No. 24-904

IN THE

Supreme Court of the United States

ALPINE SECURITIES CORPORATION,
Petitioner,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,
Respondent.

UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Margaret A. Little
Counsel of Record
Russell G. Ryan
Mark S. Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Drive, Suite 300
Arlington, VA 22203
(202) 869-5210
peggy.little@ncla.legal
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

GLOSSARY

FINRA Financial Industry Regulatory Authority

SEC U.S. Securities and Exchange Commission

NCLA New Civil Liberties Alliance

INTEREST OF AMICUS CURIAE[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization devoted to defending constitutional freedoms from the administrative state's depredations. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself: jury trial, due process of law, the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels, and the right to have executive power exercised only by actors accountable to the President, many of which are at stake in this appeal. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication–because Congress, federal administrative agencies, and even the courts have sometimes neglected them for so long.

NCLA defends civil liberties primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state is the focus of NCLA's concern.

NCLA is particularly disturbed when the government empowers private actors with vast executive discretion and muscle to enforce federal law

---

[1] No party's counsel authored any part of this brief and no person or entity, other than NCLA and its counsel, paid for the brief's preparation or submission. Rule 37.6. All parties received timely notice of intent to file this amicus. Rule 37.2(a).

through investigation, prosecution, and punishment, but does not ensure that these private actors are answerable to the President—or indeed accountable to anyone in much of what they do. That situation exists here, where Congress and the U.S. Securities and Exchange Commission ("SEC") have empowered Respondent Financial Industry Regulatory Authority ("FINRA") to investigate, prosecute, and punish securities brokers and firms for violating federal securities laws and rules without any meaningful direction or supervision of those functions even by SEC, much less the President.

NCLA argued for and won the ruling in *Axon Enterprise, Inc. v. FTC* and *SEC v. Cochran*, 598 U.S. 175 (2023) (*Axon/Cochran*) on behalf of Michelle Cochran. In addition, NCLA represented Raymond J. Lucia on remand from his Supreme Court victory on his Appointments Clause challenge to SEC ALJs.

Axon/Cochran held that a party "subjected to an illegitimate proceeding led by an illegitimate decisionmaker" has a 'here-and-now injury" that is "impossible to remedy once the proceeding is over" because a "proceeding that has already happened cannot be undone." *Id.* at 191. "Judicial review of the structural constitutional claims would … come too late to be meaningful." *Id.* The D.C. Circuit majority below erred in not following this Court's precedent in *Axon*/*Cochran*, which recognizes that structural constitutional injury that is impossible to remediate is equivalent to irreparable harm.

INTRODUCTION

The purpose of this brief is to urge the Court to grant certiorari and enjoin FINRA's expedited enforcement proceedings in their entirety. Such injunctive relief is necessary to ensure meaningful judicial review of those proceedings under this Court's precedents in *Axon Enterprise, Inc. v. FTC* and *SEC v. Cochran*, 598 U.S. 175 (2023) and *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010) (*Free Enterprise Fund*). In so doing, this court should also resolve divergent circuit court approaches to this exceptionally important question.

This case challenges whether FINRA, a nominally private corporation, can exercise core executive power to investigate, fine, and strip the chosen livelihoods of hundreds of securities brokers and firms each year—discretionary exercises of core executive power typically performed by governmental actors—without any accountability to the President and without any meaningful direction, supervision, or surveillance by any presidentially appointed governmental officer. Petitioner claims, among other things, that this exercise of power by FINRA contravenes Article II of the Constitution. Subjecting Petitioner to such prosecution by FINRA, free from the structural constitutional limitations *that constrain the government itself*, imposes an irreparable injury that is "impossible to remedy once the proceeding is over" because a "proceeding that has already happened cannot be undone." *Axon/Cochran*, 598 U.S. at 192. As in *Axon/Cochran*, the claim "is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker." *Id.* at 191. Judicial

review of these structural constitutional claims after Petitioner has endured the illegitimate proceeding "come[s] too late to be meaningful." *Id.*

ARGUMENT

I. RELEVANT BACKGROUND

FINRA is an ostensibly private nonprofit corporation that regulates the securities brokerage industry subject to SEC oversight. As the only SEC-registered "national securities association," FINRA wields vast legislative, executive, and adjudicatory powers over more than 3,000 broker-dealer firms and more than 600,000 individual brokers (also known as "registered representatives") operating within the securities industry. *See* FINRA, *Statistics*, www.finra.org/media-center/statistics (hereinafter "FINRA Statistics"). Federal law requires most broker-dealer firms to become members of FINRA and thus to consent to FINRA's regulatory jurisdiction. 15 U.S.C. § 78o(b)(8); *see also* SEC Press Rel. No. 2023-154, *SEC Adopts Amendments to Exemption From National Securities Association Membership* (Aug. 23, 2023) (further narrowing the thin sliver of broker-dealer firms exempt from mandatory FINRA membership). Federal law also requires FINRA to maintain rules to ensure that when its member firms or their brokers violate federal securities law or rules, they "shall be appropriately disciplined … by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a

member, or any other fitting sanction." *Id.* § 78o-3(b)(7).[2]

Although not an official agency or department of the federal government, FINRA exercises significant legislative power by promulgating rules applicable to the securities brokerage industry, most of which become legally binding on regulated parties only upon SEC approval after public notice and comment. *Id.* § 78s(b); *see also* Pet.App. 90a-91a. In a typical year, FINRA promulgates a few dozen new rules that affect its member firms and their brokers. *See* FINRA, *Rule Filings*, finra.org/rules-guidance/rule-filings (listing new rule proposals filed with SEC).

Each year, FINRA also conducts more than two thousand examinations of securities firms/brokers for compliance with federal securities laws and rules. *See*

---

[2] Federal courts have characterized comparable sanctions in attorney-discipline cases as "quasi-criminal" in nature, *e.g.*, *In re Ruffalo*, 390 U.S. 544, 551 (1968); *In re Finn*, 78 F.4th 153, 157 (5th Cir. 2023) (quoting *United States v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995))—*i.e.*, sufficiently severe to require proof of misconduct by "clear and convincing evidence," *see, e.g.*, *In re Liotti*, 667 F.3d 419, 426 (4th Cir. 2011); *Crowe v. Smith*, 261 F.3d 558, 563 (5th Cir. 2001) (citing *In re Thalheim*, 853 F.2d 383, 389 n.9 (5th Cir. 1988)); *In re Fisher*, 179 F.2d 361, 369 (7th Cir. 1950); *accord* American Bar Ass'n, STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.3. FINRA imposes disciplinary sanctions using the threadbare "preponderance of evidence" standard, which this Court has aptly described as the "rock-bottom" lightest evidentiary burden typically applied in mine-run civil cases. *Charlton v. FTC*, 543 F.2d 903, 907 (D.C. Cir. 1976). But Appellants have not raised this as an issue, so the Court need not address it.

FINRA, *Preparing for a FINRA Cycle Examination,* finra.org/sites/default/files/Education/p038336.pdf. By contrast to the "legislative" rulemaking described above, over which SEC exercises supervision, pre-approval and control, FINRA exercises vast and unchecked executive enforcement power by investigating, prosecuting, and punishing securities brokers and firms who violate federal securities laws and rules, including both SEC's and FINRA's rules. *See* Pet.App. 90a-91a. In this role, using its 350-person enforcement staff, FINRA investigates over a thousand member firms and brokers each year, filing formal disciplinary charges against several hundred or more. S*ee* FINRA Statistics. In a typical year, FINRA imposes anywhere from $50 million to $150 million in aggregate fines and restitution while suspending, barring, or expelling from the securities industry more than 500 brokers—far more than SEC itself does—and occasionally entire firms. *Id*.

II. THIS COURT SHOULD RESOLVE THE CIRCUIT COURTS' DIVERGING STANDARDS ON WHETHER STRUCTURAL CONSTITUTIONAL INJURY WARRANTS INJUNCTIVE RELIEF

Judge Walker's dissent below addressed each of the four factors that must be considered when deciding whether the challenged FINRA proceeding should be enjoined: likelihood of success on the merits, irreparable injury if the proceeding is not enjoined, the balance of equities, and the public

interest. The first two factors are the most critical in this inquiry,[3] so this brief focuses on those.

A. Petitioner is Likely to Succeed on its Structural Constitutional Claim that Addresses Who Enforces, *Not* the Merits of the Enforcement

Citing the two bedrock principles underlying the merits of the case—first that "the government must not delegate significant executive authority to private actors" and second that public officers must not exercise significant executive authority unless they are properly appointed and removable by the President—Judge Walker noted that Alpine has "made a strong showing that FINRA, whether private or public," violates one of these bedrock principles. Pet.App.54a-55a. Specifically, he concluded that FINRA "is likely a private entity exercising significant executive authority … [that] subverts the constitutional design." Pet.App. 59a. And while classifying FINRA as a part of the government "might solve its private non-delegation problem, … [that classification] runs headlong into the rest of the Constitution" because its hearing officers are neither properly appointed nor removable by the President. Pet.App. 66a-70a. Judge Walker described this as FINRA's "Goldilocks" defense: "It is too much like a private entity for Article II's strictures, yet too much like the government for the private nondelegation doctrine to apply." Pet.App.77a. His conclusion that

---

[3] *Nken v. Holder*, 556 U.S. 418, 434 (2009).

this "split identity" dooms any likelihood that FINRA can defeat Petitioner's private nondelegation claim is logically and legally unassailable. FINRA cannot be both, and if it is either, Petitioner prevails.

Put simply, 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 private actor free of government status, while at the same time evading the equally important constitutional requirement that private actors be subject to the "pervasive surveillance and authority" of governmental officers when they wield vast governmental power typically exercised by government officials. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). If, as even the district court correctly acknowledged, SEC plays no meaningful role in directing, supervising, or surveilling the overwhelming majority of FINRA enforcement investigations and prosecutions, it necessarily follows that the private actors at FINRA are exercising core executive power in violation of Article II of the Constitution and the private nondelegation doctrine.

Four Justices of this Court recognize that giving private parties the power to exercise significant authority under the laws of the United States raises grave Article II concerns. *See United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 442 (2023) (Kavanaugh, J., concurring, in which Barrett, J., joined); *id.* at 449 (Thomas, J., dissenting). "When it comes to private entities" exercising governmental powers, there is "not even a fig leaf of constitutional justification." *Dep't of Transp. v. Ass'n of Am. RRs*, 575 U.S. 43, 62 (2015) (Alito, J.,

concurring). "If it were otherwise—if people outside government could wield the government's power—then the government's promised accountability to the people would be an illusion." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 880 (5th Cir. 2022) (citing The Federalist No. 51).

This is a structural constitutional question, and because it has nothing to do with the merits of whether Alpine violated FINRA or SEC regulations or laws, it must be addressed before the "here-and-now" injury of an illegitimate hearing presided over by an illegitimate decisionmaker takes place. That distinction was made clear in *Free Enterprise Fund* when this Court held that the structure of a private, quasi-governmental board violated the separation of powers because its officers enjoyed impermissible layers of tenure protection—even without a circuit split or pending enforcement proceeding triggering such review. 561 U.S. 477. *Free Enterprise Fund*'s unanimous jurisdictional holding—that such structural constitutional infirmities could be addressed only in Article III courts—was applied in *Axon/Cochran* when this Court homed in on the illogic of allowing a proceeding to take place that violates the constitutional structure:

> Yet a problem remains, stemming from the interaction between the alleged injury and the timing of review. … The harm Axon and Cochran allege is "being subjected" to "unconstitutional agency authority"—a "proceeding by an unaccountable ALJ." … That harm may sound a bit abstract; but this Court has made clear that it is "a here-and-now

> injury." *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U.S. [197] (2020) … And—here is the rub—it is impossible to remedy once the proceeding is over.

Axon/Cochran, 598 U.S. at 191 (citations omitted).

And it is not just the timing of the review of the illegitimate government action, but also its nature as a structural constitutional violation. The Constitution establishes relationships among the three branches of the Federal Government, commonly called separation of powers or checks and balances, Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 7 (1969), critically vesting this core power to enforce federal laws in the executive branch. As Madison put it, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund*, 561 U.S. at 492 (quoting 1 ANNALS OF CONG. 463 (1789)). For this reason, the *Axon/Cochran* Court held that where a party claims an adjudication is "insufficiently accountable to the President, in violation of separation-of-powers principles, … [such] challenges are fundamental, even existential [because] [t]hey maintain … that the agencies, as currently structured, are unconstitutional in much of their work." Such review must precede the constitutional injury. 598 U.S. at 180.

Despite the Constitution's vesting of the "Take Care" power solely in the executive, some circuits have approved of FINRA enforcement as a permissible and constitutional delegation to a private

entity. *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415 (5th Cir. 2024); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690 (2d Cir. 1952); and *Sorrell v. SEC*, 679 F.2d 1323 (9th Cir. 1982). Meanwhile, FINRA regulates an entire, critical industry in the United States. Clarity about whether that vast web of regulatory power complies with the Constitution's dictates is sorely needed by both regulated parties and FINRA itself *before* another unconstitutional proceeding erodes the "parchment barriers" that protect our liberties.

The Founders knew how fragile these constructs of their political imaginations were. James Madison presciently asked in Federalist 48: "Will it be sufficient … to trust to these parchment barriers against the encroaching spirit of power?" His answer underscores the necessity of judicial vigilance: "[M]ere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[4] Or, in this case, delegating these Article II-vested powers into wholly private hands.

---

[4] The Federalist No. 48, at 332-33, 338 (James Madison) (J. Cooke, ed., 1961).

B. Irreparable Harm Exists Here, Just as It Did in *Axon/Cochran*

This amicus's principal focus, however, is to elucidate why this court should acknowledge and apply decades of Supreme Court precedent that constitutional injury—including the structural constitutional injury of empowering private parties with vast prosecutorial discretion and power over fellow citizens—constitutes irreparable harm.

As an initial matter, "[w]hen an alleged deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary." 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2948.1 (3d ed. 2024). [5] The panel majority's decision to treat this separation of powers claim as one that can await later redress cites no authority from this Court for treating a structural constitutional injury differently from other constitutional questions. In fact, the Supreme Court has expressly rejected treating constitutional injuries differently when courts entertain their vindication: "there is no such distinction between, or hierarchy

---

[5] *See*, *e.g.*, *Zepeda v. INS*, 753 F.2d 719, 726–27 (9th Cir. 1983) (Fourth Amendment); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (Eighth Amendment); *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 745–46 (2d Cir. 2000), *superseded by rule on other grounds as stated in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163 (2d Cir. 2001) (Equal Protection Clause); *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1058–59 (9th Cir. 2009) (Supremacy Clause) cited therein.

among, constitutional rights." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 628 (1989). Enforcing structural protections has been a prime focus of recent Supreme Court decisions starting with *Lucia v. SEC*, 585 U.S. 237 (2018) (Appointments Clause); *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020) (removal protections); *and SEC v. Jarkesy*, 603 U.S. 109 (2024) (adjudication vested in Art. III courts and jury trial) just to name a few such major rulings in recent terms of this Court.

Stripped to its basics, *Axon/Cochran* is simply an example of where the "impossible to remedy" injury is congruent with this longstanding standard of presumed irremediable harm for constitutional injury. Or as Judge Walker's dissent put it, an injury that is "impossible to remedy" under *Axon* also meets the injunction standard of "irreparable": "those two phrases are indistinguishable." Pet.App.70a–72a. Hence, injunctive relief on the second factor of irreparable harm is warranted because Alpine's injury is certain and imminent and cannot later be fixed by adequate compensation or other corrective relief.

The panel majority claimed that Judge Walker "overreads" *Axon/Cochran*, because the structural constitutional question there "was both 'wholly collateral to' the questions at issue in agency proceedings and lies 'outside the agency's expertise.'" Pet.App.41a. But the structural nondelegation question at stake here is likewise wholly collateral to the particulars of FINRA's enforcement proceeding against Alpine, and it, too, lies utterly outside of FINRA's *competence* and expertise.

The panel majority also misapplied the standard adopted by this Court in *Cochran/Axon* and *Free Enterprise Fund* by leaving out the critical word "competence" when arguing that neither case applies. Both decisions held unanimously that Article III jurisdiction and undelayed judicial review is warranted for constitutional claims, where the challenge is "'collateral' to the subject of that proceeding, as well as 'outside the Commission's *competence* and expertise.'" *Axon/Cochran*, 598 U.S. at 188, 194 (citing *Free Enterprise Fund* at 491) (emphasis added).

Judge Walker's view that this Court's decisions in both *Axon* and *Free Enterprise Fund* are congruent with and thus command a finding of irreparable harm is also expressed in two D.C. Circuit dissents. The first, by Judge Rao in *Loma Linda-Inland Consortium for Healthcare Educ. v. NLRB*, No. 23-5096, 2023 WL 7294839, at *17 (D.C. Cir. May 25, 2023) (Rao, J., dissenting) explicitly relied on *Axon/Cochran* when noting that the injury of "being subjected to ultra vires proceedings" before the National Labor Relations Board constituted irreparable harm because the respondent "experiences an ongoing injury by being subjected to ultra vires proceedings before the NLRB, and this is an injury that cannot be redressed after the fact." *Id.* at *17 (Rao, J., dissenting); *see also id.* at *14. In a second, pre-*Axon/Cochran* dissent, then-Judge Kavanaugh found the mere "authority" of an unlawfully constructed agency "to bring enforcement actions" sufficient to establish irreparable harm for an injunction. *John Doe Co. v. CFPB*, 849 F.3d 1129, 1135 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

In addition, a unanimous panel of judges on the Fifth Circuit enjoined the underlying administrative proceeding pending appeal in *Cochran v. SEC*, No. 19-10396 (5th Cir. Sept. 24, 2019) (summary order), a holding that required it to find irreparable injury.

The dissonance of the D.C. Circuit panel majority with these other opinions by their colleagues on the D.C. Circuit, all of whom routinely navigate the intricacies of where administrative law runs headlong into the Constitution, underscores the need for this Court's review on injunctions pending appeal.

The holdings of the Tenth Circuit, the Sixth Circuit, and now the D.C. Circuit panel majority below are thus outliers not only when viewed against the standard constitutional-injury jurisprudence of the circuits more broadly as set forth above, but also because their reasoning for not following *Axon/Cochran* is logically flawed. Here's why. In *Leachco, Inc. v. Consumer Prod. Safety Comm'n*, 103 F.4th 748, 760 (10th Cir. 2024), that court asserted that "mere subjection to administrative proceedings before an agency whose officials possess unconstitutional removal protections, alone," does not constitute irreparable harm. In so ruling, the court explicitly assigned "separation of powers" claims a lower ranking in a hierarchy of constitutional claims, *Id*. at 753-54, a demotion of structural claims that the Supreme Court itself disavows. Not only do the recent decisions of this Court in *Lucia*, *Axon/Cochran* and *Jarkesy* underscore the importance of structural protections, the *Leachco* court's elevation of the Bill of Rights over structural protections, *Leachco*, 103 F.4th at 654, runs contrary to Justice Scalia's insight that a country may boast an extensive bill of rights, but

weak or non-existent structural barriers render those guarantees "worthless." *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

Further, the principal grounds of decision for such a dubious distinction were drawn from the Tenth Circuit's deeply flawed ruling in *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020), which has since been overruled on the merits by *Garland v. Cargill*, 602 U.S. 406 (2024). *Aposhian* also relied upon *Chevron* deference in ruling in favor of the agency to deny injunctive relief. Such reliance further delegitimizes *Aposhian*'s authority on the likelihood of success on the merits and the irreparable harm of illegitimate agency action now that this Court has overruled *Chevron*. *Loper Bright Enters. v. Raimondo* and *Relentless v. Dep't of Commerce*, 603 U.S. 309 (2024).

Second, *Leachco* oddly relied on the Supreme Court's decision in *Collins v. Yellen*, 594 U.S. 220 (2021), to suggest that even if the plaintiff were to prevail on the unconstitutional multiple removal protections, it would be unable to show after the fact how that constitutional violation adversely affected the adjudication, and so it was not entitled to enjoin the proceedings to prevent the violation. *This gets the question exactly backward*!

To see why, consider the dissent from the Fifth Circuit's en banc decision in *Cochran*, which floated a similarly illogical argument based on *Collins*—which the majority opinion neatly dispatched. First, the majority responded to the dissent's conjured-up hierarchy of constitutional claims—the same dubious ranking engaged in by the *Leachco* court—by pointing out that it is not at all clear how "the injury Cochran would suffer from an enforcement proceeding

presided over by an unconstitutionally insulated ALJ is supposedly less "serious" than the injury caused by an enforcement proceeding presided over by an unconstitutionally appointed ALJ," adding:

> In making this curious argument, the dissenting opinion relies solely on the Supreme Court's recent decision in *Collins*, which held that the Director of the Federal Housing Finance Agency was unconstitutionally insulated from the President's removal power, but that this constitutional defect did not render the Director's acts "void." 141 S. Ct. at 1787. *Collins* does not impact our conclusion in this case because Cochran does not seek to "void" the acts of any SEC official. Rather, she seeks an administrative adjudication untainted by separation-of-powers violations. Although we will not engage in the dissenting opinion's efforts to weigh the relative severity of constitutional injuries, Cochran's injury is sufficiently serious to justify pre-enforcement review in federal court. Moreover … because a removal power violation does not render an improperly insulated official's acts void, Cochran would not be entitled to any relief on post-enforcement review even if she prevailed on her removal power claim. … If it were true that Cochran could not obtain any post-enforcement relief, then Cochran's only hope for meaningful judicial review

> would be through the present lawsuit. Therefore, even under the dissenting opinion's view, Cochran's removal power claim was properly before the district court.

Cochran v. SEC, 20 F.4th 194, 210 n.16 (5th Cir. 2021) (en banc). The same logic applies with equal force here.

The Sixth Circuit's decision declining to apply *Axon/Cochran*'s holding to injunctions is also deeply flawed for exactly the same reason. *YAPP USA Auto. Sys., Inc. v. NLRB*, No. 24-1754, 2024 WL 4489598, at *2-3 (6th Cir. Oct. 13, 2024). In short, all three circuit decisions, including the panel majority below here, are outliers, and as gravely in need of correction as the six erroneous circuits were in *Axon/Cochran*.

Axon/Cochran *unanimously* overruled, reversed, or called into immediate question six circuit decisions that, like the panel here, had endorsed delayed "eventual"—and futile—judicial review, rendering the constitutional injury permanent, irremediable, and unreviewable.[6] There, as here, the

---

[6] *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016); *Hill v. SEC* and *Gray v. SEC*, 825 F.3d 1236 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015). The D.C. Circuit, in a decision authored by Judge Srinivasan, had denied district court jurisdiction over jury trial and due process constitutional claims in *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015), claims upon which Mr. Jarkesy ultimately prevailed at this Court, rendering his 10-year journey through administrative process a complete nullity.

"claim is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker. … [where a] proceeding that has already happened cannot be undone." *Axon/Cochran*, 598 U.S. at 191.

Axon/Cochran also directly reversed the Ninth Circuit's decision to march in lockstep with these earlier circuit decisions in *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173 (9th Cir. 2021).

The aftermath of *Axon*/*Cochran* is similarly revealing. FTC promptly dropped its claims against Axon after Axon won district court jurisdiction for its structural and due process constitutional claims. See Order Dismissing Complaint, *In re Axon Enterprise, Inc.*, No. 9389, 2023 WL 6895829 (F.T.C. Oct. 6, 2023). Michelle Cochran also never got her day in court. Just a few weeks after *Axon/Cochran* was decided, the SEC dismissed all 42 open administrative proceedings with Ms. Cochran's case at the head of the list of dismissals, citing its scandalous "control deficiency" in which enforcement staff had accessed the files of the SEC ALJs as the reason for such a shocking mass dismissal. Dave Michaels, *SEC Says Employees Improperly Accessed Privileged Legal Records*, Wall St. J. (April 6, 2022), https://tinyurl.com/42cz9mbm. Those dismissals also meant that no one could bring a court challenge on the multiple removal protections enjoyed by SEC ALJs—and incidentally precluded discovery in court on the extent and reach of the control deficiency breaches in all 42 of these cases, or with respect to an unknown number of closed or settled cases. *What Is Gary Gensler Hiding?*, Wall St. J. (Oct. 13, 2023), http://bit.ly/4iIfBAB. See, generally, Margaret A. Little, *The SEC Puts Itself on Moot—Answering Justice Robert Jackson's Eight-Decade-Old-Query—Has the SEC Become a Law Unto Itself?*, Cato Supreme Court Review 2023, pp. 61-65.

III. DENYING INJUNCTIVE RELIEF POTENTIALLY EXPOSES PETITIONER AND THOSE SIMILARLY SITUATED TO MULTIPLE TO-BE-VACATED UNCONSTITUTIONAL PROCEEDINGS

The panel majority also failed to consider the practical consequences of denying injunctive relief, something that was expressly considered by the courts in deciding *Cochran*, even from the outset. The district court judge in *Cochran*, who felt compelled to adhere to the five circuits' erroneous view that § 78y of the '34 Act impliedly stripped jurisdiction from the district courts to hear Cochran's structural claim, noted:

> The court is deeply concerned with the fact that plaintiff already has been subjected to extensive proceedings before an ALJ who was not constitutionally appointed, and contends that the one she must now face for further, undoubtedly extended, proceedings likewise is unconstitutionally appointed. She should not have been put to the stress of the first proceedings, and, if she is correct in her contentions, she again will be put to further proceedings, undoubtedly at considerable expense and stress, before another unconstitutionally appointed administrative law judge.

Cochran v. SEC, No. 4:19-CV-066, 2019 WL 1359252, at *2 (N.D. Tex. Mar. 25, 2019) (McBryde, J.).

This Court should likewise consider the practical consequences of illogically allowing administrative agencies—or their surrogates in the case of FINRA—to bring serial, to-be-vacated, proceedings against their targets while the legality of those proceedings is in serious question. Judge Walker rightly takes into consideration Petitioner's already years-long protracted FINRA proceedings. Pet.App.53a.

Both Raymond Lucia and Michelle Cochran endured years-long SEC administrative proceedings before they could obtain any judicial review. Ray Lucia's administrative gauntlet began in 2012 and Michelle Cochran's in 2016. [7] On remand after prevailing in the Supreme Court on his Appointments Clause challenge, Mr. Lucia was unable to secure an injunction from the Ninth Circuit pending decision on his subsequent removal-protection challenge filed in district court, Order Denying Motion For An Injunction Pending Appeal, *Lucia v. SEC*, No. 19-56101 (9th Cir. Jan. 23, 2020) (ECF No. 22), and was

---

[7] The annihilating journey through administrative process at the SEC endured by Raymond Lucia, George Jarkesy, Christopher Gibson and others was submitted to this Court in two *amicus* briefs in *Axon/Cochran* to establish that in many instances SEC targets languish for the better part of a decade before any judicial review, Amicus Brief of Raymond J. Lucia, et al., *SEC v. Cochran*, No. 21-1239, March 11, 2022 https://bit.ly/4iXrlie, and that "after-the-fact judicial review" is neither a realistic possibility nor meaningful under the SEC circuit review scheme. Amicus Brief of Raymond J. Lucia, et al., *SEC v. Cochran,* No. 21-1239, July 7, 2022. https://bit.ly/4l1K0eM. This "process is the punishment" problem holds true with equal if not greater force for the FINRA scheme at stake here.

also denied an administrative stay. SEC Order Denying Stay, *In re Raymond J. Lucia Companies, Inc.*, July 15, 2019. His six-year journey to the Supreme Court depleted him financially, barred him for life from his chosen profession, and exacted enormous human, financial, health, and reputational costs. So, in 2020, unable to endure additional administrative and judicial process over a decade or more, he threw in the towel and settled—for just $25,000—which speaks volumes about the strength of SEC's case against him.[8] He settled because, even if he won at the Supreme Court *again*, he would have faced a *third* adjudication either before the Commission or in district court. No rational judicial system would operate in this fashion.

The only thing that distinguishes Michelle Cochran's case from Mr. Lucia's was that a Fifth Circuit motions panel unanimously (and mercifully) found irreparable harm if her administrative proceedings were to run in parallel with her court challenge.

These multi-year journeys through the SEC's—or its proxy, FINRA's—maze of investigation, proceedings, adjudications, appeals to the Commission, and delayed court review are not outliers, but sadly, the norm. George Jarkesy spent 10 years in the labyrinth, Ray Lucia 8 years and Michelle Cochran 7 years. Justice Gorsuch's concurrence in *Axon/Cochran* explicitly addressed this too-often

---

[8] Order of Settlement, *Raymond J. Lucia Cos.* and *Lucia*, Exchange Act Release No. 89078, 2020 WL 3264213 (June 16, 2020), *also available at* https://www.sec.gov/files/litigation/admin/2020/34-89078.pdf

unacknowledged aspect of protracted agency processes (or, in this case, a protracted SRO administrative process), along with the costly, uncertain, human and reputational consequences.

As set forth above, the district court felt compelled to dismiss Ms. Cochran's case because of the unanimity of prior circuit decisions, decisions which were eventually overruled but by then had stranded innumerable enforcement targets in an unending administrative wasteland. Justice Gorsuch's concurrence put it this way:

> In 2019, the district court dismissed Ms. Cochran's suit without reaching its merits. … A year and a half later, a panel of the Fifth Circuit ran through the *Thunder Basin* factors and affirmed … A year and a half after that, the en banc Fifth Circuit took another look and largely reversed … Now, more than four years after Ms. Cochran filed her complaint, this Court … holds that her case belonged in district court all along. … For its part, Axon has endured a similarly tortuous path. Over the course of three years, the district court dismissed its case … and the court of appeals affirmed, … only to have this Court reverse that judgment today.
>
> This is what a *win* looks like. …

Axon/Cochran, 598 U.S. at 214-15 (Gorsuch, J., concurring) (emphasis in original).

Without an injunction, Cochran would have had to endure an adjudication stacked against her, which finds in favor of the agency over 90% of the

time, and she would likely have been barred or otherwise impaired in utilizing her hard-earned CPA to support her family during the many years her case wound its way through the courts on after-the-fact review.[9]

All this holds true for Petitioner and similarly situated FINRA enforcement targets. An injunction is all that stands between them and a corporate or occupational death sentence.

---

[9] "Not many possess the perseverance of Ms. Cochran and Axon. The cost, time, and uncertainty associated with litigating a raft of opaque jurisdictional factors will deter many people from even trying to reach the court of law to which they are entitled. Nor is the loss of a day in court in favor of one before an agency a small thing. Agencies like the SEC and FTC combine the functions of investigator, prosecutor, and judge under one roof. They employ relaxed rules of procedure and evidence—rules they make for themselves. The numbers reveal just how tilted this game is. From 2010 to 2015, the SEC won 90% of its contested in-house proceedings compared to 69% of the cases it brought in federal court. *See* Gideon Mark, *Response: SEC Enforcement Discretion*, 94 Tex. L. Rev. *See Also* 261, 262 (2016). Meanwhile, some say the FTC has not lost an in-house proceeding in 25 years. … And how many people can afford to carry a case that far anyway? Ms. Cochran's administrative proceedings have already dragged on for *seven years*. Thanks in part to these realities, the bulk of agency cases settle." *Axon/Cochran*, 598 U.S. at 917-18 (Gorsuch, J., concurring) (emphasis in original). Like Justice Gorsuch, Judge Walker's dissent homes in on the troubling ramifications of the high settlement rates of these proceedings: "But look at what's missing. At *no time* was the SEC involved. Nor was *any* executive officer with a commission from the President—just a Delaware corporation enforcing federal law." Pet.App. 65-66a.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, and FINRA's expedited enforcement proceeding should be enjoined in its entirety.

Respectfully submitted,

/s/ *Margaret A. Little*
Margaret A. Little
Counsel of Record
Russell G. Ryan
Mark S. Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Drive, Suite 300
Arlington, VA 22203
(202) 869-5210
peggy.little@ncla.legal
Counsel for Amicus Curiae

March 26, 2025