No. 24A808

In the Supreme Court of the United States

ALPINE SECURITIES CORPORATION, APPLICANT

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY, ET AL.

RESPONSE OF THE UNITED STATES IN OPPOSITION TO THE APPLICATION FOR A STAY

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The Acting Solicitor General, on behalf of the United States, respectfully files this response in opposition to the application for a stay of the mandate of the United States Court of Appeals for the District of Columbia Circuit in this case. This application concerns an expedited disciplinary proceeding before respondent Financial Industry Regulatory Authority (FINRA), a private self-regulatory organization in the securities industry, against one of its members, applicant Alpine Securities Corporation. FINRA alleged that applicant repeatedly violated internal FINRA rules and sought to expel applicant from FINRA membership. The court of appeals held that applicant is likely to succeed on its claim that FINRA's expulsion of a member without plenary review by the Securities and Exchange Commission (SEC) would violate the private nondelegation doctrine, and thus directed entry of "a limited preliminary injunction enjoining FINRA from giving effect to any expulsion order against [applicant] until either the SEC reviews the order on the merits or the time for [applicant] to seek SEC review lapses." Appl. App. 40-41. The court declined, however, to enjoin the expedited proceeding itself, finding that applicant had "not demonstrated that it

faces irreparable harm stemming from participating in FINRA's hearing process enforcing FINRA's membership rules." *Id.* at 40.

Despite the largely favorable ruling below, applicant asks this Court to halt FINRA's expedited proceeding pending resolution of applicant's recently filed petition for a writ of certiorari, *Alpine Securities Corp.* v. *FINRA*, No. 24-904 (filed Feb. 20, 2025). Applicant has not satisfied the requirements for that relief. Applicant's principal contention (Appl. 4, 16-18, 27-28) is that the private nondelegation issue on which applicant prevailed nonetheless warrants this Court's review. Applicant cites the fact that this Court has granted a pair of consolidated petitions that present private nondelegation issues and may be holding several more. *E.g.*, *FCC* v. *Consumers' Research*, No. 24-354 (oral argument scheduled for Mar. 26, 2025); *FTC* v. *National Horsemen's Benevolent and Protective Association*, No. 24-429 (filed Oct. 16, 2024). But "[this Court's] practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed." *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011) (citation omitted).

Indeed, although the emergency application focuses heavily on private nondelegation, applicant's petition for a writ of certiorari barely addresses that issue. Cf. Pet. at 15-37, *Alpine*, *supra* (No. 24-904). Instead, the petition presents two questions: (1) whether, under *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023), being compelled to participate in a proceeding before an allegedly unconstitutional adjudicator by itself constitutes an irreparable injury for purposes of obtaining preliminary injunctive relief; and (2) whether FINRA's structure violates Article II's Appointments Clause and related requirements regarding presidential supervision and removal of Executive Branch officers. See Pet. at i, *Alpine*, *supra* (No. 24-904).

This Court is unlikely to grant certiorari on either of those issues. Every court of appeals to address the irreparable-injury question has rejected applicant's position, making certiorari review unlikely. Applicant relies on this Court's statement in *Axon* that participation in adjudicative proceedings before an allegedly illegitimate decisionmaker is a "'here-and-now injury'" that "is impossible to remedy once the proceeding is over, which is when appellate review kicks in." 598 U.S. at 191 (citation omitted). But the Court recognized that here-and-now injury in the course of holding that a federal district court had subject-matter jurisdiction to entertain the aggrieved party's claim; the Court did not describe that injury as irreparable harm for purposes of preliminary injunctive relief.

As to the Appointments Clause question, certiorari is unlikely because there is no court of appeals ruling for this Court to review; the court below specifically declined to express any view as to applicant's likelihood of ultimate success on the merits of its Appointments Clause challenge. Nor did the court of appeals opine on the merits of any other Article II claim.

Finally, the remaining equitable factors weigh against applicant. Just as applicant's participation in the expedited FINRA disciplinary proceeding does not constitute irreparable harm for purposes of a preliminary injunction, so too does it not constitute irreparable harm for purposes of a stay, especially given that applicant is protected from sanctions until after the SEC has had an opportunity to conduct plenary review. On the other side of the balance, enjoining the expedited disciplinary proceeding would frustrate the political Branches' (and the public's) goal of encouraging self-regulation of the securities industry while ensuring that markets remain trustworthy and sound. The Court should deny the application.

STATEMENT

1. From the Founding to the Great Depression, the securities industry was entirely self-regulated by private associations, such as the New York Stock and Exchange Board (today the New York Stock Exchange) and similar associations in Boston and Philadelphia. See Appl. App. 5-6. In the 1930s, Congress empowered the SEC to regulate securities brokers through a model of "cooperative regulation," in which the SEC would assume a supervisory role over the existing system of private regulation. *Id.* at 7 (citation omitted). Under that cooperative approach, self-regulatory organizations composed of brokers and dealers ("registered securities associations") must register with the SEC and adopt rules for their members to follow. 15 U.S.C. 78*o*-3. Those associations must "enforce both their own rules and federal securities laws against their members." Appl. App. 8. They also must "submit rule changes to the SEC for approval before [the rules] can go into effect," and the SEC may "'abrogate, add to, and delete from'" those rules. *Id.* at 9 (quoting 15 U.S.C. 78s(c)). The associations must "'provide a fair procedure for' disciplining members." *Id.* at 10 (quoting 15 U.S.C. 78*o*-3(b)(2), (7), and (8)). Joining an association is mandatory for "virtually all securities traders," although the SEC "retains the authority to exempt individual traders." *Id.* at 9 (citing 15 U.S.C. 78*o*(b)(9)).

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

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

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

2. Applicant is a securities broker-dealer and a FINRA member. Appl. App. 11. In 2017, the SEC filed an enforcement action against applicant for "egregious and illegal conduct on a massive scale" between 2011 and 2015, which resulted in a $12 million civil penalty. *Ibid.* (brackets, citation, and ellipsis omitted); see *SEC* v. *Alpine Securities Corp.*, 413 F. Supp. 3d 235, 241 (S.D.N.Y. 2019), affirmed, 982 F.3d 68 (2d Cir. 2020), cert. denied, 142 S. Ct. 461 (2021). In 2019, FINRA investigated complaints from applicant's customers about excessive fees, and FINRA ultimately initiated a disciplinary proceeding in which it charged applicant with violations of internal FINRA rules. Appl. App. 12. After finding applicant's misconduct to be "intentional and egregious," the FINRA panel imposed various sanctions, including (as relevant here) (1) a cease-and-desist order prohibiting the misconduct and (2) an order expelling applicant from FINRA membership. *Ibid.* (citation omitted).

The expulsion order was stayed pending applicant's appeal, which remains pending within FINRA. Appl. App. 12. Applicant did not appeal the cease-and-desist order, which thus became final. *Id.* at 12-13. FINRA later received reports that applicant was continuing to engage in the prohibited misconduct. *Id.* at 13. FINRA opened a second investigation and ultimately initiated an expedited disciplinary proceeding, charging that applicant had violated the cease-and-desist order more than 35,000 times. *Ibid.* The complaint sought applicant's "immediate expulsion from FINRA." *Id.* at 14.

Meanwhile, after the first disciplinary proceeding, applicant filed suit in federal district court to challenge FINRA's constitutionality under the private nondelegation doctrine, the Appointments Clause, the First Amendment, the Fifth Amendment, and the Seventh Amendment. Appl. App. 13. The United States intervened to defend the constitutionality of the statutory scheme. *Ibid.* When FINRA initiated the expedited disciplinary proceeding, applicant moved for a preliminary injunction against that expedited proceeding. *Id.* at 14. The district court denied relief, *ibid.*, but a motions panel of the court of appeals ordered that an "injunction pending appeal be granted" and that FINRA "be enjoined from continuing the expedited enforcement proceeding against [applicant] pending further order of the court." *Id.* at 72. A merits panel of the court of appeals then received briefing and heard argument on the underlying appeal from the district court's order denying a preliminary injunction.

3. The court of appeals reversed the district court's denial of a preliminary injunction in part and remanded with instructions "to enter a limited preliminary injunction enjoining FINRA from giving effect to any expulsion order issued against [applicant] until either the SEC reviews the order on the merits or the time for [applicant] to seek SEC review lapses." Appl. App. 40-41, 71; see *id.* at 1-70.

a. The court of appeals concluded that applicant had demonstrated a likelihood of success on its private nondelegation claim "to the extent that FINRA can unilaterally expel a member * * * without governmental superintendence or control." Appl. App. 16; see *id.* at 16-22.

i. The court of appeals explained that, under the private nondelegation doctrine, a private entity to whom the government has delegated some authority "must act only 'as an aid' to an accountable government agency that retains the ultimate authority to 'approve, disapprove, or modify' the private entity's actions and decisions on delegated matters." Appl. App. 17 (quoting *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 388, 399 (1940)) (brackets omitted). The court observed that "[t]ypically, SEC oversight of FINRA disciplinary actions involves the SEC['s] 'conducting its own review' of any final decision or sanction," including "an 'independent review of the record,'" and approving, disapproving, or modifying FINRA's decision. *Id.* at 18 (brackets and citations omitted).

The court of appeals found, however, that "expulsions imposed through FINRA's expedited proceedings" are different because, under FINRA's rules, such expulsion orders are not automatically stayed on appeal (as they are when issued in typical disciplinary proceedings), but instead by default "take effect immediately, before the SEC can review them." Appl. App. 18; see *id.* at 12, 18-20 (citing 15 U.S.C. 78s(d)(2); 17 C.F.R. 201.420(d); and FINRA Rules 9311(b), 9360, and 9559(*o*)(5), (q)(4)-(5), and (r)). The court observed that federal law generally requires an entity to be "a member of a registered securities association" to trade securities, and that "FINRA is the only such association." *Id.* at 19 (citing 15 U.S.C. 78*o*(b)(1)). "As a result," the court explained, "expulsion from FINRA effectively amounts to expulsion from the securities industry," and "many expelled FINRA members could be forced

out of business before they can obtain SEC review of the merits of FINRA's decision," potentially making such review "a largely academic exercise." *Id.* at 18-19. The court of appeals acknowledged that "the SEC can stay the effectiveness of an expulsion order." *Id.* at 19. The court concluded, however, that "the SEC's stay authority likely is insufficient to satisfy the constitutional requirements of meaningful SEC merits review" because such stays are discretionary, "the process still takes time," the stay standard "disfavors immediate relief for the expelled member," and the stay proceeding "does not decide the merits." *Id.* at 19-20, 22. The court concluded, "[t]hat falls short of what the private nondelegation doctrine requires." *Id.* at 22.

ii. The court of appeals further held that applicant had satisfied the remaining requirements for preliminary injunctive relief on its private nondelegation claim. The court explained that applicant "faces irreparable harm" because "expulsion from FINRA will effectively * * * forc[e] it to shutter its operations immediately." Appl. App. 24-25. The court held that the interests of FINRA and the public did not outweigh that harm because the court's "opinion is narrow and limited to expedited expulsion proceedings, where the irreversible nature of the underlying sanction prevents review on the merits by the SEC." *Id.* at 26. The court thus held that applicant was entitled to a preliminary injunction preventing "FINRA during the pendency of this litigation from expelling [applicant] (should such an order issue) until after the SEC has reviewed any expulsion order in FINRA's expedited proceeding or the time for [applicant] to seek SEC review of an expulsion order has elapsed." *Id.* at 27.

iii. Applicant also contended that "FINRA's hearing officers are officers of the United States who must be appointed in conformance with the Appointments Clause and must be removable at will." Appl. App. 29. Applicant sought a prelimi-

nary injunction that would prevent the FINRA disciplinary proceedings from going forward pending the completion of the district court litigation. The court of appeals denied that request, holding that applicant had not demonstrated any additional irreparable harm that would warrant broader injunctive relief than the court had already ordered on applicant's private nondelegation claim. *Id.* at 29-39.

The court of appeals explained that its injunction preventing FINRA from expelling applicant until after SEC review fully alleviated applicant's "asserted harm of forced closure," given that applicant "does not dispute that the SEC's members are constitutionally appointed and have the authority to expel [applicant] from the securities industry consistent with the Appointments Clause." Appl. App. 30-31. The court explained that circuit precedent foreclosed applicant's argument that "being forced to litigate before an allegedly unconstitutionally appointed FINRA officer" was a "'per se irreparable harm.'" *Id.* at 32 (citation omitted); see *id.* at 32-36. The court of appeals also rejected applicant's contention that this Court's decision in *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023), supported its irreparable-harm argument. Appl. App. 36-39. The court explained that *Axon* had held that, "as a matter of statutory jurisdiction, a federal-court challenge to an unconstitutional appointment can begin before the agency acts," but that *Axon* "does not say that every agency proceeding already underway must immediately be halted because of an asserted constitutional flaw." *Id.* at 38; see *id.* at 37 (explaining that *Axon* "did not speak to what constitutes irreparable harm for purposes of the extraordinary remedy of a preliminary injunction"). The court further explained that "FINRA is not a government agency like those at issue in *Axon*," and that "[n]othing in *Axon* addressed an asserted injury from a member of a private organization having to go through a hearing process before such an entity." *Id.* at 38.

Because the court of appeals found that continuation of the FINRA disciplinary proceedings would not irreparably harm applicant, the court "express[ed] no view on the remaining preliminary-injunction factors, including whether [applicant] has demonstrated a likelihood of success on the merits of the applicability of the Appointments Clause to FINRA's employees." Appl. App. 39. The court thus declined to "enjoin[] FINRA's expedited proceeding from going forward." *Id.* at 41.

b. Judge Walker concurred in the judgment in part and dissented in part. Appl. App. 42-70. He would have granted an injunction to prevent the expedited disciplinary proceeding from going forward. He concluded that "FINRA wields significant executive authority when it investigates, prosecutes, and initially adjudicates allegations against a company required by law to put itself at FINRA's mercy," and that "[t]his panoply of enforcement powers requires no contemporaneous oversight by the SEC," all in violation of the private nondelegation doctrine. *Id.* at 42, 47. Judge Walker explained that "FINRA is a private entity," but that "if we assume FINRA is a governmental entity," its structure would violate Article II's requirements regarding presidential supervision, appointment, and control of Executive Branch officers. *Id.* at 60; see *id.* at 59-63. He also viewed *Axon* as supporting applicant's irreparable-harm argument. *Id.* at 63-68.

4. The court of appeals entered a judgment ordering that "the injunction pending appeal entered by [the motions panel] * * * be dissolved only to the extent that it enjoins FINRA's expedited proceeding from going forward." Appl. App. 71. The court further ordered that "the portion of the injunction that would preclude FINRA from giving effect to any expulsion order it might issue against [applicant] will remain in effect until the district court issues its injunction." *Ibid.* The court denied applicant's motion to stay the mandate. C.A. Doc. 2099484 (Feb. 7, 2025).

ARGUMENT

The application should be denied. A stay pending certiorari is "'not a matter of right'" but a matter of "'judicial discretion,'" and an applicant "bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken* v. *Holder*, 556 U.S. 418, 433-434 (2009) (citations omitted). The applicant must show that (1) it is likely to succeed on the merits, which includes a showing that this Court is reasonably likely to grant certiorari; and (2) it will suffer irreparable injury without a stay, and that the equities and the public interest support a stay. *Ohio* v. *EPA*, 603 U.S. 279, 291 (2024); *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam); see *Does 1-3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).* Applicant has not made the necessary showings here.

I. APPLICANT IS UNLIKELY TO SUCCEED ON THE MERITS

Applicant is unlikely to succeed on the merits of any of the issues it raises in the emergency application or petition for a writ of certiorari for a straightforward reason: this Court is unlikely to grant certiorari to review any of them. Applicant obtained relief on its private nondelegation claim; the court of appeals did not reach

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* The application requests a stay of the court of appeals' mandate, but it does not appear that such a stay would provide applicant any relief. Just as the court of appeals' injunction pending appeal took effect immediately, Appl. App. 72 (motions panel injunction), so too did its subsequent partial dissolution of that same injunction, *id.* at 71. Those actions regarding the court's *own* orders do not depend on the mandate, which identifies the point in time when a court of appeals' reversal of a *district court* order takes effect and the district court regains jurisdiction. Because the motions panel's injunction against continuation of the FINRA disciplinary proceedings has *already* been dissolved, staying the mandate would provide applicant no tangible relief. Applicant notes that, "[i]n the alternative, this Court could enjoin the FINRA enforcement proceedings directly." Appl. 3 n.1. Such an order would provide applicant the relief it seeks. But while this Court's entry of an injunction pending certiorari turns on essentially the same factors as a stay, it "'demands a significantly higher justification' than * * * a stay," *Respect Maine PAC* v. *McKee*, 562 U.S. 996, 996 (2010) (citation omitted), and should be granted "sparingly and only in the most critical and exigent circumstances," *Wisconsin Right to Life, Inc.* v. *FEC*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citation omitted).

the merits of applicant's Article II claim; and no court of appeals has adopted applicant's position that participation in allegedly unconstitutional adjudicative proceedings, standing alone, constitutes irreparable harm for purposes of the preliminary-injunction analysis.

A. This Court Is Unlikely To Review The Private-Nondelegation Issue On Which The Court Of Appeals Granted Applicant Relief

The application for emergency relief principally focuses on the private nondelegation issue, but that issue is not squarely presented. Applicant repeatedly observes (Appl. 4, 6, 16, 27) that this Court has granted certiorari to review issues involving the private nondelegation doctrine in *FCC* v. *Consumers' Research*, No. 24-354 (oral argument scheduled for Mar. 26, 2024), and a consolidated case; and that the Court appears to be holding several other petitions that implicate the private nondelegation doctrine, including *FTC* v. *National Horsemen's Benevolent and Protective Association*, No. 24-429 (filed Oct. 16, 2024); see Appl. 17 (listing others). But the court of appeals in this case held that applicant was *likely to prevail* on its private-nondelegation challenge to expedited expulsion, and it granted preliminary injunctive relief on that claim. Appl. App. 16-22. This Court's "practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed," *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011) (quoting *Bunting* v. *Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from the denial of certiorari)), and applicant provides no sound basis for this Court to deviate from that "settled" practice here.

Indeed, although the emergency application focuses heavily on private nondelegation, the petition for a writ of certiorari barely addresses that issue. The sole mention of "private nondelegation" in the "Reasons for Granting the Petition" section appears in a quotation from a Fifth Circuit case addressing a different entity. See

Pet. at 18, *Alpine Securities Corp.* v. *FINRA*, No. 24-904 (filed Feb. 20, 2025); cf. *id.* at 15-37 (nothing further). Instead, the relevant portion of the petition focuses on the Appointments Clause and Article II requirements regarding presidential supervision and removal of Executive Branch officers. See *id.* at 25-29. And neither FINRA nor the United States has asked the Court to review the interlocutory ruling in applicant's favor on the private nondelegation claim. Accordingly, there would be no sound basis for this Court even to hold applicant's petition pending its decision in *Consumers' Research*, much less to grant plenary review on an issue that the petition itself does not squarely present and on which the court below has already granted relief.

B. This Court Is Unlikely To Review The Article II Claims Described In Applicant's Certiorari Petition

Likewise, the Court is unlikely to review applicant's Appointments Clause claim, or any other claim about Article II's requirements regarding presidential supervision or removal of Executive Branch officers, because those issues also are not squarely presented in this case. In the court of appeals, applicant made "two constitutional arguments in the alternative": that FINRA's structure violates *either* "the private nondelegation doctrine" *or* "the Appointments Clause." Appl. App. 15. As noted, the court held that applicant was likely to prevail on its private nondelegation challenge, and it granted preliminary injunctive relief on that claim. *Id.* at 16-22.

With respect to applicant's alternative Appointments Clause claim, by contrast, the court of appeals denied preliminary injunctive relief on the ground that applicant had failed to show irreparable injury from continuation of the FINRA disciplinary proceedings. See Appl. App. 29-39. Because the absence of irreparable harm provided a sufficient basis for denying injunctive relief on that claim, the court "express[ed] no view on the remaining preliminary-injunction factors, including

whether [applicant] has demonstrated a likelihood of success on the merits of the applicability of the Appointments Clause to FINRA's employees." *Id.* at 39. The court likewise did not address the merits of any other Article II claim regarding presidential supervision or removal of Executive Branch officers. That makes this case a poor vehicle in which to review the merits of those claims, given that this Court is one "of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). See, *e.g.*, *Seattle's Union Gospel Mission* v. *Woods*, 142 S. Ct. 1094, 1096-1097 (2022) (Alito, J., respecting the denial of certiorari).

The current preliminary-injunction posture of this case provides a further reason to deny review. Because the district court proceedings are still ongoing, the only Article II question properly before this Court is whether applicant has shown a likelihood of success on its Appointments Clause and related claims—not whether those claims are correct. Cf. *City of Ocala* v. *Rojas*, 143 S. Ct. 764, 765 (2023) (Gorsuch, J., respecting the denial of certiorari). In addition, review of applicant's Article II claim would be premature because FINRA might well amend its rules in response to the court of appeals' private-nondelegation holding, which—given the obvious analytic overlap—could affect the Article II claim.

Finally, the court of appeals viewed applicant as having made its private-nondelegation claim and its Article II appointment and removal claim "in the alternative." Appl. App. 15. Judge Walker likewise appeared to view each of those claims as being dependent on whether FINRA is a private or a governmental entity, respectively. See *id.* at 59-60; cf. *Department of Transportation* v. *Association of American Railroads*, 575 U.S. 43, 50-55 (2015). Because applicant obtained relief below on its private-nondelegation claim—which depends on the premise that FINRA is private—applicant is poorly positioned to press an argument in this Court that reflects a con-

trary understanding of FINRA as a governmental entity. Cf. *New Hampshire* v. *Maine*, 532 U.S. 742, 749-751 (2001) (party that prevails by assuming one position in litigation generally may not later assume a contrary position in that litigation). At a minimum, this case is an especially poor vehicle for review because that tension in applicant's pleadings would complicate this Court's review of the Article II issues in the petition for a writ of certiorari.

C. The Court Is Unlikely To Review The Court Of Appeals' Ruling That The Continuation Of FINRA Disciplinary Proceedings Will Not Subject Applicant To Irreparable Injury

The application (Appl. 19-21) and certiorari petition (Pet. at 15-18, 19-24, *Alpine*, *supra* (No. 24-904)) challenge the court of appeals' holding that applicant had not demonstrated an irreparable injury sufficient to justify an injunction prohibiting FINRA's expedited disciplinary proceeding from going forward. Unlike the private-nondelegation and Article II claims, the irreparable-injury claim *is* squarely presented in this posture, but this Court is unlikely to grant certiorari because applicant has not identified any circuit conflict warranting review. See Sup. Ct. R. 10.

Applicant relies on this Court's statement in *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023), that compelled participation in proceedings before an allegedly illegitimate decisionmaker is a "'here-and-now injury'" that "is impossible to remedy once the proceeding is over, which is when appellate review kicks in," *id.* at 191 (citation omitted). In applicant's view, that statement implies that a regulated party who challenges the decisionmaker's legitimacy *necessarily* has "establish[ed] irreparable injury for the purpose of securing injunctive relief." Appl. 19; see Pet. at 20, *Alpine*, *supra* (No. 24-904).

No court of appeals has adopted applicant's incorrect reading of *Axon*. As applicant acknowledges (Appl. 20-21), the Sixth and Tenth Circuits—like the D.C. Cir-

cuit below—have expressly rejected that argument. See *YAPP USA Automotive Systems, Inc.* v. *NLRB*, No. 24-1754, 2024 WL 4489598, at *3 (6th Cir. Oct. 13, 2024) (denying injunction pending appeal), application for injunction pending appeal denied, No. 24A348 (Oct. 15, 2024); *Leachco, Inc.* v. *CPSC*, 103 F.4th 748, 758-759 (10th Cir. 2024), cert. denied, No. 24-156 (Jan. 13, 2025). Contrary to applicant's claims (Appl. 21), the Third and Ninth Circuits have not held otherwise. In *CFPB* v. *National Collegiate Master Student Loan Trust*, 96 F.4th 599 (2024), cert. denied, No. 24-185 (Dec. 16, 2024), the Third Circuit held that the regulated party had not demonstrated an illegitimate proceeding in the first place, so the court had no occasion to address whether compelled participation in such a proceeding would constitute irreparable injury. *Id.* at 615. *United States* v. *Biden*, No. 24-1703, 2024 WL 4541448 (3d Cir. May 9, 2024) (per curiam), did not even involve injunctive relief; the court held that *Axon*'s language does not mean that a criminal defendant has a general right to interlocutory review of pretrial orders. *Id.* at *2 n.1. And applicant's citation of *Garraway* v. *Ciufo*, 113 F.4th 1210 (9th Cir. 2024), is to the *dissenting* opinion in that case. Even that dissenting judge, moreover, cited *Axon* only to support the view that a federal official should be entitled to immediate interlocutory review of a decision creating a new *Bivens* cause of action. *Id.* at 1224-1225 (Bumatay, J., dissenting).

Nothing in those decisions conflicts with the decision below. For good reason: applicant's reading of *Axon* takes the discussion of injury out of context and transmutes it into a broad proposition for injunctive relief. In *Axon*, parties to SEC and FTC proceedings filed suit in federal district court to challenge on constitutional grounds the tenure protections of administrative law judges (ALJs) in those agencies. 598 U.S. at 180. Although constitutional challenges literally "aris[e] under the Constitution," 28 U.S.C. 1331, district courts lack jurisdiction over such challenges to

agency action where Congress has erected an alternative review scheme that implicitly precludes the exercise of jurisdiction under Section 1331. See *Axon*, 598 U.S. at 185. One of the factors courts consider in deciding whether district court review is available in a particular case is "whether preclusion of district court jurisdiction 'could foreclose all meaningful judicial review.'" *Id.* at 190 (citation omitted).

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

Applicant construes *Axon*'s observation that the plaintiffs' alleged injury there was "impossible to remedy once the proceeding is over," 598 U.S. at 191, to mean that any plaintiff raising a similar claim about an unconstitutionally structured agency automatically has established an irreparable injury for purposes of injunctive relief. But *Axon* did not present any question concerning the standards for injunctive relief. The Court's analysis thus focused solely on subject-matter jurisdiction, as evidenced by its emphasis on the plaintiffs' *allegations* and *claims*. See *ibid.* (repeatedly referring to the plaintiffs' "claim" and their "allege[d]" harm). As Chief Justice Marshall

long ago observed, "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 19 U.S. 264, 399 (1821); see *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute.").

Applicant cites (Appl. 20) then-Judge Kavanaugh's dissent in *John Doe Co.* v. *CFPB*, 849 F.3d 1129 (D.C. Cir. 2017) (per curiam), as evidence of "dueling perspectives" (Appl. 19) in the lower courts. But that decision pre-dates *Axon* and, as explained, no courts of appeals post-*Axon* have adopted applicant's position on irreparable harm. Indeed, the majority in *John Doe* found no irreparable harm. 849 F.3d at 1134-1135. Moreover, *John Doe* involved an illegitimately structured agency that had *final* authority to regulate the plaintiff's conduct and pursue sanctions. See *id.* at 1136 (Kavanaugh, J., dissenting); cf. *Seila Law LLC* v. *CFPB*, 591 U.S. 197 (2020). Applicant, in contrast, has not challenged the legitimacy of the SEC, which has final authority here. Rather, applicant alleges only that FINRA is insufficiently supervised by the SEC, and applicant advances that argument in a case involving alleged violations only of FINRA's internal rules, not of federal securities laws.

II. APPLICANT HAS NOT SATISFIED THE EQUITABLE REQUIREMENTS FOR THE EXTRAORDINARY RELIEF IT SEEKS

A. Applicant Has Not Demonstrated That It Will Sustain Any Irreparable Injury If FINRA's Expedited Proceeding Goes Forward

The only harm that applicant alleges it will sustain without a stay is the abstract harm of being "subject to an illegitimate decision-making process by an illegitimate decision-maker." Appl. 24. Just as that sort of harm, standing alone, does not establish an irreparable injury for purposes of a preliminary injunction, so too does it not establish an irreparable injury for purposes of a stay, especially given that any

expulsion order that FINRA might issue following the expedited disciplinary proceeding will be enjoined from taking effect until after the SEC has had an opportunity for plenary review. See Appl. App. 71.

Both the previous disciplinary proceeding and the expedited proceeding at issue here involve only alleged violations of internal FINRA rules; neither involves any alleged violation of federal securities laws. See Appl. App. 12 ("FINRA's findings involved violations only of FINRA's own internal rules."); *id.* at 13 ("The complaint alleged only violations of internal FINRA rules."). So even if being subject to FINRA's "decision-making process" (Appl. 24) could potentially be viewed as giving rise to a cognizable injury in situations involving FINRA's enforcement of the federal securities laws, that conclusion would not follow when, as here, FINRA enforces its own private rules. And, by virtue of the court of appeals' preliminary injunction, any expulsion order that FINRA may issue cannot take effect until a concededly legitimate governmental decisionmaker—namely, the SEC—has an opportunity to conduct plenary review.

B. The Government And The Public Would Be Harmed By A Stay

On the other side of the balance, enjoining the expedited disciplinary proceeding from going forward would harm the interests of the government and public, which merge in this context, see *Nken*, 556 U.S. at 435. There is a strong congressional and public interest in ensuring that securities markets remain trustworthy and sound, including by ensuring that those markets remain free of those who repeatedly violate not just the federal securities laws, but also longstanding industry rules that protect customers and investors, see Appl. App. 10 (describing some of those rules). Applicant does not contend that plenary review by the SEC of its alleged disciplinary violations—in proceedings that permit the SEC to take new evidence, review legal issues

de novo, and modify or set aside any sanction entered by FINRA—would violate any constitutional provision or principle. And the injunctive relief already entered by the court of appeals ensures that applicant will not incur any legal sanctions arising out of the expedited proceeding until the SEC has had a chance to conduct that review.

CONCLUSION

The application should be denied.

Respectfully submitted.

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