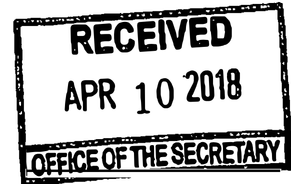

ADMINISTRATIVE PROCEEDING FILE NO. 3-13678R

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

JOHN M.E. SAAD,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

IN THE MATTER OF THE APPLICATION OF JOHN M.E. SAAD
FOR REVIEW OF DISCIPLINARY ACTION TAKEN BY FINRA

ON REMAND FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT, CASE NO. 15-1430

REPLY BRIEF FOR PETITIONER JOHN M.E. SAAD

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INTRODUCTION

In *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017), the Supreme Court articulated a framework for distinguishing remedial sanctions from punitive ones. The Court explained that a sanction which "cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 1645 (internal quotation marks omitted). FINRA does not contest that, under this framework, the permanent bar imposed on Mr. Saad is punitive. Nor does it contest that applicable D.C. Circuit precedent requires sanctions affirmed by the Commission to be *remedial*. Accordingly, the permanent bar is unlawful under *Kokesh.*

FINRA insists that *Kokesh*, which announced standards for determining whether a sanction is remedial or punitive, is irrelevant. Its primary argument is that *Kokesh* concerns *solely* the context in which it was decided—namely, the meaning of the word "penalty" in 28 U.S.C. § 2462. *See, e.g.*, FINRA Br. 9. This interpretation of *Kokesh* is entirely at odds with the opinion's reasoning and text. In *Kokesh*, the unanimous Supreme Court recognized a set of *general principles* for classifying sanctions, which it then applied to the context at hand. FINRA is attempting to give *Kokesh* a far more cramped reading than the opinion will tolerate.

FINRA's secondary argument is that the D.C. Circuit has been using the word "remedial" in a different and broader sense than the one the Supreme Court described in *Kokesh*. *See, e.g.*, FINRA Br. 8. Yet *Kokesh* is significant to this case *precisely because* the Supreme Court clarified the meaning of "remedial" and that definition is in tension with how the D.C. Circuit had been interpreting the term. At bottom, FINRA's view is that the D.C. Circuit should *continue* to adhere to an interpretation of the word "remedial" that the Supreme Court has rejected.

FINRA also puts forward sundry other arguments, which are addressed below. But the core proposition necessary to resolve this case is quite straightforward. The Commission can uphold this sanction only if it was remedial; and the Supreme Court has made clear that it was punitive because the purpose of permanently barring Mr. Saad was to punish and to deter, rather than to redress the harm suffered by any individual. Accordingly, the best path forward would be to simply rescind the sanction. At a minimum, however, a new analysis is necessary to explain why, following the Supreme Court's recognition of principles for distinguishing remedial and punitive sanctions, permanent bars should be permitted at least in some circumstances, and what standards should be used in adjudicating those permanent bars. That deliberation should be carried out by FINRA in the first instance.

ARGUMENT

I. FINRA DOES NOT CONTEST THAT, UNDER THE *KOKESH* FRAMEWORK, THE PERMANENT BAR IMPOSED ON MR. SAAD IS UNLAWFUL AND SHOULD BE RESCINDED

In *Kokesh*, the Supreme Court articulated a set of "principles" for determining whether a sanction is punitive or remedial. 137 S. Ct. at 1642, 1644. As the opening brief explained at length, applying this framework to Mr. Saad's case inexorably yields the conclusion that his permanent bar was punitive rather than remedial. Saad Br. 9-16 (demonstrating that the bar is punitive under each of the principles discussed in *Kokesh*). FINRA *does not contest* this proposition. Thus, it is undisputed that, if the *Kokesh* framework is applicable here, the sanction imposed on Mr. Saad is not remedial.

FINRA also does not—and cannot—contest the proposition that, under applicable D.C. Circuit precedent, the Commission may affirm *only* remedial sanctions. Saad Br. 16-17 (collecting cases); *see, e.g.*, *Siegel v. S.E.C.*, 592 F.3d 147, 157-58 (D.C. Cir. 2010). In conformity with this precedent, the Commission has previously affirmed Mr. Saad's sanction only based on a finding that it was "remedial." *In the Matter of the Application of John M.E. Saad for Review of Disciplinary Action Taken by FINRA*, Release No. 34-76118, 2015 WL 5904681, at *5-7 (Oct. 8, 2015); Saad Br. 17-18. Indeed, the FINRA Sanction Guidelines

expressly *require* that any sanction imposed by FINRA be remedial. Saad Br. 21-22; FINRA Sanction Guidelines 2-4.

Finally, FINRA affirmatively refuses to "engage with [Mr. Saad's] arguments" as to how the Commission should proceed if it concludes that *Kokesh* is applicable here. FINRA Br. 31. As the opening brief explained, and FINRA does not contest, the best course of action would be simply to rescind the sanction. Saad Br. 16-23.

In short, FINRA has tacitly accepted that, if the *Kokesh* framework governs this case, Mr. Saad's permanent bar is unlawful and should be rescinded. Any argument to the contrary is now waived.[1] The only question that divides the parties is whether the principles articulated in *Kokesh* apply in this context.

II. THE KOKESH FRAMEWORK GOVERNS THIS CASE

A. The Scope of *Kokesh* Cannot Be Limited to a Statute of Limitations

1. As noted above, FINRA's position rests entirely on the notion that the Commission should ignore *Kokesh* in evaluating whether Mr. Saad's permanent bar is remedial. Its main argument in support of this view is that the reasoning of

[1] *See, e.g.*, *In the Matter of the Robare Group, Ltd., Mark L. Robare, and Jack L. Jones, Jr.*, Release No. 806, 2015 WL 3507108, at *38 (June 4, 2015); *In the Matter of Newbridge Secs. Corp., Guy S. Amico, Scott H. Goldstein, Eric M. Vallejo, and Daniel M. Kantrowitz*, Release No. 380, 2009 WL 1684744, at *61 n.58 (June 9, 2009); *In the Matter of the Application of Ahmed Gadelkareem for Review of Disciplinary Action Taken by FINRA*, Release No. 34-80586, 2017 WL 1735943 at n.7 (May 3, 2017); *Stoiber v. S.E.C.*, 161 F.3d 745, 754 (D.C. Cir. 1998).

Kokesh applies *exclusively* to the specific provision that it construed. *See, e.g.*, FINRA Br. 9 (insisting that "*Kokesh* was *only about* the meaning of the term 'penalty' in 28 U.S.C. § 2462" (emphasis added)). This is a profound mischaracterization of *Kokesh*.

It is readily apparent from *Kokesh* itself that it is not merely an opinion about a single word in Section 2462. Instead, the Supreme Court invoked *general principles* of how to distinguish a punitive sanction from a remedial one, and then *applied* those principles to Section 2462.

Indeed, the Court expressly stated that it was doing so. It began its analysis with a general definition of penal sanctions. *Kokesh*, 137 S. Ct. at 1642 ("A penalty is a punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws." (internal quotation marks and alterations omitted)). It then observed that "[t]his definition gives rise to two principles" as to whether a given sanction "operates as a penalty." *Id.* And then it concluded that the "*[a]pplication* of the foregoing principles readily demonstrates that SEC disgorgement constitutes a penalty within the meaning of § 2462." *Id.* at 1643 (emphasis added). In other words, the opinion *expressly declares* that its interpretation of Section 2462 is simply one application of the general principles it discusses; nothing in the opinion remotely suggests that these principles are

confined to Section 2462. *See also id.* at 1642 (noting that "[t]his Court has *applied these principles* in construing the term 'penalty'" (emphasis added)).[2]

Indeed, the opinion is replete with general and trans-substantive statements regarding the nature of punitive and remedial sanctions. *See, e.g., id.* ("[W]hether a sanction represents a penalty turns in part on whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." (internal quotation marks omitted)); *id.* ("[P]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State." (internal quotation marks omitted)); *id.* ("[A] pecuniary sanction operates as a penalty only if it is sought for the purpose of punishment, and to deter others from offending in like manner—as opposed to compensating a victim for his loss." (internal

[2] Contrary to FINRA's suggestion, FINRA Br. 12, 21 n.20, a number of courts have recognized that *Kokesh* may have significant implications beyond its immediate context. *See, e.g., S.E.C. v. Collyard*, 861 F.3d 760, 763 (8th Cir. 2017) (explaining that "*Kokesh* undermines [Eighth Circuit precedent holding] that a claim is not a penalty simply because it's equitable" and potentially implies that an injunction can constitute a penalty (internal quotation marks omitted)); *S.E.C. v. Metter*, 706 F. App'x 699, 702 (2d Cir. 2017) (assuming that, "in light of [*Kokesh*], the disgorgement liability imposed in this matter was essentially punitive in nature and thus was a fine within the meaning of the Excessive Fines Clause of the Eighth Amendment"); *S.E.C. v. Gentile*, No. 16-1619 (JLL), 2017 WL 6371301, at *3-4 (D.N.J. Dec. 13, 2017) (explaining that "the Supreme Court's reasoning [in *Kokesh*] is quite instructive" on the question whether two requested injunctions were "penal in nature," and concluding that the Commission's "requested reliefs ... are '*noncompensatory sanctions*' and must be considered penalties" for Section 2462 purposes); *S.E.C. v. Premier Links, Inc.*, No. 14-CV-7375 (CBA) (ST), 2017 WL 7792702, at *9 n.10 (E.D.N.Y. Sept. 14, 2017) (observing that, in *Kokesh*, "[t]he Supreme Court indicated that it may be willing to revisit the viability of the disgorgement remedy"); *Osborn v. Griffin*, 865 F.3d 417, 470 n.1 (6th Cir. 2017) (Merritt, J., dissenting) (observing that equitable disgorgement "may not even be applicable in SEC contexts for much longer in light of [*Kokesh*]").

quotation marks omitted)); *id.* at 1643 ("Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because deterrence is not a legitimate nonpunitive governmental objective." (internal quotation marks and alterations omitted)); *id.* at 1644 ("When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty."); *id.* ("SEC disgorgement thus *bears all the hallmarks of a penalty*: It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate." (emphasis added)); *id.* at 1645 ("The justification for this practice given by the court below demonstrates that disgorgement in this context is *a punitive, rather than a remedial*, sanction." (emphasis added)).[3]

In short, the reasoning of *Kokesh* sweeps far beyond Section 2462.

2. Moreover, *Kokesh*'s teachings on the distinction between remedial and punitive sanctions are fully binding on lower courts and agencies. First, because they provided the rationale for the Court's ultimate holding, they are themselves holdings rather than dicta. *See Schermerhorn v. State of Israel*, 876 F.3d 351, 356

[3] The Commission's brief in *Kokesh* also repeatedly made general observations about the nature of punitive and remedial sanctions. *E.g.*, U.S. Br. 17 (referring to "the non-punitive character of disgorgement" and stating that "a punishment ... may be imposed regardless of whether the defendant profits" while disgorgement is "remedial" because it is "intended to lessen the effects of a violation"); *id.* at 17 n.3 ("The existence of a punishment must be determined objectively."); *id.* at 10 (stating that SEC disgorgement is not a penalty "because it is not a punishment"); *id.* at 11 (stating that "disgorgement in SEC actions is often compensatory, and thus unambiguously nonpunitive").

(D.C. Cir. 2017); *U.S. Telecom Ass'n v. F.C.C.*, 825 F.3d 674, 744 (D.C. Cir. 2016); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996) (explaining that the "rationale" of a decision is not dicta); *UARG v. E.P.A.*, No. 12-1342, 2018 WL 1386138, at *3 (D.C. Cir. Mar. 20, 2018) (relying on *Seminole Tribe*); *see also In the Matter of Union Electric Company*, Release No. 35-18368, 1974 WL 162698, at *9 n.48 (April 10, 1974) (referring to the Commission's "duty ... to follow the Supreme Court's decisions").

Even if those principles were dicta, however, lower courts would be required to follow them. As the D.C. Circuit has repeatedly explained, "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Nat. Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 216 F.3d 1180, 1189 (D.C. Cir. 2000) (internal quotation marks and alterations omitted); *see, e.g., United States v. Fields*, 699 F.3d 518, 522 (D.C. Cir. 2012); *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 650 (D.C. Cir. 2010). The Commission, too, adheres to what the Supreme Court *says*, and not just to what it *does*. *See In re Flanagan*, Release No. 8437, 2004 WL 1538526, at *4 (July 7, 2004) (noting that the "language" of a Supreme Court opinion "controls our decision here"); *In the Matter of the Application of Mission Securities Corporation and Craig M. Biddick for Review of Disciplinary Action Taken by FINRA*, Release No. 34-63453, 2010 WL 5092727, at *10 (Dec. 7, 2010)

(reviewing the reasoning of a recent Supreme Court decision to determine whether it rendered FINRA unconstitutional).

In short, *Kokesh*'s reasoning on the nature of punitive and remedial sanctions is binding and overrules any inconsistent precedent. *See, e.g.*, *Nat'l Inst. of Military Justice v. D.O.D.*, 512 F.3d 677, 682-83 n.7 (D.C. Cir. 2008) (explaining that a Supreme Court opinion "supersedes Circuit precedent" if it "effectively overrules" that precedent (internal quotation marks omitted)).[4]

3. FINRA's attempts to locate limiting language in the opinion are entirely unsuccessful. *See, e.g.*, FINRA Br. 9. FINRA points primarily to *Kokesh*'s footnote 3, where the Court observes that "[t]he sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period." 137 S. Ct. at 1642 n.3. But the fact that a Supreme Court decision addresses a particular question presented does not in any way imply that it has no bearing on any other question. To the contrary, "the reasoning of a

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[4] *Kokesh* is not the only unfavorable authority that FINRA reads quite narrowly. Elsewhere, FINRA asserts that several Supreme Court and D.C. Circuit decisions regarding the nature of penal sanctions are irrelevant here because they "were not about whether non-compensatory sanctions imposed by a securities-industry SRO were 'excessive or oppressive' within the meaning of Section 19(e) [of] the Exchange Act or Section 15A of the Exchange Act, or about the meaning of the terms 'remedial' and 'penal' as applied to imposing or evaluating non-compensatory sanctions in SRO disciplinary proceedings." FINRA Br. 28-29. In other words, FINRA would have the Commission disregard these cases for the sole reason that they were not decided in precisely the context that is involved in this case. As discussed above, this is not consistent with the D.C. Circuit's and the Supreme Court's approach to controlling legal authority.

Supreme Court case" is just as binding as "the result." *United States v. Duvall*, 740 F.3d 604, 609 (D.C. Cir. 2013). And as shown above, the reasoning of *Kokesh* in defining "remedial" and "punitive" cannot be confined to Section 2462.[5]

In summary, *Kokesh* set out a general framework for distinguishing remedial sanctions from penal ones. This framework is fully binding on the D.C. Circuit, and on the Commission.

B. FINRA Has Offered No Cogent Way of Distinguishing *Kokesh*

1. By way of backup, FINRA argues that, even if *Kokesh* is not restricted to Section 2462, it nevertheless does not apply to *this* case. FINRA asserts that, in declaring that SRO-imposed sanctions must be remedial, lower courts have had in mind a different meaning of "remedial." *See, e.g.*, FINRA Br. 8 (claiming that, in this context, federal courts "have used the term 'remedial' to refer to sanctions that

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[5] Indeed, multiple sophisticated commentators have interpreted footnote 3 as a reflection of *Kokesh's* breadth rather than its narrowness (as FINRA would have it). *See, e.g.*, Sam Bray, *Equity at the Supreme Court*, The Washington Post, June 10, 2017, *available at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/10/equity-at-the-supreme-court/?utm_term=.88ae1b6027a3 ("Footnote three suggests the ostensible remedy of disgorgement, at least as sought by the SEC, may be vulnerable."); Stephen M. Bainbridge, Kokesh *Footnote 3 Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases* 4 (UCLA School of Law, Law & Economics Research Paper No. 17-12, 2017) ("Despite its seeming neutrality on the question, footnote 3 all but invites defendants to make a challenge to the validity of the disgorgement sanction."); Jessica S. Musselman, Matthew J. Jacobs, & Erica Connolly, *Keeping Current: Supreme Court Curbs SEC's Disgorgement Power: Holds That the SEC Can't Escape the SOL*, Bus. L. Today (July 2017) ("A footnote in *Kokesh* suggests that the practice of disgorgement could itself be in jeopardy."); Daniel R. Walfish, *Other People's Money: SEC Disgorgement after 'Kokesh,'* " N.Y.L.J., Sept. 8, 2017 ("Many have assumed, on the basis of [footnote 3], that courts will soon be considering whether they have authority to order disgorgement at all in SEC enforcement actions.").

serve the purpose of protecting the public interest and investors, and they have used the term 'penal' in counterpoint to *that* use of the term remedial"); *see also id.* at 23, 26.

This argument actually undercuts FINRA's position. *Kokesh* matters here *precisely because* the D.C. Circuit has been relying on an overbroad conception of the word "remedial." Indeed, the Court granted review in *Kokesh* specifically because some courts—including the D.C. Circuit—took an overly restrictive view of what constituted a punitive sanction. 137 S. Ct. at 1641 & n.2. The fact that the D.C. Circuit has articulated a different view of the term "remedial" is the reason why *Kokesh* matters, not an argument against its significance.

FINRA dwells at length on favorable pre-*Kokesh* precedent, in lieu of analyzing the impact of *Kokesh* on those decisions. For example, it is true that certain pre-*Kokesh* cases "sustain[ed] FINRA-imposed, non-compensatory sanctions." FINRA Br. 17. But the proper question, to which briefing is directed, is whether the holdings of those cases can properly be applied to Mr. Saad in light of *Kokesh*. For example, FINRA relies on pre-*Kokesh* authorities suggesting that a remedial sanction can be based on deterrence. *Id.* at 15 n.11. But *Kokesh* expressly rejects that proposition. 137 S. Ct. at 1643 ("Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because deterrence is not a legitimate nonpunitive governmental objective." (internal

quotation marks and alterations omitted)). Where such a conflict exists, it is the lower court's point of view—and not that of the Supreme Court—that "fails as a matter of law." FINRA Br. 15 n.11.

2. FINRA also attempts to minimize the significance of *Kokesh* by reciting a list of differences between the factual and legal background of *Kokesh* on one hand, and this case on the other. It notes, for example, that this case involves "the assessment of sanctions in an SRO disciplinary proceeding," while *Kokesh* did not, FINRA Br. 18; that *Kokesh* concerned "a federal statute of limitations," while this case does not, *id.* at 19; that Section 2462 is "a time based, mandatory, procedural requirement," while Section 19(e)(2) of the Exchange Act is not, *id.*; that Section 19(e)(2) applies only "once allegations of wrongdoing have been proven before the SRO and the Commission," while Section 2462 is not so limited, *id.* at 20; and that *Kokesh* relied significantly on cases "that pre-dated the existence of SROs" and did not concern "whether a particular remedy imposed was appropriate or excessive in size or amount," *id.* at 27. These observations do not advance FINRA's argument.

a. First, FINRA does not explain why any of those distinctions are relevant, let alone dispositive. As shown above, *Kokesh* articulated a set of general principles for classifying sanctions. The Court "defin[ed]" penalty as a "punishment, whether corporal or pecuniary, imposed and enforced by the State,

for a crime or offen[s]e against its laws." 137 S. Ct. at 1642 (internal quotations omitted). The Court further explained:

> This definition gives rise to two principles. First, whether a sanction represents a penalty turns in part on "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." . . . Second, a pecuniary sanction operates as a penalty only if it is sought "for the purpose of punishment, and to deter others from offending in like manner"—as opposed to compensating a victim for his loss.

Id. There is nothing in *Kokesh* to suggest that the application of this framework depends on any of the distinctions listed by FINRA. There is no basis for concluding that the definition of penalty or the principles for classifying a sanction as punitive depend, for example, on whether the defendant's wrongdoing has already been proven to an SRO's satisfaction, or on whether the statute to be interpreted concerns a statute of limitations. *See id.*

It is not surprising that FINRA is unable to find any persuasive distinctions. After all, even assuming that *Kokesh* does not apply in *all* contexts, both this case and *Kokesh* arise "in the securities-enforcement context." *Kokesh*, 137 S. Ct. at 1639. It would be strange if, within that single context, a sanction that is punitive for statute of limitations purposes suddenly became remedial for the purposes of evaluating SRO sanctions.[6]

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[6] At times, FINRA itself deviates from the thrust of its argument and resorts to general observations about the nature of remedial sanctions. For example, it asserts that "remedial" means something other than "compensatory," and that compensatory sanctions are "not the only type of remedy." FINRA Br. 27. There is nothing about these claims that would confine them to

b. FINRA's position must be that administrative imposition of sanctions is somehow immune from general legal principles governing penal sanctions. But D.C. Circuit precedent rejects this view. As noted in the opening brief (at 7 n.4), *American Bus Ass'n v. Slater* addressed the Department of Transportation's efforts to impose certain sanctions for violations of the Americans with Disabilities Act. 231 F.3d 1, 2 (D.C. Cir. 2000). Because the case concerned an agency's substantive authority to impose sanctions, FINRA's logic would suggest that it is much closer to this case than it is to *Kokesh*. And yet the D.C. Circuit found that the sanctions were penal under reasoning that closely mirrors *Kokesh*.[7] *See id.* at 7 ("[T]his Court regards as a penalty any sanction that goes *beyond* remedying the damage caused to the harmed parties by the defendant's action" (internal quotation marks omitted)); *id.* at 6 (explaining that the sanctions were punitive because there was "no connection between the fine imposed and the injury suffered"); *id.* at 7 (explaining that any sanction that is even "in part designed to punish" must be

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the context of SRO sanctions. In other words, FINRA appears to recognize that broader principles of what constitutes a remedial sanction do exist; it is just unwilling to accept the principles the Supreme Court set out in *Kokesh*.

[7] FINRA dismisses this language as "dicta." FINRA Br. 28. In fact, it is a binding alternative holding. *See, e.g., Ass'n of Battery Recyclers, Inc. v. E.P.A.*, 716 F.3d 667, 673 (D.C. Cir. 2013) (explaining that, where an appellate decision rests on two alternative grounds, neither one is dictum and both represent the binding judgment of the court).

regarded as punitive). In other words, the distinctions FINRA has identified are illusory.[8]

One way of testing FINRA's argument is to consider how FINRA would characterize disgorgement—the very sanction that was declared punitive in *Kokesh*—if it was imposed by an SRO.[9] If FINRA were to call SRO disgorgement remedial, it would put itself in conflict with *Kokesh*. But if it acknowledged that SRO disgorgement is punitive, its position in this case would fall *a fortiori*: as Mr. Saad's opening brief explained, and FINRA does not contest, Mr. Saad's permanent bar is *more clearly punitive* under the *Kokesh* framework than disgorgement is. Saad Br. 12 (noting that disgorgement frequently does nothing more than compensate the victim, whereas expulsions never compensate victims).

c. Even in the specific context of SRO sanctions, FINRA's characterization of pre-*Kokesh* precedent misses the mark. For example, in 2007, the D.C. Circuit referred to a permanent bar as "the most severe, and therefore apparently punitive sanction." *PAZ Secs., Inc. v. S.E.C.*, 494 F.3d 1059, 1066 (D.C. Cir. 2007). This observation would make no sense if, as FINRA suggests, the pre-*Kokesh* conception of "remedial" concerned exclusively the question whether a sanction

[8] Similarly, the Fifth Circuit has held that the disbarment of an attorney—a sanction that is similar to a permanent bar—constitutes "a punishment or penalty," and that attorneys are therefore entitled to procedural due process protections in connection with disbarment. *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 229 (5th Cir. 1998).

[9] *See* FINRA Sanction Guidelines 5 (noting that adjudicators may order disgorgement).

had "a purpose of protecting investors and the public interest." FINRA Br. 23. After all, the severity of a sanction is totally orthogonal to the extent to which it protects investors. *See also PAZ*, 494 F.3d at 1066 (noting that general deterrence "is essentially a rationale for punishment, not for remediation," albeit still allowing deterrence to be "considered as part of a larger remedial inquiry").

PAZ demonstrates that the D.C. Circuit was already uneasy about the broad scope that it had given to the word "remedial." As Judge Kavanaugh observed, the D.C. Circuit had essentially painted itself into a corner, with current panels being constrained by precedent to characterize patently non-remedial sanctions as remedial. *Saad v. S.E.C.*, 873 F.3d 297, 304 (D.C. Cir. 2017) (*Saad II*). *Kokesh* simply crystallizes (and solves) the problem that the court of appeals had already perceived.

4. FINRA also emphasizes the differences in wording between the Exchange Act and Section 2462. FINRA Br. 19. It observes that Section 19(e) does not use the word "penalty," which was at issue in *Kokesh. Id.* at 21. This is true but irrelevant. As the opening brief explained, and FINRA does not contest, the applicable language in the Exchange Act *has already been authoritatively interpreted* to mean that sanctions approved by the SEC must be remedial and not punitive. Saad Br. 16-17; *see, e.g.*, *Siegel*, 592 F.3d at 157. The question,

therefore, is what it means for a sanction to be "remedial"—as opposed to punitive"—and that question is directly addressed by *Kokesh.*

5. FINRA also tries to capitalize on *Johnson v. S.E.C.*, which essentially anticipated *Kokesh* by holding that a censure and a six-month suspension imposed by the Commission constituted a "penalty" under Section 2462. 87 F.3d 484, 491-92 (D.C. Cir. 1996); Saad Br. 12 n.9. FINRA notes, first, that the Ninth Circuit has declined to apply *Johnson* to an NASD-imposed suspension. *Krull v. S.E.C.*, 248 F.3d 907, 914 n.9 (9th Cir. 2001); FINRA Br. 21. But *Krull* is a non-D.C. Circuit opinion which is essentially unreasoned on this point—the relevant language is contained in a cursory footnote which merely observes that *Johnson* arose in a different context (but does not explain why the two contexts are distinguishable). 248 F.3d at 914 n.9.[10] *Krull* also found the "appropriateness of the one-year suspension" to be "a difficult issue" because there was "no clear rule as to when a sanction is remedial versus punitive." *Id.* at 914. In any event, *Krull* does not provide helpful guidance as to the question at hand: it is far more difficult to ignore a binding Supreme Court decision than a decision from a sister circuit (which constitutes at most persuasive authority).

[10] Notably, another decision which dismissed the significance of *Johnson* too quickly is *Zacharias v. S.E.C.*, 569 F.3d 458, 471-72 (D.C. Cir. 2009). *Zacharias* was a key decision in the line of D.C. Circuit cases that was abrogated in *Kokesh. See Riordan v. S.E.C.*, 627 F.3d 1230, 1235 (D.C. Cir. 2010).

Even less significant are the post-*Johnson* D.C. Circuit cases which FINRA highlights and which did not apply *Johnson* in the context of SRO sanctions. FINRA Br. 29-30. Far from rejecting *Johnson*, those decisions make no mention of it,[11] and it is impossible to know whether *Johnson* was even considered in those cases. Now, there is a Supreme Court opinion on the books, and a D.C. Circuit panel has expressly inquired about its significance. In light of these developments, FINRA can hardly derive substantial support from the silence of a handful of D.C. Circuit opinions as to another D.C. Circuit opinion. By contrast, *Slater* expressly quoted *Johnson* in concluding that the sanctions an agency sought to impose were penal. 231 F.3d at 373.

Kokesh articulated broadly applicable principles regarding the nature of remedial and punitive sanctions. FINRA has identified no plausible reason why this framework should not be applied in the closely related context of this case.

III. THERE IS NO CONFLICT BETWEEN *KOKESH* AND THE EXCHANGE ACT

FINRA also asserts that its narrow interpretation of *Kokesh* is necessary to avoid conflict between *Kokesh* and 15 U.S.C. § 78o-3(b)(7), which empowers SROs like FINRA to impose expulsions and suspensions. FINRA Br. 9, 10. As demonstrated below, there are actually multiple ways of reconciling the two. But it

[11] The one exception is *Siegel*, which cites *Johnson* in passing while discussing a different issue. 592 F.3d at 158.

is important to note at the outset that there is no reason for the Commission to work out the precise details of such a reconciliation in this case.

A. This Case Is Not a Suitable Vehicle For the Commission to Determine When Expulsions Are Permissible Under *Kokesh*

1. As the next section demonstrates, there are several ways of allowing FINRA to impose suspensions and expulsions in some cases—thereby giving effect to Section 78o-3(b)(7)—without running afoul of *Kokesh*. However, there is no need for the Commission to explore those issues in this case. FINRA has not developed any of these points, choosing instead to rely solely on the proposition that *Kokesh* is irrelevant. In future cases, if FINRA accepts that *Kokesh* applies in this context, it will presumably make these or other arguments in support of the proposition that a given expulsion or suspension is valid even in light of *Kokesh*. But FINRA has not made such arguments here and they are therefore waived. *See, e.g.*, *In the Matter of the Robare Group, Ltd., Mark L. Robare, and Jack L. Jones, Jr.*, 2015 WL 3507108, at *38. Accordingly, instead of addressing these points, the Commission should rescind Mr. Saad's sanction.

2. Moreover, even if these issues were properly presented, the Commission should not consider them in the first instance. As discussed below, each of the approaches to reconciling *Kokesh* and the Exchange Act requires a rethinking of FINRA's current sanctions framework, and a new set of standards for when expulsions are appropriate. And as the opening brief explained—to no direct

response from FINRA—any such rethinking should be undertaken by FINRA itself. Saad Br. 17-23. If the Commission does not rescind Mr. Saad's permanent bar, it should remand to FINRA.

B. *Kokesh* Need Not Be Interpreted As Prohibiting All Expulsions By SROs

Kokesh would be in tension with the Exchange Act only if, under the *Kokesh* framework, *no* expulsions or suspensions were permissible. *See* FINRA Br. 9-10. However, there are at least three ways of concluding that some expulsions and suspensions are permissible even under *Kokesh*. Specifically, (1) certain expulsions and suspensions are likely remedial under the *Kokesh* framework; (2) the SEC may have some discretion to approve expulsions and suspensions; and (3) the D.C. Circuit may adjust its caselaw in light of *Kokesh*.

1. While it is uncontested that Mr. Saad's expulsion was punitive under the *Kokesh* framework, certain expulsions and suspensions may well be remedial under that framework. *See* Saad Br. 13 (acknowledging this possibility). In particular, as noted in the opening brief (at 8), one of the factors identified in *Kokesh* is whether a sanction merely "restore[s] the status quo" or "leaves the defendant worse off." 137 S. Ct. at 1645. In other words, a sanction may be remedial if it "simply returns the defendant to the place he would have occupied had he not broken the law." *Id.* at 1644.

Thus, a FINRA suspension or expulsion may be remedial if, but for respondent's wrongdoing, he would have been unable to associate with a FINRA member. Consider, for example, an individual who improperly conceals information which, had he disclosed it, would have prevented him from associating with FINRA members—either because he would be disqualified from doing so, or because, as a practical matter, no FINRA member would be willing to be associated with him. Under those circumstances, a suspension or expulsion arguably returns the individual to the pre-violation status quo, and is therefore potentially remedial. *See, e.g.*, *In the Matter of the Application of Joseph S. Amundsen for Review of Disciplinary Action Taken by FINRA,* Release No. 34-69406, 2013 WL 1683914, at *5, 8, 12 (Apr. 18, 2013) (the Commission approving a FINRA permanent bar in a case where the applicant improperly concealed that his CPA license had been revoked and an injunction had been entered against him; the injunction rendered him statutorily disqualified); *In the Matter of the Application of Richard A. Neaton for Review of Disciplinary Action Taken by FINRA*, Release No. 34-65598, 2011 WL 5001956, at *1, 12, 13 (Oct. 20, 2011) (the Commission approving a FINRA permanent bar in a case where the applicant improperly concealed that his license to practice law had been suspended and then revoked; one agent for a FINRA member firm "testified that he never would have hired" the applicant if he had been aware of the concealed information); *In the*

Matter of the Application of Robert D. Tucker for Review of Disciplinary Action Taken by FINRA, Release No. 34-68210, 2012 WL 5462896, at *9, 12-13 (Nov. 9, 2012) (the Commission approving a FINRA suspension in a case where the applicant improperly concealed "serious financial problems"; the failure to disclose "undermined [member] firms' ability to screen his fitness to associate with them").

Of course, Mr. Saad's case does not belong in this category, and he was clearly harmed by his expulsion. But for the purposes of this section, the point is that, in *some* cases, *Kokesh* does potentially allow FINRA to impose expulsions and suspensions.

2. In addition, FINRA could argue in the future that the Commission has some discretion to approve certain additional expulsions and suspensions under 15 U.S.C. § 78s(e)(2). As Judge Millett highlighted in her *dubitante opinion*, that provision states that the Commission "*may* cancel, reduce, or require the remission" of a sanction it finds to be excessive or oppressive. *Saad II*, 873 F.3d at 310 (emphasis added).

Judge Millett appeared to interpret this language to mean that the Commission has some discretion to approve even expulsions or suspensions that are excessive or oppressive under D.C. Circuit precedent. *Id.*[12] To be sure, any

[12] Other readings of the provision are available (and may well be preferable). For example, it might be more plausible to conclude that the scope of the Commission's discretion is limited to the choice among canceling, reducing, and requiring the remission of an excessive or

such discretion would be tightly circumscribed, and the decision to approve an excessive or oppressive sanction would be subject to arbitrary and capricious review (and would have to otherwise comply with applicable legal norms). If FINRA would like the Commission to exercise such discretion consistent with *Kokesh*, FINRA should propose a framework articulating when it would be appropriate to do so.

3. FINRA could also argue that, in light of *Kokesh*, the D.C. Circuit should consider revising its rule regarding remedial sanctions. In other words, now that *Kokesh* has established that the concept of "remedial" sanctions is narrower than the D.C. Circuit previously believed, the D.C. Circuit may consider whether some punitive sanctions are permissible. As Judge Kavanaugh pointed out, this would require FINRA and the Commission "to explain why such penalties are appropriate under the facts of each case"—a determination that will be subject to "meaningful judicial review." *Saad II*, 873 F.3d at 306.

At a minimum, as the opening brief noted, this new approach to punitive sanctions would have to account for proportionality. Saad Br. 22 n.11. After all, the "principle that a punishment should be proportionate to the crime is deeply

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oppressive sanction. Indeed, current D.C. Circuit caselaw arguably forecloses the view espoused by Judge Millett. *See, e.g.*, *PAZ Secs., Inc. v. S.E.C.*, 566 F.3d 1172, 1176 (D.C. Cir. 2009) (referring to the "statutory requirements that a sanction be remedial and not 'excessive or oppressive'"). However, Judge Millett's opinion indicates that at least one D.C. Circuit judge may be prepared to carve out a broader scope for the Commission's discretion in the future.

rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284 (1983). FINRA responds to this by incorrectly asserting that *Solem* was overruled in *Harmelin v. Michigan*, 501 U.S. 957 (1991), where the Court supposedly declared that *Solem* was wrong and the Eighth Amendment does not guarantee proportionality. FINRA Br. 17 n.15. The *Harmelin* opinion cited by FINRA is not a majority opinion; in fact, it was signed by only two Justices. *Harmelin*, 501 U.S. at 965 (Scalia, J., joined by the Chief Justice). And more recent Supreme Court jurisprudence unambiguously rejects that view. As the Court explained in *Graham v. Florida*, "[t]he concept of proportionality is *central* to the Eighth Amendment." 560 U.S. 48, 59 (2010), *as modified* (July 6, 2010) (emphasis added).

More broadly, the argument raised in the opening brief was not confined to the Eighth Amendment. The concept of proportionality as a requirement for penal sanctions is fundamental to our legal tradition. As such, if FINRA seeks to justify punitive sanctions, it will have to explain why they are proportionate to the offense. And as noted in the opening brief—to no response from FINRA—its current guidelines with respect to permanent bars openly flout proportionality, calling for a permanent bar in conversion cases *regardless* of the amount converted. Saad Br. 22 n.13 (citing FINRA Sanction Guidelines 36). In this case, for example, Mr. Saad is accused of unlawfully obtaining a payment of only

$1,144. *Dep't of Enforcement v. John M. Saad,* National Adjudicatory Council, Complaint No. 2006006705601, 2009 WL 3223812, at *3 (Oct. 6, 2009). The most severe punitive sanction in FINRA's arsenal—"the securities industry equivalent of capital punishment," *Saad v. S.E.C.*, 718 F.3d 904, 906 (D.C. Cir. 2013)—was imposed on that basis.

The new framework will also have to account for different *types* of punitive motivations. For example, even if FINRA is right that *deterrence* can be an appropriate basis for a FINRA sanction, FINRA Br. 25, it does not follow that FINRA sanctions can rely on *retributive* considerations. Indeed, even FINRA appears to acknowledge that taking retribution into account would be improper. FINRA Br. 14 n.9 (denying that the permanent bar in this case was imposed with "a punitive, retributive purpose"). In this case, as explained in the opening brief, the sanction was clearly based not just on deterrence and the interests of the public, but also on retributive considerations. Saad Br. 13-14.

* * *

The permanent bar imposed on Mr. Saad was unlawful under *Kokesh.* In other cases, expulsions may still be appropriate, but FINRA has made no argument that this is such a case. Even if it had, any such conclusion would have to be reached pursuant to a reconsideration of FINRA's approach to punitive sanctions in light of *Kokesh*, which FINRA must undertake in the first instance.

Accordingly, the sanction should be rescinded. Alternatively, and at a minimum, the case should be remanded to FINRA.

CONCLUSION

For the reasons stated above and in the opening brief, the Commission should rescind Mr. Saad's permanent bar, or, in the alternative, remand the matter to FINRA.

Dated: April 10, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the word limit set forth in 17 C.F.R. § 201.450(c), because it contains 6,630 words, excluding the parts of the brief exempted by § 201.450(c).

Dated: April 10, 2018

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CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of April, 2018, I caused true and correct copies of the foregoing document to be served by courier upon:

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