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## **NCLA Asks Sixth Circuit to Rein in FINRA’s Unlawful Prosecution Regime**

*Eric S. Smith v. U.S. Securities and Exchange Commission and Financial Industry Regulatory Authority, Inc.*

**Washington, DC (March 26, 2025)** – The New Civil Liberties Alliance filed an [opening brief](#) today urging the U.S. Court of Appeals for the Sixth Circuit to set aside an SEC administrative order that affirmed Financial Industry Regulatory Authority (FINRA) sanctions unlawfully punishing our client Eric S. Smith. FINRA is a private organization whose employees are not properly appointed by or accountable to anyone in government. Yet it acted like a government agency by prosecuting a case against a member of the public, and then assumed the role of a federal court by adjudicating its own claim and penalizing Mr. Smith. FINRA banned him from the securities brokerage industry for life and ordered him to pay more than \$140,000 in restitution and costs. In all of this, Mr. Smith never received the jury trial he constitutionally deserves to defend himself. In *Smith v. SEC and FINRA*, the Sixth Circuit should reverse these injustices against Mr. Smith and expose FINRA’s fundamental flaws that allow it to violate core civil liberties.

A members-only organization, FINRA lacks any lawful power to regulate or discipline Mr. Smith because he has never been licensed by FINRA nor has he otherwise consented to its authority over him. Congress could not empower FINRA to prosecute and adjudicate claims against a member of the general public like Mr. Smith without violating the legal doctrine forbidding the government from delegating unsupervised power to private parties. Nevertheless, FINRA launched formal disciplinary proceedings in 2017 against Mr. Smith and a brokerage firm of which he was neither an officer, director, nor employee, wrongly accusing him and the firm of misconduct dating back to 2010. A FINRA-assembled panel imposed the lifetime industry ban and restitution order against Mr. Smith in January 2019. Mr. Smith first appealed those sanctions to FINRA’s National Adjudicatory Council, which affirmed the panel’s decision in September 2020 and ordered him to pay another \$1,200 in appeal costs. He then appealed the FINRA sanctions to SEC, which failed to rule on his appeal for more than three years, at which point NCLA asked the Sixth Circuit for a [writ of mandamus](#) to end the delay. Soon after the Sixth Circuit ordered a response to the mandamus petition, the agency denied Mr. Smith’s appeal, affirming FINRA’s sanctions in all respects.

The President has not commissioned FINRA employees as officers of the United States, so they had no authority to prosecute FINRA’s enforcement action against Mr. Smith. And because those employees enjoy at least three layers of for-cause removal protection, the President has been prevented from fulfilling his constitutional duty to “take care that the laws be faithfully executed” regarding their work. Not only did FINRA employees have no authority to adjudicate the claims against Mr. Smith, FINRA deprived him of his Seventh Amendment right to a jury trial and to an Article III court, rights the Supreme Court definitively recognized last year in [SEC v. Jarkesy](#).

### **NCLA released the following statements:**

“Over a decade, Mr. Smith has been unlawfully prosecuted and punished by unaccountable private actors at FINRA without his ever consenting to FINRA’s authority over him, all without a jury trial or even an Article III

tribunal. SEC has rubber-stamped this result. The Court should set aside this mockery of essential constitutional requirements.”

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

“FINRA wants to play all the roles in this government enforcement action: It wants to prosecute a member of the public like a government agency; it wants to preside over the trial like a federal judge; and it wants to decide the case like a jury. Fortunately, the Constitution categorically forbids this ambitious abuse of legal process.”

— **Daniel Kelly, Senior Litigation Counsel, NCLA**

**For more information visit the case 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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