IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

FRANK HARMON BLACK; and SOUTHEAST INVESTMENTS, N.C., INC., Plaintiffs, v. FINANCIAL INDUSTRY REGULATORY AUTHORITY; and SECURITIES AND EXCHANGE COMMISSION, Defendants.	No. 3:23-CV-709-RJC-DCK **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

Introduction

Frank Black and Southeast Investments, N.C., Inc. (SEI), challenge the adjudication of their liberty and property at the Financial Industry Regulatory Authority (FINRA) and the Securities and Exchange Commission (SEC). Black and SEI have spent over five years in FINRA's agency adjudication but have yet to have their constitutional claims considered by a court. FINRA permanently barred Black from his profession and imposed $146,000 fines on him and SEI. Black has been prohibited from practicing his profession since March 2019. Over four years later, on December 7, 2023, the SEC issued an opinion and order reviewing FINRA's decision. The SEC decision vacated the bar and reduced the fines, but it remanded the case to FINRA to re-adjudicate Black's alleged regulatory violations. Thus, seven years into FINRA's prosecution of Black, and a decade after the conduct giving rise to the alleged violations, he must go through with the adjudication process again. However,

FINRA's adjudication is unconstitutional and irreparably harms Black and SEI. This Court should enjoin FINRA's adjudication until Article III courts rule on the constitutionality of FINRA and SEC adjudication.

FINRA's administrative adjudication is unlawful in at least two ways. First, FINRA officials adjudicating Black and SEI's claims and exacting punishments against them exercise significant government authority without proper appointment under the Appointments Clause. Indeed, FINRA's hearing officers are near "carbon copies" of SEC Administrative Law Judges (ALJs), whose acts were invalidated by the Supreme Court in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). *See Alpine Securities Corp. v. FINRA,* No. 23-5129, 2023 WL 4703307, at *2 (D.C. Cir. July 5, 2023) (Walker, J., concurring). Just as the SEC ALJ's adjudication was unconstitutional and void in *Lucia*, so too is FINRA's adjudication threatening to deprive Black and SEI of liberty and property unconstitutional and void.

Second, FINRA's structure violates the separation of powers. FINRA is an economically self-interested private party that has been delegated the authority to make and enforce rules for the securities industry, while also enforcing federal securities laws and regulations on behalf of the government. Plus, FINRA is empowered to adjudicate violations of those laws and regulations with only limited SEC and appellate review. FINRA's concentration and exercise of all three governmental powers in a single private entity violates the Constitution's private non-delegation doctrine. Moreover, FINRA's private adjudication of federal

regulatory and statutory provisions violates Article III's limits on administrative delegation.

The violation of Black and SEI's constitutional rights through an unconstitutional agency adjudication inflicts irreparable injury. Black and SEI suffer a "here-and-now injury" by being subjected to an illegitimate proceeding, led by an illegitimate decisionmaker. *See Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023). That proceeding has been ongoing for seven years and is now restarting on remand. But FINRA lacks the authority to adjudicate Black's liberty and property. The longer the administrative process continues, the more their injuries compound. And the balance of equities and public interest always favor vindicating an individual's constitutional rights. The Court should preliminarily enjoin FINRA and SEC's adjudication, so that Black and SEI do not have to undergo yet another FINRA proceeding while their constitutional challenge remains pending in an Article III court.

Background

A. Congress and the SEC Delegated the Federal Government's Authority to Govern the Securities Industry to a Private Entity: FINRA

The Securities Exchange Act of 1934 (Exchange Act) permits registered securities associations (RSAs), a type of self-regulatory organization, to govern the securities industry, subject to limited SEC oversight. 15 U.S.C. § 78s. RSAs are responsible for "enforc[ing] compliance" with the "provisions" of the Exchange Act, and the "rules and regulations thereunder." *Id.* § 78s(g)(1); *see also id.* § 78o-3(b)(7).

All brokers and dealers must register with SEC and join an RSA to buy and sell securities. *Id.* § 78o(a)(1), (b)(1).

FINRA is the only RSA registered with SEC. Stephanie Dumont, Executive Vice President, Market Regulation and Transparency Services at FINRA, FINRA Request for Access to Security-Based Swap Data Obtained by Registered Security-Based Swap Data Repositories, FINRA (Aug. 11, 2022), https://www.sec.gov/files/rules/other/2022/34-95470-finra-incoming-letter.pdf ("FINRA is the only national securities association registered with the Commission under Exchange Act Section 15A."). FINRA ensures compliance with its rules and regulations through enforcement actions. FINRA Rule 9211. FINRA initiates enforcement actions by issuing a complaint. *Id.* FINRA's Office of Hearing Officers (OHO) conducts the adjudication and issues a written decision. FINRA Rules 9212, 9213, 9268. If the decision includes a "bar or an expulsion" from FINRA (and thus from the securities industry), it is "effective immediately." FINRA Rule 9268(f)(2).

A decision from OHO can be appealed to FINRA's National Adjudicatory Council (NAC). FINRA Rule 9311. The NAC "may affirm, dismiss, modify, or reverse with respect to each finding, or remand the disciplinary proceeding with instructions" and "may affirm, modify, reverse, increase, or reduce any sanction … or impose any other fitting sanction." FINRA Rule 9348. The NAC then issues a decision. FINRA Rule 9349. If no member of FINRA's board of governors calls for review of the NAC's decision, it becomes final. FINRA Rule 9349(c). When FINRA imposes civil penalties,

it profits. FINRA Rule 8320(a); *see also* Compl. ¶ 22 ("In 2021, FINRA reported that it collected $103 million in fines, which became part of its operating budget.").

The accused may then seek limited SEC review of FINRA's decision. FINRA Rule 9370; 15 U.S.C. § 78s(d)–(h). SEC may modify, affirm, or set aside FINRA's decision. 15 U.S.C. § 78s(e)(1). SEC does not conduct a de novo review and does not find facts. Instead, the agency reviews FINRA's disciplinary decisions only to determine whether the respondents engaged in the conduct that FINRA found, whether such conduct violates the rules FINRA specified, and whether FINRA's rules are, and were applied in a manner consistent with the purposes of the Exchange Act. 15 U.S.C. § 78s(e)(1); *see also In re Eric J. Weiss*, Release No. 34-69177, 2013 WL 1122496 (SEC Mar. 19, 2013). SEC reviews any sanction imposed by FINRA to determine whether it "impose[s] any burden on competition not necessary or appropriate" to further the purposes of the Exchange Act, or if the sanction "is excessive or oppressive." 15 U.S.C. § 78s(e)(2). And SEC does not have to find facts, 17 C.F.R. § 201.452 (SEC has discretion whether to allow submission of additional evidence or not), and defers to FINRA's credibility determinations, *In re Wilfredo Felix*, No. 2018058286901, 2021 WL 2288014, at *11 (SEC May 26, 2021) (SEC gives FINRA's credibility determinations deference absent substantial evidence to the contrary). An aggrieved party may petition a federal appellate court to review SEC's final decision. *Id.* § 78y. But the court does not conduct de novo review and does not find facts.[1]

[1] The federal appellate court's review of a final decision from the SEC is limited.

B. FINRA Investigated Black and SEI

Frank Black founded SEI in 1997. Decl. of Frank Harmon Black ("Black Decl.") ¶ 2. During the relevant period, Black maintained a 95% ownership stake in SEI and operated the company. *Id.* ¶ 6. SEI operated a general securities business from its main office in Charlotte, North Carolina, and its registered representatives sold investment products. *Id.* ¶¶ 6–7. From March 2010 through May 2015, SEI had between 114 and 133 registered representatives and between 7 and 38 FINRA-registered branch offices. *Id.* ¶ 8.

Black and SEI were registered with FINRA and SEC during all time periods relevant to this suit. *Id.* ¶¶ 4–5. They maintained the appropriate registrations as required by relevant statutes, regulations, and FINRA rules. *Id.* ¶ 5. During a routine cycle examination, FINRA contacted four of SEI's registered representatives located in New York, North Carolina, Ohio, and South Carolina. *Id.* ¶ 9.

FINRA's rules require office inspections. As relevant here, under FINRA's predecessor, the National Association of Securities Dealers (NASD), branch offices had to be inspected at least once every three years. NASD Rule 3010(c)(1)(B) (setting inspection schedule), (g)(2) (defining "branch office").[2]

"[F]actual findings are upheld if supported by substantial evidence." *Wiley v. SEC*, 663 F. App'x 353, 358 (5th Cir. 2016). "[A]gency actions and conclusions of law may be set aside only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* And "the SEC's interpretations of FINRA Rules are entitled to deference so long as they are not unreasonable." *Id.*; *see also* *Birkelbach v. SEC*, 751 F.3d 472, 478 (7th Cir. 2014).

[2] FINRA enforces the version of its rules effective at the time of the alleged conduct. Thus, in certain instances in this case FINRA has sought to enforce NASD's predecessor rules.

In September 2012, FINRA asked Black for records documenting SEI's office inspections. *Id.* ¶ 10. Black produced an inspections calendar, a three-page document listing 43 inspections he conducted between March 2010 and August 2012. *Id.* ¶ 11. The calendar provided the date by which each inspection was to be completed and the date Black performed each branch inspection. *Id.* ¶ 12.

C. FINRA Prosecuted and Adjudicated Its Case Against Black and SEI in Its Home Tribunals

Nevertheless, in 2015, FINRA filed a five-count complaint against Black and SEI with its OHO. *Id.* ¶ 13 (Black Decl. Exhibit 1). FINRA alleged that Black and SEI: (1) Violated FINRA Rules 8210, 4511, and 2010 by inaccurately reporting that Black had conducted site inspections of each registered representative's office; (2) Violated FINRA Rules 8210 and 2010 for providing inadequate inspection documents for those site inspections; (3) Violated NASD Rule 3010 for failing to supervise the registered representatives; (4) Failed to preserve all relevant business records and allowed one employee to conduct SEI business on a personal email account, in violation of NASD Rule 3110, FINRA Rules 4511 and 2010, Section 17(a) of the Exchange Act, and SEC Rule 17a-4 (17 C.F.R. § 240.17a-4); and (5) Failed to maintain adequate written supervisory procedures over SEI in violation of NASD Rule 3010 and FINRA Rules 3110 and 2110. *Id.*

FINRA's OHO held a hearing on the charges—a hearing that did not even pretend to abide by basic due process. *Id.* ¶¶ 16–28. The OHO decided in favor of the prosecution on all counts. *Id.* ¶¶ 15, 28. It imposed fines totaling $243,000 against

both Black and SEI. *Id.* ¶ 15. OHO also permanently barred Black from ever registering with FINRA again—the so-called corporate death penalty. *Id.* ¶ 28.

Black and SEI appealed to FINRA's NAC. *Id.* ¶ 29. In 2019, the NAC ***vacated*** the findings that Black maintained deficient supervisory systems related to emails, that SEI and Black failed to maintain emails properly, and that SEI willfully failed to maintain certain emails. *Id.* ¶ 30. The NAC, however, affirmed the other findings, reduced the fine to $146,500, and upheld the lifetime bar against Black. *Id.* The bar went into effect on May 23, 2019. *Id.* It has remained in effect since.[3]

Black and SEI appealed the NAC decision to the SEC. *Id.* ¶ 31. Over 4.5 years later, the SEC had not issued any decision. *Id.* ¶ 33. So, on October 30, 2023, Black and SEI sued FINRA in the United States District Court for the Western District of North Carolina [DE 1] and moved for a preliminary injunction on November 22, 2023 [DE 9, DE 10]. Shortly thereafter, on December 7, 2023, the SEC issued its Opinion and Order In the Matter of the Application of Southeast Investments, N.C., Inc., and Frank Harmon Black for Review of Disciplinary Action Taken by FINRA. The Opinion and Order is available at DE 30 at 4–25 (attached as Exhibit 15). The SEC affirmed FINRA's holding with respect to the alleged violation of supervisory procedures and failure to preserve 16 emails but remanded the proceeding to FINRA

[3] The SEC has adjudged FINRA itself of violating Section 17(a) of the Exchange Act and SEC Rule 17a-4. Section 17(a)(1) imposes certain record-keeping requirements on FINRA. At least three times in eight years, SEC has adjudged a FINRA official of providing altered or misleading documents to the Commission. *In re FINRA*, Release No. 65643, 2011 WL 5097714 (SEC Oct. 27, 2011). FINRA violated Section 17(a)(1) and SEC Rule 17a-4 in this case by failing to maintain exculpatory evidence of Black and SEI's innocence as required by law. Black Decl. ¶¶ 16–26.

with respect to the alleged provision of false testimony and fabricated documents. *Id.* at 2. FINRA based its remand on alleged spoliation. SEC Op. at 13–16. While SEC lifted the lifetime bar FINRA imposed on Black, SEC took no action against FINRA for spoliation of evidence that was exculpatory as to Black even while acknowledging FINRA's spoliation harmed Black and SEI. Absent an injunction, Black and SEI must begin again in FINRA's unconstitutional adjudication, thus giving FINRA a third bite at the apple to prove a nonsensical hunch that FINRA's own adjudicators and now SEC have both rejected.

Legal Standard

"A plaintiff seeking a preliminary injunction must establish that he is [1] likely to succeed on the merits, that he is [2] likely to suffer irreparable harm in the absence of preliminary relief, that [3] the balance of equities tips in his favor, and that [4] an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A plaintiff need not establish a 'certainty of success,' but must make a clear showing that he is likely to succeed at trial." *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017). "As to the third and fourth *Winter* factors — the balance of the equities and the public interest — [the court] assess[es] those factors in tandem when the government … is the opposing party." *Vitkus v. Blinken*, 79 F.4th 352, 368 (4th Cir. 2023).

Argument

I. Black and SEI Are Likely to Succeed on the Merits

A. Tasking FINRA to Perform Governmental Functions Violates the Appointments Clause

Article II, section 2, clause 2, of the U.S. Constitution, the Appointments Clause, requires the President to appoint officers of the United States with the advice and consent of the Senate. Principal officers must always be so appointed. However, Congress may vest the appointment of inferior officers in the President alone, the courts of law, or in the heads of departments. *Lucia*, 138 S. Ct. at 2051.

Anyone who wields "significant" executive power is an Officer of the United States, "and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Because the "executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead," executive officers must generally be removable by the President or an officer subordinate to the President. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020). The chain of command created by the Appointments Clause ensures legitimacy and accountability in tying all power back to the People through their elected representatives in the President and Congress. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021).

Lucia held that SEC ALJs are "Officers of the United States" not appointed in accord with the Appointments Clause. 138 S. Ct. at 2055–56 (2018). In *Lucia*, the SEC initiated an administrative proceeding against Raymond Lucia and his

investment company. *Id.* at 2049. The agency assigned an ALJ to adjudicate the case. *Id.* at 2049–50. The ALJ found Lucia violated the act and imposed civil penalties of $300,000 and a lifetime bar from the investment industry. *Id.* at 2050.

Lucia challenged the ALJ as improperly appointed under the Appointments Clause. The Supreme Court agreed. The Court held the SEC ALJs were "Officers of the United States" because they "exercise[ed] significant authority pursuant to the laws of the United States." *Id.* at 2051. The SEC was granted "statutory authority to enforce the nation's securities laws" and "delegate[d] that task to an ALJ." *Id.* at 2049. The ALJ exercised "significant discretion" carrying out the "important functions" of "tak[ing] testimony," "[r]eceiv[ing] evidence," "'[e]xamin[ing] witnesses' at hearings" with the power to "take pre-hearing depositions," "conduct trials" and "administer oaths, rule on motions, and generally 'regulat[e] the course of' a hearing, as well as the conduct of parties and counsel," "rule on the admissibility of evidence" to "shape the administrative record" and "enforce compliance with discovery orders." *Id.* at 2053 (citations omitted). The ALJs then issued decisions "containing factual findings, legal conclusions, and appropriate remedies." *Id.* The SEC could choose whether to review the ALJ decision. If the SEC declined review, the ALJ's decision became final and "deemed the action of the Commission." *Id.* at 2054. The Court held that "the Commission's ALJs are 'Officers of the United States,' subject to the Appointments Clause," who were not appointed consistent therewith and the ALJ's adjudication and decision were void. *Id.* at 2055–56. And the Fourth Circuit has extended the *Lucia*

holding beyond the SEC ALJs "to apply broadly to ALJs in other executive department federal agencies." *Brooks v. Kijakazi*, 60 F.4th 735, 740 (4th Cir. 2023).

Moreover, SEC ALJs are officers in the *executive* branch. *Arthrex* explained that, even if the "duties" of hearing officers "partake of a Judiciary quality," these officers "exercis[e] executive power." 141 S. Ct. at 1982 (simplified).

Lucia and *Arthrex* dictate the outcome in this case. As D.C. Circuit Judge Justin Walker observed, "FINRA's hearing officers are near carbon copies of [SEC's] ALJs." *Alpine Securities*, 2023 WL 4703307, at *2 (Walker, J., concurring). On behalf of the SEC, FINRA's hearing officers are tasked by statute with enforcing the nation's securities laws. 15 U.S.C. § 78s(g)(1). FINRA can "levy sanctions that carry the force of federal law." *Turbeville v. FINRA*, 874 F.3d 1268, 1270 (11th Cir. 2017) (citing 15 U.S.C. § 78o-3(b)(7)). And like the ALJs in *Lucia*, FINRA hearing officers compel testimony, rule on motions, regulate the course of a hearing, decide the admissibility of evidence to shape the record, and enforce compliance with discovery orders by punishing contempt. *See* FINRA Rules 8210 (Provision of Information and Testimony), 9252 (Requests for Information), 9235 (Hearing Officer Authority), 9263 (Evidence Admissibility), 9280 (Contemptuous Conduct). A panel of hearing officers then issues a final written decision addressing factual findings, legal conclusions, and remedial sanctions. FINRA Rule 9268. The SEC's ALJ proceedings and FINRA's OHO hearing process, for constitutional purposes, are indistinguishable, and just like in *Lucia*, FINRA's hearing officers are officers of the ***United States***.

Eventual SEC review does not change this conclusion. FINRA's hearing officers serve the same role as the SEC's ALJs; therefore, they are exercising powers that solely belong to officers of the United States, and they must be properly appointed. The OHO decision goes to the NAC (also made up of private actors) to review the hearing officers' findings and sanctions. FINRA Rule 9348. Ultimately, the NAC provides a decision to the FINRA Board—more private actors—and if no Board member calls for review, the decision is final, and the decision can be appealed to the SEC. FINRA Rule 9349(c), 9370; *see also* 15 U.S.C. § 78s(d)–(e).

In *Lucia*, the final decision of the ALJ could likewise be appealed to the SEC for review but that "ma[d]e no difference" to the Court—the ALJs still wielded significant executive power. *Lucia*, 138 S. Ct. at 2054.[4] And the SEC standard of review here, like in *Lucia*, is limited. 15 U.S.C. § 78s(e); s*ee also In re Daniel D. Manoff*, 55 S.E.C. 1155, n.6 (2002) (stating credibility determinations made by the factfinder, NASD—FINRA's predecessor—"deserve 'special weight'" and "can be overcome only when there is 'substantial evidence' for doing so").

In sum, if the SEC ALJs are executive officers, per *Lucia* and *Arthrex*, then FINRA's Board, and its OHO and NAC hearing officers must be too. But these FINRA

[4] In this case, the Appointments Clause analysis dictates the applicability of the state-action doctrine. *See, e.g*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) ("[A]ctions of private entities can sometimes be regarded as governmental action for constitutional purposes."). Because FINRA's officers exercise significant executive power under *Lucia*, their conduct here is state action. And that makes sense because the government cannot outsource a blatant constitutional violation to a private entity to avoid constitutional liability. *See Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 118 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023) ("[A] state cannot delegate duties that 'it is constitutionally obligated to provide and leave its citizens with no means for vindication of those [constitutional] rights.'").

officers are not appointed by the President, or SEC commissioners (heads of departments), or courts of law. Their appointment violates the Appointments Clause. Black and SEI are likely to prevail on the merits of this claim.

B. FINRA's Exercise of Governmental Power Violates the Private Nondelegation Doctrine

FINRA's public enforcement function violates the separation of powers. It is a private entity exercising legislative, executive, and judicial powers. It makes its own rules with the force of law, it executes federal securities laws, SEC regulations, and its own rules, and it adjudicates violations of all of those laws, regulations, and rules. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands … may justly be pronounced the very definition of tyranny." *United States v. Brown*, 381 U.S. 437, 443 (1965) (quoting The Federalist, No. 47, pp. 373–74 (Hamilton ed. 1880)).

To safeguard the separation of powers, the Constitution forbids the delegation of government power to a private party. The "nondelegation principle serves both to separate powers as specified in the Constitution, and to retain power in the governmental Departments so that delegation does not frustrate the constitutional design." *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004) (simplified). The Constitution generally "permits no delegation." *Id.* Thus, when Congress delegates authority to an agency, that delegation must be accompanied by an "intelligible principle" to direct the agency's discretion. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

The standard is not so relaxed, however, when Congress delegates government power to a private entity, particularly the power to bind other private parties. The delegation of government power to a private party such as FINRA is "delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). Such a delegation is particularly problematic because it is "not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.*

The Court in *Carter Coal* voided a law giving coal producers and miners the power to set minimum wages and maximum hours in their industry. The Court explained the core of the private nondelegation problem in *Carter Coal*: "in the very nature of things, one person may not be intrusted with the power to regulate the business of another … [a]nd a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Id.*; *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (deeming it "obvious" that a delegation of government power "to trade or industrial associations or groups so as to empower them to enact the laws … for … their trade or industries … is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.").

The Fourth Circuit has also confirmed that "Congress … may not give [private] entities governmental power over others." *Pittston*, 368 F.3d at 395. "[T]he Constitution recognizes no governmental powers vested in private entities." *Kerpen*

v. Metro. Washington Airports Auth., 907 F.3d 152, 161 (4th Cir. 2018). The actions FINRA took against Black and SEI are "necessarily a government function" that must constitutionally remain with a public body. *Id.* at 162.

FINRA is a private party exercising government power over other private parties. FINRA is a registered securities association—a self-regulatory organization—which is a private party exercising significant governmental power over the private securities market. "FINRA has the authority to create and enforce rules for its members to provide 'regulatory oversight of all securities firms that do business with the public.'" *Morgan Keegan & Co. v. Silverman*, 706 F.3d 562, 563 (4th Cir. 2013). "FINRA is empowered to bring disciplinary actions and impose sanctions to enforce its members' compliance with federal securities laws, SEC regulations, and FINRA's own rules and regulations." *Birkelbach*, 751 F.3d at 475. And it is the "sole self-regulatory organization chartered under the Exchange Act and exercises comprehensive oversight of the securities industry." *UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319, 326 (4th Cir. 2013). Therefore, all who wish to do securities business must register with FINRA and are subject to the illegal exercise of its trifold concentration of government power. 15 U.S.C. §§ 78o(a), 78o(b).

What's more, FINRA profits from the civil penalties it imposes. In 2021, FINRA reported that it collected $103 million in fines, which became part of its operating budget. *See* 2021 FINRA Financial Annual Report at 1, 3, 9, https://www.finra.org/sites/default/files/2022-06/2021-FINRA-Financial-Annual-Report.pdf. This makes the delegation to FINRA more egregious because it involves

the exercise of monopolistic government power over a private industry by a financially self-interested private entity. *See Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 821 F.3d 19, 27 (D.C. Cir. 2016) (finding a due-process violation for "an economically self-interested entity" to "exercise regulatory authority over its rivals.").

C. FINRA's Private Adjudication Violates Article III

FINRA's adjudication of federal securities laws in its in-house tribunal also violates Article III, the Seventh Amendment, and the Fifth Amendment's Due Process Clause.

When an agency seeks to enforce its regulations and laws in a federal court, the Seventh Amendment guarantees the right to a trial by jury. The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. Suits at common law include those created by statute where the action is analogous to a suit that would otherwise be brought at common law. *Tull v. United States*, 481 U.S. 412, 417 (1987). A civil penalty suit is a "sui[t] at common law" subject to the protections of the Seventh Amendment, which requires a jury trial. *Id.* at 418–19 ("Actions by the Government to recover civil penalties under statutory provisions therefore historically have been viewed as one type of action in debt requiring trial by jury."); *see also Gonzalez v. Sessions*, 894 F.3d 131, 139 (4th Cir. 2018) ("[R]emedies intended to punish culpable individuals … were issued by courts of law[.]" (quoting *Tull*, 481 U.S. at 422)).

And enforcement of federal securities laws is analogous to the penalty provisions in *Tull*. In *Tull*, "the Government sought penalties of over $22 million for

violation of the Clean Water Act and obtained a judgment in the sum of $325,000." 481 U.S. at 420. Such penalties were "clearly analogous to the 18th-century action in debt, and federal courts … rightly assumed that the Seventh Amendment required a jury trial." *Id.*; *see also id.* at 422 ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law.").

Here, FINRA has enforced Section 17(a) of the Exchange Act, SEC Rule 17a-4 (17 C.F.R. § 240.17a-4), and various FINRA rules in its public enforcement action, which resulted in a penalty award of $146,500 against Black and SEI. FINRA's action to recover civil penalties, authorized by 15 U.S.C. §§ 78s(g)(1) and 78o-3(b)(7), requires trial by a jury in an Article III court.

The adjudication of Black's and SEI's rights is performed by FINRA, which is not a federal agency. Indeed, Congress *limited* the SEC's involvement in the adjudication of these federal statutes and regulations, guaranteeing only eventual and meaningless review of a final decision from FINRA. Thus, Congress attempted to take enforcement of federal statutes *away* from an agency, to be exercised by a private party—FINRA.

The Supreme Court has never blessed a delegation of this sort. Indeed, its precedents allow Congress to "delegate [adjudicatory] power to executive officers," "reserve" the power for itself, "or . . . commit it to judicial tribunals," but each of those is a branch of the government otherwise accountable to the People. *See Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). Article III forbids "Congress [from] completely oust[ing] the courts of all determinations of fact by vesting the authority

to make them with finality in its own instrumentalities or in the executive department," and, as a corollary, would seem to also bar Congress from evading even administrative review by delegating adjudication entirely to a private entity. *See Crowell v. Benson*, 285 U.S. 22, 56–57 (1932); *see also* Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1247–48 (1994) (arguing it would violate Article III "if Congress provided for judicial review but ordered the courts to affirm the agency no matter what" and "[t]here is no reason to think that it is any different if Congress instead simply orders courts to put a thumb (or perhaps two forearms) on the agency's side of the scale."). Accordingly, Article III does not allow FINRA's scheme of private adjudication.

II. Black and SEI Suffer and Will Continue to Suffer Irreparable Harm in the Absence of a Preliminary Injunction

Black and SEI are suffering irreparable harm. They are presently subjected to FINRA's unconstitutional adjudication of Black and SEI's liberty and property. FINRA's adjudication presents a "here-and-now injury." *See Axon*, 598 U.S. at 191. FINRA and SEC's violations of constitutional structure continue to significantly harm Black and SEI. *See Bond v. United States*, 564 U.S. 211, 222–23 (2011). Black and SEI have spent eight years in FINRA and SEC adjudication only to land right back where they started. Now they face that same unconstitutional process again. But under *Axon* they do not have to go through the administrative process and suffer the very injury they are suing to prevent. *Axon*, 598 U.S. at 191 (holding "the 'here-and-now' injury of subjection to an unconstitutionally structured decisionmaking process" can be asserted before the proceeding ends, otherwise the plaintiff "will lose

their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over.").

Courts routinely hold "a deprivation of a constitutional right, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Miranda v. Garland*, 34 F.4th 338, 365 (4th Cir. 2022) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Moreso here. Black and SEI have lost time, money, and suffered reputational injuries that can never be remedied but a preliminary injunction now can prevent further irreparable injury.[5]

Finally, the SEC, NAC, and OHO have all disagreed over FINRA's enforcement theory of the case. First, FINRA pursued five charges against Black and SEI. The OHO found against Black and SEI on all five counts, fined them $243,000, and permanently barred Black from the industry, The NAC disagreed with the OHO, reduced the fine to $146,000, and vacated the findings that (1) Black maintained deficient supervisory systems related to emails, (2) SEI and Black failed to maintain emails properly, and (3) SEI willfully failed to maintain certain emails. *Id.* ¶ 30. Then, the SEC further disagreed with the NAC and OHO, finding a sufficient allegation of spoliation against FINRA to lift the lifetime bar on Black and then remanded the case to FINRA's OHO for a redo. This series of internal agency contradictions leading Black and SEI on a seven-year odyssey back to where they started continues to place

[5] It makes no difference that, at the end of the administrative process, a court of appeals may eventually review the constitutional defects in this administrative proceeding. As long as Black and SEI are mired in a process that is unlawful, having already been fined and excluded from the industry, they suffer present injuries that can only be remedied by immediate court intervention. *See Axon*, 598 U.S. at 191.

their rights and property in jeopardy, continues to demonstrate that FINRA and SEC's prosecution continues to irreparably harm Black and SEI, and it shows that they are likely to succeed on the merits of their claims.

III. The Public Interest and Balance of the Equities Favor Preliminarily Enjoining FINRA and SEC Adjudication

The public interest and equities tip in favor of protecting Black's and SEI's constitutional rights. First, Fourth Circuit precedent "counsels that 'a state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction.'" *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 191 (4th Cir. 2013) (quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)). The precedent "also teaches that 'upholding constitutional rights surely serves the public interest.'" *Id.* Black and SEI's likelihood of success on the merits of their constitutional claims tips these factors in their favor.

Further, Black and SEI have never harmed any clients. FINRA never alleged Black and SEI ever harmed any clients. Yet, after seven years in FINRA's adjudicatory process, Black and SEI are again being hauled before FINRA's OHO for re-adjudication to give FINRA yet another chance to prove what it failed to prove the first time. The public interest and balance of equities favor Black and SEI.

Conclusion

Black and SEI are likely to succeed on the merits of their constitutional claims. Supreme Court and Circuit Court precedent squarely dictates the outcome in this case. Black and SEI continue to suffer irreparable harm to their constitutional rights

because they are subjected to FINRA and SEC's unconstitutional adjudication. Enjoining private and agency adjudication of Black and SEI's liberty and property is in the public interest and the balance of equities favors such an injunction. The Court should so hold and enjoin FINRA and SEC's adjudication against Black and SEI.

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2023, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and served upon the following:

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