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,

Intervenor.

On Petition for Review of an Order of the
Securities and Exchange Commission

BRIEF FOR RESPONDENT SECURITIES AND EXCHANGE COMMISSION

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STATEMENT OF JURISDICTION

The Financial Industry Regulatory Authority, Inc. (FINRA), a private, self-regulatory organization of securities broker-dealers supervised by the Securities Exchange Commission (SEC), disciplined one of its broker-dealer members and that member's president for allegedly violating applicable rules. The Commission had jurisdiction to review FINRA's disciplinary decision under Section 19(d) of the Exchange Act. 15 U.S.C. § 78s(d). On December 7, 2023, the Commission issued an order sustaining findings of violations and sanctions that FINRA imposed against petitioners for their supervisory and record retention failures, while setting aside and remanding for further proceedings findings of violations and sanctions FINRA imposed against petitioners for their provision of false testimony and fabricated documents. JA1061-62. Petitioners filed a timely petition for review of the Commission's order. *See* Dkt. 3; 15 U.S.C. § 78y(a)(1). This Court has jurisdiction over the portion of the Commission's order upholding FINRA's sanctions under Exchange Act Section 25(a)(1), 15 U.S.C. § 78y(a)(1). As discussed below, this Court lacks jurisdiction over the portion of the Commission's order remanding to FINRA for further proceedings on the false-testimony and fabricated-documents charges because that component of the Commission's decision is not a "final order[.]" *Id.*

STATEMENT OF THE ISSUES

1. Whether the Commission's conclusion that petitioners violated FINRA rules regarding supervision and record retention is supported by substantial evidence.

2. Whether the Commission's decision to remand the false-testimony and fabricated-documents charges to FINRA is an unreviewable nonfinal order and in any event within the Commission's discretion.

3. Whether Exchange Act Section 25(c)(1), 15 U.S.C. § 78y(c)(1), bars this Court from considering petitioners' constitutional challenges, which fail in any event.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. The history of self-regulation in the securities industry

Since the early 1790s, securities professionals have organized among themselves to form stock exchanges and have agreed to be governed by a self-imposed set of industry rules. *See* Stuart Banner, *The Origin of the New York Stock Exchange, 1791-1860*, 27 J. Legal Stud. 113, 114-15 (1998). These private "business club[s]" lodged "the powers of [self-]government" in "a [self-]governing committee, whose decision, after the trial of a member for offenses under its laws, [wa]s final." *Belton v. Hatch*, 17 N.E. 225, 226-27 (N.Y. 1888).

In 1934, Congress determined that a system of "*[s]upervised* self-regulation" would preserve "the traditional private governance of exchanges" while allowing "the Government to monitor exchange business in the public interest." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127-28 (1973) (emphasis added). In 1938, Congress extended federally supervised self-regulation to private "national securities associations" of over-the-counter brokers and dealers, subjecting those private organizations to the same kind of "pervasive supervisory authority [of] the SEC" as the SEC possessed over the stock exchanges. *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 701 n.6, 732-33 (1975).

2. Overview of the current statutory framework

Self-regulatory organizations such as FINRA are required by statute to provide for "appropriate[] discipline[]" of their broker-dealer members when those members violate the association's rules or the federal securities laws. 15 U.S.C. § 78o-3(b)(6)-(7). Each registered self-regulatory organization is subject to SEC supervision of the organization's rules and disciplinary processes. *Id.* § 78s. The SEC reviews proposed rules and approves or rejects them, *id.* § 78s(b), and the SEC also has independent authority to "abrogate, add to, and delete from" any rule of a self-regulatory organization as the SEC "deems necessary or appropriate" to further the purposes of the statute, *id.* § 78s(c).

If a self-regulatory organization seeks to discipline a member for violating the rules, the organization must "bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record." 15 U.S.C. § 78o-3(h)(1).

FINRA's disciplinary actions are heard by a three-member panel, and the panel's decisions may be reviewed by FINRA's National Adjudicatory Council on appeal or on the Council's own initiative. FINRA Rules 9231, 9311.

Following that disciplinary process, a self-regulatory organization must notify the SEC of "any final disciplinary sanction" against a member. 15 U.S.C. § 78s(d)(1); 17 C.F.R. § 240.19d-1(c)(1). The SEC will review the disciplinary decision on application by an aggrieved person and may do so as well "on its own motion." 15 U.S.C. § 78s(d)(2); 17 C.F.R. §§ 201.420(a)(1), 240.19d-3. The SEC may stay the disciplinary sanction pending Commission review, whether on its own initiative or by application from the person aggrieved. 15 U.S.C. § 78s(d)(2); 17 C.F.R. §§ 201.401(d), 240.19d-2.

The SEC independently determines whether the aggrieved person engaged in the conduct that was the basis for the disciplinary sanction, whether that conduct violated the relevant rules, and whether the application of those rules to the aggrieved person is consistent with the purposes of the Exchange Act, such as protecting the public interest. 15 U.S.C. § 78s(e)(1)(A); *see, e.g.*, *Application of Scottsdale Capital Advisors*

Corp. for Review of Action Taken by FINRA, Exchange Act Release No. 93052, 2021 WL 4242630, at *7 (Sept. 27, 2021). The SEC may "affirm," "modify," or "set aside" the self-regulatory organization's disciplinary sanction, 15 U.S.C. § 78s(e)(1), as the SEC "deems appropriate," *NASD v. SEC*, 431 F.3d 803, 806 (D.C. Cir. 2005). A person aggrieved by the SEC's final order regarding the self-regulatory organization's disciplinary decision may seek judicial review in the appropriate court of appeals. 15 U.S.C. § 78y(a)(1).

3. Relevant FINRA and NASD rules

In 2007, the National Association of Securities Dealers (NASD) and the New York Stock Exchange consolidated their member oversight functions and formed a single, renamed self-regulatory organization, the Financial Industry Regulatory Authority, Inc., or FINRA. *Order Approving Proposed Rule Change To Amend the By-Laws of NASD*, 72 Fed. Reg. 42,169, 42,170 (Aug. 1, 2007).

Under the SEC's supervision, FINRA, like NASD before it, has established rules for its broker-dealer members. *See generally* FINRA, *FINRA Rules*, https://www.finra.org/rules-guidance/rulebooks/finra-rules (last visited July 3, 2024) (FINRA Rules); FINRA, *Retired NASD*

Rules, https://www.finra.org/rules-guidance/rulebooks/retired-rules-0 (last visited July 3, 2024) (NASD Rules). Relevant here, FINRA Rule 3110 and its predecessor, NASD Rule 3010, require members to establish, maintain, and enforce a supervisory system and written supervisory procedures that are reasonably designed to achieve compliance with applicable securities laws, regulations, and self-regulatory rules.[1] They also require members to conduct periodic inspections of firm offices and "retain a written record of the date upon which each review and inspection is conducted." FINRA Rule 3110(c)(1); *see* NASD Rule 3010(c)(1).

Among other things, a member's supervisory system and written supervisory procedures must be reasonably designed to achieve compliance with books and records requirements, including Exchange Act Section 17(a)(1), 15 U.S.C. § 78q(a)(1); Rule 17a-4 thereunder, 17 C.F.R. § 240.17a-4; and FINRA Rule 4511. Section 17(a)(1) requires broker-dealers to "make and keep for prescribed periods such records …

[1] NASD Rule 3010 governs conduct prior to December 1, 2014, which includes some of the conduct at issue in this case. *See* FINRA, *FINRA Regulatory Notice 14-10*, *SEC Approves New Supervision Rules*, https://www.finra.org/rules-guidance/notices/14-10 (Mar. 19, 2014).

and make and disseminate such reports as the Commission, by rule, prescribes[.]" Rule 17a-4 mandates that broker-dealers preserve required records for specified periods of time. And FINRA Rule 4511 instructs members to make and preserve the books and records required by Section 17(a) and Rule 17a-4. These provisions cover all business-related correspondence, including email, and enable the Commission's "[p]rompt access" to information that "is fundamental to [its] ability to discharge its examination, investigative and law enforcement responsibilities." *vFinance Invs., Inc.*, Exchange Act Release No. 62448, 2010 WL 2674858, at *8 (July 2, 2010) (cleaned up); *see Reporting Requirements for Brokers or Dealers Under the Securities Exchange Act of 1934*, Release No. 38245, 1997 WL 46859, at *5 (Feb. 5, 1997). Accordingly, "[i]mplicit in these requirements is that the records be accurate." *Meyers Assocs., L.P (n/k/a Windsor St. Cap., L.P.)*, Exchange Act Release No. 86497, 2019 WL 3387091, at *10 (July 26, 2019); *see Sinclair v. SEC*, 444 F.2d 399, 401 (2d Cir. 1971) (per curiam).

When FINRA examines or investigates members for compliance with books and records provisions or other applicable requirements, FINRA Rule 8210 authorizes FINRA staff to direct members or associated persons to provide relevant information orally, in writing, or electronically. A member or associated person violates the rule by providing false or misleading information. *See, e.g.*, *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 WL 3891311, at *7 (Aug. 22, 2008). Rule 8210 ensures that FINRA has the "ability to detect misconduct[.]" *PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1175 (D.C. Cir. 2009) (quotation marks omitted).

A violation of any securities law, regulation, or self-regulatory rule may also constitute a violation of FINRA Rule 2010, a "broad ethical principle" requiring members to observe "high standards of commercial honor and just and equitable principles of trade." *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 WL 1683914, at *1 n.3 (Apr. 18, 2013) (quotation marks omitted); *see Heath v. SEC*, 586 F.3d 122, 132 (2d Cir. 2009) (cleaned up). Under FINRA Rule 8310, sanctions available for such violations include imposing a fine on a member or associated person, suspending or expelling a member, and suspending or barring an associated person from associating with members.

B. Facts

1. Black formed Southeast and implemented a record retention policy wholly reliant on representatives' self-certifications.

Petitioner Frank Harmon Black has been in the securities industry since 1971. JA334. He formed petitioner Southeast Investments, N.C., Inc., a North Carolina broker-dealer, in 1997. JA335; JA1062. Southeast has been a FINRA member, with which Black has been associated, since then. JA1062.

During the relevant period, from 2010 to 2015, Black was the majority owner of Southeast and was the firm's President, Chief Executive Officer, and Chief Financial Officer. JA336. Southeast had a home office in Charlotte, North Carolina, and had approximately 130 registered representatives located throughout the United States who often worked from their residences. JA170. In accordance with written supervisory procedures that Black implemented, he was responsible for supervising Southeast's representatives to ensure that the firm was complying with its obligations to retain electronic correspondence. JA336-37.

In 2008, Southeast implemented a policy allowing its registered representatives to use private email accounts when conducting official firm business so long as they either copied or forwarded business emails to Southeast's home office. JA504. The policy required Southeast's representatives to annually certify that they were abiding by the policy. JA119.

2. Petitioners continued to use supervisory procedures governing email retention despite being repeatedly told by Commission staff and FINRA staff that those procedures were inadequate.

On three separate occasions, Commission and FINRA staff identified and informed Southeast and Black of infirmities in the firm's supervisory procedures governing email retention.

First, in 2011, Commission staff examined Southeast, *see* 15 U.S.C. § 78q(b), (j), and identified "deficiencies and weaknesses" in Southeast's supervisory procedures governing record retention, noting that "al[l] firms must have the ability to flag emails that may evidence misconduct" and "[r]elying on brokers to provide copies of their own emails to supervisors for review is hardly an effective means to detect such misconduct." JA33, 38 (quotation marks omitted).

Second, after a 2012 examination, FINRA staff found that Southeast failed to print and maintain at least 103 original emails, 123 attachments, and 21 regulatory emails; that failure led FINRA staff to conclude "that the firm's current method of retaining and reviewing electronic correspondence is inadequate." JA55-56.

Third, after a 2014 examination, FINRA staff again found that Southeast "failed to implement an adequate supervisory system for capturing and preserving incoming and outgoing electronic correspondence[,]" observing that Southeast was copied "on a very small percentage of actual incoming and outgoing email communications." JA101, 103. FINRA's examination of registered representative Richard Sebastian's South Carolina office was illustrative. Sebastian claimed he forwarded all business-related emails to Southeast's home office. JA286. Yet, after reviewing one-month's worth of Sebastian's emails, FINRA staff discovered 16 business-related emails in Sebastian's personal email account that Sebastian had not forwarded or copied to Southeast's home office, a discrepancy Sebastian attributed to an "oversight." JA286-89.

As part of the 2012 examination, FINRA examiners also checked to see if Black was inspecting Southeast's satellite offices. JA171-72. Southeast and Black produced documents, including calendars, checklists, and expense vouchers, indicating that Black inspected 43 offices between 2010 and 2012. JA64; JA1062-63; JA71; JA172,176. Three registered representatives whose offices were included in those documents gave written statements to FINRA that neither Black nor anyone else from Southeast had ever inspected their respective offices, and a fourth wrote that he did not recall any inspection. JA70; JA67; JA69; JA68. Black, on the other hand, gave investigative testimony that he had personally inspected all four offices. JA1063-64.

C. Procedural History

1. FINRA commenced disciplinary proceedings against Black and Southeast.

On September 15, 2015, FINRA commenced a disciplinary proceeding, alleging that Black and Southeast: (1) failed to establish, maintain, and enforce a supervisory system and written supervisory procedures reasonably designed to ensure the retention and review of business-related emails, in violation of NASD Rule 3010 and FINRA Rules 3110 and 2010; (2) failed to retain business-related emails of

Southeast's registered representatives, in violation of Exchange Act Section 17(a), Rule 17a-4, NASD Rule 3110, and FINRA Rules 4511 and 2010; and (3) provided false testimony and fabricated documents to FINRA regarding inspections of four Southeast registered representatives' offices, in violation of FINRA Rules 8210, 4511, and 2010. JA138-39; JA1065. A three-member panel consisting of a FINRA hearing officer and members of the securities industry held a four-day hearing, at which ten witnesses testified, including Black and the four relevant Southeast registered representatives. JA741 & n.2; JA1065; *see* FINRA Rule 9231(c).

2. A FINRA Hearing Panel imposed disciplinary sanctions and the NAC affirmed in part.

In March 2017, the Hearing Panel found that Black and Southeast engaged in the conduct alleged in the complaint. JA782; JA1065. For the supervisory violations, the Hearing Panel imposed a $120,000 fine jointly and severally against Black and Southeast. JA783; JA1067. The Hearing Panel also imposed a $50,000 fine, again on a joint-and-several basis, for the firm's failure to retain the 16 emails that Sebastian did not send to the home office. JA782; JA1067. Finally, for providing false testimony and fabricated documents, the Hearing Panel barred Black from associating with any FINRA member and fined Southeast $73,000. JA782-83; JA1067.

Black and Southeast appealed the Hearing Panel's decision to the National Adjudicatory Council (NAC), a FINRA committee consisting of 15 members of the securities industry and the public that reviews initial decisions rendered in FINRA disciplinary proceedings. JA824; JA1066; *see* FINRA Rules 9311, 9331; FINRA, *By-Laws of FINRA Regulation, Inc.* § 5.2(a), https://www.finra.org/rules-guidance/rulebooks/corporate-organization/number-members-and-qualifications (last visited July 3, 2024).

Following briefing and oral argument before a NAC subcommittee, the NAC issued an interim order regarding a "discovery issue." JA787; JA1066. Before the Hearing Panel, a FINRA examiner testified that she had taken notes of her initial calls with the four Southeast registered representatives who later testified. JA787; JA1066. But FINRA Enforcement had not produced the notes to petitioners and the Hearing Panel did not order it to do so. JA787-88; JA1066. The NAC instructed the Hearing Panel to direct FINRA Enforcement to produce the notes to petitioners. JA789; JA1066. The NAC also instructed the Hearing Panel to conduct further proceedings regarding whether FINRA Enforcement should have produced the notes before the hearing and, if so, whether the failure to do so was harmless error. JA789; JA1066.

Responding to the Hearing Panel's subsequent order, FINRA Enforcement represented that it could not locate the notes and instead produced, for the first time, near-contemporaneous emails from the FINRA examiner summarizing her notes and a summary memorandum by another FINRA examiner who was on the calls. JA791-92; JA1066. After additional briefing, the Hearing Panel concluded that the failure to produce the notes was, at most, "harmless error" because there was no evidence that the notes were exculpatory. JA819; JA1067.

On May 23, 2019, the NAC issued a decision finding that Black and Southeast committed the supervisory and record retention violations alleged in the complaint. JA824-25; JA1067. The NAC further found that Black and Southeast fabricated documents and gave false testimony concerning Black's purported inspections of Southeast's offices. And, like the Hearing Panel, the NAC found that FINRA

Enforcement's failure to produce the examiner's notes was at most harmless error. JA843-46; JA1067.

The NAC significantly reduced the fines for the supervisory and record retention violations. For the supervisory failures, the NAC imposed a joint-and-several fine of $73,000, reduced from $120,000. JA825; JA1067. For the failure to retain Sebastian's emails, the NAC imposed a joint-and-several fine of $500, reduced from $50,000 due to the small number of emails at issue. JA825; JA1067.

Finally, the NAC found that both the associational bar against Black and the $73,000 fine against Southeast were appropriate sanctions for the provision of false testimony and fabricated documents. JA825; JA1067. Given the associational bar, the NAC did not impose a fine on Black for those violations. JA825; JA1068 n.6.

3. The Commission sustained the NAC's decision regarding the supervisory violations but remanded the false-testimony and fabricated-documents charges.

Black and Southeast petitioned the Commission to review the NAC's decision, and Black also sought a stay of the associational bar. JA1067-68 & n.7. The Commission denied the stay. *See Southeast Invs.,* *N.C., Inc.*, Exchange Act Release No. 86097, 2019 WL 2448245, at *5 (June 12, 2019).

After an "independent review of the record[,]" the Commission affirmed the NAC's decision in part and remanded in part. JA1061-62, 1068. The Commission found that Southeast and Black failed to establish, maintain, and enforce a supervisory system and written supervisory procedures reasonably designed to ensure retention of business-related emails because the firm "retained only those emails that its registered representatives forwarded or copied to the home office without any review or monitoring[.]" JA1069. The Commission noted that Sebastian's inadvertent failure to comply with the email retention policy illustrated "the unreasonable design of this system." JA1070. The Commission also found that Southeast and Black failed to maintain and preserve the 16 business-related emails that Sebastian did not furnish to the home office. JA1072.

Regarding the contention that Southeast and Black provided false testimony and fabricated documents to FINRA, the Commission found that FINRA Enforcement's failure to produce its examiner's notes was error and was not harmless. JA1073-76. The Commission further found that there was no evidence that FINRA Enforcement's inadvertent "failure to preserve the notes was … so egregious as to justify dismissal." JA1075-76 & n.50. For that reason, the Commission remanded the false-testimony and fabricated-documents issues to FINRA, noting that Black may be entitled to both additional record development and "an adverse inference against FINRA Enforcement." JA1076. But the Commission "express[ed] no view as to whether the record would support this outcome[,]" or as to the outcome of the remand proceedings more generally. JA1076.

The Commission then sustained both the $73,000 joint-and-several fine for the supervisory violations and the $500 joint-and-several fine for the record retention violations. JA1077-80. The Commission concluded that for the supervisory violations, a fine "at the top of the … range" set by FINRA's sanction guidelines was warranted because Black and Southeast "failed to establish and maintain a reasonable supervisory system for ensuring email retention over the course of several years." JA1078. It was "especially troubling," the Commission found, that although Commission staff and FINRA "informed Southeast in 2012 and 2014 that its email retention system was inadequate," Black and Southeast "ignored those warnings and instead continued to use … an 'honor system.'" JA1078 (quotation marks omitted). The Commission considered, and rejected, the claim that "certain factors mitigate[d] the[] misconduct and support[ed] a lesser fine[,]" finding that specific warnings issued by Commission and FINRA staff in 2012 and 2014 superseded any recommendation FINRA staff might have given in 2008, and further finding that Southeast's decision to use a new system "after FINRA began its investigation" was not mitigating. JA1078-79. The $500 fine for the record-retention violations fell below the guidelines' recommended range and was unchallenged before the Commission. JA1079-80.

The Commission concluded that both fines will "impress upon" Black and Southeast "and other firms and their associated persons the importance of complying with" record retention and supervisory "requirements in the future" and "will have this effect without resort to a more serious sanction, such as a suspension or expulsion of Southeast or bar of Black from FINRA membership that would be unnecessary in light of the nature of [the] misconduct." JA1080.

Because the Commission remanded the false-testimony and fabricated-documents issues, it "set aside" Black's associational bar and Southeast's additional $73,000 fine. JA1082.

4. Black and Southeast initiated a parallel proceeding in district court.

While the case was pending before the Commission, Black and Southeast sued FINRA and the Commission in district court, raising, for the first time, constitutional challenges to FINRA's adjudicatory process. *See* JA1087. With the parties' agreement, the district court stayed the proceedings for six months due in part to the pendency of this appeal. *See* JA1098; JA1101.

SUMMARY OF ARGUMENT

I. Although Black and Southeast raise a plethora of arguments, only one is properly before this Court: their challenge to the factual predicate underpinning the Commission's decision to uphold FINRA's findings regarding their violations of FINRA rules governing record retention and supervision. That challenge is meritless. The Commission's detailed findings and its step-by-step rejection of each of petitioners' arguments—reasoning that petitioners do not controvert on appeal—easily surpass the substantial-evidence threshold.

Petitioners' contention that the Commission erred in remanding the portion of the disciplinary sanction regarding whether they provided false testimony and fabricated documents fares no better. As a threshold matter, this Court lacks jurisdiction over the portion of the Commission's decision remanding on this issue because it is not a final reviewable order. And, in any event, the Commission's decision to remand for FINRA to consider, in the first instance, the impact of the withheld-examiner notes was appropriate and consistent with this Court's precedents.

II. A. Petitioners' additional arguments are forfeited. "It is firmly established that, before an agency, parties must raise all issues they seek to maintain on appeal at the time appropriate under its practice," a requirement that "obliges a party to challenge an issue it disputes during an initial proceeding." *Edd Potter Coal Co. v. Director, Office of Workers' Comp. Programs,* 39 F.4th 202, 206-07 (4th Cir. 2022) (quotation marks omitted) (holding that the petitioner had forfeited an Appointments Clause challenge by failing to raise it before the agency). Congress has codified that principle for cases arising under the Exchange Act, providing that "[n]o objection to an order or rule of the

Commission, for which review is sought under this section, may be considered by the court [of appeals] 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 nevertheless devote the greater part of their brief to constitutional contentions that they at no point presented to the Commission. But they make no reference to 15 U.S.C. § 78y(c)(1), this Court's most relevant decisions, or the decisions of other circuits holding that petitioners had forfeited Appointments Clause challenges by failing to raise them before the SEC. *E.g.*, *Malouf v. SEC*, 933 F.3d 1248, 1255 (10th Cir. 2019). Petitioners offer no sound basis for failing to give effect to the statute and this Court's precedent or for concluding that other courts of appeals have uniformly erred in finding that Appointments Clause and other constitutional challenges have been forfeited in similar circumstances. The Court thus need not and should not reach these forfeited arguments.

B. Those arguments fail in any event. As Chief Judge Sutton explained in a recent opinion upholding a similar statutory scheme modeled in part on the provisions of the securities statutes at issue here, "[i]n case after case, the courts have upheld" SEC supervision of private, self-regulatory organizations like FINRA, "reasoning that the SEC's ultimate control over the rules and their enforcement makes the [self-regulatory organizations] permissible aides and advisors" in satisfaction of private-nondelegation principles. *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023), *cert. denied*, No. 23-402, 2024 WL 3089535 (U.S. June 24, 2024). A court engages in a private-nondelegation inquiry precisely because the entity in question is not a government agency. The Appointments Clause has no application to the private corporate officers of a private corporation because they are not Officers of the United States subject to the structural constitutional requirements of Article II. As this Court has explained, failure to make the "threshold" showing that a corporation is part of the government itself "is fatal to [a litigant's] claims under the Appointments Clause." *Kerpen v. Metropolitan Washington Airports Auth.*, 907 F.3d 152, 160 (4th Cir. 2018). And petitioners' forfeited invocations of jury trial rights at common law and the indivisibility of the judicial power, as well as their forfeited allegations of bias, do not grapple with the long tradition in this country of private professional associations conducting disciplinary proceedings.

STANDARD OF REVIEW

In reviewing a Commission order, Commission findings of fact must be upheld "if supported by substantial evidence[.]" 15 U.S.C. § 78y(a)(4). This standard is "highly deferential," and the Commission's factual findings are treated "as conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Madrid-Montoya v. Garland*, 52 F.4th 175, 179 (4th Cir. 2022) (quotation marks omitted); *see West v. SEC*, 641 F. App'x 27, 28-29 (2d Cir. 2016). The Commission's legal conclusions must be upheld "unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Greatwide Dedicated Transp. II, LLC v. U.S. Dep't of Labor*, 72 F.4th 544, 552 (4th Cir. 2023) (quotation marks omitted).

ARGUMENT

I. Substantial Evidence Supports The Commission's Finding That Petitioners Violated FINRA Rules Governing Supervision And Record Retention.

The only issue properly before the Court is petitioners' challenge to the Commission's determinations that their supervisory system and written supervisory procedures were insufficient to ensure compliance with record retention requirements, and that they failed to retain 16 business-related emails. Br. 52. Petitioners identify no legal error in the Commission's analysis, and their contrary factual assertions cast no doubt on the Commission's findings.

As the Commission found, because Southeast allowed registered representatives to use private email addresses to conduct business, the firm had "no access or control" over its representatives' business-related emails. JA1069. Southeast instead "relied entirely" on its representatives always remembering to forward business-related emails to the home office without ever "audit[ing]" or otherwise checking if Southeast's representatives were complying with that email retention policy. JA1069. The Commission further found that Sebastian's failure to forward 16 of his business-related emails to the home office was emblematic of the "unreasonable design of this system" because the "failure resulted from an oversight, not any intentional circumvention" of the policy. JA1069-70. "[E]ven though the policy could fail due to inadvertence or inattention[,]" the Commission found, the firm "did not conduct *any* monitoring for compliance[.]" JA1070. The Commission concluded that the absence of "a system to prevent or detect such inadvertent failures establishes that the firm's policy was not reasonabl[y] designed to ensure compliance with the Exchange Act." JA1070.

In this Court, petitioners "do not dispute that a Southeast employee lost 16 emails[,]" Br. 52 n.19, nor do they dispute that Black was responsible for the firm's supervisory system, written supervisory procedures, and retention of records (including email). The arguments they do make merely repeat assertions that they advanced before the Commission, without grappling with the Commission's well-founded rejection of those arguments.

First, petitioners contend that they implemented their "honor" system "at FINRA's suggestion" in *2008*. Br. 54. But the Commission reasonably found that, "even accepting that this is true, Commission and FINRA staff in *2012 and 2014*, respectively, put [petitioners] on notice that they believed the email retention system was inadequate." JA1070 (emphasis added); *see* JA765-67; JA55-56. Petitioners observe that the 2012 letter from Commission staff cited "only a FINRA Press Release[,]" which "is not a regulatory requirement." Br. 56. But as the Commission found, "the letter explicitly notified" petitioners that "in the view of the staff, the firm's email retention system was not reasonable and needed to be revised[,]" and FINRA echoed that finding after conducting on-site examinations in both 2012 and 2014. JA1070; *see* JA766-67; JA55-56. Petitioners' assertion that the Commission and FINRA did not communicate "that Southeast must adopt a different system" or "that a change was legally required[,]" Br. 57, is accordingly incorrect.

Second, invoking a FINRA regulatory notice, petitioners assert that FINRA "permits flexibility in designing supervisory systems[.]" Br. 54. But as Commission staff explicitly told Black, that flexibility is not unbounded. JA38 ("[A]lthough FINRA's rules afford firms the flexibility to tailor procedures that are appropriate for their particular business models[,] al[l] firms must have the ability to flag emails that may evidence misconduct." (quotation marks omitted)). Petitioners concede that supervisory systems nevertheless must be reasonable (Br. 52-53) and, as the Commission found, the regulatory notice petitioners invoke "[n]owhere … suggest[s] that it was appropriate" for a broker-dealer to rely entirely on an honor system for email retention. JA1070.

Third, petitioners claim that "Southeast's experience with the honor system also shows it was reasonable[,]" because the firm required its representatives to certify compliance annually and its email use was "minimal." Br. 55-56. But the Commission's findings with respect to Sebastian's failure to send business-related emails to the home office, *see* JA1070, belie this claim. More generally, the Commission has held that "supervisory procedures must establish mechanisms for ensuring compliance and detecting violations." JA1071 & n.23 (quoting *John A. Chepak*, Exchange Act Release No. 42356, 2000 WL 49226, at *2 (Jan. 24, 2000)). The Commission's conclusion that Southeast's honor system was not reasonable adheres to its "repeated[]" holding "that supervisors cannot rely on the unverified representations of their subordinates." JA1071 & n.24 (quoting *Stephen J. Horning*, Exchange Act Release No.

56886, 2007 WL 4236161, at *10 (Dec. 3, 2007), *aff'd*, *Horning v. SEC*, 570 F.3d 337 (D.C. Cir. 2009)).

Finally, petitioners emphasize that Southeast installed an "email archival system" in 2015 that "fixed the supervisory problem[.]" Br. 58. But as the Commission found, "the eventual use of an automated email retention system does not negate [the] supervisory violations" that occurred prior to 2015. JA1071.

II. This Court Lacks Jurisdiction To Review The Commission's Decision To Remand The Remaining Issues To FINRA, Which Was In Any Event Reasonable.

Petitioners also challenge the Commission's decision to remand the false-testimony and fabricated-documents issues to FINRA, rather than foreclosing those charged violations due to FINRA Enforcement's failure to preserve the FINRA examiner's call notes. Br. 50-52. But that decision is not a "final order[,]" 15 U.S.C. § 78y(a)(1), so this Court cannot review it. Regardless, the Commission reasonably determined that a remand was "appropriate," 15 U.S.C. § 78s(e)(1)(B), because FINRA Enforcement's "inadvertent, even if negligent, failure to preserve the notes was not … egregious[.]" JA1076.

A. The Remand Decision Is An Unreviewable Nonfinal Order.

This Court equates the term “final order” in Exchange Act Section 25(a)(1) with the “final agency action” requirement in the Administrative Procedure Act. *Bennett v. SEC*, 844 F.3d 174, 183 (4th Cir. 2016). Accordingly, a Commission decision is final and reviewable if: (1) it “mark[s] the consummation of the agency’s decisionmaking process”; and (2) is “one by which rights or obligations have been determined, or from which legal consequences will flow[.]” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation marks omitted); *see also Kouambo v. Barr*, 943 F.3d 205, 212 (4th Cir. 2019) (applying *Bennett* to determine whether agency action was a “final order” under the Immigration and Nationality Act). Courts have applied this framework to Commission orders remanding FINRA orders. *See Saliba v. SEC*, 47 F.4th 961, 967-70 (9th Cir. 2022) (applying *Bennett* to conclude that the portion of a Commission decision upholding a violation and certain sanctions was final and reviewable but the portion of the Commission decision remanding a sanction was nonfinal and not reviewable); *Gaskill v. SEC*, No. 23-1139, 2024 WL 2734998, at *2 (D.C. Cir. May 28, 2024) (per curiam) (concluding that Commission’s “remand order” was "non-final agency action" (quotation marks omitted)). Both requirements must be satisfied for a decision to be final. *Howard Cty. v. FAA*, 970 F.3d 441, 449 n.3 (4th Cir. 2020); *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432 (4th Cir. 2010).

Petitioners cannot get past the first requirement. The Commission recognized that "further proceedings" before FINRA regarding the false-testimony and fabricated-documents issues "might include … further record development" in light of newly produced evidence, and the Commission "express[ed] no view" as to Black's liability regarding these issues on remand. JA1076. Where such issues "remain[] unresolved when [the] case [is] remanded[,]" an order is not final. *Kouambo*, 943 F.3d at 212; *Gaskill*, 2024 WL 2734998, at *2 ("[A]n agency remand order is generally considered non-final for the purpose of judicial review." (quotation marks omitted)). In addition, "[o]rdinarily, a final agency action means a final order imposing some sort of sanction." *Saliba*, 47 F.4th at 968-69 (quotation marks omitted). But here, the Commission "set aside … for further consideration" the sanctions FINRA imposed. JA1082. The Commission also "express[ed] no view" as to the propriety of an adverse inference against FINRA Enforcement for its failure to preserve the notes. JA1076. Because the Commission's remand order does not resolve whether petitioners provided false testimony or fabricated documents; what sanction might be appropriate if they did; whether FINRA Enforcement should be sanctioned for its alleged spoliation; or what the result might be if—depending on the outcome on remand—Black appeals FINRA's findings to the Commission again, the Commission's decisionmaking process is far from complete.

Moreover, absent a finding of violation or imposition of a sanction, the Commission's remand order "has no legal consequences" for petitioners. *Saliba*, 47 F.4th at 969. Petitioners object to "again fac[ing] FINRA's unconstitutional private adjudication." Br. 50. But remand for further proceedings has never been thought to generate "legal consequences" within the meaning of *Bennett*. That is precisely why remand orders are the canonical example of nonfinal agency action not subject to immediate judicial review, even though the entire point of remand is holding additional proceedings.

The range of possible outcomes on remand underscores the non-final nature of this portion of the Commission's order. On remand, FINRA Enforcement could decide to forego seeking to establish the false-testimony and fabricated-documents violations. Or FINRA could decide that petitioners did not commit the alleged violations. Or FINRA could find those violations and issue sanctions and the Commission could set aside those determinations. In those circumstances, petitioners would not be aggrieved by any final order of the Commission and there would thus be nothing for this Court to review under the direct review statute at issue here. And if, on the other hand, FINRA determines that petitioners committed the alleged violations and imposes sanctions, and the Commission upholds those sanctions, petitioners could seek this Court's review at that time, including on the issue of whether the sanctions should be vacated due to spoliation. That the remand decision is not final "does not render the Commission's entire opinion" unreviewable, because "the issues for which the Commission issued sanctions may be considered a 'final order' on their own as part of a final disposition." *Saliba*, 47 F.4th at 968 (explaining that the APA defines "'order' broadly as 'the whole or part of a final disposition'"(quoting 5 U.S.C. § 551(6)).

B. The Remand Decision Was Within The Commission's Discretion.

In any event, the Commission's decision to remand the false-testimony and fabricated-documents issues to FINRA was reasonable. Once it "set aside the sanction[s]" FINRA imposed, the Commission was statutorily empowered to "remand" to FINRA "for further proceedings" if the Commission deemed a remand "appropriate[.]" 15 U.S.C. § 78s(e)(1)(B). The Commission reasonably exercised its discretion in concluding that such a remand was appropriate here.

Recognizing that petitioners could seek review in this Court, the Commission found this Court's case law governing spoliation instructive (JA1075) in deciding the appropriate remedy for FINRA Enforcement's failure to preserve the FINRA examiner's call notes. This Court has held, and petitioners do not dispute, that "dismissal on the basis of spoliation of evidence is only appropriate if the conduct was" particularly "egregious" or "if the effect of the conduct was 'so prejudicial that it substantially denied the defendant the ability to defend'" itself. *Loveless v. John's Ford, Inc.*, 232 F. App'x 229, 236-37 (4th Cir. 2007) (per curiam) (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001)). But dismissal generally is not warranted where "evidence is simply transformed from one form into another" and there is no indication that a failure to preserve was intended to deprive the opposing party of evidence. *Id.*

Under that standard and based on the record before it, the Commission determined that FINRA Enforcement's failure to preserve the notes was "inadvertent," and perhaps negligent, but "not so egregious as to justify dismissal." JA1076. As the Commission found, the examiner "submitted a declaration stating that she summarized the contents of the notes in her emails, and there is no evidence that the loss of the notes was intended to destroy evidence." JA1075. Because "FINRA Enforcement preserved the substance of the notes" in the examiner's emails, as well as a memorandum by another examiner who was on the calls, the loss of the notes "did not deny" petitioners "the ability to defend the case or amount to a wholesale destruction of primary or dispositive evidence." JA1076.

Petitioners do not dispute these findings. Instead, they assert, without evidence, that "FINRA's spoliation [led] to FINRA Enforcement giving altered and misleading testimony at the hearing[.]" Br. 51. And they incorrectly claim that there is now "no evidence in the record controverting Black/Southeast's documentary evidence and truthful testimony that Black indeed conducted office inspections." Br. 51-52. Although the Commission determined that FINRA Enforcement's failure to preserve the notes was not harmless, the remand order did not cast doubt on the testimony of the four Southeast registered representatives who said that Black did not inspect their offices. Rather, the Commission directed FINRA to conduct further proceedings, which "might include, should [petitioners] request it, further record development through cross-examination of" those representatives, "with the benefit of" the examiners' emails and memorandum regarding their initial calls with those representatives. JA1076. Contrary to petitioners' assertion that the Commission "refus[ed] to sanction FINRA[,]" Br. 51, the Commission also left open the possibility of an adverse inference against FINRA Enforcement if the record supports it. JA1076.

The Commission's decision to remand for FINRA to address these issues in the first instance accords with the general principle that "in the case of procedural noncompliance," "the appropriate relief is to remand" for the process to be "properly applied." *Wilson v.*

UnitedHealthcare Ins. Co., 27 F.4th 228, 242 (4th Cir. 2022). This Court took the same approach in *International Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383 (4th Cir. 2000), on which petitioners rely (at Br. 51). Rather than directing the outcome due to an arbitrator's failure to hear evidence, the Court "vacat[ed] the arbitration award and remand[ed] the case to the arbitrator for the evidentiary hearing required[.]" *Id.* at 391.

III. Petitioners Forfeited Their Constitutional Arguments, Which Would Fail If They Were Properly Before The Court.

A. The Exchange Act Bars Consideration Of The Constitutional Arguments That Petitioners Never Presented To The Commission.

"It is firmly established that, before an agency, parties must raise all issues they seek to maintain on appeal at the time appropriate under its practice." *Edd Potter Coal Co. v. Director, Office of Workers' Comp. Programs*, 39 F.4th 202, 206 (4th Cir. 2022) (quotation marks omitted). As this Court has explained, rigorously enforcing "forfeiture is essential to the orderly administration of justice, not a mere technicality." *Id.* (quotation marks omitted). "Arguments made in initial administrative proceedings should not be treated as a rough draft, to be expanded whenever a new idea pops into a party's head," because "the very word 'review' presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance." *Id.* at 207 (quotation marks omitted).

Accordingly, "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). That rule conserves administrative and judicial resources and "discourag[es] gamesmanship" and "sandbagging" by "prevent[ing] litigants from abiding the outcome of a [proceeding] and then overturning it if adverse upon a technicality of which they were previously aware." *Joseph Forrester Trucking v. Director, Office of Workers' Comp. Programs*, 987 F.3d 581, 592-93 (6th Cir. 2021) (quotation marks omitted) (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (plurality opinion)).

Congress has codified that principle in the Exchange Act, which provides that "[n]o objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court [of appeals] unless it was urged before the Commission or there was reasonable ground for failure to do so." 15 U.S.C. § 78y(c)(1). "Failure to comply with [this] mandatory exhaustion requirement prevents judicial review of the issue." *Malouf v. SEC*, 933 F.3d 1248, 1256 (10th Cir. 2019). Where "Congress sets the rules" mandating issue exhaustion before an agency under specified terms, Congress also "foreclos[es] judicial discretion" to excuse forfeiture on other terms not specified in the statute. *Ross v. Blake*, 578 U.S. 632, 639 (2016).

Without acknowledging the governing statutory provision, petitioners devote the bulk of their opening brief to new arguments, not presented to the Commission, implicating the private-nondelegation doctrine, the Appointments Clause, Article III, the Seventh Amendment, and the Due Process Clause. Br. 18-50.

Petitioners' constitutional objections, pressed for the first time in this Court on direct review after petitioners obtained new counsel, are thus forfeited and ineligible for direct review. *See Malouf*, 933 F.3d at 1255 (applying this forfeiture provision to similar constitutional claims); *Gonnella v. SEC*, 954 F.3d 536, 544 (2d Cir. 2020) (same); *Springsteen-Abbott v. U.S. SEC*, 989 F.3d 4, 7-8 (D.C. Cir. 2021) (same); *Cooper v.*

U.S. SEC, 788 F. App'x 474, 475 (9th Cir. 2019) (same); *see also Edd Potter*, 39 F.4th at 206-13 (applying a related forfeiture provision to similar constitutional claims)*; Fleming v. USDA*, 987 F.3d 1093, 1097-1103 (D.C. Cir. 2021) (same); *Joseph Forrester Trucking*, 987 F.3d at 588-89 (same); *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (same); *cf. K & R Contractors, LLC v. Keene*, 86 F.4th 135, 144 (4th Cir. 2023) (reaching unexhausted constitutional removal issue where the agency affirmatively waived an issue-exhaustion requirement the agency had created by regulation).

Petitioners make no attempt to identify any "reasonable ground" for their failure to timely present these arguments to the Commission that might excuse their failure to comply with the statute. 15 U.S.C. § 78y(c)(1). That failure, alone, should foreclose their ability to raise any such purported ground for the first time in reply. Insofar as they may have thought the Commission would rule against them, "a pessimistic view of the Commission's likelihood of granting the motion is not enough to overcome the traditional rule mandating litigants to lodge their objections during the administrative proceedings." *Gonnella*, 954 F.3d at 545. Issue-exhaustion rules "allow[] agencies to take into account the specific facts of each matter, and to change course if appropriate." *Gilmore v. Weatherford*, 694 F.3d 1160, 1169 (10th Cir. 2012) (citation omitted). Indeed, as the Supreme Court has explained, litigants must exhaust issues before an agency even if the agency were thought to be "required" by a "predetermined policy" to "overrule the objection if made." *L.A. Tucker Truck Lines*, 344 U.S. at 37. As the Court noted, an agency "is obliged to deal with a large number of like cases," and "[r]epetition of the objection in them might lead to a change of policy, or, if it did not, the [agency] would at least be put on notice of the accumulating risk." *Id.* Accordingly, "the SEC's past response" rejecting an objection "alone is not a sufficient ground for presuming futility." *C.E. Carlson, Inc. v. SEC*, 859 F.2d 1429, 1439 (10th Cir. 1988); *cf. Lucia v. SEC*, 585 U.S. 237, 244 (2018) (noting that the government had defended the Commission's position that SEC administrative law judges are not constitutional officers, but "switched sides" in response to a certiorari petition).

The constitutional nature of the objections at issue here does not change the analysis. As this Court has explained, "no procedural principle is more familiar than that a constitutional right may be forfeited when a party fails to make timely assertion of the right" in an administrative agency. *Edd Potter*, 39 F.4th at 206 (cleaned up) (holding Appointments Clause challenge forfeited). The Supreme Court has noted the imperative of preserving the kind of constitutional claims at issue here: A "*timely* challenge to the constitutional validity of the appointment of an officer"—one that is presented "before the Commission" before being pressed in the court of appeals on direct review—will receive judicial review. *Lucia*, 585 U.S. at 251 (emphasis added) (quotation marks omitted). By the same token, under this Court's precedent, a constitutional claim that is forfeited under the terms of the statute, by the petitioner's failure to raise it before the Commission, is ineligible for judicial review on direct appeal from a final decision of the Commission. *Edd Potter*, 39 F.4th at 206-13.

"Constitutional considerations, no matter how important or 'fundamental,' can be forfeited"—especially where, as here, Congress has enacted an "explicit" "exhaustion requirement." *RELCO Locomotives*, 734 F.3d at 798 (quoting *Freytag v. Commissioner*, 501 U.S. 868, 893 (1991) (Scalia, J., concurring in part and concurring in the judgment)). An agency thus does not err "in failing to identify, raise, and resolve *sua sponte* an issue never presented to [it]," including Appointments Clause arguments. *Fleming*, 987 F.3d at 1100; *see also Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 750 (6th Cir. 2019).

The courts of appeals have unanimously held that the Exchange Act's statutory "exhaustion requirement encompasses constitutional claims," including Appointments Clause claims similar to the ones here, just as it does any other forfeited objection. *Malouf*, 933 F.3d at 1256 n.5 (citing *C.E. Carlson*, 859 F.2d at 1439). "Constitutional claims are no different." *Gonnella*, 954 F.3d at 543. A "constitutional argument does not categorically qualify as a 'reasonable ground'" excusing forfeiture. *Springsteen-Abbott*, 989 F.3d at 9 (declining to review Appointments Clause challenge to FINRA that was raised for the first time in the court of appeals). And the statutory exhaustion requirement "is not inapplicable solely because the objection not urged before the SEC is a constitutional one." *Stoiber v. SEC*, 161 F.3d 745, 754 (D.C. Cir. 1998).

The Supreme Court's decision in *Axon Enterprise, Inc. v. Federal Trade Commission*, 598 U.S. 175 (2023), does not alter the statutory requirement that petitioners seeking direct review in the court of appeals must present their arguments to the Commission in the first instance. The issue in *Axon* was whether a litigant could present certain arguments in district court rather than before the agency followed by review in the court of appeals. The Supreme Court recognized that Congress has provided for direct review in the court of appeals of final orders of the Commission and that such direct-review provisions generally "divest[] district courts" of jurisdiction. *Id.* at 185. The Court concluded, however, that district courts could review certain constitutional claims challenging an allegedly "unconstitutionally structured decisionmaking process," brought before an agency reaches a final decision, where the plaintiff's alleged injury is the process itself and where judicial review of a final agency order after the process comes to a close would come too late. *Id.* at 192. Under those circumstances, the Court held, "[a] district court" can review the plaintiff's constitutional challenge to the structure of agency decisionmaking. *Id.* at 196.

Axon thus establishes that plaintiffs may file certain structural constitutional challenges to ongoing administrative proceedings in district court. And petitioners here, citing *Axon*, have indeed filed a (since-stayed) suit in district court seeking to raise the same constitutional arguments they press in this petition for review. *See Black v. FINRA*, No. 3:23-CV-709 (W.D.N.C. filed Oct. 30, 2023). Whether those claims are properly presented in district court under *Axon* is a matter for the district court to address in that separate case in the first instance. The key point here is that a party choosing to proceed before the Commission under the specialized review provisions of 15 U.S.C. § 78s and § 78y(c)(1) cannot decline to raise arguments—constitutional or otherwise—and then assert them for the first time in the court of appeals notwithstanding the express and mandatory terms governing such review.

As the courts of appeals have correctly recognized after *Axon*, "structural [constitutional] challenges have no special entitlement to review on appeal from the agency" under a direct-review provision, where petitioners have forfeited such a challenge by failing to present it to the agency, and "[*Axon*] does not apply" to alter that analysis. *Smith v. Board of Governors of Fed. Reserve Sys.*, 73 F.4th 815, 823 & n.9 (10th Cir. 2023) (citation and quotation marks omitted). Notwithstanding *Axon*, "[w]hen litigants *choose* to use a statutory review mechanism" providing for direct review in a court of appeals, "they must still meet its strictures," including issue-exhaustion requirements provided by statute. *Heating, Air Conditioning & Refrigeration Distribs. Int'l v. Environmental Prot. Agency*, 71 F.4th 59, 65 n.2 (D.C. Cir. 2023).

In sum, petitioners' constitutional claims are forfeited and unreviewable under the mandatory issue-exhaustion requirement of 15 U.S.C. § 78y(c)(1). This Court does not allow petitioners to "throw a monkey wrench into a finely tuned system" of administrative review by "tak[ing] a second bite of the apple when the first is not to their liking." *Edd Potter*, 39 F.4th at 209, 212.

B. Petitioners' Constitutional Claims Would Fail In Any Event.

The governing statute and a wealth of case law make clear that this Court should not reach petitioners' constitutional claims, which were never presented to the Commission. Were the claims before the Court, they would properly be rejected. Self-regulatory organizations such as FINRA have played a crucial role in the securities industry since the founding. The Exchange Act subjected the self-regulatory organizations to federal oversight that subordinates FINRA to the SEC.

That calibrated statutory structure is consistent with nearly 100 years of Supreme Court guidance establishing that private bodies may play a role in a statutory scheme as long as they are subject to adequate agency supervision.

A private body functioning consistent with those principles is not part of the government. And the private officials of such a private body are not covered by the Appointments Clause, which applies only within the government to "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Petitioners do not explain how a private, self-regulatory organization that is not part of the government would nonetheless exercise the judicial power of the United States when it decides for itself whether a member has violated standards and, if so, whether the member should be disciplined.

1. FINRA functions subordinately to the Commission in satisfaction of private-nondelegation principles.

a. For nearly 100 years, the Supreme Court and the courts of appeals have recognized that "a private entity may aid a public federal entity that retains authority" over it. *Oklahoma v. United States*, 62 F.4th 221, 228-29 (6th Cir. 2023), *cert. denied*, No. 23-402, 2024 WL

3089535 (U.S. June 24, 2024). That test derives from *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940). There, the Supreme Court upheld a statute under which local boards consisting of private coal producers chosen by private coal producers "operate[d] as an aid to the [National Bituminous Coal] Commission but subject to its pervasive surveillance and authority." *Id.* at 388. The governmental Coal Commission was "empowered to fix minimum prices" for coal following a procedure in which the private boards would "propose minimum prices," which "may be approved, disapproved, or modified by the [Coal] Commission." *Id. Adkins* concluded that the statute was "unquestionably valid" because "members of the [private boards] function subordinately to the [Coal] Commission," which "has authority and surveillance over the[ir] activities." *Id.* at 399.

In the following decades, the courts of appeals repeatedly applied these principles to uphold SEC supervision of private self-regulatory organizations against private-nondelegation challenges. As Chief Judge Sutton recently explained in upholding a statutory scheme involving self-regulation in the horseracing industry, modeled in part on the provisions of the securities statutes at issue here, "[i]n 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*, 62 F.4th at 229.[2]

If this Court reaches the merits of petitioners' constitutional arguments, it should join the unanimous view of its sister circuits. Self-regulation in the securities industry dates back to the founding. The Exchange Act simply ensures that the industry's traditional self-regulation comports with statutory requirements designed to protect the public by placing the self-regulatory organizations under the close supervision of the SEC.

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[2] *See R. H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012-13 (3d Cir. 1977); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Sorrell v. SEC*, 679 F.2d 1323, 1325-26 (9th Cir. 1982); *cf. Association of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 n.5 (D.C. Cir. 2013) (explaining that the self-regulatory-organization cases "resemble *Adkins*" in light of the SEC's supervisory powers), *vacated on other grounds*, 575 U.S. 43 (2015); *National Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 887 (5th Cir. 2022) ("[A]lthough FINRA plays an important role in formulating securities industry rules, its role is ultimately 'in aid of' the SEC, which has the final word." (citing *Adkins*, 310 U.S. at 388)).

Starting in the early 1790s, stockbrokers organized among themselves and agreed to be governed by a self-imposed set of industry rules backed by self-assessed fines and the threat of expulsion from private stock exchanges. *See, e.g.*, SEC Historical Soc'y, *The Institution of Experience: Self-Regulatory Organizations in the Securities Industry, 1792-2010*, https://perma.cc/B7FV-N98H. Thus organized, stock exchanges operated as private "business club[s]" supervising the conduct of their own members via "a [self-]governing committee, whose decision, after the trial of a member for offenses under its laws, [wa]s final." *Belton v. Hatch*, 17 N.E. 225, 226-27 (N.Y. 1888).

In the first decades of the twentieth century, the "ungoverned self-regulation" of securities exchanges became "more and more obviously inadequate, with acceleratingly grave consequences." *Silver v. New York Stock Exch.*, 373 U.S. 341, 351 (1963). The stock market crash of 1929 convinced Congress of the need for "[*s*]*upervised* self-regulation" to preserve "the traditional private governance of exchanges" while allowing "the Government to monitor exchange business in the public interest." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127-28 (1973) (emphasis added). To that end, the 1934 Exchange

Act established the SEC, required all national stock exchanges to register with the Commission, and granted the SEC power to supervise exchange self-regulation by reviewing and amending the rules of the exchanges to protect the public. *Id.* at 128-30.

The Maloney Act of 1938, Pub. L. No. 75-719, 52 Stat. 1070, amended the Exchange Act to extend that system of oversight to the over-the-counter market in which securities transactions occur outside of the exchanges. The Exchange Act, as amended, subjected to SEC supervision the self-regulatory activities of the pre-existing private national securities associations, such as FINRA's predecessor. *See* NASD for Special Subcomm. on Legis. Oversight of H. Comm. on Interstate and Foreign Commerce, 85th Cong., *History of National Association of Securities Dealers, Inc.* 3 (Subcomm. Print 1959), https://perma.cc/W8K6-AEQQ; *Order Approving Proposed Rule Change To Amend the By-Laws of NASD*, 72 Fed. Reg. 42,169, 42,170 (Aug. 1, 2007).

The Exchange Act places self-regulatory securities organizations, such as exchanges and securities associations, under the "pervasive supervisory authority [of] the SEC" in order to protect "the public interest," as the Supreme Court has recognized. *United States v. NASD*, 422 U.S. 694, 732-33 (1975). Under the current statutory framework, FINRA may "propose[] rule[s]" to govern its members, but, in general, "[n]o proposed rule" may "take effect unless" it has been approved by the SEC after public notice and comment. 15 U.S.C. § 78s(b)(1). The SEC generally may approve a proposed FINRA rule only if the SEC finds, in its own judgment, that the proposed rule is "consistent with the requirements of" the Exchange Act and SEC regulations. *Id.* § 78s(b)(2)(C). The SEC may also initiate its own rulemaking to "abrogate, add to, and delete from" any FINRA rule as the SEC "deems necessary" to further the purposes of the statute. *Id.* § 78s(c). That broad power ensures that the private self-regulatory organization's "rulemaking power is subordinate to the [agency's]," as the Fifth Circuit recently held with respect to a self-regulatory scheme for horseracing. *National Horsemen's Benevolent & Protective Ass'n v. Black*, -- F.4th --, 2024 WL 3311366, at *5 (2024). The SEC also ensures that FINRA complies with the statutory requirements to be registered as a self-regulatory organization and may suspend its registration or limit its activities if appropriate. 15 U.S.C. §§ 78s(h)(1), 78o-3(b).

The SEC also exercises supervisory authority over FINRA's internal self-disciplinary decisions. FINRA's rules addressing investigation and discipline of its members for violating the rules are—like all other such FINRA rules—subject to the SEC's approval and amendment. *See* 15 U.S.C. § 78s(b)(1), (c). And any final decision by FINRA to discipline a member is subject to SEC review. *See id.* § 78s(e). The SEC may initiate such review either "on its own motion" or on petition by an aggrieved party. *Id.* § 78s(d)(2). The SEC may also stay any final disciplinary sanction pending such review, either *sua sponte* or on request, and may do so summarily. *Id.*; 17 C.F.R. §§ 201.401, 240.19d-2. In conducting its review of a disciplinary sanction, the SEC may consider additional evidence and arguments not presented before FINRA, may "fully revisit[] the issue of liability," and may affirm, set aside, or reduce FINRA's disciplinary sanction "as it deems appropriate." *NASD v. SEC*, 431 F.3d 803, 806 (D.C. Cir. 2005).

Accordingly, as other courts of appeals have consistently held, SEC supervision of FINRA's self-disciplinary activities comports with private-nondelegation principles because FINRA "function[s] subordinately" to the SEC in all relevant respects. *Adkins*, 310 U.S. at

399; *cf. Kerpen v. Metropolitan Washington Airports Auth.*, 907 F.3d 152, 162 (4th Cir. 2018) (recognizing that the federal government may "delegate" to "private entities," under government supervision, the authority "to incarcerate, to confine, to discipline, to feed, and to provide medical and other care to inmates who are imprisoned by order of the federal government" (cleaned up)).

b. Petitioners do not address the long history of private industry self-regulation in this area and the uniform caselaw upholding this statutory scheme against private-nondelegation challenges. Petitioners' bare assertion that self-discipline is "necessarily a government function," Br. 28 (quotation marks omitted), is belied by the centuries of history they ignore. As discussed above, private, self-regulatory securities organizations have, since the founding, decided for themselves whether to investigate a member for rules violations, decided whether a violation has occurred through specified procedures, and decided whether to assess fines or revoke membership because of a rule violation. As this Court has recognized, a private entity may play a role in a statutory scheme by exercising "private" "power[s]" possessed by other traditionally private entities, such as calculating and seeking payment of monetary obligations under governmentally prescribed rules. *Pittston Co. v. United States*, 368 F.3d 385, 396-97 (4th Cir. 2004). The Constitution thus does not require governmental approval before a private organization can decide for itself whether to even try to investigate or discipline its own members for violating rules that were reviewed and approved by the government.

In any event, the statute empowers the SEC to create rules for FINRA as the SEC deems appropriate. 15 U.S.C. § 78s(c). That broad rulemaking provision thereby "gives the [agency] the tools to step in" and disallow any disciplinary activity at the outset, if the agency so desires, as Chief Judge Sutton correctly held with respect to similarly broad agency rulemaking power over self-regulation in horseracing. *Oklahoma*, 62 F.4th at 231. The Fifth Circuit recently held, to the contrary, that the horseracing agency's rulemaking power implicitly exempts rules governing disciplinary procedures. *National Horsemen*, 2024 WL 3311366, at *8-*13. That conclusion disregards the plain text of the broad rulemaking provision, which contains no such exception, and improperly interprets a statute to create, rather than avoid, constitutional concerns. In any event, the Fifth Circuit recognized that its analysis relied on other features of the horseracing statute, beyond the rulemaking provision that is similar to the rulemaking provision here, that "differ[] materially" from the Exchange Act, and the court recognized that the Exchange Act gives the SEC "potent oversight power over [FINRA's] enforcement." *Id.* at *12-*13.

The Exchange Act also does not, contrary to petitioners' assertion, delegate governmental power to FINRA to impose "lifetime industry bars." Br. 28. The statute assigns FINRA no role in deciding whether FINRA membership will be a mandatory condition of participation in any segment of the securities industry. FINRA has only the power any other private membership organization has to remove a rule-breaking member from membership, and FINRA cannot seek judicial enforcement of any FINRA-assessed sanction. *See Fiero v. FINRA*, 660 F.3d 569, 575 (2d Cir. 2011). Such self-disciplinary decisions are subject to SEC review, as described above, and the courts of appeals have uniformly upheld this statutory scheme on that basis. *See Oklahoma*, 62 F.4th at 229. The Exchange Act assigns to the Commission, and the Commission alone, the power to determine whether a broker-dealer must be a member of a securities association, such as FINRA, or transact in securities only on an exchange of which a broker-dealer is a member. *See* 15 U.S.C. § 78o(b)(8), (9); *cf. Currin v. Wallace*, 306 U.S. 1, 16 (1939) (holding that Congress may "exercise[] its legislative authority … in prescribing the conditions of [the] application" of the law, where the congressionally prescribed conditions are the actions of private parties).

2. FINRA is not part of the government, and its private corporate officers are not subject to the Appointments Clause.

Petitioners' attempt to invoke the Appointments Clause fares no better. The Appointments Clause of Article II governs the manner of appointing "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. It does not govern the selection of the private executives or board members of a private corporation outside the government—private corporate officials whose accountability to the government under the Exchange Act is ensured by private-nondelegation principles.

a. As the Supreme Court has explained, appointment and removal of Officers of the United States under Article II ensures popular "control on the government" and "makes a single President responsible for the actions of the Executive Branch." *Free Enter. Fund v. Public Co.*

Accounting Oversight Bd., 561 U.S. 477, 496-97, 501 (2010) (quotation marks omitted). The "lines of accountability demanded by the Appointments Clause" for appointments within the Executive Branch ensure that "the President is ultimately responsible" for "[t]he activities of executive officers." *United States v. Arthrex, Inc.*, 594 U.S. 1, 16-17 (2021).

These structural constitutional provisions are thus concerned with the President's "executive subordinates," *Myers v. United States*, 272 U.S. 52, 117 (1926), "officers of … an agency," *Free Enter. Fund*, 561 U.S. at 497, "the Government's workforce," *Lucia*, 585 U.S. at 245, and "governmental structures," *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 231 (2020). By the same token, as the Supreme Court has explained, these structural Article II requirements "say[] nothing" about the method of hiring or firing "some *other* type of officer" that is not an officer "*of the United States*." *Financial Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 590 U.S. 448, 459 (2020) (emphases added).

The Supreme Court has held that a corporation is "part of the government," and its officers are subject to the Appointments Clause, only if "the Government creates the corporation" in "furtherance of governmental objectives" and "retains for itself permanent authority to appoint a majority of the directors of that corporation." *Herron v. Fannie Mae*, 861 F.3d 160, 167 (D.C. Cir. 2017) (cleaned up). This test draws the line between government entities and private enterprises not only for purposes of First Amendment claims, as in the case in which it was first applied, *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995), but also more generally for the structural constitutional claims like those arising under the Appointments Clause. *See Department of Transp. v. Association of Am. R.Rs.*, 575 U.S. 43, 55 (2015); *Free Enter. Fund*, 561 U.S. at 484-86, 503.

As this Court has explained, "[o]nly those entities that satisfy both conditions"—federal creation and federally selected leadership—"may be considered federal entities." *Kerpen*, 907 F.3d at 158-59. And the "failure to meet the threshold of establishing" an organization "as a federal entity is fatal to [a litigant's] claims under the Appointments Clause." *Id.* at 159-60; *cf. Corr v. Metropolitan Washington Airports Auth.*, 702 F.3d 1334, 1337 (Fed. Cir. 2012).

That test derives from Supreme Court case law and forecloses petitioners' Appointments Clause argument. In *Free Enterprise Fund*, 561 U.S. 477, the Supreme Court applied that test to determine that the Public Company Accounting Oversight Board was part of the government for purposes of Article II's removal requirements. The Court recognized that the accounting board was "modeled on" the "private self-regulatory organizations in the securities industry," such as FINRA and the New York Stock Exchange, that "investigate and discipline their own members subject to Commission oversight." *Id.* at 484. The Court stressed, however, that there was a critical difference between the Board and these other entities: "[u]nlike the self-regulatory organizations," the Supreme Court emphasized, the accounting Board "is a Government-created, Government-appointed entity." *Id.* at 485. On that basis, the Supreme Court in *Free Enterprise Fund* accepted the parties' view that the accounting Board is "part of the Government for constitutional purposes," and thus that its "members are Officers of the United States" to whom Article II's removal requirements apply, *id.* at 485-86 (quotation marks omitted), and expressly distinguished the accounting board from "private organizations like the New York Stock Exchange," *id.* at 503.

The Supreme Court applied the same principles in *Association of American Railroads*, 575 U.S. 43, to determine which doctrine—private nondelegation or the Appointments Clause—applied to Amtrak. In that case, the D.C. Circuit had taken Amtrak to be a *private* entity for purposes of a private-nondelegation claim and determined that a particular provision of a statute was unconstitutional under that doctrine. *Id.* at 50. Reversing, the Supreme Court explained that the test of government creation and government appointment applied to determine whether "Amtrak is a governmental entity" or "a private one" for "purposes of determining the constitutional issues presented in this case." *Id.* at 55. Because Amtrak was a government-created and government-appointed entity (and thus part of the government), the Supreme Court explained, it was not subject to the private-nondelegation doctrine. *Id.* And precisely because Amtrak was a "governmental entity," the Court recognized that questions arose "implicating the Constitution's structural separation of powers and the

Appointments Clause," which the Court directed the D.C. Circuit to address on remand. *Id.* at 46.

Here, all agree that FINRA was not created by the government and that its directors, executives, and other corporate officials are selected, not by the government, but by private entities in the manner specified in FINRA's private corporate charter. *See* FINRA, FINRA By-Laws art. VII, § 13 (2007), https://perma.cc/EZ8L-5GJ2. FINRA is thus not "part of the Government." *Lebron*, 513 U.S. at 400. And, as this Court and others have held, litigants' "failure to meet the threshold of establishing [an organization] as a federal entity is fatal to their claims under the Appointments Clause." *Kerpen*, 907 F.3d at 160; *National Horsemen*, 2024 WL 3311366, at *1 (holding that, under *Lebron*, a private horseracing self-regulatory authority "does not qualify as a government entity subject to the Appointments Clause").

b. Petitioners nowhere address precedent holding that the Appointments Clause does not apply where an entity is not part of the federal government. Petitioners instead seek to relitigate first principles, which they misunderstand. In applying the Appointments Clause only within its constitutional bounds, courts do not "circumvent" the Constitution. Br. 25 n.10. The Appointments Clause ensures accountability of the President for his or her selection of SEC Commissioners within the government. Private-nondelegation principles ensure accountability of the Commissioners supervising FINRA in the public interest. Applying Article II's appointment requirement outside its domain to a private corporation like FINRA would eviscerate the private-nondelegation doctrine, the entire point of which is to permit private entities outside of government to play a role (subordinate to a public agency) under a statute.

Petitioners urge that FINRA's private corporate officers must be subject to Article II appointment because they assertedly "exercise significant governmental powers" when they discipline FINRA members. Br. 20 (citing *Lucia*). That argument misunderstands both the doctrine and important differences between the role of FINRA and the role of the SEC. Doctrinally, as the Supreme Court has explained, an entity's purportedly "significant authority" is not the "critical legal test" for determining whether the Appointments Clause applies in the first place. *Aurelius*, 590 U.S. at 468 (quotation marks omitted). The degree of authority a private entity may permissibly exercise under a federal statute is governed by the private-nondelegation doctrine. As explained above, FINRA functions subordinately to the SEC in conformance with that doctrine. And petitioners' Appointments Clause argument fails at the "threshold" because FINRA is not part of the government. *Kerpen*, 907 F.3d at 160.

That doctrinal conclusion reflects the important differences between FINRA and the SEC. Again, as noted above, securities professionals have long created rules for themselves and disciplined members for violating those rules. Petitioners do not contend that the private officials who conducted self-disciplinary proceedings for the private exchanges in the nineteenth century, including by barring members from membership and thus from transacting on the private exchange, were Officers of the United States subject to the Appointments Clause. And the Exchange Act did not change the private nature of that conduct. To the contrary, the Exchange Act preserved the exchanges' "traditional private governance," *Ware*, 414 U.S. at 127-28, subjecting such self-regulation to SEC supervision to protect the public interest. Today, supervised self-regulation ensures that, after a private body decides for itself in the first instance whether to discipline a member, as such private bodies have always done, the ultimate decision regarding a private member's conduct is made by the government agency with "due regard for the public interest and the protection of investors." 15 U.S.C. § 78s(e)(2).

Accordingly, as this Court has explained, FINRA is "a professional association charged with regulating itself." *Jones v. SEC*, 115 F.3d 1173, 1182 (4th Cir. 1997). The SEC, by contrast, is a "policing agency that reviews [FINRA] action and executes, in the public interest, the securities laws of the United States." *Id.* And it is the Commissioners—not the private officials of the private entity subordinate to the Commissioners—that are subject to the requirements of the Appointments Clause.

3. Petitioners fail to explain how the Constitution prohibits a private company from using internal procedures to discipline private members.

Finally, petitioners offer a mélange of arguments derived from the premise that they are being subject to inherently judicial proceedings that implicate the right to a jury. Br. 30-42. The Commission did not have the opportunity to opine on these arguments due to petitioners' failure to urge them before the agency, as Congress required. Therefore, and given the nature of these far-reaching challenges, it is particularly inappropriate for petitioners to ask this Court to resolve them in the first instance, especially when they fail to grapple with the long tradition of self-regulation in this area.

The Supreme Court has explained that, "[u]nder the basic concept of separation of powers that flows from the scheme of a tripartite government adopted in the Constitution, the judicial Power of the United States cannot be shared with the other branches." *SEC v. Jarkesy*, -- S. Ct. --, 2024 WL 3187811, at *10 (2024) (cleaned up) (quoting *Stern v. Marshall*, 564 U.S. 462, 483 (2011)). Congress may thus not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law." *Id.* at *13 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855)).

The Supreme Court has recently offered guidance that "centuries-old rules" and "historic categories of adjudications" outside courts are relevant to determining the permissibility of adjudicating certain matters in a particular forum or manner. *Jarkesy*, 2024 WL 3187811, at *12. As discussed above, there is an "unbroken tradition," *id.* at *11, as old as the republic, of private, self-regulatory securities organizations conducting their own proceedings to decide whether their own members have violated applicable standards and, if so, whether they should be assessed a fine or expelled according to the rules of the private organization. Petitioners do not dispute that self-disciplinary proceedings, by their very nature, have always occurred in front of the organizations' own "governing committee, whose decision, after the trial of a member for offenses under its laws, is final." *Belton*, 17 N.E. at 227.

Petitioners have offered no reason to conclude that the self-disciplinary proceedings at issue here, placed in their appropriate historical context, should be considered to be claims "which, from [their] nature, [are] the subject of a suit at the common law." *Jarkesy*, 2024 WL 3187811, at *10 (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 284). In particular, petitioners cite no precedent supporting their bare assertion (Br. 34-35) that the disciplinary fines assessed by a private organization against its members, or any allegation of violating a private rule against lying to a private company, are by their nature suits at common law. Nor do they explain how separation-of-powers principles regarding the exercise of the "judicial Power of the United States," U.S. Const. art.

III, § 1, could apply to self-regulatory organizations outside the government.

Insofar as petitioners raise these assertions without addressing historical practice, their failure to present their claims to the Commission is particularly troubling. The Commission's discussion of such questions would be particularly informative if such considerations were thought relevant. In any event, this Court should not address the merits of petitioners' forfeited and unsupported assertions about the unlawfulness of traditional self-disciplinary proceedings.

4. Petitioners' allegations of bias are similarly undeveloped.

Finally, petitioners contend that traditional self-discipline is "inherent[ly] bias[ed]" because FINRA both investigates and decides alleged rule violations, Br. 42-46, and that FINRA has an impermissible "profit motive" to impose fines, Br. 46-50. Like the other constitutional issues presented for the first time in their opening brief to this Court, the Exchange Act bars consideration of those forfeited arguments. 15 U.S.C. § 78y(c)(1); *cf. Wards Corner Beauty Acad. v. National Accrediting Comm'n of Career Arts & Scis.*, 922 F.3d 568, 579 (4th Cir.

2019) (declining to review forfeited argument about combination of investigative and adjudicative functions)

In any event, as explained above, self-disciplinary organizations have always investigated and adjudicated allegations that a member has violated professional standards and have always been able to impose fines as disciplinary sanctions. Petitioners cite no precedent indicating that such procedures are unlawful in general. And they present no information regarding the specific people who decided the disciplinary matters at issue here and what role those people did or did not play in the investigation of petitioners or what connection they may or may not have to the use FINRA may make of any assessed fines. Petitioners thus fail to present any information relevant to their contentions of improper bias. As this Court has explained, even where the due process clause applies, as when evaluating agency action, "[i]t 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). "Rather, actual bias or a high probability of bias" by the specific decisionmakers at issue "must be present before due process concerns are raised." *Id.* And "[d]etermining whether an adjudicator's pecuniary interest violates due process" is a similarly "fact- and context-specific inquiry." *Wards Corner*, 922 F.3d at 574.

Here, if petitioners had timely raised these objections before the Commission, the relevant principles would derive from the Exchange Act's requirement that self-disciplinary proceedings be "fair." 15 U.S.C. § 78o-3(b)(8). As explained above in relation to private-nondelegation principles, the Exchange Act gives the SEC all the tools necessary to make those proceedings fair when parties timely raise such objections—as the proceedings in this case illustrate. Though petitioners never pressed before the Commission the combination-of-functions or profit-motive contentions they now press before this Court, petitioners did argue that FINRA's conclusion that petitioners fabricated documents and lied should be vacated because FINRA broke its own rules and acted unfairly by not producing documents relevant to the credibility of certain witnesses. JA948-68. The Commission agreed that FINRA erred and that the error was prejudicial and vacated and remanded to correct the errors or drop the allegations. JA1076. That kind of independent Commission review of disciplinary sanctions is adequate to ensure the fairness of FINRA proceedings when litigants timely raise meritorious objections.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,994 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Century Schoolbook 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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ADDENDUM

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15 U.S.C. § 78s. Registration, responsibilities, and oversight of self-regulatory organizations

…

(c) Amendment by Commission of Rules of Self-Regulatory Organizations.

The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter, … .

…

(d) Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure

(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this chapter.

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

(3) The provisions of this subsection shall apply to an exchange registered pursuant to section 78f(g) of this title or a national securities association registered pursuant to section 78o–3(k) of this title only to the extent that such exchange or association imposes any final disciplinary sanction for—

(A) a violation of the Federal securities laws or the rules and regulations thereunder; or

(B) a violation of a rule of such exchange or association, as to which a proposed change would be required to be filed under this section, except that, to the extent that the exchange or association rule violation relates to any account, agreement, contract, or transaction, this subsection shall apply only to the extent such violation involves a security futures product.

(e) Disposition of review; cancellation, reduction, or remission of sanction

(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and

opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)—

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this chapter, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

…

15 U.S.C. § 78y. Court review of orders and rules

…

(c) Objections not urged before Commission; stay of orders and rules; transfer of enforcement or review proceedings

(1) No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

…

…

17 C.F.R. § 201.401. Consideration of stays

(a) Procedure. A request for a stay shall be made by written motion, filed pursuant to § 201.154, and served on all parties pursuant to § 201.150. The motion shall state the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. Portions of the record relevant to the relief sought, if available to the movant, shall be filed with the motion. The Commission may issue a stay based on such motion or on its own motion.

(b) Scope of relief. The Commission may grant a stay in whole or in part, and may condition relief under this section upon such terms, or upon the implementation of such procedures, as it deems appropriate.

(c) Stay of a Commission order. A motion for a stay of a Commission order may be made by any person aggrieved thereby who would be entitled to review in a federal court of appeals. A motion seeking to stay the effectiveness of a Commission order pending judicial review may be made to the Commission at any time during which the Commission retains jurisdiction over the proceeding.

(d) Stay of an action by a self-regulatory organization—

(1) Availability. A motion for a stay of an action by a self-regulatory organization for which the Commission is the appropriate regulatory

agency, for which action review may be sought pursuant to § 201.420, may be made by any person aggrieved thereby at the time an application for review is filed in accordance with § 201.420 or thereafter.

(2) Summary entry. A stay may be entered summarily, without notice and opportunity for hearing.

(3) Expedited consideration. Where the action complained of has already taken effect and the motion for stay is filed within 10 days of the effectiveness of the action, or where the action complained of, will, by its terms, take effect within five days of the filing of the motion for stay, the consideration of and decision on the motion for a stay shall be expedited in every way, consistent with the Commission's other responsibilities. Where consideration will be expedited, persons opposing the motion for a stay may file a statement in opposition within two days of service of the motion unless the Commission, by written order, shall specify a different period.

…