

**UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION**

In the Matter of the Application of:

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

Admin. Proc. File No. 3-19185
Appeal of FINRA No. 2014039285401

RESPONDENTS' MOTION TO DISMISS

CAMERON HALLING
Cal. Bar No. 306778
Pacific Legal Foundation
555 Capitol Mall, Ste. 1290
Sacramento, CA 95814
Tel.: (916) 419-7111
Fax: (916) 419-7747
CHalling@pacificlegal.org

ADITYA DYNAR
D.C. Bar No. 1686163
Pacific Legal Foundation
3100 Clarendon Blvd., Ste. 1000
Arlington, VA 22201
Tel.: (202) 807-4472
Fax: (916) 419-7747
ADynar@pacificlegal.org

Counsel for Respondents

PRELIMINARY STATEMENT

Respondents Frank Harmon Black (“Black”) and Southeast Investments, N.C., Inc. (“Southeast”) respectfully move for: (1) dismissal with prejudice of all claims brought by Financial Industry Regulatory Authority, Inc. (“FINRA”) against Black/Southeast because FINRA’s adjudicatory process is unconstitutionally structured (i.e., notice of charges causes of action four and five); (2) reversal of SEC’s decision affirming FINRA’s claims relating to sixteen missing emails; (3) affirmance with prejudice of the National Adjudicatory Council’s (“NAC”) dismissal of the remanded causes of action; and (4) an award of attorney fees, costs, and damages, to censure FINRA, as authorized by 15 U.S.C. §78s(h)(1), 5 U.S.C. § 504, and 17 C.F.R. §§ 201.31–.60.

RELEVANT BACKGROUND

Mr. Black has been in the securities industry since 1971. He formed Southeast Investments, N.C., Inc., in 1997. During the relevant period of 2010 to 2015, Black owned 95%–100% of Southeast. Southeast has been a FINRA member firm since 1997. SEC Dec. at 2.

During the relevant period, Southeast engaged in general retail securities business, with a home office in Charlotte, North Carolina. *Id.* Southeast had between 114 and 133 registered financial professionals, known as registered representatives, located throughout the United States. *Id.*

In September 2015, FINRA’s Department of Enforcement filed a five-cause complaint against Black/Southeast, alleging deficient supervision and record

retention. FINRA's Hearing Panel found for FINRA on all five counts, permanently barred Mr. Black from the securities industry, and fined Black/Southeast \$243,000.

Black/Southeast appealed to FINRA's NAC. In May 2019, the NAC found in FINRA's favor, and (1) fined Black/Southeast \$73,000 for alleged false testimony and fabrication of documents, (2) fined Black/Southeast \$73,500 for supervisory and email retention failures, and (3) imposed a practice bar on Mr. Black. The practice bar imposed by NAC against Black went into effect immediately on May 23, 2019, and remained in effect for four-and-a-half years until SEC lifted it in December 2023.

Black/Southeast appealed the NAC decision to the SEC, which did not issue a decision until over four years later, December 7, 2023. The SEC sustained NAC's findings and sanctions concerning Black/Southeast's alleged supervisory and email retention failures under, inter alia, Section 17(a) of the 1934 Act, Exchange Act Rule 17a-4. But the SEC set aside the NAC's findings and sanctions related to Black/Southeast's alleged false testimony and fabrication of documents because, the SEC concluded, FINRA Enforcement's spoliation of exculpatory evidence was not harmless error. SEC Dec. at 13–16. The SEC remanded that portion of the case back to FINRA for further proceedings consistent with the SEC's decision.

Finally, on remand, the NAC dismissed the remanded causes of action. That leaves the supervisory and email retention allegations for which SEC previously affirmed FINRA's imposition of \$73,500 fines payable to FINRA.

ARGUMENT

I. DISMISSAL OF ALL CLAIMS WITH PREJUDICE IS WARRANTED BECAUSE FINRA’S AND SEC’S ADJUDICATORY PROCESS IS UNCONSTITUTIONAL

A. FINRA’s and SEC’s Adjudication Is Unconstitutionally Structured Because It Deprives Black/Southeast of Their Constitutional Right to Trial by Jury

SEC v. Jarkesy, 603 U.S. 190, 122 (2024), held that respondents in administrative proceedings like Black/Southeast have the right to trial by jury when the suit is “legal in nature.” A suit is legal in nature when it involves (1) monetary penalties and (2) legal claims. *Id.* at 123. Here, FINRA asked for (1) monetary penalties against Black/Southeast for (2) fraud, perjury, and negligent recordkeeping, all of which are legal claims. As a result, Black/Southeast are entitled to a jury trial.

First, the “remedy” factor is the “more important” and “all but dispositive.” *Id.* at 111. *Jarkesy* held that “money damages are the prototypical common law remedy.” *Id.* at 123; *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33 (1989); *Tull v. United States*, 481 U.S. 412 (1987). Actions to recover civil penalties under statutory provisions are “a type of action in debt requiring trial by jury.” *Jarkesy*, 603 U.S. at 122 (simplified). Civil penalties are those where the purpose is to punish the wrongdoer. *Id.* at 123. The \$73,500 penalty imposed here will be paid to FINRA to be “used for” FINRA’s “general corporate purposes,” FINRA Rule 8320(a), including “performance-based” “[i]ncentive compensation” for prosecutors and hearing officers, 2023 FINRA Annual Financial Report at 25, <http://t.yl/TcNwp>. FINRA does not claim it will “return any money to [nonexistent] victims” of Black/Southeast. *Jarkesy*, 603 U.S. at 124. Nor does FINRA allege any investor harm whatsoever, meaning that this case does not

involve “return [of] unjustly obtained funds.” *Id.* at 123. Because FINRA’s civil penalty is punitive, it is a legal remedy that must be tried by a jury. *Id.*

Civil penalties that are not “return[ed] ... to victims” do not “‘restore the status quo’ and can make no pretense of being equitable.” *Id.* at 124 (quoting *Tull*, 481 U.S. at 422). Since the remedies FINRA sought against Black/Southeast are “designed to punish and deter, not to compensate,” they are “a type of remedy at common law that could only be enforced in courts of law.” *Id.* at 125 (simplified).

Second, the nature of the “cause[s] of action” against Black/Southeast only “confirms that” they are “entitled to a jury on [FINRA’s] claims.” *Id.* FINRA alleged that Black/Southeast were liable for improper record retention and supervision (the claims that SEC upheld), and for misrepresenting or concealing material facts (the claims that FINRA recently dismissed). All of these causes of action bear a “close relationship” to “common law fraud.” *Id.* As such, they are legal claims that must be tried by a jury. *Id.*

Jarkesy specifically addressed securities-fraud claims and acknowledged the “enduring link” between securities fraud and “its common law ancestor.” *Id.* (simplified). It is irrelevant that the statutory or regulatory law at issue proscribes conduct that is “narrower” or “broader” than the common law, or that it “only targets certain subject matter and certain disclosures.” *Id.* at 126. That “close relationship ... with common law fraud” “confirms that this action is ‘legal in nature,’” which entitles Black/Southeast to a jury trial. *Id.* (quoting *Granfinanciera*, 492 U.S. at 53).

In sum, because this action involves (1) monetary penalties and (2) legal claims, Black/Southeast are entitled to a jury trial. *Id.* at 122–23. Because FINRA/SEC proceedings deprive them of that jury right, FINRA/SEC adjudication is unconstitutionally structured.

B. FINRA and SEC Adjudication Is Unconstitutionally Structured Because It Violates Article III and the Fifth Amendment

1. FINRA/SEC Adjudication Violates Article III

In *Stern v. Marshall*, 564 U.S. 462 (2011), the Supreme Court held that the bankruptcy statutes violated Article III by authorizing the non-Article III bankruptcy courts to decide suits at common law. “Congress,” the Supreme Court said, cannot “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.” *Id.* at 484 (simplified). And *Jarkesy*, as already noted, held that a securities-fraud action is the subject of a suit at common law.

SEC statutes allow what *Stern* and *Jarkesy* prohibit. They withdraw common-law suits for money penalties and the corporate death penalty (lifetime industry bars) from Article III courts and deposit them for adjudication inside FINRA, a private entity. See 15 U.S.C. §§ 78o-3(b)(7)–(b)(8), 78s(g)(1). But non-Article III tribunals like FINRA’s or SEC’s can “exercise no part of th[e] judicial power,” *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 275 (1856), “no matter how court-like [its] decisionmaking process might appear,” *Ortiz v. United States*, 585 U.S. 427, 465 (2018) (Alito, J., dissenting). The “responsibility for deciding” such suits “rests with Article III judges in Article III courts.” *Stern*, 564 U.S. at 484 (simplified).

2. FINRA/SEC Adjudication Violates the Fifth Amendment

The Seventh Amendment “operates together with Article III and the Due Process Clause of the Fifth Amendment” to “vindicate the Constitution’s promise of a ‘fair trial in a fair tribunal.’” *Jarkesy*, 603 U.S. at 141 (Gorsuch, J., concurring) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Black/Southeast have the right to “a fair process of decisionmaking” *before* they can be “deprive[d] ... of [their] possessions.” *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). To constitute fair process, the process must be designed to dispel even the “appearance of partiality” or “impropriety.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872, 888 (2009); *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U.S. 617, 643 (2018) (Kagan, J., concurring) (disapproving administrative adjudication that can be “infected by ... hostility or bias”). While Article III “promise[s] a defendant an independent judge rather than one dependent on those who hold political power,” and the Seventh Amendment “promise[s] the right to a jury trial” in suits at common law, *Jarkesy*, U.S. 603 U.S. at 149 (Gorsuch, J., concurring), the Fifth Amendment’s Due Process of Law Clause addresses the “remaining concer[n] about the processes that would attend trials before independent judges and juries.” *Id.* That is, no person can be deprived of life, liberty, or property “without affording him the benefit of ... *judicial* process.” *Id.* at 150.

While Black/Southeast are not liable to pay civil penalties until a circuit court’s appellate review of SEC’s appellate-style review of FINRA’s second-level decision, Black/Southeast stand to be deprived of their property by a constitutionally deficient

process that places a judicial thumb on the scales in favor of the government. Black/Southeast are afforded the benefit of only the lesser half of the judicial process that they are entitled to in Article III courts under the Fifth Amendment's Due Process Clause: eventual and deferential appellate review, but no trial-level decision by an Article III judge and jury. By denying Black/Southeast judicial process before potentially depriving them of their liberty and property, SEC's adjudicative structure violates Black/Southeast's Fifth Amendment due process rights.

Sidestepping the Fifth Amendment deficits only confirms the unconstitutionality of the FINRA/SEC adjudicatory structure. Black/Southeast have already suffered harm—Black's four-and-half year practice bar, loss of revenue, reputational harm, loss of brokers and reduction in workforce of 80 brokers, and decrease in the value of the company due to FINRA's actions. This is well beyond trivial harm to Black/Southeast that can be remedied by SEC by censuring FINRA (as discussed below) or otherwise vacating SEC's previous order affirming FINRA's decision as to Black/Southeast.

Separately, FINRA's impermissible profit motive deprives Black/Southeast of fair process and thereby violates the Due Process Clause. In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), an individual charged with traffic offenses claimed that trial before the village's mayor violated due process. There, "[a] major part of village income [wa]s derived from the fines, forfeitures, costs, and fees imposed by [the mayor] in his mayor's court." *Id.* at 58. The Court held that even if no money went directly into the mayor's pocket, the mayor would face institutional pressure "to

maintain the high level of contribution.” *Id.* at 60. The Constitution’s due process of law protects against such a financial incentive that offers “a possible temptation to the average man.” *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). The Fifth Amendment’s Due Process Clause precludes FINRA from being “a judge in [it]s own case.” *In re Murchison*, 349 U.S. at 136. That impermissible profit motive is not “diminished by the possibility of reversal [by SEC] on appeal.” *Ward*, 409 U.S. at 61–62.

Here, FINRA pockets the fines it levies. FINRA Rule 8320(a). More than 6% of FINRA’s revenue in 2023 came from such fines. 2023 FINRA Annual Financial Report at 9, <https://t.ly/TcNwp> (\$88.4 million in fines and \$1,327.8 million in other operating revenue). With this revenue, FINRA pays its prosecutors and hearing officers “performance-based” “incentive compensation.” *Id.* at 25. *See also* 2021 FINRA Annual Financial Report at 1–3, 9, 25, <https://t.ly/YTXGn> (same, with \$103 million revenue from fines). The Constitution forbids such “an economically self-interested entity” from “exercis[ing] regulatory authority” over that industry’s participants. *Ass’n of Am. R.R.s v. Dep’t of Transp.*, 821 F.3d 19, 27 (D.C. Cir. 2016). FINRA’s financial self-interest contravenes basic fairness and impartiality that the Due Process Clause requires.

C. FINRA’s and SEC’s Adjudication Is Unconstitutionally Structured Because FINRA’s Adjudicators Are Not Properly Appointed

The Appointments Clause requires the President to appoint principal officers of the United States with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. Congress may vest the appointment of “inferior” officers in the President alone, the courts of law, or in the heads of departments. *Lucia v. SEC*, 585 U.S. 237,

253 (2018). Anyone who wields “significant” government power is an Officer of the United States and must be “appointed in the manner prescribed by [the Appointments Clause].” *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Without such appointment, “the President can neither oversee [FINRA hearing officers or board members] himself nor attribute [their] failings to those whom he *can* oversee.” *United States v. Arthrex, Inc.*, 594 U.S. 1, 17 (2021) (simplified).

FINRA’s hearing officers exercise significant governmental powers, which, as the Supreme Court has held in *Lucia*, *Freytag*, and *Arthrex*, makes them executive Officers of the United States subject to the Appointments Clause. *Lucia*, 585 U.S. 237; *Freytag v. Comm’r*, 501 U.S. 868 (1991). The SEC ALJs in *Lucia* and the U.S. Tax Court special trial judges in *Freytag*, all exercised significant “executive power,” which required their appointment in compliance with the Appointments Clause. *Arthrex*, 594 U.S. at 17 (quoting *City of Arlington v. FCC*, 569 U.S. 290, 305 n.4 (2013)).

FINRA’s hearing officers exercise identical powers to *Lucia*’s ALJs and *Freytag*’s STJs. FINRA’s hearing officers take testimony, conduct trials, decide the admissibility of evidence, enforce compliance with discovery orders and issue final decisions addressing factual findings, legal conclusions, and remedial sanctions. Compare FINRA Rules 8210, 9252, 9235, 9263, 9268, 9280 with *Lucia*, 585 U.S. at 248–49; *Freytag*, 501 U.S. at 880–82; 17 C.F.R. § 201.111 (powers of SEC ALJs).

FINRA hearing officers perform statutory duties and exercise governmental power without appointment while operating outside the executive branch’s chain of

command. Yet “the President can neither oversee [FINRA hearing officers] himself nor attribute [their] failings to those whom he *can* oversee.” *Arthrex*, 594 U.S. at 17 (simplified). Thus, FINRA/SEC adjudication is unconstitutionally structured based on the Appointments Clause.

FINRA’s status as a quasi-private entity has no bearing on that inquiry. FINRA may argue that FINRA’s corporate form means that the Appointments Clause does not apply. But the Supreme Court has not endorsed such an Appointments Clause carve-out. Nor should SEC because that conclusion would only allow FINRA to attribute its systemic “failings” to SEC, whose principals the President can and does oversee, while insulating FINRA from remaining unaccountable to SEC and the President. *Arthrex*, 594 U.S. at 17. In *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995), the Supreme Court said that one cannot “evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.” Corporate form is not a factor under the Supreme Court’s Appointments Clause cases. The Constitution simply requires that individuals who are vested with “significant” government power—as FINRA’s hearing officers are—must be appointed in conformity with the Appointments Clause. *Buckley*, 424 U.S. at 126; *Edmond v. United States*, 520 U.S. 651, 659–60 (1997).

Nor does SEC’s review of FINRA decisions cure the Appointments Clause problems. In *Lucia*, 585 U.S. at 249, the SEC ALJ’s decision was appealable to SEC, but that “ma[de] no difference” to the Court—the SEC ALJs still unlawfully wielded significant executive power. *See also Freytag*, 501 U.S. at 868 (same). In sum,

FINRA/SEC adjudication is unconstitutionally structured because FINRA's hearing officers are not appointed in compliance with the Appointments Clause.

D. FINRA's and SEC's Adjudication Is Unconstitutionally Structured Because It Violates the Nondelegation Doctrine

Jarkesy held that “Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal government could confer the Government’s ‘judicial Power’ on entities outside Article III.” 603 U.S. at 132 (simplified); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (holding that the delegation of government power—legislative, executive, or judicial—to a private entity is “delegation in its most obnoxious form”). This “nondelegation principle serves both to separate powers as specified in the Constitution, and to retain power in the governmental Departments so that delegation does not frustrate the constitutional design.” *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004) (simplified). Congress and SEC’s vesting in FINRA the executive and the “judicial Power of the United States,” U.S. Const. art. III, § 1, violates the private nondelegation doctrine. A private entity like FINRA cannot be vested with the government’s executive or judicial powers. Also, a private entity like FINRA cannot be vested with a combination of the government’s legislative, executive, or judicial powers because they are purposefully kept separate by the Constitution.

Delegation to FINRA of governmental power to prosecute and decide cases is particularly problematic because such delegation is “not even delegation to an official or an official body, presumptively disinterested, but to private persons whose

interests may be and often are adverse to the interests of others in the same business.” *Carter*, 298 U.S. at 311; *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (holding that delegation of governmental power “to trade or industrial associates ... is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress”). “[T]he Constitution recognizes no governmental powers vested in private entities.” *Kerpen v. Metro. Wash. Airports Auth.*, 907 F.3d 152, 161 (4th Cir. 2018); *see also Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1319 (D.C. Cir. 2024) (holding that FINRA adjudication likely violates the private nondelegation doctrine due to lack of government review prior to expulsion); FINRA Rules 9268(f)(2), 9370(a) (industry bar is immediately effective before SEC review).

The Sixth Circuit in *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023) (simplified), confirmed that “[p]rivate entities may serve as advisors that propose regulations. And they may undertake ministerial functions, such as fee collection. But a private entity may not be the principal decisionmaker in the use of federal power, may not create federal law, and may not wield equal power with a federal agency, or regulate unilaterally.”

Yet each of these forbidden features is present in FINRA adjudication. FINRA is the “principal decisionmaker,” *id.*, when it adjudicates cases in its in-house tribunals. FINRA Rules 9211–9213, 9268, 9311. FINRA does not need, nor ask for, SEC’s approval to file a complaint with FINRA’s hearing officers, which amounts to FINRA exercising prosecutorial discretion, a quintessential executive power. *Seila*

Law LLC v. CFBP, 591 U.S. 197, 218 (2020); FINRA Rule 9211; *see also* FINRA Rules 8210, 8310, 8313, 9120, 9235(a), 9268(f). SEC has no close supervision nor comprehensive oversight over FINRA adjudication, i.e., FINRA’s exercise of the federal government’s judicial power, until an appeal after two levels of FINRA in-house adjudication. FINRA Rule 9370.¹ During that in-house adjudication, FINRA “create[s] federal law” by (a) interpreting statutes and rules, (b) penalizing conduct FINRA determines to have violated its interpretation of statutes and regulations, and (c) “wield[ing] equal power with [SEC]” when FINRA’s hearing officers do everything that SEC’s ALJs do. *Oklahoma*, 62 F.4th at 229. Permitting FINRA to “regulate unilaterally” in this way violates the private nondelegation doctrine. *Id.* (citing *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 53 F.4th 869, 872 (5th Cir. 2022)).

Finally, Congress cannot give away the federal government’s judicial or executive power in this way because Congress cannot give away that which “it does not possess.” *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (citing *INS v. Chadha*, 462 U.S. 919, 954–55 (1983)); *see also Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 132 (2015) (Thomas, J., concurring) (“Lacking the power itself, it cannot delegate that power to an agency.”).

FINRA/SEC adjudication is thus unconstitutionally structured because it violates the private nondelegation doctrine.

¹ In this case, FINRA operated outside SEC’s knowledge or supervision from September 2015 when FINRA’s notice of charges was filed against Black/Southeast until May 23, 2019, when NAC issued a decision adverse to Black/Southeast that could be (and was) appealed to SEC.

E. Black/Southeast Did Not Waive or Forfeit Their Constitutional Claims

FINRA may argue that Black/Southeast failed to exhaust the constitutional questions presented herein and that, as such, the constitutional claims have been waived or forfeited. But such an argument cannot be squared with the Supreme Court's repeated determination that structural constitutional challenges are an exception to general principles of exhaustion. The failure to raise constitutional issues at FINRA or SEC does not bar review.

Importantly, the constitutional questions here go to the constitutional legitimacy and accountability of FINRA/SEC adjudication. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 496 (2010). Because Black/Southeast's claims present a structural constitutional challenge, they can "be considered on appeal whether or not [they were] ruled upon below." *Freytag*, 501 U.S. at 879; *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (noting "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers"). As in *Freytag*, Black/Southeast raises "constitutional challenge[s] that [are] neither frivolous nor disingenuous," and those constitutional challenges—based on the Appointments Clause, private nondelegation doctrine, Article III, and Fifth and Seventh Amendments—"g[o] to the validity" of the non-Article III adjudication here. 501 U.S. at 879.² Exhaustion is inapposite.

² The right to adjudication in Article III courts, with juries where appropriate, is a structural right. *Stern*, 564 U.S. at 484 ("Congress" cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.") (simplified); *Jarkesy*, 603 U.S. at 128, 132

Black/Southeast’s constitutional arguments also “implicate fundamental separation of powers concerns.” *Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff’d*, 573 U.S. 513 (2014). In *Noel Canning*, the D.C. Circuit excused exhaustion and reached an Appointment Clause challenge, *id.* at 496–98, despite NLRA’s more stringent exhaustion statute. *Compare* 29 U.S.C. § 160(e) (third sentence; “extraordinary circumstances”) *with* 15 U.S.C. § 78y(c)(1) (“reasonable ground”). The *en banc* D.C. Circuit explained “we cannot avoid the constitutional question” because a remand to CFPB for further action “necessitates a decision on the constitutionality of the” ensuing non-Article III adjudication. *PHH Corp. v. CFPB*, 881 F.3d 75, 83 (D.C. Cir. 2018), *overruled on other grounds by Seila Law*, 591 U.S. 197. Black/Southeast’s structural constitutional claims are likewise pure questions of law going to the constitutionality of FINRA/SEC adjudication on remand that will not benefit from further development.

Moreover, FINRA does not have the power to resolve these claims, and it would have been futile for Black/Southeast to have raised them before FINRA. The Supreme

(Suing enforcement targets like Black/Southeast in Article III court is “mandatory” when the suit “concerns private rights,” and “presump[tive]” in all other cases.); *id.* at 150 (Gorsuch, J., concurring) (The Fifth Amendment’s Due Process Clause structurally guarantees “*judicial* process ... before” a person can be deprived of life, liberty, or property.); *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (The “right of jury trial” is “structur[al].”); *Jones v. United States*, 526 U.S. 227, 242–48 (1999) (Juries provide structural checks and balances.). Structural rights cannot be waived by party consent, and courts indulge every reasonable presumption against the waiver of such structural rights. *CFTC v. Schor*, 478 U.S. 833, 850–51 (1986) (holding that “parties cannot by consent cure” Article III structural separation of powers violations); *id.* at 851 (When “Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.”).

Court has “consistently recognized a futility exception to exhaustion requirements.” *Carr v. Saul*, 593 U.S. 83, 93 (2021) (simplified); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000). “It makes little sense to require litigants to present claims to adjudicators *who are powerless to grant the relief requested.*” *Carr*, 593 U.S. at 93 (simplified; emphasis added); *McCarthy v. Madigan*, 503 U.S. 140, 147–48 (1992) (explaining exceptions to exhaustion and collecting cases).

As in *Carr*, Black/Southeast “assert purely constitutional claims about which [FINRA officers/employees] have no special expertise and for which they can provide no relief.” 593 U.S. at 93. Structural constitutional claims “are ... outside [FINRA’s] competence and expertise.” *Free Enter. Fund*, 561 U.S. at 491.

Even assuming the exhaustion requirement applies here, FINRA rules contemplate that no constitutional claims are raised in the FINRA hearing. In 2015, after FINRA served its underlying complaint on Black/Southeast, Black/Southeast could not have filed a motion to dismiss the complaint because that motion is not allowed under FINRA Rule 9215. Nor is it reasonable to require Black/Southeast to have presented the constitutional arguments to SEC in 2019, only to excuse the four-and-half-year unexplained and unfair hiatus from issuing a decision. The “here-and-now injury of subjection to an unconstitutionally structured decisionmaking process ... [is] effectively lost if review is deferred until after” the “structural constitutional claims” are exhausted through administrative adjudication. *Axon Enters., Inc. v. FTC*, 598 U.S. 175, 191–92 (2023) (simplified).

II. SEC SHOULD RECONSIDER ITS AFFIRMANCE OF FINRA'S CLAIM ABOUT FAILURE TO PRESERVE SIXTEEN EMAILS BECAUSE FINRA FAILED TO MEET ITS BURDEN OF PROOF

FINRA found, and SEC affirmed, that Black/Southeast failed to preserve 16 emails. But this finding cannot be sustained. There is no record evidence to support the affirmance of FINRA's order. SEC should therefore reverse.

FINRA/SEC have maintained that recordkeeping requirements cover all business-related correspondence including email. But FINRA provided no evidence to suggest that the 16 missing emails were business-related. In other words: What are these 16 missing emails? Are they simple acknowledgments saying things like "Received, thank you"? Are they non-business-related emails like wishing someone a "happy birthday"? Absent such evidence, as a matter of law, FINRA did not prove that Black/Southeast failed to retain all *business-related* correspondence. Moreover, SEC compounded the error when it misconstrued the applicable statutes and rules to mean that the FINRA-recommended honor-code system that Black/Southeast implemented is retroactively unreasonable.

Those 16 missing emails were not business related. Letter by southeast to Brooks Brown, FINRA Exam Manager, at page 2 (FINRA002128) (dated Oct. 7, 2014). Those emails were personal emails of the wife of a Southeast representative. FINRA has not proved otherwise. The duty of supervision over representatives and the duty to retain business-related correspondence covers only business-related emails. 15 U.S.C. § 78q(a)(1); 17 C.F.R. § 240.17a04; NASD Rule 3010; FINRA Rules

2010, 3110.³ Holding otherwise would mean that every firm registered with FINRA must supervise and maintain as business records all personal correspondence of the firm's registered representatives.

FINRA's first-level adjudicating arm found in FINRA's favor based on this flimsy record and imposed a six-figure monetary fine and a lifetime bar, but that fine has been successively reduced by FINRA's second-level adjudicator as well as by SEC, and SEC also lifted the lifetime bar on Mr. Black that had gone on for more than four-and-a-half years. The civil penalty now stands at \$73,500. Absent relevant, probative, substantial evidence, 5 U.S.C. § 556(d), a reasonable trier of fact would not find for FINRA on its made-up allegation of 16 missing emails that FINRA failed to prove are business related. SEC should thus reconsider its decision to affirm FINRA's claim for failure to preserve the 16 emails and should vacate that portion of its previous decision

III. SEC SHOULD AFFIRM DISMISSAL OF THE REMANDED CAUSES OF ACTION WITH PREJUDICE

SEC should affirm FINRA's dismissal of the remanded causes of action with prejudice. The NAC correctly acknowledged that parties will be unable to present further evidence. NAC Decision at 10 (June 6, 2025). On the one hand, two of the four witnesses are deceased and only one of the remaining two witnesses remains subject to FINRA's jurisdiction. On the other hand, significant time has passed since the events at issue, in no small part owing to SEC's four-and-a-half years' hiatus in

³ Also, the email retention system that FINRA claimed is problematic during this litigation was recommended to Southeast by *FINRA*. SEC Dec. at 18. And FINRA has not proved that system stopped working here.

making its own decision. Nearly 12 years have passed since FINRA interviewed its four witnesses and these interviews would necessarily be the focus of new proceedings. Such a significant passing of time, coupled with the unavailability of three of the four witnesses, is sufficient ground for dismissal according to the NAC. NAC is correct and SEC should so hold.

In sum, SEC should affirm the dismissal of the remanded causes of action with prejudice.

IV. SEC SHOULD ORDER FINRA TO PAY BLACK/SOUTHEAST PREVAILING-PARTY ATTORNEY FEES AND COSTS TO CENSURE FINRA, AS AUTHORIZED BY 15 U.S.C. § 78s(h)(1), THE EQUAL ACCESS TO JUSTICE ACT, 5 U.S.C. § 504, AND 17 C.F.R. §§ 201.31–.60

SEC “is authorized ... to censure” a “self-regulatory organization” such as FINRA if in SEC’s “opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.” 15 U.S.C. § 78s(h)(1). SEC, by rule, has also provided “for the award of attorney fees and other expenses” under the Equal Access to Justice Act. 17 C.F.R. § 201.31; 5 U.S.C. § 504. Ordering FINRA to pay attorney fees and costs to Black/Southeast here is appropriate because Black/Southeast have already substantially prevailed against FINRA.

FINRA initially brought five claims against Black/Southeast and imposed \$243,000 fines against Black/Southeast and a lifetime bar against Black. SEC’s December 2023 Order related to two of the five claims that SEC affirmed against Black/Southeast by imposing \$73,500 in fines and lifting the lifetime bar FINRA had imposed on Black. SEC Dec. at 17–21; SEC Order at 1. Via that order, SEC remanded

two claims to FINRA, SEC Order at 1, which FINRA has now dismissed. June 6, 2025, NAC Decision at 12. What started as a five-count quarter-million-dollar fine plus lifetime bar has now become a fine for \$73,500 and no lifetime bar for the surviving two counts relating to 16 missing emails. As such, Black/Southeast have substantially prevailed against FINRA and are entitled to attorney fees on this basis alone. As noted above, FINRA had no valid grounds to even bring any of these claims. Its claims about forgery and perjury are now dismissed. And its claim about 16 missing non-business-related emails is frivolous.⁴

An award of attorney fees and costs is “necessary or appropriate in the public interest” here. 15 U.S.C. § 78s(h)(1). FINRA’s protracted litigation of near-frivolous claims against Black/Southeast is in bad faith, calculated to intimidate and harass, not calculated “for the protection of investors,” and is not “in furtherance of the purposes of this chapter.” 15 U.S.C. § 78s(h)(1). Award of fees and costs is, therefore, “an integral part of the remedy necessary to achieve compliance with [the] statutory policies.” S. Rep. No. 94-1011, 94th Cong. 2d Sess. (1976), p. 3 (discussing Civil Rights Attorneys’ Fees Awards Act, 42 U.S.C. § 1988). Censuring FINRA serves the purpose of putting FINRA on notice that bringing non-meritorious claims against brokers and

⁴ Of note, SEC should now take punitive action against FINRA for its spoliation of exculpatory evidence that SEC previously suggested is harmful error and FINRA now admits is cause for dismissing FINRA’s claims against Black/Southeast. On at least three occasions, SEC has adjudged FINRA to have violated Section 17(a) of the 1934 Act and Exchange Act Rule 17a-4 for providing altered or misleading documents to SEC. *In re FINRA*, Release No. 65643, 2011 WL 5097714 (SEC Oct. 27, 2011). FINRA likewise violated Section 17(a) of the 1934 Act and Exchange Act Rule 17a-4 here by failing to maintain exculpatory evidence. Censuring FINRA by awarding damages to Black/Southeast or at the very least issuing a decree of censure against FINRA is appropriate under these circumstances.

dealers carries financial consequences. Such censure is necessary to ensure FINRA does not repeat such tactics against Black/Southeast or others. *See Farrar v. Hobby*, 506 U.S. 103, 116 (1992) (holding that an award of attorney fees and costs under the civil-rights statute is appropriate based on the “extent of success”). And such an award is appropriate because FINRA’s litigating position against Black/Southeast is neither “substantially justified,” nor are there “special circumstances [that] make an award unjust” here. 5 U.S.C. § 504(a)(1).⁵

Black/Southeast are also entitled to attorney fees if SEC rules in their favor on the two additional bases briefed here: (1) if FINRA adjudication is unconstitutionally structured for any of the reasons stated in this motion, Black/Southeast would be prevailing parties on this basis; (2) if SEC reverses its previous order relating to the 16 missing emails that FINRA did not prove were business related, Black/Southeast would be prevailing parties on this basis.

SEC should order FINRA to pay attorney fees and costs to Black/Southeast in an amount to be determined upon submission of an application for such an award as provided in SEC rules, 17 C.F.R. §§ 201.31–.60, within “30 days after the Commission’s final disposition of the proceeding.” 17 C.F.R. § 201.44(a).

⁵ FINRA’s litigation misconduct during the course of this litigation—spoliation of evidence, pursuing frivolous claims, failure to meet FINRA’s burden of proof and burden of persuasion, failure to prove its allegations, basing its decision on speculation and conjecture, plus the constitutional deficits with democratically unaccountable FINRA adjudication—all are cause for ordering FINRA to pay damages to Black/Southeast in an amount to be measured by FINRA’s practice bar against Black that remained in effect for four-and-half years, and the levying of monetary penalties, all of which caused financial and reputational harm to Black/Southeast.

CONCLUSION

For the foregoing reasons, SEC should: (1) dismiss with prejudice all claims brought by FINRA against Black/Southeast in this administrative adjudicatory proceeding because FINRA's adjudicatory process is unconstitutionally structured; (2) reconsider its decision affirming FINRA's claims relating to sixteen missing emails; (3) affirm with prejudice the NAC's dismissal of the remanded causes of action; and (4) award attorney fees, costs, and damages, in an amount to be proved by the submission of the appropriate paperwork, as authorized by 15 U.S.C. §78s(h)(1), 5 U.S.C. § 504, and 17 C.F.R. §§ 201.31–.60, including but not limited to issuing a decree of censure against FINRA.

DATED: July 2, 2025.

CAMERON HALLING
Cal. Bar No. 306778
Pacific Legal Foundation
555 Capitol Mall, Ste. 1290
Sacramento, CA 95814
Tel.: (916) 419-7111
Fax: (916) 419-7747
CHalling@pacificlegal.org

Respectfully submitted,

/s/ Aditya Dynar
ADITYA DYNAR
D.C. Bar No. 1686163
Pacific Legal Foundation
3100 Clarendon Blvd., Ste. 1000
Arlington, VA 22201
Tel.: (202) 807-4472
Fax: (916) 419-7747
ADynar@pacificlegal.org

Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that this Respondents' Motion to Dismiss has been filed with the SEC through the SEC's eFAP system and served on the following parties, as follows:

Securities and Exchange Commission
Office of the Secretary
100 F Street N.E.
Washington, D.C. 20549
Mail Stop 1090
Fax: 202-772-9324
(One copy via fax; original and three copies via
overnight mail delivery)

Andrew Love, Esq.,
FINRA, Office of the General Counsel
1735 K Street, N.W.
Washington, DC, 20006-1506
nac.casefilings@finra.org
(Courtesy copy via email and one copy via overnight
mail delivery)

DATED: July 2, 2025.

/s/ Aditya Dynar
ADITYA DYNAR
Counsel for Respondents

CERTIFICATION PURSUANT TO 17 C.F.R. § 201.154(c)

I certify that this Motion conforms to the requirements of 17 C.F.R. § 201.154(c). The length of this brief is 5,722 words, which is less than the 7,000 words allowed.

DATED: July 2, 2025.

/s/ Aditya Dynar
ADITYA DYNAR
Counsel for Respondents