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NCLA Amicus Brief Asks Fourth Circuit to Nix FINRA’s Unlawful ‘Private’ Enforcement Sanctions

Frank Harmon Black and Southeast Investments, N.C., Inc. v. Securities and Exchange Commission and Financial Industry Regulatory Authority, Inc.

Washington, DC (April 22, 2024) – Today, the New Civil Liberties Alliance filed an *amicus curiae* [brief](#) asking the U.S. Court of Appeals for the Fourth Circuit to set aside the U.S. Securities and Exchange Commission’s partial affirmance of a sanction the Financial Industry Regulatory Authority (FINRA) illegally imposed on a North Carolina securities firm and its principal owner. FINRA investigates, prosecutes, and punishes hundreds of securities firms and brokers every year for alleged violations of federal securities laws and rules, all without meaningful supervision by a presidentially appointed federal officer. In *Black v. SEC and FINRA*, NCLA urges the Fourth Circuit to end this dumbfounding, extra-constitutional exercise of unsupervised governmental power.

FINRA is a nominally private, nonprofit corporation that regulates the securities brokerage industry, subject to oversight by SEC. It wields vast legislative, executive, and adjudicatory powers over more than 600,000 individual brokers and thousands of broker-dealer firms nationwide. In a typical year FINRA bars hundreds of brokers from the securities industry and imposes tens of millions of dollars in aggregate fines against industry participants. FINRA claims it is not a “state actor”—leaving it unbound by most constitutional restraints when it investigates, prosecutes, and punishes alleged wrongdoers. But when private actors wield substantial executive power ordinarily performed by government officials, as FINRA does, Article II of the Constitution and the so-called private nondelegation doctrine demand pervasive governmental supervision and oversight.

That oversight and supervision is woefully lacking during FINRA enforcement investigations and disciplinary proceedings. SEC provides virtually no real-time supervision or direction of FINRA’s law enforcement activities. Indeed, in most cases, SEC commissioners are entirely oblivious to FINRA’s investigatory and prosecutorial activities, even as those activities routinely threaten fines and other career-altering sanctions against American citizens. FINRA cannot have it both ways. It cannot evade the Constitution’s appointment, removal, due process, and jury-trial requirements by claiming to be a mere private actor, while simultaneously wielding vast, unsupervised governmental power. The Fourth Circuit should recognize that if FINRA insists on being treated as a purely private actor, its unsupervised investigation, prosecution, and punishment of Frank Black and his securities firm were blatantly unconstitutional—and its resulting FINRA sanctions should be cancelled.

NCLA released the following statements:

“FINRA operates a private law enforcement regime, with no real supervision by SEC. The Fourth Circuit should take this opportunity to end this unconstitutional arrangement.”

— **Andrew Morris, Senior Litigation Counsel, NCLA**

“FINRA conducts its investigative and disciplinary proceedings with no meaningful direction or supervision by SEC or any other presidentially appointed government official, resulting in hundreds of punitive fines and other career-ending sanctions. Most FINRA targets eventually settle or default before SEC is even aware of their cases. For the tiny handful who endure the whole process and seek after-the-fact SEC review, that review is too little, too late. The Court should end this pernicious and extra-constitutional system of private prosecution.”

— **Russ Ryan, Senior Litigation Counsel, NCLA**

For more information visit the *amicus* page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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