No. _____

In The Supreme Court of the United States

ALPINE SECURITIES CORPORATION,

Applicant,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY,

Respondent,

&

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Application for Stay of Judgment Pending
Petition for a Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

EMERGENCY APPLICATION FOR STAY OF JUDGMENT PENDING PETITION FOR WRIT OF CERTIORARI

February 18, 2025

Kenneth G. Turkel
David A. Hayes
TURKEL CUVA BARRIOS, P.A.
100 North Tampa Street
Suite 1900
Tampa, FL 33602
Phone: (813) 834-9191
kturkel@tcb-law.com

David H. Thompson
Counsel of Record
Brian W. Barnes
Athie O. Livas
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Maranda E. Fritz
MARANDA E. FRITZ PC
521 Fifth Avenue 17th Floor
New York, New York 10175
Phone: (646) 584-8231
maranda@fritzpc.com

Counsel for Applicant

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

This application arises from the United States Court of Appeals for the District of Columbia Circuit.

Applicant is Alpine Securities Corporation. Scottsdale Capital Advisors Corporation is a plaintiff in the district court but was not a party to the appeal in the Court of Appeals and is not an applicant here.

Respondent is the Financial Industry Regulation Authority. Additionally, the United States of America is an intervenor-respondent.

The proceedings below were:

1. *Alpine Sec. Corp. v. FINRA*, No. 23-5129 (D.C. Cir. Nov. 22, 2024)

2. *Alpine Sec. Corp. v. FINRA*, No. 23-1506 (D.D.C. June 7, 2023)

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, Applicant is wholly owned by SCA Clearing LLC, an Arizona limited liability company. Scottsdale Capital Advisors is wholly owned by Scottsdale Capital Advisors Holdings LLC, an Arizona limited liability company. No publicly held company owns 10% or more of either entity's stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Constitutions and Statutes

Other Authorities

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE D.C. CIRCUIT:

The Financial Industry Regulatory Authority ("FINRA") is a nominally private corporation that acts as a federal government agency.

In the name of enforcing the federal securities laws and its own rules that carry the force of federal law, FINRA investigates, prosecutes, adjudicates, and punishes individuals and entities who are forced to join FINRA as a condition of doing business in the United States securities industry. FINRA exercises discretion over when, how, against whom, and with what threatened federal force to prosecute its alleged violations. Through its aggressive enforcement regime and unchecked prosecutorial discretion, FINRA makes and executes policy judgments on behalf of the Executive Branch and, in turn, the American people. Based on its unusual status as the purportedly "private" enforcer of the federal securities laws, FINRA insists that it can exercise enforcement power derived from the government, mandated by the government, and with immunity reserved for the government, all free from the constitutional obligations that *constrain* the government.

In an audacious exercise of this unusual and sweeping authority, FINRA employed a truncated procedural mechanism—known ominously as the Expedited Proceeding—against Applicant, a securities broker-dealer that challenged FINRA's unconstitutional structure in federal court. FINRA threatened Applicant with the corporate death penalty: immediate and permanent expulsion from the securities industry. FINRA's chosen punishment would have had the effect of destroying

Applicant's business for good and, of course, forestalling Applicant's constitutional challenge.

Applicant challenged FINRA's efforts. Applicant argued at every stage of the proceedings below that FINRA's exercise of federal executive power violates the private non-delegation doctrine, the Appointments Clause, and Article II's guarantees of presidential supervision and removal. Fundamentally, if FINRA seeks to wield government power—assuming it may do so at all—it must abide by the constraints on government power. At the very least, the Government cannot delegate to a private party authority to do that which it cannot constitutionally do itself.

The D.C. Circuit agreed with Applicant in part. After a motions panel of the D.C. Circuit granted Applicant an injunction pending appeal, App.72, 78, Judge Millett, writing for the majority, enjoined FINRA's self-executing power to expel Applicant from the securities industry without *any* review by the SEC—the government agency that is meant to supervise FINRA. App.4.

The divided D.C. Circuit refused, however, to enjoin FINRA's ability to move forward with its Expedited Proceeding because it thought such relief was unnecessary to prevent Applicant from sustaining irreparable injury. Applicant argued, in accordance with *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023), that "subjection to an illegitimate proceeding, led by an illegitimate decisionmaker" is a "here-and-now injury" that "is impossible to remedy once the proceeding is over" and constituted irreparable injury. The panel majority rejected that argument, holding that *Axon* did not apply in the context of establishing irreparable injury for injunctive

relief. App.36–39.

Judge Walker wrote separately, explaining that the majority's decision was a "victory for the Constitution," App.42, but did not go far enough. He would have found FINRA unconstitutional on separation of powers grounds under a straightforward application of this Court's precedents. App.60 (FINRA Hearing Officers "are indistinguishable from the administrative law judges in *Lucia* and the special trial judges in *Freytag*."). Judge Walker also explained that the majority erred in rejecting Applicant's request for an injunction against FINRA moving forward with its enforcement action based on its misreading of *Axon*. App.63–68. He cited an opinion by then-Judge Kavanaugh for the proposition that being subjected to actions of an "unconstitutionally structured agency" constitutes irreparable injury. *See John Doe Co. v. CFPB*, 849 F.3d 1129, 1136 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("Irreparable harm occurs almost by definition when a person or entity demonstrates a likelihood that it is being regulated on an ongoing basis by an unconstitutionally structured agency that has issued binding rules governing the plaintiff's conduct and that has authority to bring enforcement actions against the plaintiff.").

Now, Applicant seeks a stay of the D.C. Circuit merits panel's judgment to prevent the Expedited Proceeding from going forward while Applicant's forthcoming petition for certiorari is pending.[1] This relief would have the effect of maintaining

[1] In the alternative, this Court could enjoin the FINRA enforcement proceedings directly, rather than staying the D.C. Circuit's judgment. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 112–13 (2022). The practical effect of either course would be the same—FINRA's Expedited Proceeding could not move forward while proceedings in this Court are pending.

the D.C. Circuit motions panel's original injunction pending appeal, so that FINRA cannot moot Applicant's credible constitutional challenge to the Expedited Proceeding while Applicant asks this Court to grant certiorari and rule that Judge Walker's partial dissent is correct.

This matter presents an unusually strong case for emergency relief for two reasons. First, the Court has *already* granted certiorari over a private non-delegation question this Term that asks the Court to address concerns regarding governmental power being wielded by private entities. And second, there is no doubt that Applicant will suffer irreparable harm. FINRA has already indicated it intends to resume its Expedited Proceeding against Applicant immediately, and the *Axon* injury will arise as soon as FINRA resumes its enforcement action, regardless of any later reversal by the SEC.

A stay of the judgment will simply preserve the status quo while Applicant awaits this Court's decision on how to handle Applicant's petition, especially in light of the Court's recent grant of certiorari over another private non-delegation case, *see FCC v. Consumers' Rsch.*, No. 24-354 (cert. granted Nov. 22, 2024), and the several other private non-delegation petitions currently pending before the Court. *See* Cert. Pet., *Horseracing Integrity & Safety Auth., Inc. v. Nat'l Horsemen's Benevolent & Protective Ass'n*, No. 24-433 (U.S. Oct. 15, 2024); Cert. Pet., *FTC v. Nat'l Horsemen's Benevolent & Protective Ass'n*, No. 24-429 (U.S. Oct. 16, 2024); Cert. Pet., *Walmsley v. FTC*, No. 24-420 (U.S. Oct. 10, 2024); Cert. Pet., *Oklahoma v. United States*, No. 23-402 (U.S. Oct. 13, 2024); *Oklahoma*, No. 23-402 (U.S. Nov. 6, 2024).

Absent a stay of the D.C. Circuit's judgment, Applicant will suffer the injury that *Axon* recognized as immediate and irreparable: subjection to an expedited disciplinary proceeding by a single, improperly appointed FINRA employee who is not meaningfully supervised by the President or the SEC—a "private" individual with government power yet no government accountability. While Judges and Courts have differed on the meaning of *Axon*—making this Court's guidance all the more valuable and needed—a stay of the judgment would permit the Court the chance to weigh in on the nature and import of that injury *before* Applicant is made to irreversibly suffer it.

This is not to say that Applicant's injury rises and falls with the merits of the meaning of *Axon*. Applicant's injury would remain even if this Court disagrees with Judge Walker and then-Judge Kavanaugh that being subjected to a constitutionally illegitimate enforcement proceeding inflicts irreparable harm. Absent a stay of the Expedited Proceeding, and given FINRA's express desire to proceed apace with that hearing, Applicant will face the independent harm of potentially losing its chance to challenge FINRA's enforcement action on separation of powers grounds in this Court.

FINRA, by contrast, would not be injured by maintenance of the status quo. It delayed the Expedited Proceeding for years, only launching it days after this Court decided *Axon*, at which point Applicant was permitted to sue FINRA in federal court without first exhausting internal FINRA proceedings.

In the alternative to granting a stay, the Court could treat this application as a petition for writ of certiorari, grant review or hold the petition for *Consumers'*

Research (or the HISA cases, if review is granted), and enter a stay pending resolution of the merits. In the meantime, Applicant respectfully requests an administrative stay while the Court considers this Application, as FINRA has indicated an intent to resume its Expedited Proceeding against Applicant as soon as possible, and has employed procedural mechanisms to expedite the hearing and avoid internal FINRA appellate review.[2]

There is a reasonable probability that four justices will consider at least one of the private non-delegation, Article II, or *Axon* questions sufficiently meritorious to grant certiorari—indeed, the Court has already granted certiorari in a private non-delegation case—and a fair prospect that a majority will vote to reverse on at least one of the questions presented. Applicant will face irreparable harm absent a stay, and the public interest supports maintenance of the status quo while the Court reviews Applicant's constitutional challenge to the "private," utterly unaccountable enforcer of our Nation's securities laws.

[2] Indeed, FINRA sought initially to resume its Expedited Proceeding after the D.C. Circuit's decision but *before* the D.C. Circuit had issued its mandate, despite the still-operative injunction pending appeal enjoining FINRA from doing so.

OPINIONS BELOW

The D.C. Circuit's panel opinion is reproduced at App.1–70. The D.C. Circuit's motions panel opinion granting Applicant an injunction pending appeal is reproduced at App.72–78. The district court's opinion is reproduced at App.79–108.

JURISDICTION

The D.C. Circuit entered judgment and an accompanying written decision on November 22, 2024. No party timely moved for rehearing or rehearing en banc. The D.C. Circuit denied a motion to stay its mandate on February 7, 2025. This Court has authority to stay the D.C. Circuit's judgment pending the filing and disposition of a writ of certiorari. 28 U.S.C. §§ 1651(a), 2101(f).

STATEMENT OF THE CASE

A. The Modern FINRA.

The Financial Industry Regulatory Authority ("FINRA") is a nominally private corporation that acts as a federal government enforcement agency.

FINRA is the sole registered national securities association in the United States. Applicant and nearly every other broker-dealer is obligated by federal law to join FINRA as a condition of doing business in the United States securities industry. App.9. FINRA performs a variety of important functions: "adjudicatory, regulatory, and prosecutorial functions, including implementing and effectuating compliance with securities laws." *Weissman v. NASD*, 500 F.3d 1293, 1296 (11th Cir. 2007); *see NASD v. SEC*, 431 F.3d 803, 805-06 (D.C. Cir. 2005). FINRA also has rulemaking authority, and its rules carry the force and status of federal law. *See Birkelbach v.*

SEC, 751 F.3d 472, 475 n.2 (7th Cir. 2014). *See also* 15 U.S.C. § 78s(b). Indeed, FINRA's rules are so well established as federal law that they *preempt* contrary state law. *See Whistler Invs., Inc. v. Depository Tr. & Clearing Corp.*, 539 F.3d 1159, 1168 (9th Cir. 2008). Remarkably, the SEC can even "aid in the enforcement" of FINRA's rules. *See* 15 § U.S.C. 78u(a)(1). FINRA rules also carry the trappings of federal law; the SEC is directed by statute to publish FINRA's rule changes in the Federal Register. *See* 15 U.S.C. § 78s(b)(2)(E).

FINRA's predecessor, the National Association of Securities Dealers, was originally created as a voluntary and member-run collaborative association—a "self-regulatory organization" or "SRO"—and for several decades operated in that manner. In recent decades, though, FINRA was created and has morphed from a collaborative, member-run organization into a full-fledged enforcement agency in which membership is compelled, external non-industry governance is mandated, and aggressive enforcement and imposition of devastating penalties comparable to those imposed by the SEC are backed by the force of federal law. FINRA investigates, prosecutes, and imposes penalties—including permanent expulsion from the securities industry—for alleged violations not only of FINRA's own rules but also of the federal securities laws. The SEC has permitted and even encouraged this development, embracing and expanding a "private" enforcement arm and enabling it to engage in aggressive action unburdened by the dictates of the Constitution or democratic accountability.

Were there any doubt about the modern FINRA's status as the "private" enforcer of our federal securities laws, the Court can take FINRA's word for it. FINRA has repeatedly claimed in litigation, enforcement proceedings, and public guidance that its rules are federal law. *See, e.g.*, *In the Matter of Dep't of Enf't v. Charles Schwab & Co.*, 2014 WL 1665738, at *16 (FINRA Bd. Apr. 24, 2014) ("FINRA rules have the force and effect of a federal regulation."); *FINRA Regulatory Notice* 16-25 (July 22, 2016) at 3 ("FINRA's rules . . . have the force of federal law. FINRA rules are not mere contracts that member firms and associated persons can modify.").

So too, FINRA has repeatedly and successfully argued that it is immune from tort suits arising from its prosecutorial, adjudicatory, and enforcement conduct on the ground that it is in fact performing governmental functions. *See In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114 (D.C. Cir. 2008); *Weissman*, 500 F.3d at 1296 ("Because they perform a variety of vital governmental functions . . . SROs are protected by absolute immunity when they perform their statutorily delegated adjudicatory, regulatory, and prosecutorial functions" (cleaned up)). When FINRA is not performing such a function, its right to immunity ceases. *Id.*

B. FINRA Launches its Expedited Proceeding.

On April 14, 2023, the Court decided *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023), holding that plaintiffs do not have to circumnavigate an administrative review process for a district court to consider structural constitutional claims against an agency. *Id.* On April 19, 2023, just five days after the *Axon* opinion was handed down,

FINRA filed an Expedited Proceeding against Applicant, seeking to deploy its truncated and accelerated process to obtain an order permanently expelling Applicant from the industry and in turn putting Applicant out of business.

FINRA's Expedited Proceeding arose out of a complicated tapestry of FINRA procedures. FINRA claims that Applicant violated a cease-and-desist order contained in an Initial Hearing Panel Decision from a prior FINRA enforcement proceeding. FINRA does not claim that Applicant violated any clear and specific provision of that cease-and-desist order. Rather, FINRA alleges that Applicant engaged in conduct that violated the general "obey the law" provisions of the order. Numerous courts have expressed skepticism of such broad provisions, finding them to be violative of due process because they do not furnish fair notice. *See, e.g.*, *SEC v. Goble*, 682 F.3d 934, 949 (11th Cir. 2012).

The Expedited Proceeding is procedurally unique and unusually powerful. Unlike FINRA's ordinary disciplinary proceedings, the Expedited Proceeding is conducted by a single Hearing Officer whose order would become immediately effective without review by FINRA's in-house appellate tribunal or the SEC. Thus, unlike most FINRA Hearing Officer decisions, the expulsion order that FINRA sought to impose through the Expedited Proceeding would have become effective *immediately* and forced the closure of Applicant's business.[3]

The Expedited Proceeding threatens to stop Applicant's decades-old business from operating in the securities industry and is an exercise of federal executive

[3] The D.C. Circuit's narrow injunction would prevent FINRA from permanently expelling Applicant from the securities industry before any SEC review. App.4.

power—no different in substance or legal effect from the SEC promulgating a rule and enforcing it in an administrative proceeding before an ALJ. *See United States v. Ackerman*, 831 F.3d 1292, 1292 (10th Cir. 2016) (Gorsuch, J.) (observing that "when an actor is endowed with law enforcement powers beyond those enjoyed by private citizens, courts have traditionally found the exercise of the police power engaged").

C. Applicant Sues to Challenge FINRA's Structure and Unsupervised Exercise of Federal Power.

Throughout the proceedings below, Applicant has argued that FINRA, a purportedly "private" body that enforces the federal securities laws against other private parties, violates the Appointments Clause, Article II's requirements of presidential removal and supervision, and the private non-delegation doctrine. In so doing, Applicant sought to enjoin an expedited FINRA disciplinary proceeding seeking to expel Applicant from the securities industry. Applicant argued that if FINRA exercises Federal Government power, it must abide by the constitutional limitations on that power. Based on these arguments, Applicant twice secured injunctive relief from the D.C. Circuit.

On May 9, 2023, Applicant filed an emergency motion for preliminary injunction for relief from FINRA's Expedited Proceeding in the Middle District of Florida, where Applicant originally sued. On May 26, 2023, after briefing and a hearing, that district court transferred this case to the District of Columbia.

On February 6, 2023, the United States intervened "for the limited purpose of defending the constitutionality of the federal securities laws, including the Securities

Exchange Act of 1934, as amended by the Maloney Act of 1938, 15 U.S.C. § 78a et seq." Not. of Intervention, Doc. 28, at 1 (D.D.C. Feb. 6, 2023).

Two days after the case was transferred, and before any briefing or submission by the parties, the district court denied Applicant's motion for a preliminary injunction "without prejudice." *See* D.D.C. Minute Order of May 26, 2023. In its denial, the district court relied on *Springsteen-Abbott v. SEC*, 989 F.3d 4 (D.C. Cir. 2021), reasoning that because "the administrative process before [FINRA] and the [SEC] will not be exhausted until the SEC has had an opportunity to rule on the result of the FINRA proceeding," Applicant's claims could not prevail. *See* Minute Order. Applicant filed a motion for reconsideration, Doc. 65 (May 30, 2023), advising the district court that this Court had recently overruled *Springsteen-Abbott* in *Axon*. Applicant filed a renewed motion for preliminary injunction or, in the alternative, a temporary restraining order. Doc. 66 (D.D.C. May 30, 2023). Between May 30, 2023, and June 2, 2023, the district court ordered briefing, held a hearing, and ordered supplemental briefing on the emergency motion.

On June 7, 2023, the district court granted Alpine's motion for reconsideration and acknowledged the applicability of the *Axon* decision, but denied Applicant's renewed preliminary injunction motion, holding that Applicant had demonstrated irreparable harm but was not likely to succeed on the merits.

Amidst all this, and despite the recent transfer of the matter to the District of Columbia and Applicant's pending constitutional claims against FINRA, FINRA pressed forward with the Expedited Proceeding against Applicant, seeking to expel it

from the securities industry as quickly as possible. FINRA commenced its hearing in the Expedited Proceeding on June 5, 2023, before the district court had ruled on Applicant's preliminary injunction motion.

As FINRA relentlessly pursued the Expedited Proceeding, Applicant brought an expedited appeal and sought an emergency injunction pending appeal from the D.C. Circuit. After briefing, the panel granted Applicant an injunction pending appeal. App.71–72 (Applicant "has satisfied the stringent requirements for an injunction pending appeal."). The same day, the FINRA hearing was suspended.

In a concurring statement, Judge Walker explained that Applicant clearly faced irreparable harm absent an injunction, both "because the ongoing FINRA enforcement proceedings would put it out of business" and because under *Axon*, "the resolution of claims by an unconstitutionally structured adjudicator is a 'here-and-now injury' that cannot later be remedied." App.75 (Walker, J., concurring). Judge Walker further explained that Applicant was likely to succeed on the merits of its constitutional claims against FINRA.

After the motions panel issued its order, FINRA took the extraordinary step of moving for en banc reconsideration of the motions panel's order. The D.C. Circuit denied FINRA's motion. FINRA at the same time forged ahead in the district court, moving to dismiss Applicant's complaint on June 30, 2023. Doc. 93. The district court rejected FINRA's effort, granting Applicant's motion (over FINRA's opposition) to hold the district court proceedings in abeyance during the course of appellate review. *See* Minute Order of July 26, 2023.

At the merits panel stage in the D.C. Circuit, the case was reassigned to a new panel. After briefing, oral argument, and a round of supplemental briefing, the new panel also agreed with Applicant and, ruling on private non-delegation grounds, directed that an injunction of the Expedited Proceeding be entered "enjoining FINRA from giving effect to any expulsion order issued against Alpine until either the SEC reviews the order on the merits or the time for Alpine to seek SEC review lapses." App.40–41; *Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1337 (D.C. Cir. 2024). As to Applicant's claims arising out of the Appointments Clause, the Court held that Applicant failed to establish irreparable harm, finding that Applicant "overreads *Axon*." *Alpine*, 121 F.4th at 1335.

After putting *Axon* aside, the majority opinion for the panel relied on Circuit decisions for the proposition that a separation of powers injury does not establish irreparable harm. App.32–36; *Alpine*, 121 F.4th at 1333–35. Judge Walker's opinion explained that those decisions, which FINRA had not even cited, predate *Axon* and are either non-binding or involve inapposite topics. *See Alpine*, 121 F.4th at 1349–52 (Walker, J., concurring in the judgment in part and dissenting in part).

In particular, the D.C. Circuit focused on two distinctions between *Axon* and this case. First, *Axon* involved a "statutory jurisdictional question" and "did not speak to what constitutes irreparable harm for purposes of the extraordinary remedy of a preliminary injunction." *Alpine*, 121 F.4th at 1335–36. Second, "[n]othing in *Axon* addressed an asserted injury from a member of a private organization having to go through a hearing process before such an entity." *Id.* at 1336. Judge Walker,

concurring in the judgment in part and dissenting in part, adopted a different reading of *Axon*. *Id.* at 1348–49. As to the factual differences between this case and *Axon*, he reasoned: "To be sure, *Axon* was answering a question about whether a district court had jurisdiction, not whether a court should grant a preliminary injunction. But I struggle to see how an injury that is completely 'impossible to remedy' (the standard there) meaningfully differs from an injury that is 'beyond remediation' (the standard here)." *Id.* at 1348 (Walker, J., concurring in the judgment in part and dissenting in part) (citations omitted). No party moved for rehearing of the panel's decision.

Applicant timely moved the D.C. Circuit panel to stay its mandate pending Applicant's forthcoming petition for certiorari. The panel denied the request in an unreasoned order. Judge Walker would have granted the stay pending certiorari.

REASONS FOR GRANTING A STAY OF THE JUDGMENT PENDING DISPOSITION OF A PETITION FOR CERTIORARI

FINRA exercises one of the most powerful forms of federal executive power while expressly eschewing any obligation to abide by *any* of the constraints on federal executive power. That is a constitutional problem. FINRA's unfettered exercise of federal power creates broad policy consequences for the nation and existential consequences for securities brokers like Applicant.

Under 28 U.S.C. §2101(f), this Court is authorized to stay "the execution and enforcement" of a "final judgment or decree of any court . . . subject to review . . . on writ of certiorari." This Court will grant a stay of a lower court's order if there is "(1) a reasonable probability that four justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will

vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curium); *see also Anderson v. Loertscher*, 137 S. Ct. 2328 (2017). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190.

For the reasons given below, Applicant has satisfied these requirements, and the Court should stay the D.C. Circuit's judgment pending the disposition of Applicant's forthcoming petition for certiorari.

I. There Is a Reasonable Probability that Four Justices Will Vote To Grant Certiorari and a Fair Prospect that Five Justices Will Vote To Reverse the D.C. Circuit's Order.

This case raises several substantial questions worthy of the Court's attention, and it is likely this Court will reverse the D.C. Circuit on at least one question presented.

A. The Private Non-Delegation Question Is Implicated By this Court's Recent Grant in *Consumers' Research*.

This is the rare case in which the Court need not speculate about whether it would grant certiorari over one of the questions presented. The Court has *already* granted certiorari on a central issue to be raised in the Petition for which the judgment would be stayed. In *Federal Communications Commission v. Consumers' Research*, No. 24-354 (cert. granted Nov. 22, 2024), this Court will consider whether the FCC violated the private non-delegation doctrine by delegating certain federal government functions to a purportedly private body.

Further, the Court also has before it several pending requests for review over related questions in the context of the Horseracing Integrity and Safety Authority (HISA), a purportedly "private" body highly analogous to FINRA. *See* Cert. Pet., *Horseracing Integrity & Safety Auth., Inc. v. Nat'l Horsemen's Benevolent & Protective Ass'n*, No. 24-433 (U.S. Oct. 15, 2024); Cert. Pet., *FTC v. Nat'l Horsemen's Benevolent & Protective Ass'n*, No. 24-429 (U.S. Oct. 16, 2024); Cert. Pet., *Walmsley v. FTC*, No. 24-420 (U.S. Oct. 10, 2024); Cert. Pet., *Oklahoma v. United States*, No. 23-402 (U.S. Oct. 13, 2024).

HISA's constitutionality presents an acknowledged circuit split, *see* Resp. to Pet. for Reh'g at 1, *Oklahoma*, No. 23-402 (U.S. Nov. 6, 2024) ("There is now a square conflict among the Courts of Appeals." (capitalization omitted)), and the Solicitor General has urged the Court to grant review, *see* Cert. Pet., *FTC v. Nat'l Horsemen's Benevolent & Protective Ass'n*, No. 24-429 (U.S. Oct. 16, 2024). It would make good sense for the Court to consider Applicant's Petition presenting a virtually identical question about a highly analogous "private" enforcement body among these related petitions.

This Court may soon clarify the contours of how much supervision, and what kind of supervision, the Constitution requires when the Federal Government chooses to delegate power to a private body, assuming it may do so at all. Applicant's claims should be permitted to survive while the Court decides those questions. At the very least, the Court should have the opportunity to consider how to handle Applicant's petition in light of its private non-delegation docket.

In any case, the private non-delegation question presented in this matter is independently certworthy and meritorious. The federal Courts of Appeals have diverged on whether the FINRA-SEC relationship passes constitutional muster under the private non-delegation doctrine. The Sixth Circuit, for example, found that "[i]n case after case, the courts have upheld th[e] arrangement, reasoning that the SEC's ultimate control over the rules and their enforcement makes the SROs permissible aides and advisors." *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2679 (2024) (petition for reh'g pending). The Fifth Circuit too, although disagreeing with the Sixth Circuit on the constitutionality of HISA, referenced "Circuit cases concluding that FINRA's enforcement role presents no private nondelegation problem," *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 434 (5th Cir. 2024), and distinguished the unconstitutional HISA from the SEC-FINRA relationship on several grounds. *Id.* The D.C. Circuit below, by contrast, concluded that the procedure that FINRA was deploying against Alpine constituted a violation of the private non-delegation doctrine. App.4.

Further, this case squarely presents the broader issues arising from FINRA's structure and operations. The issue implicates core constitutional protections critical to the Separation of Powers and to government accountability more broadly. And, as a practical matter, FINRA exercises sweeping authority over the securities industry in the United States. Indeed, even FINRA admitted that this case has "far-reaching real-world implications." FINRA Pet'n for Reh'g, Doc. 2010871 (Aug. 3, 2023), at 5–6.

B. Applicant's Article II Claims Are Certworthy and Meritorious.

As to Applicant's Article II claims, the question presented is whether FINRA, a purportedly "private" body that exercises federal executive power through the enforcement of federal law, including the core executive function of prosecutorial discretion, is subject to Article II's constitutional protections and constraints. Namely, whether the Appointments Clause and Article II's guarantees of presidential supervision and removal apply when the enforcer is not formally a part of the federal government yet in practice exercises significant executive authority.

These claims also implicate the proper reading of this Court's *Axon* decision in the context of injunctive relief. The threshold question on the irreparable injury standard is: does this Court's holding in *Axon*—that being subject to an illegitimate proceeding by an illegitimate decision maker constitutes "a here-and-now injury," because "a proceeding that has already happened cannot be undone" 598 U.S. at 191—apply when the party subject to the illegitimate proceeding seeks to establish irreparable injury for the purpose of securing injunctive relief? Or, alternatively, is *Axon* cabined to its facts?

The dueling perspectives in this case demonstrate the importance of this question. In this case, the district court below, the opinion concurring in the D.C. Circuit motions panel order, and Judge Walker's separate writing at the merits panel stage read *Axon* to apply in the context of establishing irreparable injury for injunctive relief. *See* App.106 ("Consequently, under the Supreme Court's explicit language, the nature of the constitutional claims asserted here, no matter their unlikelihood of success, suffice to show irreparable harm to Alpine."); App.72–78

(order granting injunction pending appeal in full); App.75 (Walker, J., concurring) (quoting *Axon* for the proposition that "the resolution of claims by an unconstitutionally structured adjudicator is a 'here-and-now injury' that cannot later be remedied"); App.63 (Walker, J., concurring in the judgment in part and dissenting in part) ("The Supreme Court's recent decision in *Axon Enterprise, Inc. v. FTC* tells us that Alpine faces certain and imminent harm that cannot later be fixed.").

In a case *predating Axon*, then-Judge Kavanaugh reached the same result to which the broader reading of *Axon* leads—that being subjected to actions of an "unconstitutionally structured agency" constitutes irreparable injury. *See John Doe Co.*, 849 F.3d at 1136 (Kavanaugh, J., dissenting) ("Irreparable harm occurs almost by definition when a person or entity demonstrates a likelihood that it is being regulated on an ongoing basis by an unconstitutionally structured agency that has issued binding rules governing the plaintiff's conduct and that has authority to bring enforcement actions against the plaintiff."); *id.* (collecting cases); *Alpine*, 121 F.4th at 1350 (Walker, J., concurring in the judgment in part and dissenting in part) (citing then-Judge Kavanaugh's dissent).

As discussed above, the panel majority adopted a different reading of *Axon*, concluding that the "here-and-now injury" language was largely inapposite in this case because *Axon* arose in a distinguishable context. *Alpine*, 121 F.4th at 1335–36.

The Courts of Appeals have meaningfully differed in their approaches to interpreting *Axon*. Some Circuits, like the merits panel majority below, have declined to apply *Axon*'s here-and-now injury language where a party seeks to establish

irreparable injury in the context of injunctive relief. *See, e.g.*, *Leacho, Inc. v. Consumer Prod. Safety Comm'n*, 103 F.4th 748, 760 (10th Cir. 2024); *YAPP USA Auto. Sys., Inc. v. Nat'l Lab. Rels. Bd.*, No. 24-1754, 2024 WL 4489598, at *3 (6th Cir. Oct. 13, 2024).

Other Circuits, meanwhile, have invoked *Axon*'s broad here-and-now injury language *without* any carve-out or limitation for injunctive relief. *See, e.g.*, *Consumer Fin. Prot. Bureau v. Nat'l Collegiate Master Student Loan Tr.*, 96 F.4th 599, 615 (3d Cir. 2024), *cert. denied sub nom. Nat. Collegiate Master v. Consumer Fin. Prot.*, No. 24-185, 2024 WL 5112295 (U.S. Dec. 16, 2024) ("[T]he Supreme Court has noted that 'subjection to an illegitimate proceeding, led by an illegitimate decisionmaker' is a manifestation of a 'here-and-now' injury."); *United States v. Biden*, No. 24-1703, 2024 WL 4541448, at *2 (3d Cir. May 9, 2024) (noting that *Axon* "dealt with a 'here-and-now injury,' but criminal defendants seeking dismissal must show more: a right not to be tried stemming from a statutory or constitutional guarantee that trial will not occur"); *Garraway v. Ciufo*, 113 F.4th 1210, 1224–25 (9th Cir. 2024) ("[B]eing subject to a proceeding in violation of the 'separation of powers' presents a 'here-and-now injury.").

Whoever has the better reading of *Axon*, this interpretive question is certworthy. The meaning of this precedent—which impacts the preliminary injunction analysis for every structural constitutional challenge seeking to enjoin some kind of proceeding—presents an important question on which jurists and

Courts have disagreed. Parties and the lower courts would benefit from clarity about how to interpret and properly apply *Axon*.

On the merits of the Article II claims, there is also a reasonable probability that this Court would grant review and a fair prospect that the Court would reverse because FINRA's structure violates several structural protections of Article II under a straightforward application of this Court's precedents.

In *Lucia v. SEC*, this Court held that SEC ALJs are "Officers of the United States," and thus must be appointed consistent with the Appointments Clause. SEC ALJs, this Court explained, exercise "significant discretion," have "the authority needed to ensure fair and orderly adversarial hearings," and may serve as the "last-word" in an enforcement action. 585 U.S. 237, 247–52 (2018). All of that is also true of FINRA Hearing Officers, who "are indistinguishable from the administrative law judges in *Lucia* and the special trial judges in *Freytag*." *See* App.60; *Alpine*, 121 F.4th at 1346 (Walker, J., concurring in the judgment in part and dissenting in part). Thus, it follows that FINRA officers must likewise be appointed consistent with the Constitution's Appointments Clause.

As to presidential removal, this Court held in *Free Enterprise Fund v. PCAOB*, that the structure of a private, quasi-governmental board violated the separation of powers because its officers enjoyed two separate levels of protection from presidential removal. 561 U.S. 477, 482 (2010). Here again, FINRA's structure is identical in this respect and is unconstitutional under a straightforward application of this Court's precedent. *See* App.61–63; *Alpine*, 121 F.4th at 1347 (D.C. Cir. 2024) (Walker, J.,

concurring in the judgment in part and dissenting in part) (FINRA's structure violates both the Appointments Clause and Article II's protections on presidential removal).

It also bears mentioning that the position of the United States in this litigation in the courts below directly contradicts the considered views of the Office of Legal Counsel. As OLC explained, *any* "position to which is delegated by legal authority a portion of the sovereign powers of the federal government and that is 'continuing' is a federal office subject to the Constitution's Appointments Clause." 2007 OLC Op. at 73. Delegated sovereign "powers primarily involve binding the Government or third parties for the benefit of the public, such as by administering, executing, or authoritatively interpreting the laws"—exactly what FINRA is seeking to do in the expedited proceeding against Applicant. *Id.* This rule applies to all positions, "however labeled." *Id.* at 71. "[F]ederal employment is not necessary for the Appointments Clause to apply," and "the applicability of the [Appointments] Clause does not depend on whether Congress has formally and directly created an 'office.' " *Id.* at 73.

As to a reasonable probability of certiorari, even where no circuit split has yet developed, the Court has a long-standing practice of granting review over structural Constitutional questions—especially those implicating Article II. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015); *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010); *Clinton v. City of New York*, 524 U.S. 417 (1998); *Morrison v. Olson*, 487 U.S. 654 (1988). *Free Enterprise Fund*, which involved the purportedly "private"

PCAOB, is particularly instructive. Applicant's forthcoming Petition will present a closely analogous question and will argue that FINRA's unconstitutionality follows directly from *Free Enterprise Fund*.

Finally, no vehicle issues would preclude the Court's review. That the case arose in the preliminary-injunction posture is no barrier because the *Axon* question—whether the Court's "here-and-now injury" language applies in the context of injunctive relief—would *only* ever arise in a preliminary posture. And resolution of the legal questions would be unlikely to turn on any record facts that have not yet been developed.

II. Applicant Will Be Irreparably Harmed Without a Stay.

Unless this Court enters a stay of the D.C. Circuit's judgment, Applicant will be irreparably harmed, sustaining an injury in the Expedited Proceeding that "cannot be undone." *Axon*, 598 U.S. at 191. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*) ("[A] party asking this Court for a stay . . . must show . . . that the applicant would likely suffer irreparable harm absent the stay.").

Without a stay, Applicant would be subject to an illegitimate decision-making process by an illegitimate decision-maker *before* the Court could decide whether to weigh in on whether that injury is enough to justify injunctive relief, to say nothing of Applicant's private non-delegation and Article II claims. Applicant would face the very constitutional harm it has always sought to avoid, and which *Axon* itself described as irreparable and irreversible in *at least* one other context, if not in all contexts.

This would be all the more problematic given that this Court is *already* poised to decide one private non-delegation case this Term, and may—in light of the acknowledged circuit split, the agreement of the parties that certiorari should be granted, and the urging of the Solicitor General that the Court grant review—also grant review of one of the HISA cases. Either way, if this Court is likely to provide *any* guidance about the constitutional implications of the private enforcement of federal law, Applicant's claims should be permitted to survive while the Court does so.

III. The Balance of Harms and the Public Interest Favor a Stay.

"In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190.

As explained above, Applicant will be irreparably harmed if FINRA is permitted to subject Applicant to its Expedited Proceeding. And the public interest likewise supports a stay. FINRA seeks to "exercise[] power in the people's name." *Free Enterprise Fund*, 561 U.S. at 497. Assuming it may do so at all, the Constitution requires that FINRA exercise federal power subject to "Presidential oversight," *id.*, and the other protections against government overreach guaranteed to the People.

FINRA, on the other hand, will not be harmed by a temporary delay. FINRA waited several months to initiate the Expedited Proceeding, only doing so days after this Court decided *Axon*. And the Expedited Proceeding alleges conduct known to FINRA since at least June of 2022. FINRA would suffer no meaningful harm from

allowing the Court to consider Applicant's constitutional arguments before it again attempts to close Applicant's business for good. Even if FINRA could demonstrate any harm to itself or the public interest from mere delay, the "fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (cleaned up). After all, "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Id.*

FINRA has in the past attempted to undercut this conclusion by arguing that an injunction would allow Applicant to "victimize its customers." FINRA Pet. for En Banc Reh'g, at 16. That assertion candidly assumes the truth of the vigorously contested premise that Applicant is guilty of the misconduct that FINRA has alleged but not yet proven. "[T]he only evidence that Alpine *has* violated the law is FINRA's say so." App.75 (Walker, J., concurring). FINRA assumes the truth of its own unproven allegations and urges the courts to do the same. But at least in this country, allegations alone are not enough to convict. It is contrary to all sense of process to assume Applicant's alleged wrongdoing based on FINRA's disputed assertions. All the more where, as Judge Walker noted, Applicant argues that FINRA is an illegitimate decisionmaker. App.42. Further, that FINRA waited months to initiate the Expedited Proceeding belies its claim that Applicant's continued operation would constitute an urgent threat to customers if Applicant's constitutional claims are adjudicated before FINRA moves forward with its enforcement action. This Court

should have the opportunity to at least consider Applicant's meritorious constitutional challenge to our Nation's "private" enforcer of the federal securities laws.

CONCLUSION

The Court has already granted certiorari this Term to address the private non-delegation doctrine and determine the contours of a purportedly private body's ability to exercise government power, if at all. And the Court may well take the parties—including the United States—up on its offer to further elucidate the doctrine as it applies to HISA, a "private" body highly analogous to FINRA. The Court should have the opportunity to consider this important matter alongside those petitions before Applicant is made to face the irreparable harm of which it has complained throughout this litigation, and which would moot a core constitutional injury: being forced to endure an unconstitutional proceeding by an unconstitutional decisionmaker.

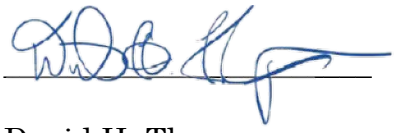
Thus, Applicant respectfully requests that this Court temporarily stay the D.C. Circuit's judgment pending the disposition of Applicant's forthcoming petition for writ of certiorari and, should certiorari be granted or the petition held, ultimate resolution on the merits. This stay would have the effect of leaving in place the D.C. Circuit's earlier injunction pending appeal enjoining FINRA from continuing its Expedited Proceeding against Applicant.

In the alternative, the Court could treat the application as a petition for certiorari, grant review or hold the petition for *Consumers' Research* or the HISA cases, if review is granted there, and grant a stay pending resolution of the merits.

Applicant respectfully requests the entry of an immediate administrative stay while the Court considers this application.

Dated: February 18, 2025

Respectfully submitted,



David H. Thompson
Counsel of Record
Brian W. Barnes
Athie O. Livas
COOPER & KIRK PLLC
1523 New Hampshire Ave., NW
Washington, DC 20036
Telephone: (202) 220-9636
Fax: (202) 220-9601
dthompson@cooperkirk.com

Counsel for Applicant