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, INC.; and SECURITIES AND EXCHANGE COMMISSION, Defendants.	**No. 3:23-CV-709-RJC-DCK** **PLAINTIFFS' OPPOSITION TO FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.'S MOTION TO DISMISS (D.E.73)**

The Court should deny Defendant Financial Industry Regulatory Authority, Inc.'s (FINRA) motion to dismiss Plaintiffs' complaint for lack of subject-matter jurisdiction. Plaintiffs Frank Harmon Black (Black) and Southeast Investments, N.C., Inc. (Southeast) brought this suit to challenge the structural constitutionality of administrative adjudication at FINRA and Securities and Exchange Commission (SEC). FINRA/SEC adjudication is structurally unconstitutional because (1) it violates Article III and the Fifth and Seventh Amendments, (2) it violates the private nondelegation doctrine, and (3) FINRA's hearing officers are improperly appointed. D.E.1; D.E.45.

FINRA now claims that (1) its dismissal of the claims SEC remanded to FINRA for re-litigation moots Plaintiffs' claims, and (2) the potential of review in the Fourth Circuit bars litigation in this Court. D.E.73:1, D.E.73-1:i.

Defendant SEC does not join FINRA's motion to dismiss. SEC correctly informed the Fourth Circuit in case number 25-1718 on July 21, 2025, that the SEC

proceeding is currently pending. And FINRA's submission in the Fourth Circuit on July 21, 2025, did not dispute that.

Based on FINRA and SEC's submissions in the Fourth Circuit, if FINRA does not withdraw the motion to dismiss it filed in this Court, then this Court should deny FINRA's motion. The administrative proceeding is ongoing at SEC, which is fatal to FINRA's mootness argument. And FINRA hasn't shown how each of the three structural claims and each form of relief Black/Southeast seek here (declaration, injunction, damages, D.E.1 ¶¶ 79–84) is moot. FINRA's suggestion of mootness is not based on any precedent recognizing mootness due to change in factual circumstances.

Background

A. In-House Adjudication Framework at FINRA and SEC

SEC has broad authority over the securities industry, including oversight of brokers and dealers, pursuant to the Exchange Act of 1934. Brokers and dealers who want to buy and sell securities must register with SEC and become members of a private self-regulatory organization. 15 U.S.C. § 78o(b)(1). These private organizations, subject to SEC review, are authorized to "enforce compliance" by their members with the Exchange Act and the "rules and regulations thereunder." 15 U.S.C. § 78s(g)(1).

FINRA, a private, nonprofit Delaware corporation, is the only self-regulatory organization registered with SEC. *Id.* §§ 78c(a)(26), 78o-3; *Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1321 (D.C. Cir. 2024); *Turbeville v. FINRA*, 874 F.3d 1268, 1270 n.2 (11th Cir. 2017).[1]

[1] FINRA is headed by a 22-member board of governors selected in accordance with FINRA's internal procedures; SEC has no input or supervision over FINRA's internal appointment process for its governing board. FINRA Board of Governors, https://t.ly/myfAC. FINRA's calendar year 2024 revenue was $1,684.9 million, of which $65.4 million resulted from fines levied by FINRA through in-house disciplinary proceedings. FINRA 2024 Annual Financial Report, at 9, https://t.ly/lQ7bw.

To enforce compliance with the Exchange Act, FINRA proceeds exclusively through in-house enforcement actions before its own Office of Hearing Officers. FINRA Rules 9211–9213, 9268. That hearing proceeds without a jury, with FINRA's own procedural and evidentiary rules of practice. If discipline is warranted, FINRA has three tools to enforce compliance under 15 U.S.C. § 78o-3(b)(2). First, FINRA has the power to impose practice bars or expel members—either of which prohibits members from participating in the securities industry, which has often been referred to as "the securities industry equivalent of capital punishment." *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013) (simplified). This remedy becomes "effective immediately" and remains in effect throughout a respondent's appeal. FINRA Rule 9268(f)(2). Second, FINRA has the power to impose civil monetary penalties. When it does so, FINRA keeps the money; the monies do not go into the federal government's treasury. FINRA Rule 8320(a). Third, restitution is payable to harmed investors if FINRA can prove such harm to specific investors. FINRA Enforcement, https://t.ly/3vYxF. FINRA thus deprives members of liberty (practice bars, expulsions) or property (monetary fines, restitution), for violation of federal securities law, via its in-house adjudication machinery.

An appeal from the Office of Hearing Officers goes to another FINRA internal department, the National Adjudicatory Council. FINRA Rule 9311, 9348–9349. If FINRA's board of governors does not review the Council's decision, then the Council's decision becomes final. FINRA Rule 9349(c). If the governing board reviews the Council's decision, then the governing board's decision is FINRA's final decision. *Id.*

An appeal from FINRA's final decision comes to SEC. FINRA Rule 9370; 15 U.S.C. §§ 78s(d)–(h). If SEC remands FINRA's decision for re-litigation, partially or fully, then the enforcement target has to go through the same FINRA in-house proceeding again. *Black v. SEC*, 125 F.4th 541 (4th Cir. 2025). The case then returns

to SEC. FINRA Rule 9370; 15 U.S.C. § 78s(d)–(h). And an appeal from SEC's fully final decision goes to the appropriate circuit court. 15 U.S.C. § 78y(a)(1).

During this multi-level proceeding, no jury and no Article III judge are involved in fact finding or in saying what the law is. Those roles are assigned to FINRA's hearing officers, and then to SEC. FINRA Rules 9268, 9370. When the case is eventually in front of a federal circuit court, the court must defer to agency-found facts under the substantial-evidence standard, 15 U.S.C. § 78y, and often defer to what FINRA or SEC say the law is, without the court itself saying what it is.

B. Black and Southeast

Mr. Black has been in the securities industry since 1971. He formed Southeast Investments, N.C., Inc. in 1997. During the relevant period of 2010 to 2015, Black owned 95%–100% of Southeast. Southeast has been a FINRA member firm since 1997. JA1062.[2]

During the relevant period, Southeast engaged in general retail securities business, with a home office in Charlotte, North Carolina. *Id.* Southeast had between 114 and 133 registered financial professionals, known as registered representatives, located throughout the United States. *Id.*

C. Administrative and Court Proceedings

In September 2015, FINRA's Department of Enforcement filed a five-cause complaint against Black/Southeast, alleging deficient record retention and supervision, JA1065; JA0138–JA0150, even while FINRA failed to retain evidence exculpatory to Black/Southeast, JA1076.[3] FINRA's Hearing Panel found for FINRA

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[2] References to the record are available in Plaintiffs' Statement of Undisputed Material Facts, D.E.45-2, D.E.45-3.

[3] FINRA admitted that its officials "may have caused the inadvertent loss of the notes," JA1075, which was the basis for SEC to conclude that FINRA Enforcement was "negligent," "the alleged spoliation may justify an adverse inference against FINRA Enforcement," and remand that portion for re-litigation to FINRA, JA1076, and a basis for FINRA to later dismiss that portion of its case against Black/Southeast, D.E.69-1:8 n.14 & D.E.69-1:11.

on all five counts, permanently barred Black from the securities industry, and fined Black/Southeast $243,000. JA0782–JA0783.

Black/Southeast appealed to FINRA's Adjudicatory Council, which in May 2019 affirmed in part and reversed in part the FINRA Hearing Panel's decision. JA0863–JA0864. The Adjudicatory Council reduced the fine to $146,500 but upheld the lifetime practice bar against Black. *Id.* The practice bar went into effect on May 23, 2019, JA0820. Black/Southeast appealed to SEC, which did nothing.

Over four years later, with the lifetime bar still in effect, Black/Southeast filed their complaint here. D.E.1 (Oct. 30, 2023). Black/Southeast allege that the adjudication at FINRA/SEC is unconstitutionally structured because (1) it violates Article III, and the Fifth and Seventh Amendments to the Constitution, (2) violates the private nondelegation doctrine, and (3) FINRA's adjudicators are not properly appointed. D.E.1.

Thirty-eight days later, perhaps having been prompted by the federal district court action, SEC issued its decision in December 2023. JA1061. SEC affirmed in part, and set aside and remanded in part, FINRA's decision. JA1082. First, SEC affirmed FINRA's holding regarding deficient supervision over business-related communications because a Southeast representative did not preserve 16 emails (they were personal emails of the representative's wife, JA0119), and imposed a $73,500 fine. JA1082. Second, SEC reversed FINRA's holding that Black/Southeast submitted false documents and testimony to FINRA because FINRA spoliated evidence exculpatory to Black/Southeast and because FINRA's failure was not harmless error, which "may justify an adverse inference against FINRA Enforcement." JA1076. SEC remanded this claim to FINRA for re-litigation. JA1062.

Black/Southeast petitioned the Fourth Circuit to review SEC's December 2023 decision. JA1083–JA1086. And the parties agreed to stay, and this Court stayed, this case pending decision of the Fourth Circuit, D.E.42, and the parties agreed to hold,

and the FINRA adjudicator granted, a stay of FINRA proceedings that were on remand from SEC.

The Fourth Circuit concluded in January 2025 that SEC's partial affirmance and partial remand to FINRA makes SEC's entire order non-final, and therefore that the Fourth Circuit lacked jurisdiction over the appeal. *Black v. SEC*, 125 F.4th 541, 547 (4th Cir. 2025).

Following the Fourth Circuit's decision, FINRA's Adjudicatory Council asked for supplemental briefing (in which Black/Southeast requested FINRA to continue the stay of proceedings), but ultimately refused to stay FINRA proceedings in deference to the pending case in this Court. With or without the stay, the bottom line was that administrative proceeding remained ongoing, so Black/Southeast filed a motion for summary judgment in this Court. D.E.45. Black/Southeast's motion for summary judgment presents structural claims, all of which are pure questions of law, and no material facts are in dispute. Black/Southeast argue in the summary-judgment motion that judgment be entered in their favor on all counts because FINRA/SEC adjudication is unconstitutionally structured since (1) it violates Article III, and the Fifth and Seventh Amendments to the Constitution, (2) violates the private nondelegation doctrine, and (3) FINRA's adjudicators are not properly appointed. D.E.45-1:1–2. These are structural claims of "subjection to an illegitimate administrative proceeding led by an illegitimate decisionmaker." *Axon Enter., Inc. v. FTC*, 598 U.S.175, 191 (2023). SEC/FINRA filed cross-motions for summary judgment, and all cross-motions were fully briefed as of May 23, 2025. D.E.45, D.E.49–D.E.52, D.E.55–D.E.57, D.E.65–67.

Two weeks later, on June 6, 2025, FINRA's Adjudicatory Council further trimmed its own case against Black/Southeast and decided to dismiss the claim SEC had remanded to FINRA for re-litigation. That FINRA decision kept in place SEC's

December 2023 affirmance of the $73,500 fine against Black/Southeast. D.E.69, D.E. 69-1.

FINRA's June 6 decision triggered five things:

- First, Black/Southeast fully informed this Court of the multi-stage twists and turns necessitated by FINRA's unilateral action and requested this Court to rule as early as practicable on the parties' fully briefed cross-motions for summary judgment. D.E.70, D.E.71:3 (filed June 25, 2025). Briefing of that motion is complete and awaits this Court's decision as of this filing.

- Second, Black/Southeast filed a motion to dismiss with SEC, asking SEC to dismiss FINRA's entire administrative case in the hope of obtaining a fully final appealable order from SEC.[4] That briefing is ongoing; SEC is expected to rule on the pending motion at some point in time.

- Third, exercising abundance of caution, lest they lose the sixty-day time window to petition the Fourth Circuit under 15 U.S.C. § 78y(a)(1), Black/Southeast filed a petition for review and have asked the Fourth Circuit to determine whether it has jurisdiction if it concludes that SEC's December 2023 decision is now final as of June 6, 2025. *Black v. SEC*, No. 25-1718 (4th Cir.). Briefing of the motion for jurisdictional determination is complete; the Fourth Circuit is expected to rule on the motion in the coming months.

- Fourth, FINRA requested, and the Fourth Circuit granted to FINRA, intervention in the Fourth Circuit case.

- Fifth, on July 9, 2025, FINRA filed a motion to dismiss, asking this Court to dismiss this case in its entirety, D.E.73, D.E.73-1, despite having actual notice and knowledge as of June 25 and July 2, 2025, that the SEC proceeding is

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[4] Black/Southeast filed the motion with the SEC on July 2, 2025, and served it on FINRA the same day. *In re Black*, SEC No. 3-19185. Yet, in its motion to dismiss filed in this Court on July 9, 2025, FINRA refused to exercise candor by failing to note this important fact for the Court's benefit. *See* D.E.73-1:11 n.3.

currently ongoing. This filing is Black/Southeast's opposition to FINRA's motion to dismiss.

Since objection to federal courts' jurisdiction can neither be waived nor forfeited by the parties, the parties are in no position to streamline these various proceedings by agreement because each federal court has jurisdiction to decide whether it has jurisdiction.

Standard of Review

A Fed. R. Civ. P. 12(b)(1) movant, here FINRA, must show "lack of subject-matter jurisdiction." If a case is moot, the court lacks subject-matter jurisdiction, requiring dismissal of the case. *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 757 (4th Cir. 2011). The movant must establish mootness "for each claim" and "for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008).

Where, as here, there is "an ongoing injury" to the plaintiffs due to the ongoing FINRA/SEC administrative proceeding that plaintiffs challenge is unconstitutionally structured, that ongoing injury "is sufficient to prevent the case from being moot." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000). Where, as here, a defendant suggests mootness because that defendant "completed violation of [the plaintiff's] legal right," "damages provide the necessary redress" that "save[s] a case from mootness." *Uzuegbunam v. Preczewski*, 592 U.S. 279, 284, 293 (2021); D.E.1 ¶¶ 79–84 (request for relief including, inter alia, damages).

Summary of Argument

FINRA filed a Rule 12(b)(1) motion for "lack of subject-matter jurisdiction" to suggest that a change in factual circumstances moots the "entir[e]" case in this Court. D.E.73-1:6, D.E.73-1:9 ("change in the facts"). As basis for the motion, FINRA presents two changed factual circumstances: (1) dismissal of FINRA's portion of the administrative matter, and (2) pending action in the Fourth Circuit. D.E.73-1:i.

Neither is a sufficient basis to moot this case because Black/Southeast's structural claims are "here-and-now" claims that remain live because the administrative proceeding at SEC is currently ongoing. *Axon*, 598 U.S. at 191. And the resulting harm persists even if Black/Southeast eventually prevail in front of SEC, where the administrative proceeding is currently pending, because the harm does not arise out of "this or that ruling" of the administrative decisionmaker, "but from subjection to all agency authority." *Id.* at 191, 195. This Court has subject-matter jurisdiction "under 28 U.S.C. § 1331," *id.* at 182, to decide whether FINRA/SEC adjudication is unconstitutionally structured, and this Court may fully redress Black/Southeast's injuries by issuing declaratory as well as other relief. D.E.1 ¶¶ 79–84 (relief requested, including declaratory and damages relief); *Uzuegbunam*, 592 U.S. 279 (holding that where violation of a legal right is complete, a request for damages keeps the case live).

FINRA does not show mootness as to "each claim" and "each form of relief." *Davis*, 554 U.S. at 734. If mootness of all three claims ((1) administrative proceeding without an Article III judge and jury, (2) private nondelegation, (3) improper appointment of administrative adjudicators) and all relief sought (declaration, injunction, damages, D.E.1) turns on whether there is an ongoing administrative proceeding—it does not—then the ongoing SEC proceeding plainly demonstrates lack of mootness here.

Finally, FINRA's miscellaneous arguments are all unavailing as discussed below. The Court should deny FINRA's motion to dismiss. D.E.73, D.E.73-1.

Argument

I. SEC Proceeding Is Ongoing

As noted, the SEC proceeding is currently ongoing. SEC previously took over four years to decide the case, only to partially affirm and partially remand back to FINRA for re-litigation. After conclusion of FINRA's portion of the administrative

proceeding on June 6, 2025, SEC could do the same here—take months if not years to issue a decision, or issue a remand to FINRA to decide in the first instance whether the portion of the case relating to 16 missing emails should be dismissed because FINRA failed to prove that those emails were business related. Either way, Black/Southeast challenge the constitutionality of subjection to this FINRA/SEC proceeding, and because that proceeding is currently ongoing, the case in this Court is not moot.

A "here-and-now injury" exists if there is an ongoing allegedly unconstitutional administrative proceeding. *Axon*, 598 U.S. at 191. FINRA admits as much. D.E.73-1:1, D.E.73-1:11. That ongoing proceeding is the SEC proceeding, which occurs after FINRA's portion of the proceeding concludes, as FINRA itself confirms. D.E.73-1:3. The fact that Black/Southeast "are no longer the subjects of an ongoing FINRA disciplinary proceeding" is a half-truth because Black/Southeast are the subjects of an ongoing administrative proceeding. D.E.73-1:1.

Black/Southeast claim that FINRA/SEC adjudication as currently structured is unconstitutional—that it is unconstitutional for FINRA/SEC to proceed against them administratively for three constitutional reasons given in the three-count complaint, D.E.1, and explained in the summary-judgment motion, D.E.45. *Axon*, 598 U.S. at 180. Those structural claims are certainly live since the administrative proceeding at SEC is currently ongoing. Also, that structural injury—"subjection to an illegitimate administrative proceeding, led by an illegitimate decisionmaker"—is plainly traceable to FINRA/SEC actions, and remains redressable (through declaratory, injunctive, damages, or other form of relief, D.E.1 ¶¶ 79–84) by this Court even if Black/Southeast "*w*[*i*]*n*" in front of SEC at the conclusion of the currently-pending SEC proceeding. *Axon*, 598 U.S. at 191; *Davis*, 554 U.S. at 734 (mootness is evaluated "for each claim" and "for each form of relief sought").

In any event, the ongoing nature of the SEC proceeding is not a change in factual circumstances that could moot this case; the SEC proceeding was ongoing when Black/Southeast filed the complaint in this Court in October 2023. D.E.1. Thirty-eight days later, SEC purported to issue a final decision and order, JA1061, JA1082, that in the Fourth Circuit's view was not final after all. *Black v. SEC*, 125 F.4th at 547. Procedural gamesmanship by FINRA/SEC is insufficient to moot claims in federal district court based on change in factual circumstances. The Court should so hold and reject FINRA's mootness argument.

Axon held that federal district courts have 28 U.S.C. § 1331 subject-matter jurisdiction to decide whether the challenged administrative adjudication is unconstitutionally structured irrespective of whether that adjudication is ongoing or complete. And the Supreme Court in *Uzuegbunam* held that a case is not mooted just because the plaintiff's alleged injury is complete; relief in the form of damages redresses the plaintiff's injury in such circumstances. 592 U.S. at 292. So too here.

Black/Southeast's three structural claims—unconstitutional FINRA/SEC adjudication structure due to (1) lack of jury trial in federal district court under Article III, and Fifth and Seventh Amendments, (2) unconstitutional delegation of governmental power to a private entity, and (3) improper appointment of administrative adjudicators—do not arise out of "this or that ruling" of the administrative adjudicator, but rather "from subjection to all agency authority." *Axon*, 598 U.S. at 195. Declaratory relief, as requested by Black/Southeast in the motion for summary judgment, D.E.45, redresses that structural injury if the administrative proceeding remains ongoing at the time this Court decides the summary-judgment motion. Relief in addition to a declaration, including injunction or damages—as requested by Black/Southeast, D.E.1 ¶¶ 79–84, and as can be shown by filing supplemental post-decision briefs as to appropriate remedies—would redress Black/Southeast's grievance of having been subjected to an unconstitutionally

structured administrative proceeding. The two factual developments noted by FINRA simply do not show how "each claim" and "each form of relief sought" here is moot. *Davis*, 554 U.S. at 734.

The Court should so hold and deny FINRA's motion to dismiss. D.E.73.

II. FINRA's Arguments to the Contrary Are Unavailing

FINRA ignores the above crucial points that govern mootness of cases due to factual developments. FINRA's miscellaneous arguments are all beside the point.

First, FINRA maintains that "dismissal of FINRA's disciplinary proceeding … forecloses [Black/Southeast's] attempt to invoke *Axon*'s narrow exception" because the Exchange Act "vests exclusive jurisdiction … in [the Fourth Circuit]." D.E.73-1:6–7. That argument lacks merit because (1) the SEC proceeding is ongoing, and (2) *Axon* confirms district courts' jurisdiction to decide structural claims under 28 U.S.C. § 1331 precisely because the jurisdiction of circuit courts under the Exchange Act is not "exclusive" as to the structural claims here. 598 U.S. at 186. FINRA's argument also doesn't show why this case is thereby moot. FINRA has not shown how it meets the standard for mootness set by *Davis* and *Uzuegbunam*; FINRA's attempt to create some new rule for mootness based on the exclusivity argument that the unanimous Supreme Court *rejected* in *Axon* is not supported by established precedent.

Second, FINRA says Black/Southeast would be entitled to petition for review only if they are *aggrieved* by SEC's decision. D.E.73-1:5 (quoting *Black v. SEC*, 125 F.4th at 547 (Black/Southeast "must await the conclusion of the remand proceedings to FINRA, and only then—if they are ultimately 'aggrieved' by the SEC's 'final order' resolving the entire case—will they be entitled to petition for review by [the Fourth Circuit].")). Let's run that thought experiment. It is theoretically possible for SEC to dismiss the entire case against Black/Southeast; Black/Southeast have asked SEC to do just that in the motion to dismiss they filed with SEC. If SEC agrees, Black/Southeast would not be aggrieved by SEC's decision and would have no need

to petition the Fourth Circuit for review. But Black/Southeast's "separation-of-powers claim [in this Court] is not about that [SEC] order; indeed [Black/Southeast] would have the same claim [if they] *w*[*i*]*n* before [SEC]." *Axon*, 598 U.S. at 191. About that structural claim, "the court of appeals can do nothing" if SEC dismisses all of FINRA's administrative claims brought against Black/Southeast. *Id.* And if SEC rules against Black/Southeast, "the court of appeals can [still] do nothing" (other than "vacate the [SEC]'s order") because "[a] proceeding that has already happened cannot be undone." *Id.* In contrast, Black/Southeast claim declaration, injunction, damages, and other relief that is available to them in this Court. Compare that with the limited relief—"petition requesting that the [SEC] order be modified or set aside in whole or in part," 15 U.S.C. § 78y(a)(1)—that is available in the Fourth Circuit. By pointing to the possibility of limited, if any, relief available directly in the Fourth Circuit, FINRA fails to show how "each claim" and "each form of relief that is sought" here is thereby moot. *Davis*, 554 U.S. at 734.

Third, FINRA's reliance on the voluntary cessation doctrine does not help FINRA. D.E.73-1:9 (discussing *Porter v. Clark*, 852 F.3d 358 (4th Cir. 2017)). In *Porter*, a state death row inmate sued prison officials for allegedly cruel and unusual conditions of confinement. 852 F.3d at 360. After the inmate filed the complaint in federal district court, the prison officials "changed the policies … addressing virtually all of the issues" the inmate's complaint raised. *Id.* The district court concluded that these factual developments mooted the inmate's action, but the Fourth Circuit reversed. *Id.* The Fourth Circuit applied the established rule that a defendant's "voluntary cessation of the challenged practice" does not moot cases. *Id.* FINRA here did not "chang[e]" or "ce[ase]" the practice of administratively proceeding against enforcement targets in general or against Black/Southeast in particular. *Id.* Indeed, FINRA employed the very practice that Black/Southeast challenge here to dismiss the causes SEC had remanded to FINRA for re-litigation. That is not "cessation"

under any definition of the term. *Id.* So, by discussing *Porter*, if FINRA wants this Court to apply the voluntary cessation doctrine, this case would still not be moot because even fixing the challenged practice does not moot cases, per *Porter*. And FINRA has not ceased the practice here nor fixed it; rather it has used it against Black/Southeast.

Fourth, FINRA's discussion of *Jolley v. United States*, No. 21-5181, 2024 WL 1521633 (D.C. Cir. Apr. 9, 2024), does not help FINRA. D.E.73-1:9. In *Jolley*, the D.C. Circuit "d[id] not decide" the *Axon* question as to whether the employee's claims "go to the structure or very existence of an agency" that is at issue here. *Id.* at *4 (simplified). So, *Jolley*, an unpublished decision of the D.C. Circuit, cannot be considered apposite here, much less "binding precedent." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). FINRA is unable to forge a passage around *Davis* and *Uzuegbunam*: FINRA has not met its burden to show mootness of "each claim" and "each form of relief" based on a change in factual circumstances. 554 U.S. at 734.

Fifth, factual developments during litigation also do not moot cases if the defendant does not offer for judgment to be entered against the defendant. *Simmons*, 634 F.3d at 764–65. FINRA has not offered for judgment to be entered against FINRA. Nor can FINRA offer that judgment be entered against SEC, the remaining Defendant in this case—only SEC can make that offer, but hasn't. That lack of offer is dispositive and the basis for this Court to deny FINRA's motion to dismiss.

In *Simmons*, employees sued their employer seeking overtime under the Fair Labor Standards Act. 634 F.3d at 757–58. The defendant employer offered a settlement agreement. *Id.* at 766–67. The district court dismissed the case as moot, but the Fourth Circuit reversed and vacated the district court's order. *Id.* at 769. The Fourth Circuit concluded, "the offer for 'full relief in this case' did not offer for judgment to be entered against the [employer], but rather only offered for the parties

to enter into a settlement agreement." *Id.* at 764. Because that was not "a judgment against the Defendants for full relief," such settlement offers do not moot cases. *Id.* at 765.

Likewise, here. FINRA's dismissing its portion of the administrative proceeding cannot be construed as an offer that judgment be entered by this Court against FINRA and SEC to provide "full relief" to Black/Southeast. *Id.* at 764. FINRA maintains that FINRA/SEC adjudication is constitutionally structured, and does not ask for judgment to be entered against FINRA or SEC. Similarly, Black/Southeast's filing a protective petition for review in the Fourth Circuit does not constitute an offer *by FINRA* that judgment be entered against FINRA/SEC due to the structural unconstitutionality of its adjudicatory apparatus.

Sixth, FINRA says "parallel litigation in this Court and the Fourth Circuit … would also waste limited judicial resources and violate the longstanding rule against claim-splitting," D.E.73-1:2, but also says that Black/Southeast "must request a new, final order from the SEC," D.E.73-1:11. This is where FINRA's suggestion of mootness falls apart. Black/Southeast have already filed a motion to dismiss with SEC (filed on July 2, 2025), and the SEC proceeding is currently ongoing—an important fact fatal to FINRA's mootness argument that FINRA chooses not to address in the motion to dismiss that FINRA filed on July 9, 2025 and cannot now address for the first time in the reply. D.E.73, D.E.73-1. FINRA's suggestion of mootness here is just another ill-conceived procedural trap designed to leave SEC Commissioners, this Court, and judges of the Fourth Circuit occupied with contemplating what (in)action the other will take or fail to take, all while leaving Black/Southeast in FINRA's view with no option but to obtain an order from SEC that to FINRA's satisfaction would be truly final. That SEC order may never come, it may come tomorrow, or it may come four years from now like the previous one—or maybe SEC's December 2023 order was final after all and the sixty days to appeal from that order have long ago come and

gone, or the Fourth Circuit, in FINRA's ever-shifting imagination, might have been wrong to have concluded otherwise, or SEC might remand to FINRA for further re-litigation the remainder of the case like it did before, JA1076. FINRA's dissatisfaction with "parallel litigation" is of FINRA's own making. D.E.73-1:2. The litigation in this Court is not about "this or that" SEC order. *Axon*, 598 U.S. at 195. And litigation in the Fourth Circuit is focused on whether there is a final SEC order to begin with. The same facts might be relevant to both cases, but that doesn't make litigation here and in the Fourth Circuit "parallel." D.E.73-1:2. The issue about the structural unconstitutionality of FINRA/SEC adjudication that Black/Southeast ask this Court to decide is different from the question currently before the Fourth Circuit: whether SEC's December 2023 order is final as of June 6, 2025. And if SEC's order is final, the Fourth Circuit can only "modif[y]" or "set [it] aside," 15 U.S.C. § 78y(a)(1), while only this Court has the 28 U.S.C. §§ 1331, 2201 initial jurisdiction to issue declaratory, injunctive, and/or damages relief if it concludes that FINRA/SEC adjudication is structurally unconstitutional. FINRA has not shown how "each claim" and "each form of relief that is sought" here is moot. *Davis*, 554 U.S. at 734.

Federal court jurisdiction cannot be conferred or taken away based on degree of party satisfaction or agreement. This Court unquestionably has 28 U.S.C. § 1331 subject-matter jurisdiction to decide whether this entire FINRA/SEC administrative adjudicatory mousetrap is structurally unconstitutional. And FINRA has satisfied neither *Davis* nor *Uzuegbunam*—far from it. The Court should so hold and deny FINRA's motion to dismiss.

Conclusion

The Court should deny FINRA's motion to dismiss (D.E.73).

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Respectfully submitted,

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