UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of SUZANNE MARIE CAPELLINI For Review of Disciplinary Action Taken by FINRA	Admin. Proc. File No. 3-22284

REPLY BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

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I. INTRODUCTION

This appeal challenges the Constitutionality and fundamental fairness of FINRA's disciplinary action against Suzanne Capellini. FINRA's proceeding violated the Seventh Amendment, the private nondelegation doctrine, Article II and the Fifth Amendment, and exceeded FINRA's jurisdictional authority. In addition, the evidence did not support any finding of wrongdoing, and the NAC[1] applied incorrect legal standards. FINRA's own witness John Sazegar admitted that "there is nothing directly stated that appears to me to be false" in Ms. Capellini's Rule 8210 responses, and that the information she provided was helpful to FINRA's investigation.[2] Ms. Capellini also acted reasonably as AMLCO under the circumstances. At a minimum, the sanction imposed – an industry bar – was grossly disproportionate to the alleged violations. The SEC should vacate the NAC's Decision and dismiss the charges in their entirety.

II. THE FACTUAL RECORD DOES NOT SUPPORT FINRA'S FINDINGS THAT MS. CAPELLINI VIOLATED FINRA RULES OR THE SANCTIONS IMPOSED

FINRA's Brief in Opposition to Application for Review (the "Opposition" or "Opp."), like the NAC Decision and OHO majority decision, distorts or ignores several critical facts. These key evidentiary errors undermine the NAC's findings that Ms. Capellini violated FINRA Rules and the sanctions imposed. The following material distortions and omissions, by themselves, warrant setting aside the Decision.[3]

First, FINRA, like the NAC, misleadingly avers that Ms. Capellini's husband's "trading generated almost $400,000 in profits, which Capellini testified benefited her household."[4] This distorts the factual record because FINRA never proved that Mr. Bendelac's trading resulted in *any*

[1] Defined terms have the same meaning herein as in the Opening Brief in Support of Application for Review ("Opening Brief" or "Br."), and citations to the record are in the same format.
[2] 1462-64; 1470-71.
[3] *See, e.g.*, *In re Scottsdale Cap. Adv. Corp.*, 2021 SEC LEXIS 2789, at *32-41 (Sept. 17, 2021).
[4] Opp. 1, 3; 7023, 7025.

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profit, rather than a return of principal on the cost basis paid. But even if FINRA had proven the trading generated $400,000 in profits, FINRA ignores the critical fact that Ms. Capellini's husband's trading was legal. FINRA never alleged or proved otherwise. FINRA also ignores that while the SEC sued Mr. Bendelac for his trading, it lost on all its claims after a bench trial.[5] FINRA also never proved that FMC would have stopped Mr. Bendelac's trading even if Ms. Capellini had further investigated any "red flags" presented by such trading. FINRA also ignores that FMC did not stop his trading when Pershing had raised an issue years earlier, and that even if it had, he could have traded LPS in outside accounts.[6]

The idea that Ms. Capellini somehow received "ill-gotten gains" from her husband's trading was fundamental to the NAC's Decision, particularly on sanctions, as to both purported violations.[7] It was what "most troubled" the NAC.[8] But the evidentiary record actually demonstrates that any "profit" Ms. Capellini received from Mr. Bendelac's trading was *not* the result of any violation of any FINRA Rule by *her*, but instead the result of *her husband's* entirely legal trading, trading that would have occurred in any event whatever Ms. Capellini did or did not do. FINRA's Opposition does not contravene any of this; it just repeats the tagline that Mr. Bendelac's trading generated profits benefiting the household. Enforcement did not prove by a preponderance of the evidence that *Ms. Capellini's* purported "deficient AML review"[9] resulted in her monetary gain. Any "benefit" she received resulted from her husband's legal trading which would have occurred regardless of what she did – any suggestion otherwise is speculation. The NAC Decision should be set aside for this reason alone.

[5] 1982; *SEC v. Trends Investments et al.*, No. 22-10889-RGS (D. Mass.).
[6] Br. 30.
[7] 7023, 7025.
[8] *Id.*
[9] 7023.

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Second, FINRA, like the NAC, misleadingly asserts that Mr. Bendlac's LPS activity at FMC increased after she became AMLCO.[10] FINRA does this by deceptively comparing the number of occasions on which Mr. Bendelac deposited and sold LPS at FMC before Ms. Capellini became AMLCO to the number of occasions on which he deposited and sold LPS at FMC after she became AMLCO.[11] What the evidence presented at the hearing actually demonstrated, however, which FINRA does not dispute, was that the number of *shares* of low-priced securities that were deposited, and the *proceeds* from the sales of such securities, were substantially *higher* in Mr. Bendelac's accounts from 2012–2017, before Ms. Capellini was AMLCO, than they were from 2018– 2020, after she became AMLCO.[12]

The NAC's erroneous finding that Mr. Bendelac's LPS "activity increased dramatically" after she became AMLCO was crucial to its Decision, including because it reinforced the NAC's incorrect conclusion that Ms. Capellini's conduct resulted in "ill-gotten gains."[13] The reality was the evidence established that the proceeds from Mr. Bendelac's sales of LPS at FMC were *substantially less* when Ms. Capellini was AMLCO than they were before. The NAC never engaged with that evidence; instead, the NAC summarily found that Mr. Bendelac's LPS "activity increased dramatically" without delving into the details of what that meant. If, as the evidence demonstrated, Mr. Bendelac actually deposited *fewer shares* and generated substantially *less in proceeds* after Ms. Capellini became AMLCO, the fact that he may have had more total deposit and sales transactions after she became AMLCO does not support the sanctions imposed. This fundamental error by the NAC warrants setting aside the Decision.

[10] Opp. 6; 6999, 7023.
[11] *Id.*
[12] 2302-2321; 4311 *et seq*.
[13] 6999, 7023.

Third, FINRA focuses *extensively* on the trading of Ms. Capellini's husband Mr. Bendelac (e.g., Opp. 6-11), trying to paint Ms. Capellini as a bad actor because her husband was a bad actor. In a sense this is not surprising because this entire proceeding appears to have arisen out of a coordinated effort by the SEC, FINRA, FMC and its counsel Wilmer Hale to use a FINRA proceeding against Ms. Capellini as leverage against Mr. Bendelac in the SEC's case against him, and as retaliation against Ms. Capellini for claims of discrimination she made against FMC. But neither FINRA nor the SEC proved Mr. Bendelac's trading was unlawful. So the allegation that Ms. Capellini missed certain "red flags" regarding the trading in his accounts (and only his accounts) goes nowhere. It was not unreasonable for her to trust her husband, which was borne out by the fact that he did nothing wrong, and nothing she did or failed to do with respect to monitoring his accounts harmed or had the potential to harm anyone. His trading was legal, so Ms. Capellini's purported AML failures posed no AML risk to anyone. As such, the evidence did not support the finding Ms. Capellini violated Rule 3310(a) or the suggested sanction.

Fourth, with respect to the Rule 8210 claim, FINRA tellingly ignores the language of the first Rule 8210 request, the RIVX request.[14] That language was critical because it framed how the subsequent, similar requests would be interpreted, a reality which FINRA, like the NAC, just ignores. The RIVX request sought:

> "***[A]ll documentation related to all receipt, delivery, and/or transfer of RIVX stock*** as well as all due diligence inquiries made to determine the free trading basis of any RIVX shares sold by the account between August 2018 and November 7, 2019."[15] (emphasis added)

The NAC correctly declined to impose liability for the RIVX response, because the "wording" of that request sought "documentation related to the receipt, delivery and/or transfer

[14] Opp. 11 n. 6 ("Because the NAC dismissed the findings of violation with respect to this request, we omit a discussion of the facts concerning this request here.").
[15] 5311; 6630; 7003.

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of… stock" and "the customer… was Capellini's spouse," but incorrectly imposed liability for the LAZX and REMO responses, because the latter requests supposedly sought only "First Manhattan's contemporaneous due diligence."[16] But the following evidence, which FINRA and the NAC completely ignore, supports Ms. Capellini's reasonable interpretation (as well as the OHO dissent's interpretation, which FINRA also ignores) that all three requests sought all documentation relating to the trading of the shares:

- Enforcement argued throughout the proceedings that the three requests should be interpreted the same way.[17]

- As FINRA witness John Sazegar testified and the dissent found, the language of the three requests is similar, and they all served the same purpose.[18]

- The RIVX requests came first, so they set the stage for how the later LAZX and REMO requests would be understood.

- Once Ms. Capellini understood the first request to seek "all documentation related to the receipt, delivery, and/or transfer of" the stock, she reasonably understood the later requests to seek the same,[19] which was supported by Sazegar's admissions that none of the requests said the firm should produce only documents already in its files before receiving the requests.[20]

- The LAZX and REMO requests, like the RIVX request, involved trading in the accounts of Ms. Capellini's husband, which the NAC relied on when refusing to impose liability for the RIVX response.

Neither FINRA in its Opposition, nor the NAC in its Decision can coherently explain how, in the face of this evidence, the LAZX and REMO responses are misleading when the RIVX responses are not. The NAC's finding that Ms. Capellini violated Rule 8210 should be set aside.

[16] 7018-20.
[17] 18-21.
[18] 1410-11; 1479-81; 1516-17; 5559; 6661.
[19] 2688-89; 2799-2802; 2717-19; 2808; 2732-35; 2757-59; 2764; 2801-02; 2811-12.
[20] 1462-65, 69; 1481-82; 1484-85.

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Finally, FINRA, like the NAC, misleadingly suggests Ms. Capellini "stipulated" that her FINRA registration terminated when her Form U5 was filed on June 5, 2020.[21] Conspicuously absent from FINRA's Opposition and the Decision, however, is a citation to the actual stipulation. If FINRA and the NAC are referring to paragraph 10 of the parties' Joint Stipulations, all that says is:

> On June 5, 2020, First Manhattan filed a Uniform Termination Notice for Securities Industry Registration ("Form U5"), disclosing that it had terminated Capellini's employment on May 8, 2020.[22]

The suggestion that the foregoing language somehow constitutes an admission by Ms. Capellini that her registration was terminated on June 5, 2020, despite her repeated contentions otherwise throughout these proceedings, is clearly erroneous and calls into question the credibility of FINRA's other arguments. Because Ms. Capellini never stipulated to a June 2020 termination, and because her FINRA registration in fact terminated in May 2020, more than two years before the commencement of these proceedings, the SEC should set aside the Decision.

It is ironic that in a case hinging on a claim that Ms. Capellini submitted false and misleading Rule 8210 responses to FINRA, FINRA itself is distorting and ignoring crucial aspects of the record. The SEC should vacate the Decision.

III. ARGUMENT

A. FINRA Violated Ms. Capellini's Seventh Amendment Right to a Jury Trial

Ms. Capellini's opening brief established that FINRA's disciplinary action violated her Seventh Amendment right to a jury trial under the Supreme Court's recent decision in *Jarkesy*. To rule otherwise would be to permit the SEC to use FINRA to do indirectly what it cannot do directly,

[21] Opp. 35 ("[T]he parties stipulated that the Form U5 terminating Capellini's registration was filed on June 5, 2020."); 7010 n. 18 ("[T]he parties stipulated that First Manhattan filed a Form U5 terminating Capellini's registration on June 5, 2020.").
[22] 1104.

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adjudicate claims for misrepresentation and concealment seeking civil penalties administratively rather than in a federal court where a defendant has a right to a jury trial.[23] This would create a loophole enabling the SEC to avoid *Jarkesy*. FINRA completely ignores that "loophole" argument in its opposition, which is fatal to its position that its proceedings below were constitutional.[24]

FINRA's principal response to the Seventh Amendment challenge is that Ms. Capellini "has not shown that FINRA is a state actor" (Opp. 41), but this argument fails for at least four reasons. First, nothing the text of the Seventh Amendment or the *Jarkesy* decision requires FINRA to be a "state actor" for the Seventh Amendment to apply. The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Jarkesy holds the Seventh Amendment applies to claims that are "legal in nature," which include, as here, claims for misrepresentation and concealment seeking civil penalties designed to punish and deter. *SEC v. Jarkesy*, 144 S.Ct. 2117, 2128-30 (June 27, 2024). While *Jarkesy* involved the

[23] Br. 11-13.

[24] FINRA half-heartedly argues in a footnote that Ms. Capellini failed to exhaust and forfeit her constitutional claims (Opp. 37 n. 16) because she purportedly did not raise them below, but she did. She has argued at every stage that these proceedings are fundamentally unfair and that FINRA lacks authority over her (33, 37-41, 53, 139-144, 333, 349-50, 367, 369-70, 385-87, 1005, 1009, 1017-18, 1033-34, 1161-65, 2825-26, 3297-99, 6531-31, 6548-49, 6556-57, 6561-62, 6665-66, 6845, 6849-50, 6869, 6871, 6877, 6901, 6915-19, 6965, 6968-72, 7067=68), and specifically pressed the constitutional claims here below (6871). That Ms. Capellini did not develop those arguments below in the same manner as here is understandable because of: (i) her focus on defending the case on the merits given its myriad deficiencies; (ii) the practical reality that it is far from clear FINRA could or ever would declare the structure of its own Enforcement system unconstitutional; and (iii) the fact that the key cases Ms. Capellini relies on here, including *Jarkesy* and *Alpine Securities*, had not yet been decided. Moreover, even if Ms. Capellini had not raised the constitutional arguments below (which she did) or consented to FINRA's authority (which she did not), those challenges can and should still be considered on appeal. *See, e.g.*, *Freytag v. Commissioner*, 501 U.S. 868, 878-79 (1991) (considering constitutional challenge based on Appointments Clause even where not raised below). Finally, as recognized by the case law FINRA cites, it is FINRA who has waived its "exhaustion" argument by failing to develop it. Opp. 42, n. 21 (citing *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001).

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SEC, which is unquestionably a state actor, neither the text of the Seventh Amendment nor the *Jarkesy* decision itself requires FINRA to be a state actor for the Seventh Amendment to apply. There is no question that FINRA can sue or be sued in court, and there is no reason the Seventh Amendment does or should not apply here.

Second, regardless of whether FINRA is a state actor, there is state action here insofar as federal law requires firms and individuals to join FINRA to engage in securities business, and FINRA is subject to SEC oversight.[25] As FINRA concedes, FINRA requires individuals to purport to give up their right to a jury trial to register with FINRA, Opp. 45-46, and the only way an individual can be associated with a broker-dealer under federal law is by registering with FINRA. As such, federal law effectively required Ms. Capellini, like anyone else who associates with a broker-dealer, to purport to give up her right to a jury trial to work in the securities industry, even for claims that are "legal in nature" under *Jarkesy*. This violates the Seventh Amendment.

Third, as detailed in Ms. Capellini's opening brief and below, FINRA was a state actor here in any event because it acted at the behest of the SEC and was entwined with the SEC when it proceeded against Ms. Capellini. Br. 17-18. At an absolute minimum, to the extent the SEC believes FINRA must be a state actor for the Seventh Amendment to apply, the Decision should be vacated and the case remanded to FINRA for further discovery into the communications and coordination between FINRA and the SEC (and FMC and Wilmer Hale) in FINRA's case against Ms. Capellini to determine whether FINRA qualifies as a "state actor," as was done in one of the cases cited by FINRA (Opp. 43). *Warren E. Turk*, Exchange Act Release No. 55942, 2007 SEC LEXIS 1355, at *19-20 (June 22, 2007) ("[W]e believe it is appropriate to provide Turk an

[25] *Alpine Sec. Corp. v. FINRA.*, 2024 U.S. App. LEXIS 29728, *3, 10-12 (D.C. Cir. Nov. 22, 2024).

opportunity to develop a full evidentiary record on the state action question. On remand, Turk may seek discovery in connection with his efforts to prove that the NYSE engaged in state action.").

The cases cited by FINRA (Opp. 41-43) are inapposite because they are pre-*Jarkesy* and do not involve a challenge to an administrative disciplinary proceeding under the Seventh Amendment. Many of these cases are not Seventh Amendment cases at all, but instead involve the First, Fifth or Fourteenth Amendments. And with respect to the Seventh Amendment in particular, *Jarkesy* has fundamentally transformed the law of the land; FINRA's citation to various old, pre-*Jarkesy* cases fails to grapple with that reality. FINRA disciplinary actions such as this one plainly violate the Seventh Amendment under *Jarkesy*.

FINRA argues that *Jarkesy* has no bearing on a FINRA administrative proceeding because a FINRA proceeding does not have the same impact on "separation of powers" as an SEC administrative proceeding (Opp. 44), but it does for the reasons above - federal law requires firms and individuals to join FINRA to engage in securities business, FINRA is subject to SEC oversight and if FINRA can conduct administrative proceedings for claims that are legal in nature then the SEC can do through FINRA what it cannot do itself under *Jarkesy*. Because federal law requires individuals who wish to associate with broker-dealers to register with FINRA, and because FINRA requires such individuals to give up their right to a jury trial, to require the adjudication of this case before FINRA's hearing officers, would be to allow Congress to "withdraw from judicial cognizance" a matter that was the subject of a "suit at common law" at the time of the Founding under the Seventh Amendment. *Jarkesy*, 603 U.S. at 127 (internal quotation marks omitted).

FINRA also argues that a Rule FINRA 2010 claim is not a "suit at common law" because Rule 2010 requires FINRA members and associated persons to "observe high standards of commercial honor and just and equitable principles of trade" (Opp. 44-45), but this ignores Ms.

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Capellini's arguments that what was at the core of this case was a claim that she misrepresented and concealed facts in violation of FINRA Rule 8210, including to "cover up" her purported violation of FINRA Rule 3310(a). The essence of the claims here is the same as in *Jarkesy* (which involved securities fraud) – misrepresentation and concealment. It is not a stand-alone Rule 2010 case alleging some nebulous form of unethical conduct independent of Ms. Capellini's purported false and misleading statements; the Rule 2010 claim is just an add-on to the other claims focused on misrepresentation and concealment. FINRA also does not dispute that the penalties it seeks are designed to punish and deter, further demonstrating that this proceeding was a "suit at common law." Accordingly, the claims here are legal in nature.

FINRA finally argues that Ms. Capellini "waived" her right to a jury trial because "by associating with a FINRA member, Capellini submitted to FINRA's jurisdiction and rules, including its disciplinary procedures," (Opp. 45-46), but this is exactly what Ms. Capellini is saying is unconstitutional. FINRA is forcing Ms. Capellini and anyone else who wishes to associate with a broker-dealer to give up their right to a jury trial to work in the securities industry, with the force of federal law standing behind it. In any event, Ms. Capellini never consented to FINRA's jurisdiction here. By the time FINRA brought this disciplinary proceeding, she had already been out of the industry for more than two years, such that she was no longer party to any agreement with FINRA, and as set forth above, she vigorously disputed FINRA's authority to proceed against her throughout the course of this case. This distinguishes this case from those cited by FINRA,[26] where a party waived the Seventh Amendment by affirmatively invoking, and voluntarily proceeding in, a non-Article III court that did not provide for a jury trial. FINRA's disciplinary action against Ms. Capellini violated her Seventh Amendment right to a jury trial.

[26] *See, e.g., CFTC v. Schor*, 478 U.S. 833, 849-50 (1986).

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B. FINRA Violated the Private Nondelegation Doctrine

Ms. Capellini's opening brief established that under the Circuit Court of Appeals for the District of Columbia's recent decision in *Alpine*, FINRA's proceedings against her violated the private nondelegation doctrine. Br. 13-14.[27] In particular, Ms. Capellini argued that these proceedings resulted from FINRA's investigation of possible violations of the federal securities laws, without SEC oversight, which by itself contravened the private nondelegation doctrine and warrants setting the Decision aside.

Once again, FINRA ignores Ms. Capellini's essential argument, instead responding with pre-*Alpine* precedent and arguing that the SEC's oversight of FINRA's *rule-making* and *disciplinary proceedings* cure any private nondelegation problem. Opp. 46-48. These arguments are wrong for the reasons articulated in Judge Walker's dissent in *Alpine*. 2024 U.S. App. LEXIS 29728, *56-61. But more to the point, these arguments and the cited case law do not respond to Ms. Capellini's principal contention, which is that under the *majority* decision in *Alpine*, these proceedings are tainted because they resulted from FINRA's unfettered *investigation* of possible violations of the federal securities laws, without SEC oversight, which violated the private nondelegation doctrine.

[27] FINRA argues that Ms. Capellini's "private nondelegation argument undercuts her assertion that FINRA and its hearing officers are subject to the requirements of Article II of the Constitution" (Opp. 46 n. 25), but if FINRA's hearing officers are subject to Article II then this proceeding violated the Constitution and must be set aside. *Alpine*, 2024 U.S. App. LEXIS 29728, at *64 (Walker, J., dissent) ("The upshot is this: If FINRA is part of the government, then hearing officers are 'Officers of the United States,' and that means they must be appointed directly by the President, courts of law, or heads of departments — like the officials in *Lucia* and *Freytag*. In addition, they can't be insulated from presidential removal by more than one level of for-cause removal restrictions."). Even if FINRA is correct that its hearing officers are not subject to Article II, however, then this proceeding violates the private nondelegation doctrine and must be set aside. *Id.* at *56-61.

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The cases FINRA cites (Br. 13-14) focus on rulemaking and/or disciplinary proceedings and *not* investigations, over which the SEC exercises no control. *See, e.g.*, *Alpine*, 121 F.4th at 1340. (Walker, J., dissent) ("The SEC does not control FINRA's investigations [or] its prosecutions …."). Had FINRA not conducted its investigation under the federal securities laws here, this proceeding never would have come about. As such, this proceeding violates the private nondelegation doctrine and must be set aside. At a bare minimum, the case should be remanded for discovery into whether FINRA truly "functioned subordinately to and under the "authority and surveillance"[28] of the SEC here, particularly with respect to FINRA's investigation.

C. FINRA's Exercise of Federal Enforcement Authority over Ms. Capellini Violated Article II of the United States Constitution

In her opening brief, Ms. Capellini established that FINRA's structure, procedures and exercise of enforcement authority over her violated Article II of the Constitution because FINRA's hearing officers, who wield significant executive enforcement authority, are "Officers of the United States" who must be: (1) properly appointed; and (2) removable by the President, but they are not. Br. 15-17. FINRA's response is that "constitutional appointment and removal requirements do not apply to employees of a private SRO like FINRA," Opp. 37, but this once again fails to engage with Ms. Capellini's fundamental argument. The SEC cannot be allowed to use FINRA to do indirectly what the SEC cannot do itself. Even one of the principal cases relied upon by FINRA (Opp. 38) recognizes that: "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). Given that, as *Lucia* holds, the Constitution prohibits the SEC from using ALJ's because they violate the

[28] *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940); *Texas v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021), *cert. denied sub nom. Texas v. Comm'r*, 142 S. Ct. 1308 (2022).

Appointments clause, the Constitution cannot allow the SEC to have FINRA use hearing officers who are "near carbon copies" of those SEC ALJ's, to enforce federal law. This would elevate form over substance, and none of FINRA's arguments grapple with this fatal flaw in its position.

FINRA's argument that it is a private, self-regulatory organization does not answer the critical question of whether its hearing officers exercise "significant executive enforcement authority." They do for the same reasons the SEC's ALJ's did and are thus "Officers of the United States" who must be appointed and removable by the President. FINRA argues Article II only applies to government employees, but the case law does not require that. On the contrary, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484-85 (2010) involved a private, non-profit corporation. And while *Lucia* involved SEC ALJ's who were government employees, the focus of the Supreme Court's ruling in that case was on how the ALJ's *functioned* and what duties they performed, not the mere fact that they were government employees. Because FINRA's hearing officers function the same way and perform the same duties as the SEC ALJ's in *Lucia*, they too are "Officers of the United States" subject to Article II. *Lucia v. SEC*, 585 U.S. 237, 241, 244-251 (2018).[29]

FINRA argues that it is not part of the government under *LeBron*, but *LeBron* was a First Amendment case, 513 U.S. at 383, not an Article II case, so it does not define who is an "Officer of the United States." *Lucia, Freytag* and *PCAOB* do that, and FINRA's hearing officers are

[29] The *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757-58 (5th Cir. 2001) case cited by FINRA (Opp. 38) merely holds that the False Claims Act's *qui tam* provisions do not violate the Appointments Clause because a relator under the False Claims Act does not have a "a continuing and formalized relationship of employment with the United States Government." The case has nothing to do with the situation here, in which "carbon copies" of the SEC ALJ's at FINRA (FINRA's hearing officers) are enforcing federal securities laws, continuously, without being subject to the appointment and removal requirements of Article II of the Constitution.

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Officers of the United States under those cases. And as noted *Lebron* expressly holds that the government cannot "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form," which further supports application of *Lucia*, *Freytag* and *PCAOB* to FINRA's hearing officers.[30] Otherwise, the federal government could avoid Article II's appointment and removal requirements entirely simply by setting up a "private" entity to do indirectly what the government could not do directly.[31] Accordingly, FINRA's disciplinary proceeding against Ms. Capellini was unconstitutional insofar as it violated the appointments and removal requirements of Article II. The SEC should vacate the Decision.

D. FINRA's Proceeding against Ms. Capellini Violated Due Process

In her opening brief, Ms. Capellini contended that FINRA violated other Constitutional provisions, including the Fifth Amendment's Due Process clause and Article III, for the reasons argued in *Black v. SEC*, No. 23-2297 (4th Cir.). Br. 18 n. 87. FINRA responds that this argument

[30] *Kim v. FINRA*, 698 F. Supp. 3d 147, 153, 161-64 (D.D.C. 2023), cited by FINRA (Opp. 38), a non-binding district court case on a motion for a preliminary injunction, follows *LeBron*, but *LeBron* was not an appointments or removal case, so the court there should have followed *Lucia*, not *LeBron*. Moreover, *Kim* is distinguishable on the facts. The court there noted: "At no point in time did the [SEC] ever direct, suggest, or encourage the investigation" or "initiation of FINRA's enforcement actions against . . . [Plaintiff]." *Id.* at 165. Here, in contrast, Ms. Capellini believes that the SEC encouraged FINRA to pursue this enforcement action against Ms. Capellini as leverage over her husband in the SEC's separate case against him. *Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at *44-45 (Apr. 3, 2020), also cited by FINRA (Opp. 38), suffers from the same defect as *Kim* – it concludes FINRA's hearing officers are not subject to Article II because of *LeBron*, but *LeBron* is not an Article II case and, if anything *LeBron* supports Ms. Capellini's position. The *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black* ("*Horsemen's II*"), 107 F.4th 415, 437-38 (5th Cir. 2024) case cited by FINRA (Opp. 39), insofar as it assumes *LeBron* sets the standard who is an "Officer of the United States," even though *LeBron* was not an Article II case, falls into the same trap. And *Horsemen's II*, 107 F.4th at 437 acknowledges "deeming an entity "private" does not settle whether it is legally part of the federal government. Otherwise, the government could evade constitutional restrictions by mere labeling."

[31] *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) recognizes that "Officers of the United States" are those who exercise "significant authority pursuant to the laws of the United States" but, contrary to FINRA's argument (Opp. 39 n. 19), does *not* hold that only government employees can be Officers of the United States.

is insufficiently developed, Opp. 42 n. 21, but as argued in *Black*, and as Ms. Capellini argues here, these proceedings were fundamentally unfair. The record suggests this proceeding resulted from improper coordination between the SEC, FINRA, FMC and Wilmer Hale, and that this proceeding was used: (i) as leverage against Mr. Bendelac by the SEC, which was pursuing its own case against him (a case that ultimately failed); and (ii) as retaliation by FMC against Ms. Capellini for her asserting discrimination claims against it. 1273; 1433; 1519-20; 1531; 5309; 7006. In light of President Trump's March 27, 2025 Executive Order entitled "Addressing Risks from WilmerHale," the role of WilmerHale in particular should be examined closely insofar as this case arose from WilmerHale offering Ms. Capellini up as a scapegoat for purported AML shortcomings that it brought to light, purported shortcomings which had existed for many years before Ms. Capellini became AMLCO, but had never been the focus of regulatory scrutiny. Given that Wilmer Hale employs former FINRA personnel and FINRA employs former WilmerHale personnel, these facts at a minimum raise serious questions about the integrity of the proceedings here. FINRA's Due Process violations are further supported by the fact that it selectively enforced its rules against Ms. Capellini, when there were other individuals it could have targeted, including her supervisor the CCO and the former AMLCO who established and oversaw for years the procedures that were the subject of this action.

FINRA argues Due Process does not apply because it is a private actor (Opp. 42, n. 21), but as set forth above it was a state actor here. And, even absent the Due Process clause, FINRA proceedings are subject to the requirement of fundamental fairness under the Exchange Act, 15 U.S.C. § 78o-3(b)(8), which these proceedings violated for the same reasons.

The Decision should be set aside because FINRA's proceedings violated the Seventh Amendment, the private nondelegation doctrine, Article II and Due Process.

E. FINRA Lacked Jurisdiction over Ms. Capellini

Ms. Capellini's opening brief established that FINRA lacks jurisdiction; the Complaint was filed more than two years after termination of her FINRA registration. Br. 18-22. Ms. Capellini's argument rests on three fundamental realities, which FINRA cannot and does not dispute.

First, the express language FINRA's By-Laws provide a member's notice of termination triggering the effective date of termination of registration of an associated person can be accomplished in *two* ways: "via electronic process ***or*** such other process as [FINRA] may prescribe on a form designated by [FINRA]." FINRA By-Laws, Article V, Sections 3(a) (emphasis added); and 4(a)(i).

Second, FMC emailed FINRA on May 8, 2020 and gave it notice of Ms. Capellini's termination and circumstances via a WebEx presentation on May 11, 2020.[32]

Third, Ms. Capellini's CRD Report states: "“Registrations with Previous Employer(s) From 04/01/2009 to ***05/08/2020*** FIRST MANHATTAN CO (1845)."[33]

FMC's notice of Ms. Capellini's termination "via electronic process" in May 2020 triggered the effective termination of her FINRA registration in May 2020, as reflected in her CRD report. Because FINRA did not file the Complaint until June 1, 2020, it is untimely and FINRA lacked jurisdiction.

FINRA's response is to argue that *only* the filing of a Form U5 can constitute sufficient notice to terminate FINRA registration. Br. 34-36. But this ignores Ms. Capellini's argument that, as a matter of contract law, Br. 20, n. 93, FINRA's By-Laws must be interpreted to give each word meaning, and only Ms. Capellini's interpretation accomplishes that. Only Ms. Capellini's interpretation recognizes the plain language of the By-Laws providing a FINRA registration can

[32] 507; 1432-36; 1519-20; 5309; 6641; Opp. 14-15.
[33] 6477 (emphasis added).

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be terminated: "via electronic process ***or*** such other process as [FINRA] may prescribe on a form designated by [FINRA]." (emphasis added). FINRA, like the NAC, erroneously collapses those two distinct clauses to mean one and the same thing, the filing of a Form U5. FINRA also ignores Ms. Capellini's argument that any ambiguity in the language of the By-Laws should be construed against FINRA, as the drafters. Br. 20 n. 94. Ensuring FINRA exercises its jurisdiction consistently with the language of its own By-Laws is particularly important here, given the Constitutional challenges Ms. Capellini has raised to FINRA's Enforcement authority.

Citing FINRA Rule 1010, FINRA argues it "has designated the electronic filing of the Form U5 as the method for terminating registration," Opp. 36, but nothing in Rule 1010 says that the filing of a Form U5 is the *only* way a firm can notify FINRA of a termination. On the contrary, the relevant portions of the rule provide merely as follows:

> all forms required to be filed by Article IV, Sections 1, 7, and 8, and Article V, Sections 2 and 3, of the FINRA By-Laws shall be filed through an electronic process ***or*** such other process FINRA may prescribe to the Central Registration Depository…
>
> Initial filings and amendments of Form U5 shall be submitted electronically.

FINRA Rule 1010(a), (e) (emphasis added). Rule 1010(a) merely states that forms required to be filed under the By-Laws shall be filed *either* "through an electronic process" or "such other process FINRA may prescribe to the Central Registration Depository…." And Rule 1010(e) simply requires submission of the Form U5 electronically.

FINRA also cites precedent holding "the two-year period of FINRA's retained jurisdiction runs from the date that a registered person's registration—not employment—is terminated by the filing of a Form U5," and that a registered person cannot "unilaterally" terminate her FINRA registration before FINRA receives the prescribed form, but ignores that, as the Hearing Officer below recognized, "none of the SEC or NAC decisions confront precisely the circumstances that exist here."[34] In the *Evansen* case FINRA cites, a formerly registered person argued the termination of his *employment* started the jurisdictional clock, which the SEC rejected, holding "FINRA maintains jurisdiction over formerly associated persons for two years after their FINRA registration ends, i.e., 'two years after the effective date of termination of registration.'"[35] Ms. Capellini is not arguing that the mere fact her employment terminated in May 2020 triggered termination of her FINRA registration; she is arguing that FMC's electronic notice of termination to FINRA in May 2020 did. *Evansen* thus does not answer the question here, which is whether a firm's notice of termination *other than* a Form U5 can trigger the "effective date of termination of registration." The By-Laws answer that question. Electronic process, including the email and WebEx presentation here, trigger termination of registration. No precedent holds that *only* the filing of the Form U5 can constitute sufficient notice triggering termination of FINRA registration; such a ruling would contravene the plain language of the By-Laws.

FINRA mentions the parties' stipulation about the filing of the Form U5, but as set forth above, the parties only stipulated that the Form U5 was filed in June 2020, they never stipulated that Ms. Capellini's FINRA registration was terminated in June 2020 (which would be a legal question for the adjudicators to decide in any event). Her position throughout this case has been that her registration terminated in May 2020, which is supported by her CRD record. The fact that FINRA and the NAC have both resorted to such a thin argument to try and justify the exercise of jurisdiction over Ms. Capellini itself raises serious questions about the integrity of the process.

In reality, it is FINRA which has admitted Ms. Capellini's FINRA registration terminated in May 2020. FINRA offers no explanation why her CRD record says "Registrations with Previous

[34] 989-91.
[35] *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *11-14 (July 27, 2015).

Employer(s) From 04/01/2009 to 05/08/2020 FIRST MANHATTAN CO (1845)," if her registration did not terminate in May 2020. FINRA points to another portion of the CRD Record that says her "Registration Status" was "TERMED" as of the "Status Date" June 5, 2020, but ignores Ms. Capellini's argument that all that means is that by June 5, 2020, her registration was terminated; it does not say anything about the status of her FINRA registration in May 2020.[36]

FINRA argues Ms. Capellini's interpretation would "undermine the certainty and ease of administration of the current rules" (Opp. 36), but does not explain how. This case presents an unusual situation in which a member firm fully informed FINRA of the fact of a registered person's termination, and all the surrounding circumstances, via electronic process, *before* it filed the Form U5. Often the first time FINRA learns about a termination is through the filing of a Form U5, so it makes sense in that context to start the two-year clock upon the filing of the Form U5. But here FINRA knew everything it needed to know in May 2020. It did not learn anything new from the Form U5 and had plenty of time between May 2020 and May 2022 to bring this action. It would not undermine certainty or ease of administration to hold, in this unique situation, and as the language of the By-Laws requires, that FMC's notice of termination triggered termination of Ms. Capellini's FINRA registration in May 2020. Ms. Capellini's interpretation of the By-Laws fully comports with the purpose of the jurisdictional provision, which "is to ensure that [FINRA] retains

[36] FINRA also ignores that the Chief Hearing Officer recognized that CRD reflects Ms. Capellini's FINRA registration terminated in May 2020. 6857 n. 19, Order Governing FINRA Rule 9285 Motion ("According to the Central Registration Depository, Capellini… was last registered with FINRA through her association with First Manhattan, which terminated on May 8, 2020."). Enforcement itself argued as much in its Motion for Interim Conditions and Restrictions pursuant to Rule 9285: "Capellini is not currently associated with a FINRA member firm. She was last registered with FINRA through her association with First Manhattan, which was terminated on May 8, 2020." 6836. These admissions warrant dismissal of this action for lack of jurisdiction.

jurisdiction over persons for two years after they leave the securities industry."[37] Accordingly, the filing of the Complaint was untimely, and FINRA lacks jurisdiction.

F. Ms. Capellini did not Violate Rule 8210, and FINRA's Sanctions for that Charge are Excessive and Oppressive

Ms. Capellini's opening brief established that the NAC applied the wrong legal standard in finding that she violated Rule 8210 given the ambiguity of the requests.[38] FINRA's response is to assert "the requests were clear" because "they specifically asked for '[c]opies of all due diligence inquiries that the firm made to determine the free trading basis" of the stocks'"[39] and because the LAZX and REMO requests only asked for "copies of stock certificates, attorney opinion letters, and any other documents detailing the origin of the shares" "if applicable." But just saying the requests were clear does not make it so. Ms. Capellini has offered several persuasive *reasons why* the requests were ambiguous, and FINRA has not adequately responded to any of them.

<u>One</u>, FINRA does not respond to the argument that three sets of decision-makers at FINRA – the OHO majority, the OHO dissent and the NAC, who included "compliance professionals," interpreted the requests in three different ways. This fact alone establishes the requests' ambiguity.

<u>Two</u>, as set in Section II forth above, FINRA ignores all the record evidence supporting the reasonableness of Ms. Capellini's interpretation of the LAZX and REMO requests as seeking the same types of documents as the prior RIVX request, i.e. "all documentation related to the receipt, delivery, and/or transfer of" the stock, including the timing and language of the requests and the testimony of FINRA witness John Sazegar.

<u>Three</u>, "due diligence" is not defined in any of the requests, no time period is provided, and there is no explanation anywhere of what the words "if applicable" mean, so there is no reason to

[37] Br. 20, n. 95.
[38] Br. 22-27.
[39] Opp. 28.

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assume, as the NAC and FINRA do, it would be obvious to any recipient that "due diligence" meant only "contemporaneous due diligence" already contained in FMC's files at the time of the requests. FINRA does not dispute that "due diligence" can be conducted at different times, or that "due diligence" could include a firm requesting and obtaining documents from a third party. Ms. Capellini would have had to guess that FINRA meant only "contemporaneous due diligence" already included in its pre-existing files when it said "due diligence."[40]

Fourth, the NAC and FINRA fault Ms. Capellini for obtaining responsive documents through her husband, and for not disclosing that she did so, but nothing in the requests said the firm should only produce responsive documents if those documents were already contained in the firm's own pre-existing "due diligence files" or that if it obtained responsive documents from any other source, it was obligated to so state in the Rule 8210 responses. The NAC and FINRA are reading language into the requests that is not there, forcing Ms. Capellini to guess as to the meaning of the requests, which cannot constitute the basis for a Rule 8210 violation. Any reasonable person in Ms. Capellini's position could have interpreted the requests the same way she did.

FINRA harps on the "altered S1" submitted with the REMO response and argues that the NAC "found that the circumstantial evidence demonstrated persuasively that Capellini altered the document to remove the date it was downloaded."[41] But as the OHO dissent found (which FINRA ignores), there was no evidence of any wrongful intent:

> [T]he issue is the trimming of the footer at the bottom of the document during its initial printing. For guidance on whether this was a malicious attempt to deceive FINRA or was essentially inconsequential to the 8210 request cannot be resolved

[40] The present case is thus, contrary to FINRA's argument, Opp. 28 n. 11, directly analogous to *Dep't of Enf't v. Blake*, Expedited Proceeding No. FPI180004, 2018 FINRA Discip. LEXIS 30, *14 (FINRA OHO Oct. 29, 2018) ("When FINRA makes requests for documents and information, those requests must be clear and unambiguous… A recipient of a Rule 8210 request should not have to guess what documents or information is being requested….").
[41] Br. 28 n. 9.

> based on what was presented at the hearing. There were no witnesses that testified to malicious behavior. The testimony by Ms. Capellini was that she doesn't even remember how this came to pass. So the question becomes is this a single innocuous incident or part of a pattern of deceptive behavior? Based on information and belief, there is nothing apart from the alleged impropriety of removing the footer on a Form S-1/A document that suggests an attempt to deceive Enforcement. There were no other documents in Ms. Capellini's possession that were alleged to have been tampered with or altered including, most importantly, First Manhattan documents. Ms. Capellini's conjecture that the original documents didn't contain a footer and therefore that they may have been returned to their original condition for submission is not unreasonable.[42]

What the NAC really did, which it expressly stated, was hold Ms. Capellini liable for offering "no explanation" for the altered S-1.[43] In doing so, the NAC applied the wrong legal standard by improperly shifting the burden of proof to Ms. Capellini to "explain" the altered S-1. Enforcement had the burden of proof by a preponderance of the evidence, and as the OHO dissent explained, failed to meet that burden.

FINRA also fails to respond to Ms. Capellini's argument that the theory she acted to mislead FINRA by producing the S-1 without the date printed presupposes she understood the requests to seek only information the firm had before receiving the requests. Given the ambiguity of the requests, however, she reasonably believed the requests were broader, covering "all documentation" regarding the trading of the shares. And as Enforcement witness Andrew Aspen, admitted, the S1 Ms. Capellini produced was substantively identical to the S1 filed with the SEC.[44] The SEC should vacate the NAC's finding Ms, Capellini violated Rule 8210.

At a minimum, a bar for any violation of Rule 8210 here is excessive and oppressive.[45] FINRA responds that a bar is the usual sanction for a Rule 8210 violation,[46] but there are at least

[42] 6662.
[43] 7019.
[44] 1613-15; 6662.
[45] Br. 27.
[46] Opp, 33-34.

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four reasons why any sanction here should be mitigated. First, there was no evidence of intent to mislead. Second, the requests were ambiguous. Third, Sazegar admitted the documents and information Ms. Capellini provided in response to the requests were helpful. Finally, what appears to have driven the NAC's sanction is "the potential for monetary gain furthered by Capellini's misleading responses," but as set forth above and below, this is pure speculation.

The NAC applied the wrong legal standard in finding Ms. Capellini violated Rule 8210, the evidence did not support that finding and the sanction imposed was excessive and oppressive.

G. Ms. Capellini did not Violate Rule 3310(a), and FINRA's Sanctions for that Charge are Excessive and Oppressive

The touchstone for compliance with Rule 3310(a) is reasonableness, and Ms. Capellini's conduct as AMLCO was reasonable.[47] Critically, whatever "red flags" were presented by her husband's trading had existed since at least 2012, long before Ms. Capellini became AMLCO in 2018, and the Firm had already put into place its AML systems, policies and procedures regarding LPS before she became AMLCO. She simply continued doing what had always been done. This is borne out by the Acceptance, Waiver and Consent that FMC entered into with FINRA arising from the circumstances here, in which the firm accepted FINRA's findings that the firm violated Rule 3310 from *January 2012* through May 2020, which includes a six-year period *before* Ms. Capellini became AMLCO. It was not unreasonable, much less "reckless," for Ms. Capellini to continue to do what the firm had always done, particularly given that the trading in question related to her husband, whom she knew and reasonably trusted.

FINRA's own authority (Opp. 8) reinforces the idea that it is incumbent on a firm to ensure its AMLCO has "the authority, knowledge, and training to carry out the duties and responsibilities of his or her position." *NASD Regulatory Notice 02-21*, 2002 NASD LEXIS 24, at *49 (Apr. 2002).

[47] Br. 28-30.

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But here the firm never provided Ms. Capellini the knowledge, training or resources she would have needed to scrutinize the firm's LPS trading activity at the heightened level FINRA suggested was required.[48] Ms. Capellini is not seeking to "shift blame" (Opp. 22) but instead to establish the reasonableness of her conduct, which was evidenced by the fact that *no one* who reviewed FMC's AML policies or LPS trading, either Ms. Capellini's supervisor the CCO, the former AMLCO, others at FMC, the clearing firm Pershing which had much more experience with LPS than FMC or any regulator, ever identified the concerns FINRA identified here. The evidence thus did not support the NAC's findings that Ms. Capellini violated Rule 3310.

Even if it did, however, the sanction imposed, a bar, was grossly excessive and oppressive. One of the cases FINRA cites, *Wilson-Davis & Co.*, Exchange Act Release No. 99248, 2023 SEC LEXIS 3658, at *48 (Dec. 28, 2023), remanded a case imposing a three-month suspension on individuals for AML and supervisory related violations so that FINRA could "adequately explain why the chosen sanctions, considered together, are necessary to protect the public, and are remedial and not punitive or otherwise excessive or oppressive."[49] Here too the NAC has failed to adequately explain why the chosen sanctions are not punitive, excessive or oppressive, given the foregoing factors establishing the reasonableness of her conduct, the fact that she has already been sufficiently punished, the fact that LPS was a *de minimis* part of the firm's business, the fact that the only purported "red flags" she missed were in her husband's account and her husband's trading was lawful and the fact that she was candid about what she did and did not do when asked. Critically, no one was harmed by Ms. Capellini's conduct.

[48] 88; 2772; 2776.
[49] Br. 28 (citing precedent imposing three-month suspensions for AML-related violations).

What drove the NAC's sanction, and what drives FINRA's suggestion sanction,[50] was the supposed "substantial financial gain to Capellini resulting from her husband's trading in accounts for which she conducted deficient AML review," but as detailed above, there was no evidence that any "financial gain" resulted from her "deficient AML review" as opposed to her husband's legal trading.[51] There is nothing unlawful about trading in LPS, so the mere fact that Ms. Capellini may have profited from her husband's trading (which was also unproven) does not justify an increased sanction. And both the Sanction Guidelines and the precedent suggest a sanction of a bar for AML violations such as these is outlandish.[52] For all these reasons, the NAC's findings of a violation of Rule 3310 and sanctions should be vacated and set aside.

IV. <u>CONCLUSION</u>

The SEC should vacate FINRA's Decision in its entirety and dismiss all charges. At a minimum, the SEC should set aside the sanctions imposed as excessive and unsupported.

[50] Opp. 31-32.
[51] 7023.
[52] Br. 28 n. 127. FINRA's argument that sanctions cannot be determined by comparison with other cases (Opp. 32) is ironic given that it attempts to do precisely that when discussing the sanctions for the purported Rule 8210 violation, arguing a bar is appropriate for that violation because that is the standard sanction in other cases (Opp. 34). Despite the obvious reality that sanctions are determined by the facts of each case, an examination of the sanctions in similar cases is one relevant factor to consider when assessing the appropriate sanction.

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CERTIFICATE OF SERVICE

I certify that on April 3, 2025, I served a copy of the foregoing by email on:

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with the length limitation set forth in the SEC's March 13, 2025 Order Granting Motion for Extension of Time and to Exceed Word Limitation in that the reply brief contains 8,475 words, exclusive of the tables and cover and signature.

/s/ Ian J. McLoughlin
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