *See Yates v. United States*, 574 U.S. 528, 543 (2015) ("we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words'"). Accordingly, the Appointments Clause has no application to officers of a private entity unless that nominally private entity is actually part of the government.

Founding-era sources and scholarship analyzing the Constitution's original meaning confirm that "'Officers of the United States'" refers only to "federal civil officials." *Lucia*, 585 U.S. at 253 (Thomas, J., concurring) (citing Jennifer L. Mascott, *Who Are "Officers of the United States"?* 70 Stan. L. Rev. 443, 564 (2018)). 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).

Historical practice confirms this point. When the first Congress created 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[]," Mascott, *supra*, at 531, even though the Bank exercised delegated federal powers as "an instrument of the government for fiscal purposes," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 396 (1819). The "probable explanation is that Congress saw the bank" as a "nongovernmental entity" not subject to Article II. Mascott, *supra*, at 531. Similarly, Chief Justice Marshall stated for the Court regarding the Second Bank of the United States—for which the President appointed only five of twenty-five directors, *see* Aditya Bamzai, *Tenure of Office and the Treasury*, 87 Geo. Wash. L. Rev. 1299, 1343 (2019)—that "[i]t will not be contended, that the directors, or other officers of the Bank, are officers of government." *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 866-67 (1824).

The Bank therefore "stands as good evidence that the delegation of certain functions by the federal government to nominally private—though heavily regulated—entities does not necessarily violate the separation of powers." Bamzai, *supra*, at 1384. The Supreme Court has explained in closely related contexts that "[t]he First Congress's recognition" of a practice's validity "'provides contemporaneous and weighty evidence of the Constitution's meaning,'" *Seila Law LLC v. CFPB*, 591 U.S. 197, 214 (2020), as does a later "'long settled and established practice,'" *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (alteration omitted). Both exist here.[4]

[4] *See also, e.g.*, *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 495, 497 (2021) ("as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties," and the courts have "approved of that practice").

Consistent with the constitutional text, original understanding, and historical practice, the Supreme Court has applied the Appointments Clause *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) (SEC ALJs); *see also Freytag v. Comm'r*, 501 U.S. 868, 882 (1991) (Tax Court special trial judges); *United States v. Arthrex, Inc.*, 594 U.S. 1, 23 (2021) (Patent Trial and Appeal Board administrative patent judges).

To be sure, labels are "not dispositive" of an entity's "status as a governmental entity for purposes of separation-of-powers analysis." *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 51 (2015). Courts must instead undertake an "independent inquiry into [the entity's] status under the Constitution," based on "practical reality," *id.* at 51, 55, to determine "whether it is *in fact* a private entity," *Lebron*, 513 U.S. at 382.

In *Lebron*, the Supreme Court recognized a narrow, exceptional category of nominally private corporations—there, Amtrak—that are actually "part of the Government," and thus subject to constitutional constraints, because the government "create[d]" the corporation "for the furtherance of governmental objectives" and "retains for itself permanent authority to appoint a majority of the directors of that corporation." 513 U.S. at 397, 400. "Only those entities that satisfy" *all* of *Lebron*'s "conditions may be considered federal entities" that are subject to the Constitution's structural requirements. *Kerpen v. MWAA*, 907 F.3d 152, 159 (4th Cir. 2018). Applying that standard, this Court held that Freddie Mac is not part of the government because, "[u]nlike Amtrak," its board members are elected by shareholders, and thus "the government does not exert control over Freddie Mac such that it loses its private-party status." *Meridian Invs., Inc. v. Fed. Home Loan Mortg. Corp.*, 855 F.3d 573, 579 (4th Cir. 2017).

Lebron supplies the governing test for determining whether the Constitution's appointment requirements (and its corollary removal requirements) apply to private companies. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 485-86 (2010) (applying 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'" (quoting *Lebron*, 513 U.S. at 397)). Neither the Supreme Court nor *any other* court has ever sustained an appointment challenge to an entity that qualified as private under *Lebron*. And for good reason: the *Lebron* test distinguishes "Officers of the United States"—who are subject to the Appointments Clause—from officers of a private company—who are not. *See Ass'n of Am. R.R.s*, 575 U.S. at 55 (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)).[5]

This Court expressly confirmed as much in *Kerpen*, which affirmed the dismissal of an Appointments Clause challenge to the structure of the Metropolitan Washington Airports Authority. 907 F.3d at 157. "Applying the standard from *Lebron*," the Court held that the Authority was not a federal entity because it "was not created by the federal government" via "'special law'" and "is not controlled by the federal government," which appointed only a "minority" of its board. *Id.* at 158-59. The plaintiffs' "failure to meet the threshold of establishing [the Authority] as a federal entity," the Court held, was "fatal to their claims under the Appointments Clause" because the Clause "appl[ies] to federal entities" and has "little relevance when, as here, the entity in question is not a federal one." *Id.* at 160; *see also Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, — F.4th —, 2024 WL 3311366, at *17 (5th Cir. July 5, 2024) (holding that *Lebron* is "an insuperable hurdle" to Appointments Clause claims against "private actors").

[5] Petitioners refer in their Conclusion to "remov[al]" as well as appointment requirements, Pet. Br. 59, but do not assert any removal claim in the body of their brief. Regardless, a claim based on the Constitution's removal requirements would likewise fail because they, too, apply only to Officers of the United States. *See Free Enter. Fund*, 561 U.S. at 486.

2. FINRA Is A Private Entity Under *Lebron*.

Because FINRA is not part of the federal government under *Lebron*, the Appointments Clause does not apply to its board members or employees.

Petitioners and their *amicus* concede that FINRA is a "private entity," not a federal "agency," and they do not even attempt to satisfy *Lebron*'s government-actor test. *E.g.*, Pet. Br. 31, 48; NCLA Br. 6. Nor could they, as FINRA does not possess *any* of the unusual characteristics that made Amtrak part of the government: the government neither created FINRA nor appoints any of its board members. *See Scottsdale II*, 678 F. Supp. 3d at 103; *Kim*, 2023 WL 6538544, at *4.

In *Free Enterprise Fund*, the Supreme Court highlighted the stark differences between FINRA and other "*private* self-regulatory organizations in the securities industry[,] such as the New York Stock Exchange," on the one hand, and "Government-created, Government-appointed" entities like the PCAOB and Amtrak, on the other. 561 U.S. at 484-85. As the Court recognized, only the latter are "'part of the Government' for constitutional purposes." *Id.* at 486 (quoting *Lebron*, 513 U.S. at 397). Such "'carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.'" *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004).

Controlling Fourth Circuit precedent (which petitioners fail even to cite) confirms, and other courts have repeatedly agreed, that FINRA, like its predecessor the NASD, "is a private party and not a governmental agent," making the Constitution "not applicable." *Jones*, 115 F.3d at 1183; *see* NCLA Br. 11-12 (citing *Jones* and collecting cases concluding that the NASD and FINRA are "private actor[s]"). Indeed, "every court to have considered this state actor argument" as to FINRA or the NASD "has rejected it." *Kim*, 2023 WL 6538544, at *7.[6] Most recently, the district court in *Kim* denied preliminary-injunctive relief on claims essentially identical to petitioners' here. *Id.* at *2. As in *Kim*, petitioners cannot show "that FINRA is a state actor, which 'clearly requires permanent government control,'" because "the government *does not* control FINRA." *Id.*

Petitioners do not meaningfully address any of these obstacles. They assert only, in a conclusory footnote, that FINRA's private status "does not change th[e] analysis." Pet. Br. 25 n.10. But they cite no authority in support of that bald claim, fail to mention *Lebron* or *Jones* anywhere in their brief, and cite *Kerpen* only in their private nondelegation argument. Petitioners also incorrectly assert that FINRA's hearing officers are "'near-carbon copies'" of government ALJs, *id.* at 21 (citing

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[6] *See also, e.g.*, *Scottsdale II*, 678 F. Supp. 3d at 103; *Mohlman v. FINRA*, 2020 WL 905269, at *6 (S.D. Ohio Feb. 25, 2020), *aff'd*, 977 F.3d 556 (6th Cir. 2020); *Flowers v. Wells Fargo Advisors, LLC*, 2013 WL 361106, at *3 (E.D.N.C. Jan. 30, 2013); *Epstein v. SEC*, 416 F. App'x 142, 148 (3d Cir. 2010); *D.L. Cromwell Invs., Inc. v. NASD Regul., Inc.*, 279 F.3d 155, 162 (2d Cir. 2002); *Cecala v. NationsBank Corp.*, 2001 WL 36127812, at *2 (W.D.N.C. Apr. 4, 2001); *Desiderio v. NASD, Inc.*, 191 F.3d 198, 206-07 (2d Cir. 1999); *Shrader v. NASD, Inc.*, 855 F. Supp. 122, 124 (E.D.N.C. 1994); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 698 (3d Cir. 1979).

Lucia and *Freytag*), without grappling with the critical "*prior* question" whether FINRA is even part of the government, *Lebron*, 513 U.S. at 381. But unlike FINRA's board members and staff, who petitioners concede are "private actors," Pet. Br. 24, SEC ALJs are employees of *the federal government*. And "'*Lebron*—rather than *Lucia*—supplies the appropriate standard'" for "'appointments . . . claims'" against private entities. *Kim*, 2023 WL 6538544, at *9; *see also*, *e.g.*, *Alpine Sec. Corp. v. Nat'l Sec. Clearing Corp.*, 2024 WL 1011863, at *6-9 (D. Utah Mar. 8, 2024) (agreeing that "resort to the Appointments Clause" is a "*non sequitur*" when a private organization is not "'part of the government' under *Lebron*"), *injunction pending appeal denied*, Order, No. 24-4027 (10th Cir. Mar. 15, 2024).

Finally, even if FINRA were somehow part of the federal government, petitioners' appointment claim would still fail because FINRA's board members and staff do not hold positions "established by Law." U.S. Const. art. II, § 2, cl. 2. Unlike the SEC ALJs in *Lucia* and Tax Court special trial judges in *Freytag*, neither the "office" nor the "duties, salary, and means of appointment" of FINRA board members and staff are "specified by statute." *Freytag*, 501 U.S. at 881; *see also* *Trump v. United States*, 2024 WL 3237603, at *26 (U.S. July 1, 2024) (Thomas, J., concurring) ("'established by law' refers to an office that Congress creates 'by statute'"). When Congress chose to adopt self-regulation under the Exchange Act, it explicitly decided not to establish federal "offices" to carry out these private functions. Thus, FINRA itself created its board of directors, the Office of Hearing Officers, and NAC through its by-laws and rules. *See* FINRA By-Laws, Arts. VII, VIII, §§ 1, 3, bit.ly/44aU3Vs; FINRA Rules 9235, 9311. As the SEC has recognized, "FINRA's employees cannot be 'officers *of the United States*'" because the "Appointments Clause applies only when Congress creates an office *of the United States*" but "says nothing about . . . individuals who do *not* occupy a position established by Congress." *In re Newport Coast Sec., Inc.*, Securities Exchange Act Release No. 34-88548, 2020 WL 1659292, at *17-18 (Apr. 3, 2020).

Judge Walker's tentative concurrence to an unpublished motions panel order in *Alpine Securities Corp. v. FINRA* does not support a contrary conclusion. *Contra* Pet. Br. 21. He stated only at the case's "early stage" that there "may be a constitutional problem," but stressed that he "'d[id] not rule out the possibility that further briefing and argument might convince me that my current view is unfounded.'" 2023 WL 4703307, at *2, *4 (D.C. Cir. July 5, 2023). In analyzing petitioners' claims, this Court should instead look to the decision in *Kim*—which petitioners inexplicably fail to mention, even though it postdates (and persuasively addresses) Judge Walker's concurrence. As *Kim* explained, "[f]urther briefing" following the motions panel order in *Alpine* "has illuminated" that precedent fully supports FINRA's constitutionality. 2023 WL 6538544, at *9; *see also Nat'l Horsemen's*, 2024 WL 3311366, at *15 (post-*Alpine* Fifth Circuit opinion holding that the Appointments Clause is inapplicable to private companies that are "not a federal instrumentality" under *Lebron*).

In short, petitioners' failure to establish FINRA as a federal entity under *Lebron* is "fatal to their claims." *Kerpen*, 907 F.3d at 160.

B. There Is No Private Nondelegation Violation Because FINRA Does Not Exercise Unsupervised Regulatory Authority.

In the alternative, petitioners argue that, if FINRA is a private entity, then its structure violates the private nondelegation doctrine. Pet. Br. 26-30. But Congress may permissibly give a private entity a role in a regulatory program, provided the entity "function[s] subordinately" to, and is under the "authority and surveillance" of, a governmental body. *Adkins*, 310 U.S. at 399. A government agency properly "retains final reviewing authority" over the private entity if the agency "'independently perform[s] its reviewing, analytical and judgmental functions.'" *Texas v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021). That is the situation here.

FINRA does not exercise any regulatory power that is beyond the SEC's comprehensive oversight. As this Court has recognized, "the SEC has 'pervasive oversight authority' over [FINRA's] disciplinary proceedings to ensure that they are conducted fairly." *Jones*, 115 F.3d at 1182. And as the Fifth Circuit recently reiterated, the SEC has "'formidable oversight power to supervise, investigate, and discipline [FINRA] for any possible wrongdoing or regulatory missteps.'" *Nat'l*

Horsemen's, 2024 WL 3311366, at *12-13 (quoting *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 101 (2d Cir. 2007)) (alteration in original).

Among other things, the SEC must approve FINRA rules, and "the SEC 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)). The SEC also regularly examines FINRA to ensure its compliance with the securities laws and its own rules. *See*, *e.g.*, U.S. Gov't Accountability Off., GAO-18-522, SEC Inspections of FINRA's Governance Were Consistent with Internal Guidance (2018), bit.ly/3h0GdCj. In addition, FINRA must notify the SEC of any final disciplinary action against a member or associated person, which is thereafter subject to *de novo* review by the SEC acting *sua sponte*, or in response to a petition from the aggrieved party. *See* 15 U.S.C. § 78s(d)(1)-(2), (e); *see also supra* at 7-10 (describing extensive disciplinary process, including multiple levels of appeal).

The SEC's comprehensive oversight properly cabins FINRA's regulatory authority to a constitutionally permissible subordinate role. This "structure has resulted in a finding that federal securities laws do not amount to an unconstitutional delegation by every court to consider the issue." *Scottsdale II*, 678 F. Supp. 3d at 107; *accord Kim*, 2023 WL 6538544, at *11. "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 [self-regulatory organizations] permissible aides and advisors." *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023) (collecting cases); *see also Nat'l Sec. Clearing Corp.*, 2024 WL 1011863, at *9 (agreeing with cases in which "the Exchange Act has repeatedly been upheld against private nondelegation challenges").

Petitioners do not cite any of these cases, much less attempt to distinguish them. Instead, they invoke *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), while ignoring *Adkins*' subsequent explanation that "[t]here is nothing in the *Carter* case which stands in the way" of statutes authorizing subordinate private action, 310 U.S. at 396-97. Nor can petitioners draw support from two cases in which this Court *rejected* nondelegation claims. *See Pittston Co. v. United States*, 368 F.3d 385, 394-98 (4th Cir. 2004) (citing *Adkins*); *Kerpen*, 907 F.3d at 162 ("Successful non-delegation challenges are rare."). In short, petitioners offer no grounds to depart from the uniform authority squarely rejecting their nondelegation claim.

C. FINRA Disciplinary Proceedings Do Not Implicate The Seventh Amendment Or Article III.

Petitioners' Seventh Amendment and Article III claims also fail on the merits for multiple reasons.

First, petitioners have not established that FINRA, a private company, is subject to the obligations of Article III and the Seventh Amendment in its private self-regulatory disciplinary proceedings. *See Scottsdale II*, 678 F. Supp. 3d at 106 (rejecting Seventh Amendment challenge to FINRA disciplinary proceeding based on absence of state action). As discussed, petitioners concede that FINRA is "a private entity," not a federal "agency." *E.g.*, Pet. Br. 31, 48; *see supra* at 13. Nor do petitioners demonstrate that FINRA's disciplinary proceeding against them constitutes one of the "few limited circumstances," *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019), in which a private entity's conduct is "fairly attributable to" the government and thus state action, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Indeed, petitioners make *no* state-action argument at all and have thus waived the issue. *Grayson*, 856 F.3d at 316.

Petitioners do not contend, for example, that FINRA's disciplinary proceedings represent a function "traditionally and exclusively performed" by the government, *Halleck*, 587 U.S. at 809 (emphasis omitted); that FINRA is so "pervasive[ly] entwine[d]" with the government that its self-regulatory activities may be treated as state action, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001); or that the SEC "compel[led]" FINRA to initiate a disciplinary proceeding against petitioners, *Halleck*, 587 U.S. at 809. Nor could they, given the unbroken line of authority—including this Court's decision in *Jones*, 115 F.3d at 1182-83—holding that FINRA (or its predecessor the NASD) is not engaged in state action when carrying out self-regulatory responsibilities such as disciplining members and associated persons. *E.g.*, *D.L. Cromwell*, 279 F.3d at 156-57, 162; *Desiderio*, 191 F.3d at 206-07; *Epstein*, 416 F. App'x at 146, 148;

Bergen, 605 F.2d at 692, 699 n.5; *Kim*, 2023 WL 6538544, at *10; *Scher v. NASD*, 386 F. Supp. 2d 402, 407-08 (S.D.N.Y. 2005).

Second, even if Article III and the Seventh Amendment would otherwise apply to FINRA disciplinary proceedings, FINRA members and associated persons have voluntarily agreed to participate in those proceedings and thus relinquished any right they might have to a jury trial in federal court. *See CFTC v. Schor*, 478 U.S. 833, 848 (1986) (Article-III and jury-trial rights are "subject to waiver, just as are other personal constitutional rights").

Third, FINRA disciplinary proceedings regarding members' compliance with the type of recordkeeping requirements at issue concern public rights categorically outside the scope of Article III and the Seventh Amendment. In determining whether an adjudication must be heard in an Article III tribunal subject to the Seventh Amendment's requirements, the Supreme Court has distinguished between "'public rights'" and "'private rights.'" *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 334 (2018). Congress has broad authority to "assign adjudication of public rights to entities other than Article III courts," and, correspondingly, to entrust factfinding responsibilities in those adjudications to entities other than juries. *Id.*[7]

[7] "[W]hen Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of

Applying those principles, the Supreme Court has long upheld statutes that authorize non-Article III bodies to decide "actions that were not suits at common law or in the nature of such suits." *Jarkesy*, 2024 WL 3187811, at *16 (alterations and internal quotation marks omitted). For example, executive agencies may conduct adjudications and impose monetary sanctions under tariff laws, *Passavant v. United States*, 148 U.S. 214, 221-22 (1893); immigration laws, *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 338-40 (1909); tax laws, *Helvering v. Mitchell*, 303 U.S. 391, 402 (1938); labor laws, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937); and workplace-safety laws, *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 449-61 (1977).

Under that long line of precedent, even if petitioners could establish that the FINRA disciplinary proceeding against them is subject to constitutional requirements, those requirements would not include Article III and the Seventh Amendment because FINRA's disciplinary action against petitioners would qualify as a matter involving public rights. The "hallmark that [the Supreme Court] ha[s] looked to in determining if a suit concerns private rights is whether it 'is made of the stuff of the traditional actions at common law tried by the courts at Westminster in

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that action by a nonjury factfinder.'" *Oil States*, 584 U.S. at 345. Thus, the only question here is whether Article III required FINRA's disciplinary proceeding against petitioners to be heard in a federal court. Because it did not, petitioners' Seventh Amendment claim also fails.

1789.'" *Jarkesy*, 2024 WL 3187811, at *10 (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011)) (internal quotation marks omitted). The self-regulatory mechanisms of the securities industry, which have involved private investigation and adjudication of broker conduct since the 1790s, have never been "the stuff of the traditional actions at common law." They have been "the stuff of" private industry self-regulation—a system Congress embraced and perpetuated in the 1930s. *See supra* at 4-6.

That conclusion is underscored by the disciplinary counts before this Court, in which FINRA alleges that petitioners violated FINRA's rules requiring a reasonable supervisory system to ensure the retention of business-related emails, as well as FINRA's rules and the requirements of Section 17(a) of the Exchange Act and its implementing regulation mandating preservation of 16 specific business-related emails. *See* JA1068-1073. These recordkeeping requirements, like the technical Occupational Safety and Health Act building regulations at issue in *Atlas Roofing*, 430 U.S. at 444-46, do not "borrow [their] cause of action from the common law." *Jarkesy*, 2024 WL 3187811, at *15.

In that respect, the recordkeeping requirements at issue are far different from the securities-fraud charges brought by the SEC in *Jarkesy*, which require a jury because they "replicate common law fraud." 2024 WL 3187811, at *7. In contrast to alleged violations of "the antifraud provisions" of the securities laws, *id.* at *6, a disciplinary action against self-regulatory organization members and associated persons for violating their recordkeeping obligations is not "made of the stuff of the traditional actions at common law" and thus need not be tried in an Article III court, *id.* at *10 (internal quotation marks omitted).

D. FINRA Disciplinary Proceedings Do Not Implicate, But Nevertheless Provide, Due Process.

Petitioners' due-process claim similarly fails for numerous reasons.

At the outset, petitioners' Fifth Amendment arguments fail for the same threshold reason as their Appointments Clause, Seventh Amendment, and Article III claims—the Constitution does not apply to FINRA, a private actor, and its disciplinary proceeding against petitioners does not meet any of the exacting criteria for treating private conduct as state action. *See supra* at 23-33, 35-37. Because petitioners present no argument to the contrary, this Court need proceed no further to reject their due-process claim.

Moreover, even if the Fifth Amendment did apply, petitioners were afforded due process in their FINRA disciplinary proceeding. As evidenced by the Exchange Act and FINRA's rules, FINRA's procedures far exceed any applicable constitutional minimum. *See Jones*, 115 F.3d at 1182 (the SEC's "'pervasive oversight authority' over [FINRA's] disciplinary proceedings . . . ensure[s] that they are conducted fairly"). The Exchange Act requires that FINRA's rules "provide a fair procedure for the disciplining of members and persons associated with members." 15 U.S.C. § 78o-3(b)(8). Accordingly, FINRA proposed, and the SEC approved, the FINRA Code of Procedure, which governs FINRA's disciplinary process. The Code establishes robust procedural protections for disciplinary hearings, including a neutral adjudicator and the respondent's right to introduce evidence, put on witnesses, and cross-examine adverse witnesses. *See*, *e.g.*, FINRA Rules 9231-9234 (appointment of three-person hearing panel including two industry members; recusal and disqualification standards); FINRA Rule 9261 (submission of evidence and testimony); Frequently Asked Questions for Respondents in FINRA Disciplinary Proceedings, bit.ly/3wB42IG. These procedures are backstopped by multilayered review within FINRA, before the SEC, and ultimately before a U.S. Court of Appeals. *See supra* at 7-8.

Petitioners were afforded all of these procedures, which fully comply with "[t]he fundamental requirement of due process" to allow an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see*, *e.g.*, *Cody v. SEC*, 693 F.3d 251, 257-58 (1st Cir. 2012) (rejecting due-process challenge to FINRA procedures); *Scottsdale I*, 844 F.3d at 422-23 (holding that statutory challenge to FINRA's disciplinary proceedings "'can be meaningfully reviewed'" through the Exchange Act "'structure consistent with due process'").

Petitioners' contrary arguments are baseless. First, petitioners argue that FINRA hearing officers are not "neutral or unbiased" adjudicators simply because FINRA also employs enforcement staff. Pet. Br. 43. But longstanding precedent rejects "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (rejecting due-process challenge to state licensing board). Rather, even when a body combines functions—as the SEC and many other agencies do—a court "must start . . . from the presumption that the hearing officers who decide [these] claims are unbiased," which a challenger bears the burden of rebutting "by a showing of conflict of interest." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). Thus, it is "well established that due process rights are not violated simply by the combination of the investigative, prosecutorial, and adjudicative functions in one agency." *Marshall v. Cuomo*, 192 F.3d 473, 484 (4th Cir. 1999). Petitioners do not engage with any of this precedent or even attempt to show that any FINRA hearing officer has an actual conflict of interest.

Second, petitioners argue that FINRA has an institutional pecuniary interest in the outcome of enforcement hearings because the fines it imposes become part of its operating budget. Pet. Br. 46-47. But FINRA's imposition of fines is "no greater than the interests of many [government] agencies that adjudicate penalty or fee determinations in their own administrative proceedings," which do "not render all agencies incapable of adjudicating disputes within their own proceedings." *Doolin Sec. Sav. Bank, F.S.B. v. FDIC*, 53 F.3d 1395, 1407 (4th Cir. 1995). Moreover, this Court has "reasoned that statutory restrictions placed on administrative adjudicators support a finding that a dispute resolution mechanism is not institutionally biased." *Id.* Comparable restrictions are in place here, where FINRA's use of monies collected through fines "is subject to special governance procedures, restrictions on use and transparency requirements." FINRA Financial Guiding Principles ¶ 5, bit.ly/44NLxNy.

Finally, FINRA hearing officers do not have the specific characteristics of the "dual role" that the Supreme Court invalidated in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). The mayor there was both the village's chief executive and responsible for a court that assessed traffic fines, which provided 40% of the city's revenue. *Id.* at 57-58. Here, by contrast, FINRA hearing officers have no "'direct, personal, [or] substantial pecuniary interest'" in generating fees, and their "relationship to the finances and financial policy of [FINRA is] too remote to warrant a presumption of bias." *Id.* at 60-61; *see also Dugan v. Ohio*, 277 U.S. 61, 65 (1928) (no due-process violation in mayoral position with fine-generating judicial duties).[8]

[8] *Association of American Railroads v. Department of Transportation*, 821 F.3d 19 (D.C. Cir. 2016), does not support petitioners. That case addressed the "specific

Accordingly, even if the Fifth Amendment applied to FINRA, petitioners have not overcome the presumption that the FINRA hearing panel was not unconstitutionally biased.

* * *

Petitioners' sweeping constitutional assault on FINRA threatens a host of pernicious consequences. It would eviscerate the self-regulatory model that has efficiently and effectively protected investors and the markets for centuries, replace private corporate governance and self-regulation with government control, severely overburden the finite regulatory resources of the SEC, and mislabel vast swaths of private conduct as state action. If the Court reaches the merits, it should reject petitioners' unprecedented view of the Constitution's reach, which "would significantly endanger individual liberty and private enterprise." *Halleck*, 587 U.S. at 816.

CONCLUSION

The Court should dismiss or alternatively deny the petition for review.

fairness question"—not presented here—"whether an economically self-interested entity may exercise regulatory authority *over its rivals*." *Id.* at 27 (emphasis added).

Dated: August 1, 2024

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

This case involves important questions of constitutional law and an unusual procedural posture. Oral argument would assist the panel's resolution of the case.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirements of this Court's order dated March 5, 2024, Dkt. 30, because the brief contains 9,998 words, as determined by the word-count function of Microsoft Word 2019, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

2. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2024, I caused a true and correct copy of this document to be electronically filed through the Court's CM/ECF system, which will send a notice of filing to all registered users.

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