BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

William Joseph Kielczewski

For Review of Disciplinary Action Taken by

FINRA

File No. 3-20636

FINRA'S SUPPLEMENTAL BRIEF ADDRESSING APPLICANT'S CONSTITUTIONAL CLAIMS

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I. INTRODUCTION

For decades, the Securities and Exchange Commission ("Commission") and courts have affirmed the securities industry's system of self-regulation and rebuffed attempts to impose on private entities, such as FINRA, constitutional requirements that are reserved for officers or agents of the federal government. The arguments that William Joseph Kielczewski ("Applicant") raises in his supplemental brief concerning the constitutionality of the process by which FINRA disciplined him do not support overturning these longstanding precedents. Indeed, examination of these precedents confirms that FINRA is not part of the federal government, and its hearing officers are not subject to the Constitution's appointment and removal requirements; that FINRA is not a state actor subject to the Fifth or Seventh Amendments; and that the Commission's oversight properly cabins FINRA's regulatory authority to a constitutionally permissible subordinate role.

Given the unmistakable infirmity of Applicant's constitutional arguments, the Commission should deny his request to vacate this review proceeding. The Commission also should deny his alternative request for an indefinite stay. Applicant makes no attempt to meet the relevant standard for a stay, and he points to no prejudice that will result if one is not granted. The interests of justice, along with other relevant factors, require that the Commission decide this matter without pause.

II. BACKGROUND

A. FINRA Is a Private Self-Regulatory Organization Subject to Commission Oversight under the Securities Exchange Act of 1934

Self-regulation in the securities industry is nearly as old as the nation itself. *See Kim v. FINRA*, No. 1:23-cv-02420 (ACR), 2023 U.S. Dist. LEXIS 180456, at *6-7 (D.D.C. Oct. 19, 2023), *appeal filed*, No. 23-716 (D.C. Cir. October 19, 2023); *SEC Concept Release Regarding*

Self-Regulation ("*SEC Concept Release*"), 69 Fed. Reg. 71256, 71257 (Dec. 8, 2004)). When Congress adopted the Securities Exchange Act of 1934 ("Exchange Act"), it kept the "traditional process of self-regulation" of the securities industry. *See United States v. Solomon*, 509 F.2d 863, 869 (2d Cir. 1975). The Exchange Act, as amended, thus supplements the Commission's regulation of the securities industry with a system of "cooperative self-regulation." *See United States v. NASD*, 422 U.S. 694, 700 n.6 (1975). Under this statutory scheme, self-regulatory organizations ("SROs") exercise a primary supervisory role over the securities industry, subject to the Commission's comprehensive oversight. 15 U.S.C. § 78s; *Saad v. SEC*, 873 F.3d 297, 299-300 (D.C. Cir. 2017).

Securities broker-dealers generally may not transact business without registering with the Commission and joining a national securities association, which is one type of SRO. 15 U.S.C. §§ 78o(a)(1), (b)(1), 78s. FINRA was formed in 2007 when two "private actors," the National Association of Securities Dealers ("NASD"), FINRA's predecessor, and NYSE Regulation, Inc. ("NYSE"), combined their regulatory and enforcement functions into a single SRO. *See Kim*, 2023 U.S. Dist. LEXIS 180456, at *20; *Order Approving Proposed Rule Change To Amend the By-Laws of NASD*, Exchange Act Release No. 56145, 72 Fed. Reg. 42169 (Aug. 1, 2007) (SR-NASD-2007-023). FINRA is currently the only registered national securities association, and it exercises regulatory authority over member broker-dealers and associated persons that conduct business in the national securities markets.[1] *Turbeville v. FINRA*, 874 F.3d 1268, 1270-71 & n.2 (11th Cir. 2017).

[1] Although FINRA is the sole national securities association registered under the Exchange Act, it is one of many SROs, including national securities exchanges, like NYSE and Nasdaq Stock Market, LLC ("Nasdaq"), that the Commission oversees. *See* 15 U.S.C. § 78s; *SEC Concept Release*, 69 Fed. Reg. at 71256 n.2.

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FINRA is a privately-organized, not-for-profit Delaware corporation. *Id.* at 1270; *Kim*, 2023 U.S. Dist. LEXIS 180456, at *10-12; Restated Certificate of Incorporation of Financial Industry Regulatory Authority, Inc. (July 15, 2010), https://www.finra.org/rules-guidance/rulebooks/corporate-organization/restated-certificate-incorporation-financial. FINRA is financed primarily through member fees and does not receive any funding from the federal government. *Kim*, 2023 U.S. Dist. LEXIS 180456, at *12; FINRA By-Laws, art. VI, § 1.

A twenty-two member board, including industry and non-industry members and FINRA's chief executive officer, governs FINRA and oversees its management and administration. *Kim*, 2023 U.S. Dist. LEXIS 180456, at *11; FINRA By-Laws, art. VII, §§ 1, 4. FINRA board members are selected by either the FINRA board or by FINRA members; no FINRA board member is appointed by the Commission or any other government official or entity.[2] *Kim*, 2023 U.S. Dist. LEXIS 180456, at *11; FINRA By-Laws, art. VII, §§ 4, 10, 13.

FINRA adopts its own rules, which are subject to Commission review, approval, and modification. 15 U.S.C. § 78s(b); *Turbeville*, 874 F.3d at 1270; *Aslin v. FINRA*, 704 F.3d 475, 476 (7th Cir. 2013) ("the SEC may abrogate, add to, and delete from all FINRA rules as it deems necessary"). FINRA enforces these rules, and elements of the federal securities laws, through internal proceedings that FINRA staff may initiate to discipline FINRA members and associated persons. 15 U.S.C. § 78o-3(b)(7); *Turbeville*, 874 F.3d at 1271.

FINRA's Code of Procedure establishes a "multi-layered hearing and appeals process" that governs its disciplinary proceedings. *Turbeville*, 874 F.3d at 1271; *see also* FINRA Rule

[2] The FINRA board selects FINRA's chief executive, and FINRA may have other executive or administrative officers as the FINRA board deems necessary. FINRA By-Laws, art. VIII, § 1. The FINRA board may remove FINRA officers at will. FINRA By-Laws, art. VIII, § 6(b).

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9000 Series. After FINRA staff alleges misconduct by a member or associated person in a complaint, a FINRA hearing panel conducts an evidentiary hearing to decide whether the firm or individual engaged in the misconduct alleged, and if so, whether to impose sanctions.[3] *See generally* FINRA Rule 9200 Series. A party to a FINRA disciplinary proceeding may appeal the hearing panel's findings and sanctions to the National Adjudicatory Council ("NAC"), FINRA's appellate adjudicator.[4] FINRA Rule 9311(a).

A respondent disciplined by final FINRA action may, as a matter of right, apply to the Commission for its de novo review of the NAC's decision.[5] 15 U.S.C. § 78s(d)(2); *Turbeville*, 874 F.3d at 1271. A final decision of the Commission may be appealed by an aggrieved party to a federal court of appeals. *See* 15 U.S.C. § 78y(a)(1).

B. Applicant Pursues His Right to an Appeal After FINRA Disciplines Him

FINRA staff started a disciplinary proceeding against the Applicant on May 21, 2019. RP 1.[6] In a three-cause complaint, FINRA staff alleged that Applicant engaged in several violations of FINRA rules while associated with The Huntington Investment Company, a FINRA member, by making false statements to Huntington, engaging in undisclosed private securities transactions, and willfully causing Huntington to file a misleading Uniform Application for

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[3] FINRA hearing panels generally comprise a hearing officer and two panelists who are current or former members of the securities industry. *See* FINRA Rule 9231. Hearing officers are FINRA employees who work in FINRA's independent Office of Hearing Officers. *See Office of Hearing Officers*, https://www.finra.org/rules-guidance/adjudication-decisions/office-hearing-officers-oho/about.

[4] The NAC comprises 15 members—eight non-industry and seven industry members—whom the FINRA board appoints. FINRA Regulation By-Laws, art. V, §§ 5.2, 5.3.

[5] The Commission may also review a final disciplinary action of FINRA on its own motion. 15 U.S.C. § 78s(d)(2).

[6] "RP __" refers to the page numbers in the certified record filed with the Commission.

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Securities Registration or Transfer ("Form U4") and four misleading Form U4 amendments. RP 1-25.

After conducting an evidentiary hearing, a FINRA hearing panel found that Applicant engaged in the misconduct alleged in the complaint, and it imposed sanctions. RP 307-54. The Applicant then appealed the hearing panel's decision to the NAC. RP 5355-57. After de novo review of the record, the NAC affirmed the hearing panel's liability findings and, as sanctions for the Applicant's misconduct, suspended him from associating with any FINRA member in any capacity for a period of 18 months, fined him $50,000, and ordered that he requalify by examination as a registered representative before again acting in that capacity. RP 5652-79.

In October 2021, the Applicant applied to the Commission for review of FINRA's disciplinary action against him. RP 5645-47. On August 15, 2023, more than a year after the parties thoroughly briefed the issues that he raised in his application, Applicant filed a motion requesting leave to submit a supplemental brief addressing the constitutionality of the process by which FINRA disciplined him.[7] The Commission granted the Applicant's motion on September 19, 2023.[8]

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[7] The sole constitutional claim that Applicant raised before FINRA argued that FINRA Rule 2010 is "vague." *See* RP 2666, 5276, 5356, 5589. He abandoned that claim in his appeal to the Commission.

[8] In its order granting the motion, the Commission asked that the parties brief the following four questions *only*: "(1) whether the process to appoint FINRA hearing officers violates the U.S. Constitution's Appointments Clause; (2) whether the process to remove FINRA hearing officers violates the Constitution's separation of power guarantees; (3) whether the Constitution's due process and jury trial requirements apply to his proceeding; and (4) whether, because 'FINRA's disciplinary scheme relies on an unconstitutional structure' this proceeding 'should be vacated or, at a minimum, stayed pending resolution of *Alpine* [*Securities Corp. v. Financial Industry Regulatory Authority*].'"

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III. ARGUMENT

A. FINRA Is a Private Entity Not Subject to Applicant's Constitutional Claims

1. The Constitution's Appointment and Removal Requirements Do Not Apply to FINRA or its Hearing Officers

FINRA and its hearing officers are not subject to the Constitution's appointment and removal requirements. The Appointments Clause applies only to "Officers of the United States" holding principal offices "established by Law."[9] U.S. Const. art. II, § 2, cl. 2. The Constitution's removal powers are limited likewise to "executive officers," whom the President is "empower[ed] . . . to keep accountable[] by removing them from office." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010). Constitutional appointment and removal requirements hence apply only to "'Officers of the United States,' *a class of government officials*" employed by the federal government. *Lucia*, 138 S. Ct. at 2049 (emphasis added); *accord Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757-58 (5th Cir. 2001) (en banc) ("Supreme Court precedent has established that the constitutional definition of an 'officer' encompasses, at a minimum, a continuing and formalized relationship of employment *with the United States Government*." (emphasis added)); *Kim*, 2023 U.S. Dist. LEXIS 180456, at *23 ("If individuals 'are not officers of the United States, but instead are some other type of officer, the Appointments Clause says nothing about them.'" (quoting *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658 (2020)); *Newport Coast Sec., Inc.*, Exch. Act Release No. 88548, 2020 SEC LEXIS 911, at *44 (Apr. 3, 2020) ("The Appointments Clause applies only when Congress creates an office of the United States—a continuing federal position,

[9] "To the Founders, [the term 'Officers of the United States'] encompassed all federal civil officials 'with responsibility for an ongoing statutory duty.'" *Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (Thomas, J. concurring) (citing Jennifer L. Mascott, *Who are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 564 (2018)).

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'established by Law.'" (citing *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 878 (1991)). They inescapably *do not* apply to the appointment or removal of employees of a privately-organized, self-regulatory organization such as FINRA. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, No. 5:21-CV-071-H, 2023 U.S. Dist. LEXIS 77822, at *39-40 (N.D. Tex. May 4, 2023) (rejecting Appointments Clause and removal claims against the Horseracing Integrity and Safety Authority because, "[l]ike FINRA, the Authority is a private entity"); *Newport Coast*, 2020 SEC LEXIS 911, at *44 (" [T]he Appointments Clause does not apply to FINRA."); *see also Kim*, 2023 U.S. Dist. LEXIS 180456, at *23 (finding it unlikely that FINRA hearing officers are "employees of a federal government entity or instrumentality in the first instance" for purposes of plaintiff's Article II claims).

Applicant has not met the strict requirements established by the Supreme Court to treat FINRA, a private entity, as part of the "Government itself" for constitutional purposes. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995). To find that a private corporation "is a government actor for constitutional purposes, *Lebron* clearly requires permanent government control."[10] *Herron v. Fannie Mae*, 861 F.3d 160, 168 (D.C. Cir. 2017).

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[10] The Supreme Court's decision in *Lebron* supplies the operative test for determining whether Applicant's Article II claims apply to a private entity like FINRA. *See Free Enter. Fund*, 561 U.S. at 486 (stating "the parties agree that the Board is 'part of the Government' for constitutional purposes" under *Lebron*"); *see also Kim*, 2023 U.S. Dist. LEXIS 180456, at * 23 n.12 ("Neither the Court nor the parties could find any case suggesting that Article II's Appointments Clause and removal requirements apply to a private entity that is not the government itself under *Lebron* . . . ."); *Nat'l Horsemen's*, 2023 U.S. Dist. LEXIS 77822, at *28 ("[T]he Authority is a private entity under *Lebron* . . . ."). Applicant's brief makes no mention of *Lebron* and thus makes no effort to come to terms with its essential holdings. Applicant instead, citing *Free Enterprise Fund*, engages in a sleight-of-hand by suggesting that *anyone* "who exercise[s] 'significant authority pursuant to the laws of the United States'" is subject to the Constitution's appointment and removal requirements. Appl. Suppl. Br. at 13, 15. *Free Enterprise Fund* nevertheless states, in full, that Article II requirements apply to "'Officers of the United States' who 'exercis[e] significant authority pursuant to the laws of the United States.'"

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FINRA is not subject to permanent government control. *See Free Enter. Fund*, 561 U.S. at 485 (distinguishing securities industry SROs, of which FINRA is one, from the Public Company Accounting Oversight Board ("PCAOB"), "a Government-created, Government-appointed entity"); *see also Kim*, 2023 U.S. Dist. LEXIS 180456, at *22 ("The Supreme Court's discussion of SROs like FINRA in *Free Enterprise* . . . supports the conclusion that FINRA is likely not a state actor."). FINRA was not created by the government or by any law; its board members are not appointed by the government; and it is not funded by the government. *See Lebron*, 513 U.S. at 400 (holding that a corporation is part of the government where the government "creates [the] corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation"); *see also Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 138 (2d Cir. 2002) ("clearly" distinguishing NASD from Amtrak, the corporation at issue in *Lebron*); *Nat'l Horsemen's*, 2023 U.S. Dist. LEXIS 99350, at *23 ("[N]either an act of Congress nor the SEC created FINRA. . . . No government entity funds FINRA nor plays any role in the selection of its board members or officers . . . ."); *Newport Coast*, 2020 SEC LEXS 911, at *44-45 ("FINRA is a private entity; it operates as a private, Delaware non-profit corporation; it receives no funding from the government; and the positions within it are not created by federal law."). FINRA thus is not the "Government itself."[11] *See Lebron*, 513 U.S. at 378; *see also All. for Fair Bd. Recruitment v. SEC*, No. 21-

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561 U.S. at 486 (quoting *Buckley v. Valeo,* 424 U.S. 1, 125-126 (1976)). This confirms that application of the Constitution's appointment and removal requirements is predicated on the requirement that an official first be a federally employed government official.

[11] This conclusion is consistent with an uninterrupted line of Commission and judicial decisions concluding FINRA is a private organization that is *not* part of the government. *See Charles C. Fawcett*, Exch. Act Release No. 56770, 2007 SEC LEXIS 2598, at *14 (Nov. 8,

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60626, 2023 U.S. App. LEXIS 27705, at *10, 18-19 (5th Cir. Oct. 18, 2023) (rejecting claim that "Nasdaq is itself a government entity bound by the Constitution" because, like other securities-industry SROs, it was "not created by the government" nor "under the direction or control of the SEC in the manner described in *Lebron*"). And, accordingly, FINRA's privately-employed hearing officers are *not* "Officers of the United States" subject to the Constitution's Appointments Clause and removal requirements. *See Newport Coast*, 2020 SEC LEXIS 911, at *43-44 ("Because FINRA is 'not part of the Government itself' for constitutional purposes, FINRA employees cannot be 'officers *of the United States*' for purposes of the appointments clause." (emphasis in original)). Applicant's Article II challenges to FINRA and its hearing officers consequently fail.[12]

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2007) (finding NASD is "private actor," and not the "government itself"); *D.L. Cromwell Invs., Inc. v. NASD*, 279 F.3d 155, 162 (2d Cir. 2002) ("It has been found, repeatedly, that [FINRA's predecessor] NASD itself is not a government functionary."); *Desiderio v. NASD*, 191 F.3d 198, 206-07 (2d Cir. 1999) ("[NASD] is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee."); *Jones v. SEC*, 115 F.3d 1173, 1183 (4th Cir. 1997) ("While the NASD is a closely regulated corporation, it is not a governmental agency."); *First Jersey Sec. Inc. v. Bergen*, 605 F.2d 690, 698 (3d Cir. 1979) ("Congress preferred self-regulation by a private body over direct involvement of a governmental agency."); *McGinn, Smith & Co. v. FINRA*, 786 F. Supp. 2d. 139, 147 (D.D.C. 2011) ("Courts have repeatedly held that FINRA is a private entity and not a government functionary.").

[12] Although Applicant claims that FINRA acts *de facto* as a federal government agency, he does not dispute that no government official or entity appoints FINRA's board members, and its hearing officers are FINRA employees. *See* Appl. Suppl. Br. at 1, 8, 14. Nevertheless, citing to *Lucia,* and a concurrence from a motions-panel order granting an injunction in *Alpine*, Applicant asserts that a constitutional infirmity results if the Appointments Clause applies to the Commission's administrative law judges, but not to FINRA hearing officers. Appl. Suppl. Br. at 14-15 (citing *Alpine v. FINRA*, No. 23-5129, 2023 U.S. App. LEXIS 16987, at *6-7 (D.C. Cir. 2023) (Walker, J., concurring)). Courts may not, however, "disregard those aspects of the constitutional design" applicable "only to the federal government" and extend them to private parties such as FINRA. *United States v. Vaello Madero*, 596 U.S. 159, 171 (2022) (Thomas, J., concurring). Because FINRA hearing officers are employees of FINRA, a private entity, they

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2. The Constitution's Due Process and Jury Trial Requirements Do Not Apply to FINRA's Internal Disciplinary Proceedings

a. FINRA Is Not a State Actor Subject to Due Process Requirements

To establish a violation of the Fifth Amendment, Applicant must demonstrate "that in denying [his] constitutional rights, [FINRA's] conduct constituted state action."[13] *Desiderio*, 191 F.3d at 206; *accord All. for Fair Bd. Recruitment*, 2023 U.S. App. LEXIS 27705, at *9-10 ("In general, the Constitution only applies to state action."). The Commission and courts have,

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are distinguishable from the Commission administrative law judges in *Lucia,* which were unquestionably federal government personnel. *See* 138 S. Ct. at 2051 ("The sole question here is whether the Commission's ALJ's are 'Officers of the United States' or simply employees of the Federal Government."). The non-precedential *Alpine* concurrence that Applicant cites, which itself relies on *Lucia*, does not address the threshold question present in this case, and it is inconsistent with decades of precedent. *See Kim*, 2023 U.S. Dist. LEXIS 180456, at *18-19, 23 ("Neither [*Lucia* nor *Free Enterprise Fund*] addressed the threshold question posed by FINRA's structure—whether FINRA hearing officers are employees of a federal government entity or instrumentality in the first instance."); *Nat'l Horsemen's*, 2023 U.S. Dist. LEXIS 77822, at *42 ("*Lucia* does not resolve an Appointments Clause [or removal requirements] question where the challenged entity is private."); *see also All. for Fair Bd. Recruitment*, 2023 U.S. App. LEXIS 27705, at *13 n.6 ("To the extent that Petitioner relies on the reasoning identified in one judge's concurrence—that FINRA may be a state actor—that view represents the opinion of one judge at a preliminary stage of a case, prior to merits briefing, . . . and contradicts decades of case law across circuits."); *In re Grant*, 635 F.3d 1227, 1232 (D.C. Cir. 2011) (unpublished orders or opinions do not have precedential effect).

[13] Applicant failed to exhaust his Fifth and Seventh Amendment arguments before FINRA. *See Newport Coast*, 2020 SEC LEXIS 911, at *38 ("[I]mposing an exhaustion requirement promotes the efficient resolution of disciplinary disputes between SROs and their members and is in harmony with Congress's delegation of authority to SROs to settle, in the first instance, disputes relating to their operations."). These arguments challenge FINRA's rules and the way FINRA exercises its authority to discipline members and associated persons under the Exchange Act, rather than presenting a constitutional challenge to FINRA's structure or existence. *Cf. Axon Enter, Inc. v. FTC*, 143 S. Ct. 890, 902 (2023). Accordingly, Applicant has forfeited them. *See Shlomo Sharbat*, Exch. Act Release No. 93757, 2021 SEC LEXIS 3647, at *16-17 & n.44 (Dec. 13, 2021) (applicant waived his due process argument); *Kabani & Co.*, Exch. Act Release No. 80201, 2017 SEC LEXIS 758, at *45-46 (Mar. 10, 2017) (applicant forfeited his Seventh Amendment argument). Pursuant to the Commission's order for supplemental briefing, however, FINRA addresses the merits of Applicant's Fifth and Seventh Amendment arguments.

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however, uniformly rejected any assertion that FINRA is a state actor subject to constitutional challenges, including challenges that FINRA disciplinary proceedings deny its members and associated persons due process under the Constitution's Fifth Amendment.[14] *See, e.g.*, *Edward Beyn*, Exch. Act Release No. 97325, 2023 SEC LEXIS 980, at *40 & n.86 (Apr. 19, 2023) ("Constitutional due process does not apply to FINRA proceedings."); *Desiderio*, 191 F.3d at 206 (rejecting plaintiff's due process claims after finding "NASD is a private actor, not a state actor"); *Epstein v. SEC*, 416 F. App'x 142, 148 (3d Cir. 2010) ("Epstein cannot bring a constitutional due process claim against the NASD, because '[t]he NASD is a private actor, not a state actor."); *McGinn, Smith & Co.*, 786 F. Supp. 2d at 147 ("Regardless of which constitutional rights Plaintiffs claim are being violated . . . . Courts have repeatedly held that FINRA is a private entity and not a government functionary.").

No argument that Applicant raises in his supplemental brief changes the certainty of these precedents. Although the Supreme Court's state action opinions make clear that "a private entity can qualify as a state actor in a few limited circumstances," *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019), FINRA's exercise of its authority as a private SRO to

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[14] Contrary to Applicant's assertion, Appl. Suppl. Br. at 2, 14, the state action theory is irrelevant to his Appointments Clause and removal power challenges. *See Lebron*, 513 U.S. at 378-79, 381 (explaining that though the "actions of private entities can sometimes be regarded as governmental action," there exists the "prior question" whether the challenged entity is "itself a federal entity"); *Herron*, 861 F.3d at 167 (contrasting the "state action doctrine" that applies to a private party engaged in governmental action in a specific setting with claims that an entity is the "Government itself."); *Kim*, 2023 U.S. Dist. LEXIS 180456, at *23-24 & n.12 ("[T]he state action theory does not apply to Plaintiff's Article II Appointments Clause or removal power claims."). Even accepting the unsupportable premise that FINRA engages in state action when conducting internal disciplinary proceedings, FINRA hearing officers would continue to not be government officials for purposes of Article II because they are employees of FINRA, a private company. *See NB ex rel. Peacock v. District of Columbia*, 794 F.3d 31, 42 (D.C. Cir. 2015) (finding that Xerox, a private entity, engaged in state action for purposes of the Due Process Clause but that such state action did not make it subject to the Constitution's appointments or removal requirements).

discipline its members and associated persons is not state action. "[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). FINRA disciplinary proceedings do not meet the demands of this test.

First, FINRA does not "exercise[] a function traditionally exclusively reserved to the State." *See Halleck*, 139 S. Ct. at 1926 (quoting *Jackson*, 419 U.S. at 352). "To the contrary, '[s]ecurities industry self-regulation has a long tradition in the U.S. securities markets." *Kim*, 2023 U.S. Dist. LEXIS 180456, at *25 (quoting *SEC Concept Release*, 69 Fed. Reg. 71256 at 71257). Thus, "since 1938, frontline authority over broker-dealers has fallen to *private* entities and *not* the state." *Id.* (emphasis in original). The fact that FINRA enforces compliance by its members and associated persons with the requirements of both the Exchange Act and FINRA rules does not make it a state actor for purposes of the Fifth Amendment.[15] *See Daniel Turov*, 51

[15] FINRA disciplinary proceedings fulfill its obligations under the Exchange Act to, among other things, "provide a fair procedure for the disciplining of members and persons associated with members." *See* 15 U.S.C. §§ 78o-3(b)(2), (7), (8). Those obligations apply to *all* SROs registered under the Exchange Act, which requires "[e]very self-regulatory organization" to "enforce compliance" with the Exchange Act and its own rules. 15 U.S.C. § 78s(g)(1). Applicant's attempt to reframe FINRA's conduct as the "enforcement of federal law," *e.g.*, Appl. Suppl. Br. at 5-6, is thus untenable. As an initial matter, it ignores the plain fact that FINRA disciplined him solely for violations of FINRA rules. Moreover, even if FINRA's role in dispensing discipline for Exchange Act violations could be characterized as an "executive function," Appl. Suppl. Br. at 1, SROs have been the frontline regulators of the securities industry since the Founding. *See Halleck*, 139 S. Ct. at 1930-31 (rejecting attempt to "circumvent" state-action precedent by "widen[ing] the lens" and framing the "relevant function" in overly "general[]" terms). Although Congress imposed a federal overlay on that private regulatory framework, the "'traditional process of self-regulation' was not displaced." *Solomon*, 509 F.2d at 869. Finally, FINRA's authority to discipline members and associated persons is constitutionally distinct from the Commission's. FINRA discipline does not, as

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S.E.C. 235, 238 (1992) ("The privilege against self-incrimination is 'incapable of violation by anyone except the government in the narrowest sense.'" (quoting *Solomon*, 509 F.2d at 867)). FINRA's self-regulatory responsibilities are private conduct, not state action. *See Kim*, 2023 U.S. Dist. LEXIS 180456, at *25.

Second, FINRA is not so "pervasive[ly] entwined" with the government for its activities as a private self-regulatory organization to be treated as state action. *Brentwood Acad.*, 531 U.S. at 298; Appl. Suppl. Br. at 5. FINRA bears no resemblance to the "nominally private" school athletic association at issue in *Brentwood*. *Cf. All. for Fair Bd. Recruitment*, 2023 U.S. App. LEXIS 27705, at * 25 ("[T]hese circumstances are absent here."). Government officials neither select nor control FINRA board members, and FINRA's personnel, including its hearing officers, are hired and employed by a private entity. *See supra* Section II.A. Indeed, instead of explaining how FINRA meets the entwinement standard articulated in *Brentwood*, Applicant relies on cases concerning FINRA that did not involve constitutional claims, let alone the *Brentwood* test. *See, e.g.*, *Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014) (seeking review of an SEC order barring him from the securities industry); *Turberville*, 874 F.3d 1268 (involving a suit alleging tort claims against FINRA).

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Applicant avers, Appl. Suppl. Br. at 11, "carry the same consequences as SEC orders to the same effect." FINRA can discipline members only in its own private proceedings. *See supra S*ection II.A. FINRA "lacks the authority to bring court actions to collect" disciplinary fines. *Fiero v. FINRA*, 660 F.3d 569, 571 (2d Cir. 2011). And the Commission alone retains the sovereign power to enforce the Exchange Act by bringing actions for judicially enforceable relief. FINRA is accordingly distinguishable from the government actors that Applicant identifies as supposed analogues in his supplemental brief. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (the President); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (the Consumer Financial Protection Bureau); *Free Enter. Fund*, 561 U.S. 477 (the PCAOB); *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995) (challenging "the SEC's order approving" a rule promulgated by the Municipal Securities Rulemaking Board).

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Finally, neither the Commission nor any other government agency "compels" FINRA "to take a particular action" or "acts jointly with" FINRA in its enforcement actions. *See Halleck*, 139 S. Ct. at 1928. FINRA possesses enforcement discretion that is beyond government influence.[16] *See Kim*, 2023 U.S. Dist. LEXIS 180456, at *12; *see also Scottsdale Cap. Advisors Corp. v. FINRA*, No. 23-1506 (BAH), 2023 U.S. Dist. LEXIS 99350, at *6-7 (D.D.C. June 7, 2023) ("[S]uch investigations are done at FINRA's discretion without input from the SEC or other branch of government."), *appeal pending*, No. 23-5129 (D.C. Cir. June 8, 2023). FINRA thus "decides whom to investigate, whom to bring charges against, what charges to bring, and what sanctions to seek" without Commission involvement. *See Kim*, 2023 U.S. Dist. LEXIS 180456, at *12. The necessary "nexus between the state and the *specific* conduct of which [Applicant] complains" is therefore missing.[17] *See Desiderio*, 191 F.3d at 207. "Although '[FINRA] plays an important part in the highly regulated securities industry and is subject to [Commission] oversight[,] . . . even extensive regulation by the government does not transform the actions of the regulated entity into those of the government.'" *See Fawcett*, 2007 SEC LEXIS 2598, at *14 (quoting *Graman v. NASD*, No.97-1556-JR, U.S. Dist. LEXIS 11624, at *8

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[16] Applicant concedes that "neither the Commission nor any other part of the executive branch can control FINRA's investigations, . . . its decisions to initiate enforcement proceedings, or stop prosecutions." Appl. Suppl. Br. at 8.

[17] Applicant's attempt to cast FINRA as a government "agent" rings hollow. *See* Appl. Suppl. Br. at 5. FINRA undertakes disciplinary proceedings in pursuit "of its own interests and obligations, not as an agent of the SEC." *See Solomon*, 509 F.2d at 863 (dismissing claim that "interrogation by NYSE must be deemed the equivalent of interrogation by the United States"). For this reason, Applicant's "agency analogy is upside down." *See Gold v. SEC*, 48 F.3d 987, 991 (7th Cir. 1995) (quoting *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179 (7th Cir. 1984)). A self-regulatory organization discharging its regulatory responsibilities under the Exchange Act "is the principal rather than the agent; the purpose of the federal law is to strengthen the power and responsibility of the [SRO] in performing a policing function that preexisted federal regulation." *See id.*

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(D.D.C. Apr. 27, 1998)); *accord All. for Fair Bd. Recruitment*, 2023 U.S. App. LEXIS 27705, at *10-11 ("While Nasdaq must register with and is heavily regulated by the SEC, the Supreme Court has made clear that a private entity does not become a state actor merely by virtue of being regulated."). The Commission is not involved in FINRA's enforcement process, and it is not able to review a FINRA disciplinary action until it is final. *See Kim*, U.S. Dist. LEXIS at 26 ("[T]he SEC is not involved in FINRA's enforcement process until the appellate stage."). The Commission's oversight of FINRA does not make FINRA a state actor. *See Jones,* 115 F.3d at 1182 ("[SEC] review power does not convert the NASD's interest to the same interest as that of the regulating agency."); *cf. All. for Fair Bd. Recruitment*, 2023 U.S. App. LEXIS 27705, at 25-26 ("The SEC engaged in its statutory review. . . . This yes-or-no approval process does not reflect the degree of entwinement required to turn the Rules into state action.").

For these reasons, the Commission and courts have uniformly rejected arguments that FINRA engages in state action when it disciplines it members and associated persons.[18] *See Fawcett*, 2007 SEC LEXI 2598, at *14 ("Fawcett's position [that the NASD is a state actor] . . . is directly contrary to established precedent"); *Kim*, 2023 U.S. Dist. LEXIS 180456, at *26-27 ("[C]ourts in this District and elsewhere have repeatedly rejected arguments that FINRA . . .

[18] Even if the Due Process clause applied to FINRA's disciplinary proceedings (which is not the case), Applicant's undeveloped contentions that his disciplinary proceeding would not comport with due process lack merit. *See* Appl. Suppl. Br. at 16; *see also Withrow v. Larkin*, 421 U.S. 35, 58 (1975) ("the combination of investigative and adjudicative functions does not, without more, constitute a due process violation"); *Beauchamp v. De Abadia*, 779 F.2d 773, 775 (1st Cir. 1985) (due process does not require the exclusion of hearsay and application of the rules of evidence); *Sorrell v. SEC*, 679 F.2d 1323, 1326 (9th Cir. 1982) (predecessor to FINRA Rule 2010 not overly vague); *Harold T. White*, 3 S.E.C. 466, 533 (1938) (administrative disciplinary proceeding did not violate due process when judicial review was available). And, for the reasons addressed in FINRA's principal answering brief in this matter, Applicant was not, as he contends, deprived of his statutory right to a fair hearing when the Hearing Officer denied his untimely motion to compel. *Compare* Appl. Suppl. Br. at 3-4 *with* FINRA Answr. Br. at 29-37.

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engages in state action.") (collecting cases); *Scottsdale Capital Advisors Corp.*, 2023 U.S. Dist. LEXIS 99350, at *25 & n.7 ("[A] multitude of courts nationwide have held . . . that FINRA is a private entity wholly separate from the SEC or any other government agency.") (collecting cases); *Mohlman v. FINRA*, No. 3:19-cv-154, 2020 U.S. Dist. LEXIS 31781, at *14-15 (S.D. Ohio Feb. 25, 2020) ("Courts have held without exception that FINRA is a private entity and not a state actor.") (collecting cases), *aff'd*, 97 F.3d 556 (6th Cir. 2020). FINRA's entitlement to immunity when performing its self-regulatory functions does not, as Applicant claims, Appl. Suppl. Br. at 6, alter the conclusions reached in these decisions. *See Rayburn v. Hogue*, 241 F.3d 1341, 1348-49 (11th Cir. 2001) (extending governmental "immunity" to private parties is too "nebulous" a connection to establish state action). The standard for affording regulatory immunity turns on whether the self-regulatory organization is "act[ing] under the aegis of the Exchange Act's delegated authority." *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114 (9th Cir. 2008). That standard is analytically distinct from the standards for demonstrating that a private entity engages in state action, which are discussed in this section. Applicant cites no case, because none exists, that has held FINRA engages in state action due to the immunity it is afforded as a securities-industry SRO.

b. The Seventh Amendment Does Not Apply to FINRA or Applicant's Case

Like Applicant's due process argument, his Seventh Amendment argument fails because FINRA is not engaged in state action when exercising its self-regulatory responsibilities. *See supra* Section III.A.2.a. The Commission need look no further to conclude that Applicant's Seventh Amendment argument cannot succeed. *Desiderio*, 191 F.3d at 206 (rejecting a Seventh Amendment claim because the "requisite state action" was absent); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1200-02 (9th Cir. 1998) (rejecting Seventh Amendment claim

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and observing that "[a] threshold requirement of any constitutional claim is the presence of state action"), *overruled on other grounds by EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003); *Mark H. Love*, 57 S.E.C. 315, 322 n.13 (2004) ("We have held that NASD proceedings are not state actions and thus not subject to constitutional requirements.").

Moreover, even if FINRA were subject to constitutional requirements, Applicant's argument fails because his disciplinary proceeding does not implicate legal, private rights that trigger the Seventh Amendment's jury trial guarantee. The Seventh Amendment preserves "the right of trial by jury" in "Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. The Commission has held that a "disciplinary hearing before a self-regulatory organization is . . . no[t] a 'suit at common law' within the meaning of the Seventh Amendment," and its guarantee of a trial by jury is therefore inapposite. *Turov*, 51 S.E.C. at 238.

The Commission's holding is well-founded. The Supreme Court "ha[s] consistently interpreted the phrase 'Suits at common law' to refer to 'suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.'" *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989) (quoting *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830)). To determine whether a claim implicates legal rights, courts "ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). "Second, [courts] examine the remedy sought and determine whether it is legal or equitable in nature." *Granfinanciera*, 492 U.S. at 42. Lastly, courts consider "[i]f, on balance, these two factors indicate that a party is entitled to a jury trial." *Id.*

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Under this framework, Applicant's disciplinary proceeding is plainly outside the scope of the Seventh Amendment. First, disciplinary proceedings against members of the securities industry were not tried at law at the time of the Founding, nor are they analogous to any proceedings that were. *See Turov*, 51 S.E.C. at 238 & n.5 (Commission proceeding that may result in suspension or expulsion of member or officer of national securities exchange is "analogous to a proceeding for the revocation of a license and is [] no[t] a suit at law"). To the contrary, self-regulation in the securities industry dates to the Founding era. *See Kim*, 2023 U.S. Dist. LEXIS 180456, at *6-7; *SEC Concept Release*, 69 Fed. Reg. at 71257. Second, the sanctions FINRA imposes in its disciplinary proceedings are remedial measures to protect investors—they therefore do not constitute legal relief for purposes of the Seventh Amendment. *See* 15 U.S.C. § 78s(e)(2) (a sanction imposed by a SRO must further the purposes of the Exchange Act and must not be excessive or oppressive); *John M.E. Saad*, Exch. Act Release No. 86751, 2019 SEC LEXIS 2216, at *7, 11 (Aug. 3, 2019) (a FINRA sanction must be imposed for a remedial, and not a punitive, purpose), *aff'd*, 980 F.3d 103 (D.C. Cir. 2020). These factors establish, "on balance," that Applicant is not "entitled to a jury trial under the Seventh Amendment." *Granfinanciera*, 492 U.S. at 42.

Applicant seeks to rewrite FINRA's decision against him to include findings of fraud and by imagining that FINRA's action sought to vindicate the rights of his employer. But this argument misstates the facts of this case. FINRA alleged that Applicant violated its rules by not disclosing private securities transactions, making false statements to his employer, and causing his firm to file misleading Forms U4. RP 20-23. FINRA nowhere alleged that Applicant committed fraud, nor did it seek to vindicate any rights of his employer. *See id.* Instead, as in all its disciplinary proceedings, FINRA sought to enforce professional rules of conduct to protect

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investors.[19] *See, e.g.*, *Geoffrey Ortiz*, Exch. Act Release No. 58416, 2008 SEC LEXIS 2401, at *29 (Aug. 22, 2008) ("The public interest demands honesty from associated persons of NASD members; anything less is unacceptable."); *Richard A. Neaton*, Exch. Act Release No. 65598, 2011 SEC LEXIS 3719, at *16 (Oct. 20, 2011) ("Because '[r]egistration of broker-dealers is a means of protecting the public,' every person submitting a Form U4 has the obligation to ensure that the information provided on the form is true and accurate."); *Blair C. Mielke*, Exch. Act Release No. 75981, 2015 SEC LEXIS 3927, at *45 (Sept. 24, 2015) (finding the respondents' failure to disclose private securities transactions to the firm harmed investors "by depriving them of [the firm's] supervision of their investments").

Applicant's Seventh Amendment argument concerning trial by jury has no relevance to the proceedings by which FINRA disciplined him. *See Turov*, 1992 SEC LEXIS 3332, at *8 ("The guarantees pertaining to trials by jury . . . are . . . inapposite."). Applicant points to no evidence that, throughout the centuries of self-regulation, disciplinary proceedings by FINRA or other securities-industry SRO were ever tried to a jury, or even in a court of law. His misguided attempt to rewrite FINRA's disciplinary decision against him does nothing more than establish

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[19] The fact that Applicant's sanctions include a fine does not support a contrary result. *See Curtis v. Loeher*, 415 U.S. 189, 195-96 (1974) (declining to find that any reward of monetary relief constitutes "legal relief" under the Seventh Amendment). As discussed above, FINRA sanctions, including fines, are remedial measures to protect investors and are therefore distinguishable from traditional forms of legal relief. Moreover, even if the Commission were to determine that Applicant's fine constitutes legal relief (which it does not), that would not dictate the conclusion that the Seventh Amendment applies under the two *Granfinanciera* factors. *See Granfinanciera*, 492 U.S. at 42 (a court must consider the two factors "on balance"); *see also Entergy Ark., Inc. v. Nebraska*, 358 F.3d 528, 546-47 (8th Cir. 2004) (a request for compensatory damages did not require a jury trial when it was "interrelated" to the requested equitable relief); *Hyde Prop. v. McCoy*, 507 F.2d 301, 306 (6th Cir. 1974) (when a requested remedy at law is inadequate, suit can sound in equity and no jury trial is required).

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that the actual characteristics of his disciplinary proceeding, which imposed sanctions for remedial purposes, do not implicate the Seventh Amendment.

3. The Commission Should Not Consider Applicant's Nondelegation Argument

Faced with consistent precedent holding that FINRA is not a state actor, Applicant raises an alternative argument that he relies on throughout his brief—that FINRA, as a private actor, exercises power in violation of the private nondelegation doctrine. Appl. Suppl. Br. at 2-12, 14, 18. But Applicant did not request, and the Commission did not grant, leave for the parties to brief this alternative issue, and the Commission therefore should not consider this argument. *See* 17 C.F.R. § 201.421(b).

Even if the Commission were to consider Applicant's nondelegation argument, it is squarely foreclosed by Supreme Court precedent holding that Congress may give a private organization a role in a regulatory program, provided it "function[s] subordinately" to, and is under the "authority and surveillance" of, a governmental body. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). Applying this precedent, courts in "case after case" have concluded that the Commission-FINRA model does not violate the private nondelegation doctrine.[20] *See Okl. v. United States*, 62 F.4th 221, 229-32 (6th Cir. 2023); *see also id.* at 243

[20] While Applicant refers to a purported "shift" in FINRA's relationship with the Commission, he does not cite a single amendment to the Exchange Act altering the fundamental features that have led numerous courts to conclude that FINRA is not engaged in state action and does not violate the private nondelegation doctrine when it conducts disciplinary proceedings. *See Kim*, 2023 U.S. Dist. LEXIS 180456, at *28-29 (collecting cases). And, contrary to Applicant's argument, the 2007 merger of the regulatory and enforcement functions of NASD and NYSE did not result in a "significant expansion of FINRA's regulatory authority" by "leaving only a single national securities association." Appl. Supp. Br. at 9. n.3. NYSE is a national securities exchange, not a national securities association. *SEC Concept Release*, 69 Fed. Reg. at 71257 (discussing the NYSE's history as a registered exchange and the former NASD's registration as a national securities association). Thus, the cited merger does not support

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(Cole, J., concurring) (referring to the SEC-FINRA model as "unquestionably constitutional"); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 877 (5th Cir. 2022) (collecting cases); *Sorrell v. SEC*, 679 F.2d 1323, 1325-26 (9th Cir. 1982) (collecting cases in which courts uniformly concluded that nondelegation challenges to NASD had "'no merit'"); *Kim*, 2023 U.S. Dist. LEXIS 180456, at *28-29 (finding a private nondelegation claim against FINRA "unlikely to succeed on the merits").

As this precedent recognizes, FINRA's enforcement activities are appropriately "subordinate to" the Commission for nondelegation purposes. *Nat'l Horsemen's*, 53 F.4th at 887-88. Among other things, the SEC must approve FINRA rules, and it "may abrogate, add to, and delete from all FINRA rules as it deems necessary." *Aslin*, 704 F.3d at 476 (citing 15 U.S.C. §§ 78s(b)(1), (c)). The SEC also regularly examines FINRA to ensure its compliance with securities laws and FINRA rules. *See* U.S. Gov't Accountability Off., GAO-18-522, SEC Inspections of FINRA's Governance Were Consistent with Internal Guidance (2018), bit.ly/3h0GdCj; *see also* 15 U.S.C. §§ 78s(g), (h). In addition, FINRA must notify the SEC of any final disciplinary action against a member, which is thereafter subject to de novo review by the Commission acting sua sponte, or in response to a petition from the aggrieved party. *See* 15 U.S.C. §§ 78s(d)(1)-(2). This extensive government oversight properly cabins FINRA's regulatory authority to a constitutionally permissible subordinate role. *See*, *e.g.*, *Oklahoma*, 62 F.4th at 229-32 (concluding, based on a similar statutory scheme, that the Horseracing Integrity and Safety Authority operates in a constitutionally permissible, subordinate role to the Federal

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[cont'd]
Applicant's argument, and there is nothing new about FINRA's status as the only currently registered national securities association. *See Domestic Sec., Inc. v. SEC*, 333 F.3d 239, 242 (D.C. Cir. 2003) (observing, in a decision that predated FINRA's creation, that the NASD was "the only 'national securities association' registered with the SEC").

Trade Commission); *Nat'l Horsemen's*, 53 F.4th at 887-88 (distinguishing the statutory scheme at issue from the Maloney Act and observing that FINRA's role in rulemaking is ultimately "in aid of" the SEC).

Applicant cites no authority for his argument that, if FINRA is not a state actor, the exercise of its self-regulatory authority violates the private nondelegation doctrine. Appl. Suppl. Br. at 2-3, 7. This is not "unsurprising." *See All. for Fair Bd. Recruitmen*t, 2023 U.S. App. LEXIS 27705, at *20. The private-nondelegation and state-action tests are distinct. *Id.* Applicant "fail[s] to explain why [FINRA] cannot be a private entity whose conduct, while subject to government regulation, is neither an exercise of the [Commission's] government authority nor fairly attributable to the [Commission]." *Id.* at *21. Courts have "found as much by holding that SROs are not state actors and that SROs do not exercise unconstitutional delegations of legislative power." *Id.* (collecting cases). Applicant gives the Commission no reason to reach a different result in this case. *See id.* (finding Nasdaq is not a state actor subject to constitutional constraints).

B. The Commission Should Not Vacate or Stay This Proceeding

The Commission should not vacate this appeal proceeding. Applicant's cursory argument in favor of this relief relies on *Lucia*, but that decision has no applicability where, as here, the challenged proceeding does not involve "officers of the United States." *See* 138 S. Ct. at 2049; *supra* Section III.A.1. Because Applicant's sole argument in favor of vacating this proceeding is foreclosed, the Commission should deny his request.

The Commission also should deny Applicant's request for a stay. Under Rule of Practice 161, the Commission may stay a review proceeding for "good cause." 17 C.F.R. § 201.161(a). In considering such a request, however, the Commission adheres "to a policy of strongly

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disfavoring" delays "except in circumstances where the requesting party makes a strong showing that the denial of the request . . . would substantially prejudice their case." 17 C.F.R. § 201.161(b). Applicant identifies no specific prejudice that will result if the Commission does not stay this review proceeding.[21] He relies solely on his assertion that an indefinite stay is appropriate because the D.C. Circuit Court's pending decision in *Alpine* will "inform the Commission's understanding" of the issues he now raises.[22] This is not a sufficient reason to justify a stay of this proceeding, much less a stay of indefinite duration. *Cf. Jon Edelman*, 52 S.E.C. 789, 790 (1996) ("The public interest demands prompt enforcement of the securities laws, even while other government proceedings are under way.").

Other factors call for denying Applicant's request to stay this review proceeding under Rule 161. For example, the length of this proceeding to date and the stage at which Applicant made his stay request disfavor granting the stay request. *See* 17 C.F.R. §§ 201.161(b)(1)(i), (iii). Applicant did not request a stay until August 15, 2023—nearly two years after he filed his application for review, and more than a year and six months after briefing on the merits concluded in March 2022. At this late stage, the public interest favors a resolution of this proceeding. *See John Roger Faherty*, Exch. Act Release No. 41454, 1999 SEC LEXIS 1067, at *6 (May 26, 1999) (denying an indefinite stay and concluding the "[t]imely resolution of adjudicatory proceedings promotes public confidence in the securities markets").

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[21] The sanctions FINRA imposed on Applicant are stayed pending resolution of his appeal. FINRA Rule 9370(a).

[22] Unlike the *Alpine* plaintiff, Applicant does not rely on the Supreme Court's decision in *Axon* to establish prejudice—nor could he. Applicant already has been through FINRA's full disciplinary process and, consequently, the prejudice analysis in *Axon* does not apply here. *See Axon*, 143 S. Ct. at 903-04 (explaining that the "here-and-now injury" of an illegitimate proceeding cannot be rectified once the proceeding is complete).

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Finally, the interests of justice weigh heavily against Applicant's request. *See* 17 C.F.R. § 201.161(b)(1)(v). The Exchange Act requires FINRA "to protect investors." 15 U.S.C. § 78o-3(b)(6). FINRA, just like "[e]very self-regulatory organization" under the Exchange Act, must specifically "enforce compliance" with "its own rules," including the FINRA rules Applicant was found to have violated in the proceeding under review. 15 U.S.C. §§ 78o-3(b)(2), 78s(g)(1)(B). If Applicant may obtain a stay of this review proceeding by referencing *Alpine*, that would signal that any other litigant may do the same. The resulting copy-cat litigation would greatly damage the public interest.[23] *See Kim*, 2023 U.S. Dist. Ct. 180456, at *40 ("Suspending FINRA's ability to enforce its own rules would harm investors.").

IV. CONCLUSION

FINRA is a private entity that is not part of the federal government under *Lebron*, and its hearing officers are not "Officers of the United States." Nor is FINRA a state actor when it fulfills its responsibilities under the Exchange Act as a self-regulatory organization. Applicant's constitutional challenges to the process by which FINRA disciplined him accordingly fail, as does his unsolicited "alternative" argument that FINRA exercises power in violation of the private non-delegation doctrine. This review proceeding should not be vacated or stayed pending the resolution of *Alpine*. The public interest demands that the Commission decide this matter without delay.

[23] If Applicant may obtain a stay based on the pending litigation in *Alpine*, there would be "no principled basis whereby acceptance of" such "argument[s] could be confined to" this specific context without also threatening a breakdown in the regulatory activities conducted by other SRO's. *See Solomon*, 509 F.2d at 869-70.

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CERTIFICATE OF COMPLIANCE

I, Gary Dernelle, certify that FINRA's Supplemental Brief Addressing Applicant's Constitutional Claims complies with:

(1) SEC Rule of Practice 151(e) because it omits or redacts any sensitive personal information; and

(2) the page limitation established by the Commission's September 19, 2023 order directing the parties to file supplemental briefs addressing the constitutionality by which FINRA disciplined applicant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gary Dernelle, certify that on this 21st day of November 2023 I caused a copy of FINRA's Supplemental Brief Addressing Applicant's Constitutional Claims, In the Matter of the Application of William Joseph Kielczewski, Administrative Proceeding File No. 3-20636, to be served through the SEC's eFAP system on:

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