No. 23-2297

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRANK HARMON BLACK; and
SOUTHEAST INVESTMENTS, N.C., INC.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

and

FINANCIAL INDUSTRY REGULATORY AUTHORITY,

Intervenor.

On Petition for Review of the Decision and Order of the Securities and Exchange Commission under 15 U.S.C. §78y(a)(1)

PETITIONERS' REPLY BRIEF

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Introduction

The Financial Industries Regulatory Authority (FINRA) and the Securities and Exchange Commission (SEC) are together the nation's chief regulator for securities brokers and dealers. FINRA, using its homebrew quasi-judicial system, concluded that Frank Harmon Black and his firm Southeast Investments, N.C., Inc., violated federal law. As a result, FINRA imposed a six-figure monetary fine on Black/Southeast, and banished Black from the securities industry for life.

Even SEC thinks FINRA's decision was egregious. SEC reduced the six-figure fine to $73,500, JA1062, and lifted the lifetime bar—but only after SEC gave itself 24 extensions across four-and-a-half years to issue its decision, JA0018-JA0020.

There is ample indication in the record that FINRA's enforcement arm botched its case against Black/Southeast and then attempted to cover up FINRA's fool's errand while making Black/Southeast spend a pretty penny and a decade litigating the matter to this Court only for SEC/FINRA to boldly assert in this Court that it cannot even hear their plight. SEC/FINRA want this Court to direct an 83-year-old Mr. Black to submit once again to the very same three levels of bureaucracy Black/Southeast claim is unconstitutional so that SEC/FINRA can take another decade to issue a decision that could again be nonfinal in SEC/FINRA's view. This Court should swiftly put an end to such a travesty of fairness and justice.

This Court has the power to decide structural constitutional questions. *See infra* Part V. FINRA/SEC's in-house adjudication violates the Seventh Amendment, Article III, the Fifth Amendment's Due Process Clause, the Article II Appointments Clause, and the private nondelegation doctrine. *See infra* Parts I-IV. This Court should once and for all lay the matter to rest by (1) vacating the SEC decision and order and (2) enjoining FINRA/SEC from taking further adverse action against Black/Southeast.

Argument

I. *Jarkesy* Confirms Black/Southeast's Right to a Jury Trial

After the opening brief was filed but before the SEC/FINRA briefs were due, the Supreme Court decided *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024). The Supreme Court confirms what Black/Southeast argued in the opening brief: FINRA/SEC's in-house adjudication violates Article III and the Seventh Amendment. Petitioners' Opening Brief (POB) 30-41. It also violates the Fifth Amendment's Due Process Clause. POB41-50; *Jarkesy*, 144 S.Ct. at 2139-54 (Gorsuch, J., concurring). SEC/FINRA's attempt to argue around *Jarkesy* fails. SEC67-68; FINRA38-40.

A. FINRA Seeks a Legal Remedy Based on a Legal Claim

Jarkesy confirmed that juries are required when the suit is "legal in nature." 144 S.Ct. at 2128. A suit is legal in nature when it involves (1) monetary penalties and (2) legal claims. *Id.* at 2129. Here, SEC/FINRA ask for (1) monetary penalties against Black/Southeast for

(2) fraud, perjury, and negligent recordkeeping, which are all legal claims. Therefore, Black/Southeast are entitled to a jury trial.

Of these two *Jarkesy* factors, "remedy" is the "more important" and "all but dispositive." *Id.* at 2129. Here, SEC/FINRA seek civil penalties against Black/Southeast. And *Jarkesy* confirms that "money damages are the prototypical common law remedy." *Id.* at 2129; *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33 (1989); *Tull v. United States*, 481 U.S. 412 (1987); POB40 (arguing same). Civil penalties are distinguished from equitable remedies like restitution based on the penalties' purpose to punish the wrongdoer. *Jarkesy*, 144 S.Ct. at 2129. The penalty imposed here, if upheld, will be paid to FINRA to be "used for" FINRA's "general corporate purposes," FINRA Rule 8320(a), including "performance-based" "[i]ncentive compensation" for hearing officers, FINRA 2023 Annual Financial Report, at 25, https://t.ly/TcNwp; neither SEC nor FINRA claims it will "return any money to [nonexistent] victims" of Black/Southeast. *Jarkesy*, 144 S.Ct. at 2130. Nor have SEC/FINRA alleged much less proven any investor harm whatsoever, meaning that this case, by SEC/FINRA's own admission, does not involve "return [of] unjustly obtained funds." *Id.* at 2129. Because SEC/FINRA's civil penalty is punitive, it is a legal remedy. *Id.*

Second, the nature of the "cause[s] of action" against Black/Southeast only "confirms that" Black/Southeast are "entitled to a jury on [FINRA's] claims." *Id.* at 2130. The remanded claim against

Black/Southeast is for "misrepresenting or concealing material facts." *Id.*; FINRA8-9 ("cover up," "providing false documents and testimony"). And the affirmed claim is for wrongful record retention and supervision. Because these causes of action bear a "close relationship" to "common law fraud," they are legal claims that must be heard by a jury. 144 S.Ct. at 2130. Indeed, *Jarkesy* addressed securities-fraud claims and acknowledged the "enduring link" between securities fraud and "its common law ancestor." *Id.* (simplified). It is irrelevant that the statutory or regulatory law at issue proscribes conduct that is "narrower" or "broader" than the common law, or that it "only targets certain subject matter and certain disclosures." *Id.* at 2131; *see* FINRA39 (asserting that the record-disclosure "requirements at issue are far different" than the common law). "[T]he close relationship … with common law fraud" remains "enduring" and "confirms that this action is 'legal in nature,'" which entitles Black/Southeast to a trial by jury. *Id.* at 2130-31 (quoting *Granfinanciera*, 492 U.S. at 53).

In sum, because SEC/FINRA's action involves (1) monetary penalties and (2) legal claims, Black/Southeast are entitled to a jury trial. *Jarkesy*, 144 S.Ct. at 2128-29.

B. The Public-Rights Exception Does Not Apply

Jarkesy reaffirmed the black-letter separation-of-powers principle that:

(1) "adjudication by an Article III court is *mandatory*" if a suit "concerns private rights," 144 S.Ct. at 2132 (emphasis added); and

(2) "with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the *presumption* is in favor of Article III courts." *Id.* at 2134 (emphasis added).

SEC/FINRA fail to rebut that presumption. SEC only obliquely argues that FINRA's suit against Black/Southeast concerns public rights—and for good reason, since *Jarkesy* dismantled every single argument SEC presented to the Supreme Court. SEC66-69. Tellingly, SEC does not even mention *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977), opting instead to discuss the inapposite *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855). FINRA attempts to present a more fleshed-out albeit self-defeating argument based on *Atlas Roofing*. FINRA37-40. The argument for applying the public-rights exception lacks merit here for at least five reasons.

First, *Jarkesy* cabined the public-rights exception to *six* categories of cases, and this case is not one of them:

(1) "revenue collection by a sovereign," in a suit where the tax official failed to deposit taxes he collected into the public treasury, 144 S.Ct. at 2132, 2134 (discussing *Murray's Lessee*);

(2) immigration, *id.* at 2132-33;

(3) tariffs on imports, *id.* at 2133;

(4) "relations with Indian tribes," *id.* at 2133;

(5) "administration of public lands," *id.*;

(6) "granting of public benefits such as payments to veterans, pensions, and patent rights," *id.* (simplified).

SEC/FINRA do not explain why the claims FINRA asserts against Black/Southeast should be added as a seventh category. Nor can they because "[t]he public rights exception is, after all, an *exception* [that] has no textual basis in the Constitution." *Id.* at 2134. And the burden is on SEC/FINRA to overcome the "presumption" that Article III courts decide suits involving public rights. *Id.* at 2134. The Supreme Court "has typically evaluated the legal basis for the assertion of the [public-rights] doctrine with care," and has "t[aken] pains to justify the application of the exception." *Id.* at 2133-34. SEC/FINRA, on the other hand, have taken no such pains to explain to this Court the legal basis for their proposed expansion of the pubic-rights exception.

Second, SEC/FINRA's argument ultimately fails even under *Atlas Roofing*'s circular definition of public rights—"cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes," 430 U.S. at 450—because here FINRA, a private entity, brought suit against Black/Southeast. *Jarkesy*, 144 S.Ct. at 2139 (explaining *Atlas Roofing*'s "circular" "definition" of the "public rights exception"). SEC/FINRA themselves insist on FINRA's status as a private actor. By SEC/FINRA's own telling, therefore, this is a private-versus-private suit to collect monies to which the public-rights exception,

as articulated by *Atlas Roofing*, simply cannot apply. The Court should so conclude even if it is not prepared to candidly acknowledge that "*Granfinanciera* … overruled *Atlas Roofing*." *Id.* at 2137 n.3.

Third, FINRA's reliance (SEC does not even mention the case) on other portions of *Atlas Roofing* is also misplaced. In *Atlas Roofing*, the Supreme Court held that the claims at issue there—violations of the Occupational Safety and Health Act—were "unknown to the common law." *Jarkesy*, 144 S.Ct. at 2133-34 (quoting *Atlas Roofing*, 430 U.S. at 461). *Atlas Roofing* involved claims under a law "requiring the sides of trenches …to be … [sufficiently] supported," 430 U.S. at 447, which *Jarkesy* said carried "no common law soil with them." *Jarkesy*, 144 S.Ct. at 2137. The opposite is true here. The claims of fraud, perjury, forgery, and negligence here are very much known to the common law (FINRA8-9), as SEC/FINRA readily admit: SEC/FINRA explain that the statutes and regulations Black/Southeast are accused of violating come from a "long tradition," SEC67, dating back to "the 1790s" that "Congress embraced and perpetuated in the 1930s." FINRA39. There is nothing "self-consciously novel" about FINRA's claims that would lead this Court to conclude that they "bring no common law soil with them." *Jarkesy*, 144 S.Ct. at 2137.

Fourth, FINRA's consent-by-membership argument, FINRA37, does not somehow make a matter involving private rights one involving public rights. FINRA's invocation, *id.*, of *CFTC v. Schor*, 478 U.S. 833

(1986), in support of its argument—where no Seventh Amendment claims were presented—is misplaced. *Schor* involved an "express waiver" where the counterclaimant "elect[ed] to forgo his right to proceed in state or federal court" on his state-law counterclaim. *Id.* at 849. Here, the FINRA adjudication was brought by FINRA against Black/Southeast, where FINRA did not have to plead fraud allegations with particularity as would have been the case had it filed suit in federal court, and where Black/Southeast did not even have the right to file a motion to dismiss (FINRA Rule 9215). And after *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023), recognized the right to present structural constitutional challenges directly in federal court, Black/Southeast pressed their structural constitutional arguments in federal district court in a parallel proceeding, JA1096, and then here, in an appeal from SEC's decision and order. Black/Southeast never "elect[ed] to forgo [their] right to proceed in … federal court." *Schor*, 478 U.S. at 850.

Fifth, FINRA's argument that it is not subject to Article III or the Seventh Amendment because it is a private entity, FINRA35-37, is meritless. "Delaware corporation[s]," FINRA6, have sued and have been sued for centuries in the courts of "The First State," as well as in federal courts for all manner of legal disputes. Under the Constitution, it is plain that an "action in debt requir[es] trial by jury." *Jarkesy*, 144 S.Ct. at 2129. FINRA does not even attempt to reconcile its position with binding Supreme Court precedent.

Ultimately, because FINRA/SEC seek monetary penalties from Black/Southeast for legal claims, *Jarkesy* controls. In *Jarkesy*, as here, ruling on the Seventh Amendment question is sufficient to dispose of this entire case. The Court should vacate the SEC's decision, and enjoin SEC/FINRA from taking further adverse action against Black/Southeast.

C. FINRA/SEC Adjudication Violates Article III and the Due Process Clause

The principal flaw in SEC/FINRA's due-process arguments is their failure to recognize that the Seventh Amendment "operates together with Article III and the Due Process Clause of the Fifth Amendment" to "vindicate the Constitution's promise of a 'fair trial in a fair tribunal.'" *Jarkesy*, 144 S.Ct. at 2140 (Gorsuch, J., concurring) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). And that's precisely how Black/Southeast presented the due-process arguments to this Court. POB30-31. SEC/FINRA do not address that argument and have therefore waived arguments they could have presented on this point. *Stokes v. Stirling*, 64 F.4th 131, 137 (4th Cir. 2023) ("[A]ppellees waive arguments by failing to brief them.") (simplified).

SEC/FINRA present cursory arguments with respect to the Fifth Amendment's Due Process Clause. SEC69-72; FINRA40-44. They address only two—bias and impermissible profit motive—of the four due-process violations. POB41-50. Neither addresses the remaining two arguments—(1) due process requires judicial process in Article III courts,

and (2) eventual and deferential judicial review is insufficient. SEC/FINRA have waived arguments they could have presented against the latter two due-process violations. *Stokes*, 64 F.4th at 137.

SEC/FINRA's arguments regarding bias and FINRA's profit motive lack merit. First, due process precludes FINRA from being "a judge in [it]s own case." *In re Murchison*, 349 U.S. at 136. Second, due process precludes the adjudicating entity from having a financial incentive to raise revenue through its decisions. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Even a "possible temptation to the average man" is enough to flunk the due-process requirement that the adjudicator have no profit motive. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

But FINRA/SEC claim that SEC's oversight neutralizes FINRA's bias and impermissible profit motive. SEC71; FINRA40-41. That is incorrect. Trial-level procedures cannot "be deemed constitutionally acceptable simply because" there is a possibility that SEC review will "eventually offe[r]" some degree of impartiality. *Ward*, 409 U.S. at 61-62.

At day's end, FINRA adjudicators levy fines that their employer FINRA pockets. FINRA Rule 8320(a). The outcome is the same after SEC affirms FINRA's decision in full or in part—FINRA still gets the fine. *See Axon*, 598 U.S. at 215-16 (Gorsuch, J., concurring) (noting that regulated parties almost always lose in front of SEC). SEC/FINRA do not suggest that FINRA's "incentive" to fine "would be diminished by the possibility of reversal on appeal" to SEC. *Ward*, 409 U.S. at 62-62. FINRA's profit

motive is both direct and impermissible here. Consequently, the Court should vacate SEC's decision without remand.

II. FINRA/SEC Adjudication Violates the Private Nondelegation Doctrine

Article III cases and controversies cannot be assigned for adjudication to a non-governmental entity. "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Jarkesy*, 144 S.Ct. at 2134; *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (holding that the delegation of government power to a private entity is "delegation in its most obnoxious form"). Therefore, Congress and SEC's vesting in FINRA the "judicial Power of the United States," U.S. Const. art. III, § 1, violates the private nondelegation doctrine.

But SEC/FINRA's argument regarding the private nondelegation doctrine largely focuses on confirming what the parties do not dispute: that FINRA is a non-governmental entity. SEC48-58; FINRA33-35. In the main, SEC argues that FINRA is a "permissible aid[e] and adviso[r]" to SEC because it is "under the close supervision" of SEC. SEC50. FINRA argues the same when it says it is under "SEC's comprehensive oversight." FINRA33. Their principal case appears to be *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023). SEC48-50; FINRA34-35.

But *Oklahoma* does not help SEC/FINRA. There, the Sixth Circuit held that the Horseracing Integrity and Safety Act's (HISA's) delegation of *legislative* power to the private Horseracing Integrity and Safety Authority to promulgate *rules* does not violate the private nondelegation doctrine. 62 F.4th at 229-30. The Sixth Circuit, in dicta, mentions SEC's control over "private, self-regulatory organizations," in the context of legislative-power delegations, *id.* at 229, but is otherwise careful not to create precedent as to whether federal *judicial* power can be delegated to a private entity such as FINRA. Contrary to SEC/FINRA's argument, the Sixth Circuit confirms: "Private entities may serve as advisors that propose regulations. And they may undertake ministerial functions, such as fee collection. But a private entity may not be the principal decisionmaker in the use of federal power, may not create federal law, may not wield equal power with a federal agency, or regulate unilaterally." *Id.* (simplified; collecting cases).

Each of these forbidden features is present in FINRA adjudication. FINRA is the "principal decisionmaker," *id.*, when it adjudicates cases in its in-house tribunals. FINRA Rules 9211-9213, 9268, 9311. And FINRA does not need, nor ask for, SEC's sign-off to file a complaint with its hearing officers. FINRA Rule 9211; *see also* FINRA Rules 8210, 8310, 8313, 9120, 9235(a), 9268(f). SEC has no "close supervision," SEC50, nor "comprehensive oversight," FINRA33, over the adjudication until a timely appeal after two levels of FINRA in-house adjudication is filed

with SEC. FINRA Rule 9370. And during that in-house adjudication, FINRA "create[s] federal law" by (a) interpreting statutes and rules, (b) penalizing conduct FINRA determines to have violated its interpretation of statutes and regulations, and (c) "wield[ing] equal power with [SEC]" when FINRA's hearing officers do everything that SEC's ALJs do. *Oklahoma*, 62 F.4th at 229; POB22-23. Permitting FINRA to "regulate unilaterally" in this way violates the private nondelegation doctrine. *Id.* (citing *National Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 872 (5th Cir. 2022)).

SEC provides a string cite, SEC50 n.2, for the proposition that many courts have upheld the delegation of *adjudicatory* authority to FINRA. Not so. What may be true for delegations of federal legislative power is not necessarily true for delegations of federal judicial power because Congress cannot give away that which "it does not possess." *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (citing *INS v. Chadha*, 462 U.S. 919, 954-55 (1983)); *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 132 (2015) (Thomas, J., concurring) ("Lacking the power itself, it cannot delegate that power to an agency.").

As they do elsewhere, SEC/FINRA rely on cases that do not address the issues in this case. Thus, the constitutional arguments at issue here were "not raised in briefs … nor discussed in the opinion of the Court" in cases SEC/FINRA cite, so those cases cannot be considered as "binding precedent on this point." *United States v. L.A. Tucker Truck Lines, Inc.*,

344 U.S. 33, 38 (1952). In the end, SEC/FINRA are left with precious little except to latch on to dictum about SEC in FTC/horseracing cases. But obiter dictum is not binding precedent. *Payne v. Taslimi*, 998 F.3d 648, 654-55 (4th Cir. 2021).

This Court's job is to provide the "best reading" without affording deference. *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2263 (2024). If "the best reading of the statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress *subject to constitutional limits*." *Id.* (emphasis added). The private nondelegation doctrine is one such constitutional limit, which prohibits Congress or SEC from outsourcing the judicial power of the United States to FINRA, "a private, not-for-profit Delaware corporation." FINRA6. The Court should so hold, vacate SEC's decision, and enjoin SEC/FINRA from taking further action against Black/Southeast.

III. FINRA's Hearing Officers Are Not Properly Appointed

FINRA hearing officers exercise significant government power and, therefore, are subject to the Appointments Clause. But the hearing officers who oversaw the action against Black/Southeast were not properly appointed. As a result, the action should be vacated.

SEC/FINRA's principal response is misdirection. They argue that FINRA is private enough for purposes of the jury-trial and due-process claims, but public enough to survive the private nondelegation doctrine.

With regards to the Appointments Clause, SEC/FINRA switch again to the FINRA-is-private refrain. SEC58-66; FINRA23-33. To the contrary, Black/Southeast have consistently assumed that FINRA is a private entity—"a private, not-for-profit, Delaware corporation," as FINRA puts it. FINRA6. That private corporate form, however, has no bearing on the Appointments Clause analysis, just as it has no bearing on the other structural constitutional arguments.

The principal case SEC/FINRA proffer to support their argument states that SEC/FINRA cannot "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). The corporate form is not a factor under the Supreme Court's Appointments Clause cases. What the Constitution requires is simply that individuals who are vested with "significant" government power, *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), must be appointed in conformity with the Appointments Clause. FINRA's hearing officers are such officers.

As Black/Southeast showed, POB18-25, FINRA's hearing officers are vested with significant government power. They are carbon copies of SEC's ALJs, which the Supreme Court held were officers requiring appointment under the Appointments Clause of Article II. *Lucia v. SEC*, 585 U.S. 237, 245-52 (2018).

FINRA's hearing officers wield significant government power because they "must … 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)). SEC/FINRA do not dispute that "the enforcement of federal law" is significant government power. *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982); *Seila Law LLC v. CFPB*, 591 U.S. 197, 219, 225 (2020) (same regarding "set[ting] enforcement priorities, initiat[ing] prosecutions, and determin[ing] what penalties to impose on private parties"); *Morrison v. Olson*, 487 U.S. 654, 696 (1988) (same regarding "the power to initiate an investigation"); *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 202 (1928) (same regarding "appoint[ing] the agents charged with the duty of … enforc[ing federal law]").

SEC/FINRA also do not dispute that the statutory/regulatory scheme "governing [FINRA] actions parallels [SEC's] internal adjudicative structures." *Nat'l Ass'n of Sec. Dealers, Inc. v. SEC*, 431 F.3d 803, 806 (D.C. Cir. 2005) (*NASD*). And FINRA admits that it engages in "vigorous … enforcement of … federal securities laws and rules." *Enforcement: Who We Are*, FINRA, https://bit.ly/3QYSvL0.

Also, if FINRA proceedings "supplan[t] a disciplinary action that might otherwise start with a hearing before an [SEC] ALJ," *NASD*, 431 F.3d at 806, those proceedings must still be overseen by properly appointed officers. *Lucia*, 585 U.S. at 254; *Brooks v. Kijakazi*, 60 F.4th 735, 740 (4th Cir. 2023) (holding that *Lucia*'s holding "appl[ies] broadly"). The Constitution requires inferior officers to be appointed either by the President with the advice and consent of the Senate or by heads of

departments. *Edmond v. United States*, 520 U.S. 651, 660 (1997) (confirming that inferior officers can be appointed by heads of departments). But here, "FINRA's board is selected by FINRA's members, not the government." FINRA7. The SEC neither appoints FINRA's hearing officers nor even claims the power to ratify the appointments of FINRA hearing officers, as it did in *Lucia*, 585 U.S. at 252 n.6. SEC/FINRA's attempt to hide behind FINRA's "corporate form," therefore, is a naked attempt to "evade the most solemn obligations imposed in the Constitution." *Lebron*, 513 U.S. at 397. Because FINRA's personnel exercise significant government power, they must be properly appointed under Article II. But they were not. So, their decision against Black/Southeast must be set aside.

Further, *Lucia* rested on the premise that "SEC may decide to conduct Lucia's rehearing itself," or "it may assign the hearing to an ALJ who has received a constitutional appointment independent of the ratification." 585 U.S. at 252 n.6. But here, SEC does not want to "itself" "conduct [the] rehearing" that it remanded to FINRA. In other words, it would have been relatively easy for SEC to render the Appointments Clause issue moot by itself conducting the evidentiary hearing. But the remand portion of the SEC's order establishes SEC's continued unconstitutional vesting of significant government power in a private entity's personnel—all of which compounds the Appointments Clause problem. *Lucia*, 585 U.S. at 252 n.6.

Cases SEC/FINRA cite in support of their Appointments Clause argument do not help them. They cite *Jones v. SEC*, 115 F.3d 1173 (4th Cir. 1997), which involved double-jeopardy and res judicata issues that are not relevant to the Appointments Clause question, and other circuit-court cases,[1] which contain neither the claims nor the analyses presented here. SEC64-66; FINRA30; FINRA36. And the three federal district court cases FINRA cites, FINRA30 n.6, likewise do not contain Appointments Clause claims or analyses.[2] Therefore, because these arguments were "not raised in briefs … nor discussed in the opinion of the Court," this Court cannot consider them as "binding precedent on th[ose] point[s]." *L.A. Tucker Truck Lines*, 344 U.S. at 38.

The only Appointments Clause case that SEC/FINRA cite—*Kerpen v. Metropolitan Washington Airports Authority*, 907 F.3d 152 (4th Cir. 2018)—does not help SEC/FINRA either. SEC24; SEC63-64; FINRA27-

[1] *D.L. Cromwell Investors, Inc. v. NASD Regulation, Inc.*, 279 F.3d 155 (2d Cir. 2002) (involving the state-action doctrine); *Epstein v. SEC*, 416 F. App'x 142 (3d Cir. 2010) (same); *First Jersey Secretary, Inc. v. Bergen*, 605 F.2d 690 (3d Cir. 1979) (involving the district court's lack of jurisdiction); *Desiderio v. NASD*, 191 F.3d 198 (2d Cir. 1999) (involving Title VII employment discrimination claims).

[2] *Flowers v. Wells Fargo Advisors, LLC,* No. 7:12-CV-00052-BR, 2013 WL 361106, at *3 (E.D.N.C. Jan. 30, 2013) (involving private arbitration and state-law claims that FINRA removed to federal district court); *Cecala v. Nationsbank Corp.*, No. 3:00MC39-MU, 2001 WL 36127812, at *2 (W.D.N.C. Apr. 4, 2001) (involving private voluntary arbitration); *Shrader v. National Ass'n of Securities Dealers, Inc.*, 855 F. Supp. 122, 124 (E.D.N.C. 1994) (same).

28; FINRA33. *Kerpen* rejected an Appointments Clause challenge as to the Metropolitan Washington Airports Authority because it was local, not because it was private. *Kerpen*, 907 F.3d at 160. And, in any event, *Kerpen* does not even attempt to apply binding Supreme Court precedent on the Appointments Clause—*Lucia v. SEC*, 585 U.S. 237 (2018)—which was issued (June 2018) before *Kerpen* was argued (September 2018) and decided (October 2018).

Because the FINRA officers were not properly appointed when they enforced federal securities law and found against Black/Southeast, this Court should vacate SEC's affirmance and SEC's remand to those same FINRA hearing officers. And this Court should enjoin SEC/FINRA from taking further adverse action against Black/Southeast based on SEC/FINRA's wanton disregard of the Appointments Clause.

IV. The Court Should Vacate SEC's Decision and Enjoin FINRA/SEC's Further Action Against Black/Southeast

A. Statutes Require Vacatur Without Remand

This case is before this Court pursuant to 15 U.S.C. § 78y, which spells out the remedies this Court can award. Remand from this Court to SEC is improper under 15 U.S.C. § 78y, which contemplates a limited-purpose remand only if any party applies to this Court to "adduce additional evidence." 15 U.S.C. § 78y(a)(5). In the absence of such a motion to adduce additional evidence decided by this Court, this Court may only "affirm or modify and enforce or … set aside the order in whole

or in part." 15 U.S.C. § 78y(a)(3). The Administrative Procedure Act, 5 U.S.C. § 706(2), also confirms the scope of this Court's orders: "hold unlawful and set aside agency action, findings, and conclusions found to" not meet the listed standards.

SEC/FINRA do not argue that if Black/Southeast win on any question presented, then vacatur of SEC's decision is inappropriate. Nor do they argue that this Court should not enjoin SEC/FINRA from taking any further action against Black/Southeast. Nor could SEC/FINRA so argue because remand from this Court to SEC would be unusual in ordinary circumstances; more so here, where there is no request to "adduce additional evidence." 15 U.S.C. § 78y(a)(5).

B. The Substantial-Evidence Standard Is Inapplicable Here

SEC asks this Court to apply the substantial-evidence standard to review facts and posits that the standard is "highly deferential." SEC25. This is incorrect for at least three reasons.

First, it is improper to apply the substantial-evidence standard to facts not found by a jury. According to the Constitution, "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, *than according to the rules of the common law*." U.S. Const. amend. VII (emphasis added). The substantial-evidence standard of appellate review arose in the context of jury trials and applies *only* to jury-found facts. *See, e.g.*, *Mortensen v. United States*, 322 U.S. 369, 374 (1944); *Abrams v.*

United States, 250 U.S. 616, 619 (1919) ("A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict."). Its application to agency-found facts is improper.

Second, the SEC-specific judicial-review statute and the APA confirm as much. The SEC statute, 15 U.S.C. § 78y(a)(4), applies only to the "findings of the Commission as to the facts." Here, SEC did not find facts—it only reviewed facts found by FINRA. Therefore, § 78y(a)(4), by its plain terms, does not apply to this Court's review of the record. Further, under the Administrative Procedure Act, administratively adjudicated cases can be "otherwise reviewed on the record." 5 U.S.C. § 706(2)(E); *see also* 5 U.S.C. § 556(d) (stating that administrative adjudication must be based on "reliable, probative, and substantial evidence). Since there was no evidentiary hearing at SEC, and FINRA is not an "agency" of the United States, the APA substantial-evidence standard does not apply to FINRA's factual findings either.

Third, even if the Court were to apply the substantial-evidence standard, the standard is not as "deferential" as SEC makes it out to be. SEC25. "Substantial evidence" simply means evidence that "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939). To direct a verdict in a civil case, the court must "fin[d] that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue," where the party against whom the verdict is directed cannot prevail without "a favorable finding on that issue." Fed. R. Civ. P. 50(a). *See also* POB48-49 (arguing that adding the substantial-evidence standard to an already deferential scheme of administrative adjudication and judicial review is impermissible under the Due Process Clause). But as discussed next, SEC/FINRA have not shown either that Black/Southeast's email retention system was unreasonable or that there was any evidentiary basis for SEC's remand to FINRA.

C. SEC/FINRA Fail to Show Evidence Enough to Justify a Refusal to Direct a Verdict

FINRA found, and SEC affirmed, JA1069, that Black/Southeast violated 15 U.S.C. § 78q(a)(1), 17 C.F.R. 240.17a-4, NASD Rule 3010, FINRA Rules 2010, 3110, due to their "failure to preserve 16 emails." JA1082. But this finding cannot be sustained.

SEC concedes the applicable test is whether Black/Southeast's e-mail retention and supervision system was "reasonable." SEC26-30. But SEC points to no record evidence to support the affirmance of SEC's order. SEC26-30. Meanwhile, FINRA's brief is silent as to the merits of the alleged statutory and regulatory violations, so FINRA has waived

arguments it could have made in support of affirming SEC's order. *Stokes*, 64 F.4th at 137 ("[A]ppellees waive arguments by failing to brief them.").

Even assuming that this Court applies some version of the substantial-evidence standard, record evidence supports neither SEC's affirmance nor its remand. That is so for four reasons.

First, SEC cites only its own decision, not the underlying record. SEC26-30 (citing JA1069-1071). But the SEC did not find facts, *contra* SEC29 ("Commission's findings"); it reviewed FINRA-found facts. SEC ipse dixit is not sufficient to meet even the substantial-evidence standard that SEC urges this Court to apply, SEC25. *See Columbian*, 306 U.S. at 299, 300 (holding, after review of agency record, that NLRB failed to meet the substantial-evidence standard where NLRB's only proof was its own bland assertion).

Second, SEC cites two pieces of record evidence—the first-level FINRA decision, and two letters written by FINRA to Black/Southeast, SEC28 (citing JA0765-JA0767; JA0038; JA0055-JA0056), in support of the proposition that Black/Southeast did not maintain a reasonable record-retention system. That is all FINRA's say-so, which is also not proper evidence needed to support the finding. *See Columbian*, *supra*.

Moreover, one of the two FINRA letters refers to a "November 18, 2009 news release" in support of FINRA's proposition that Black/Southeast's email retention system was "[in]effective." JA0038.

More ipse dixit. Even if one were to assume that FINRA news releases that purport to interpret the law are akin to "interpretive rules" they still "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015).

The second of the two FINRA letters, like the first one, is an audit report where FINRA notes that given the "independent contractor model," and "the size … of the firm, it *appears* that the firm's current method of retaining and reviewing electronic correspondence is inadequate." JA0056 (emphasis added). The use of "appears" denotes something less than a firm opinion that the email retention system was in fact inadequate. In any event, the letters are not evidence that is enough to justify the refusal to direct a verdict. *Columbian*, 306 U.S. at 300.

Third, SEC maintains that recordkeeping requirements "cover all business-related correspondence including email." JA1069. But FINRA procured no evidence to suggest these 16 missing emails were business-related. *See* JA0119 (noting that the missing emails were personal emails of a Southeast representative's wife). In other words: What are these 16 missing emails? Are they simple acknowledgments saying things like "Received, thank you"? Are they non-business-related emails like wishing someone a "happy birthday"? Absent such evidence, as a matter of law, FINRA did not prove that Black/Southeast failed to retain "all *business-*

related correspondence." JA1069 (emphasis added). And, as Black/Southeast explained in their Opening Brief, SEC compounded the error when it misconstrued the applicable statutes and rules to mean that the FINRA-recommended honor-code system that Black/Southeast implemented is retroactively unreasonable. POB52-59.

Fourth, SEC remanded the question whether Black/Southeast committed forgery and perjury, but SEC does not argue that there is evidence in the record that would enable FINRA to prove those allegations. The interview notes that FINRA produced after the hearing conclusively rebut the testimony FINRA's four witnesses offered to FINRA's adjudicators—FINRA's witnesses said in the hearing that Black did not inspect their offices, JA1065; the late-produced documents show these same witnesses told FINRA interviewers that Black inspected their offices. JA1076; JA0058-JA0059. There is thus evidence in the record to disprove FINRA's theory of the case, based on which SEC should have set aside FINRA's decision regarding forgery and perjury. But it remanded instead, speculating that FINRA somehow might want to impeach its own—and only—witnesses on this issue. Such "[m]ere suspicions … are not sufficient to constitute substantial evidence." *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1260 (5th Cir. 1978). There is thus no evidentiary basis for SEC's remand.

FINRA's first-level adjudicating arm found in FINRA's favor based on this flimsy record and imposed a six-figure monetary fine and a

lifetime bar, but that fine has been successively reduced by FINRA's second-level adjudicator as well as by SEC, and SEC has now lifted the lifetime bar on Mr. Black that went on for more than four-and-a-half years. JA1068. The civil penalty now stands at $73,500. JA1062. Absent relevant, probative, substantial evidence, 5 U.S.C. § 556(d), a reasonable trier of fact would not find for FINRA. The Court should so hold, vacate the SEC decision which would also vacate the SEC/FINRA-imposed fine, and enjoin SEC/FINRA from taking further adverse action against Black/Southeast.

V. SEC/FINRA's Nonreviewability Arguments Are Meritless

A. Black/Southeast's Structural Constitutional Claims Are Properly Presented to This Court

SEC/FINRA argue that Black/Southeast failed to exhaust the constitutional questions presented. SEC38-47; FINRA20-22. Their argument relies principally on 15 U.S.C. § 78y(c)(1), which states: if "there was reasonable ground for failure to" "urg[e]" an "objection to an order … of the Commission," then such objection "may be considered by the court."

SEC/FINRA's argument cannot be squared with the Supreme Court's repeated determination that structural constitutional challenges are an exception to general principles of exhaustion. The failure to raise constitutional issues at SEC does not bar this Court's review.

The constitutional questions presented here go to the constitutional legitimacy and accountability of SEC/FINRA adjudication. *See Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 496 (2010). Because Black/Southeast's claims present a structural constitutional challenge, they can "be considered on appeal whether or not [they were] ruled upon below." *Freytag v. Comm'r*, 501 U.S. 868, 879 (1991); *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (noting "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers"). As in *Freytag*, this Court is "faced with a constitutional challenge that is neither frivolous nor disingenuous," and the Appointments Clause, private nondelegation doctrine, Article III, and Fifth and Seventh Amendment questions "g[o] to the validity" of the non-Article III adjudication in this case. 501 U.S. at 879. Exhaustion is inapposite.

Black/Southeast's challenge also "implicate[s] fundamental separation of powers concerns." *Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014). In *Noel Canning*, the D.C. Circuit excused exhaustion and reached the constitutional question, *id.* at 496-98, despite NLRA's more stringent exhaustion statute. *Compare* 29 U.S.C. § 160(e) (third sentence; "extraordinary circumstances") *with* 15 U.S.C. § 78y(c)(1) ("reasonable ground"). The *en banc* D.C. Circuit explained in *PHH Corp. v. CFPB*, 881 F.3d 75, 83 (D.C. Cir. 2018), *overruled on other grounds by Seila Law LLC v. CFPB*, 140 S.Ct. 2183

(2020): "we cannot avoid the constitutional question" because a remand to CFPB for further action "necessitates a decision on the constitutionality of the" ensuing non-Article III adjudication. Black/Southeast's structural constitutional claims are likewise pure questions of law going to the constitutionality of FINRA/SEC adjudication on remand that will not benefit from further development by them.

Moreover, neither SEC nor FINRA has power to resolve these claims, and it would have been futile for Black/Southeast to have raised them below. The Supreme Court has "consistently recognized a futility exception to exhaustion requirements." *Carr v. Saul*, 593 U.S. 83, 93 (2021) (simplified); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000). "It makes little sense to require litigants to present claims to adjudicators *who are powerless to grant the relief requested*." *Id.* (simplified; emphasis added); *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992) (explaining exceptions to exhaustion and collecting cases).

As in *Carr*, Black/Southeast "assert purely constitutional claims about which [SEC/FINRA officers/employees] have no special expertise and for which they can provide no relief." 593 U.S. at 93. Structural constitutional claims "are … outside [SEC/FINRA's] competence and expertise." *Free Enterprise Fund*, 561 U.S. at 491. Judges—not agencies—are the experts in the "field" of legal interpretation, a field which is "emphatically the province and duty of the judicial department."

Loper Bright, 144 S.Ct. at 2273 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). SEC/FINRA have already informed this Court of their view that SEC/FINRA's adjudication is constitutional in all respects; it is unlikely that either will depart from that view if this Court were to remand the matter for failure to exhaust.

Even assuming the exhaustion requirement applies here, there was ample "reasonable ground for fail[ing]" to raise the constitutional questions at any SEC/FINRA adjudication phases. 15 U.S.C. § 78y(c)(1). "Reasonable ground" is "not a high bar." *United States v. Ortiz*, 669 F.3d 439, 444 (4th Cir. 2012); *United States v. Bosyk*, 933 F.3d 319, 325 (4th Cir. 2019). "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

None of the cases SEC/FINRA cite in support of their exhaustion argument involved structural constitutional issues,[3] intervening change in the law,[4] a "reasonable ground" statute like 15 U.S.C. § 78y(c)(1),[5] or

[3] *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307 (4th Cir. 2017).

[4] *Malouf v. SEC*, 933 F.3d 1248 (10th Cir. 2019); *Edd Potter Coal Co. v. Dep't of Labor*, 39 F.4th 202 (4th Cir. 2022).

[5] *Ross v. Blake*, 578 U.S. 632 (2016); *Joseph Forrester Trucking v. Dep't of Labor*, 987 F.3d 581 (6th Cir. 2021); *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764 (8th Cir. 2013); *Heating, Air Conditioning & Refrigeration Distributors Int'l v. EPA*, 71 F.4th 59 (D.C. Cir. 2023).

post-date controlling Supreme Court precedent.[6] SEC39-41; FINRA20-22.

Further, FINRA rules contemplate that no constitutional claims are raised in the FINRA hearing. In 2015, after FINRA served its complaint on Black/Southeast, JA0002, Black/Southeast could not have filed a motion to dismiss the complaint because that motion is not allowed under FINRA Rule 9215. Nor is it reasonable to require Black/Southeast to have presented the constitutional arguments to SEC in 2019, JA0017, only to excuse SEC's four-and-half-year unexplained and unfair hiatus, JA0020, from issuing a decision.

Meanwhile, Mr. Black is 83 years old. SEC/FINRA would have him submit to the very same three levels of administrative adjudication that Black/Southeast claim is unconstitutional, only for SEC/FINRA to take another decade to issue a decision that could again be nonfinal in SEC/FINRA's view. The "here-and-now injury of subjection to an unconstitutionally structured decisionmaking process … [is] effectively lost if review is deferred until after" the "structural constitutional claims" are exhausted through administrative adjudication. *Axon*, 598 U.S. at 191-92 (simplified).

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[6] *Gonnella v. SEC*, 954 F.3d 536 (2d Cir. 2020); *Springsteen-Abbott v. SEC*, 989 F.3d 4 (D.C. Cir. 2021); *Cooper v. SEC*, 788 F. App'x 474 (9th Cir. 2019).

And, finally, the Supreme Court's ruling in *Axon*—that Appointments Clause claims and claims that persons can be deprived of property via non-Article III adjudication are "structural constitutional claims" that federal courts can decide in the first instance—came long after FINRA's action against Black/Southeast. *Id.* at 180, 191. Therefore, *Axon* represents an intervening change in law in a situation where the relief that is available through federal courts now "was not previously available," thereby justifying as "[r]easonable" Black/Southeast's "failure" to raise constitutional claims below. *Edd Potter Coal Co.*, 39 F.4th at 211 (simplified).

Black/Southeast had ample reasonable ground to ask this Court to decide federal constitutional questions. As such, Black/Southeast's structural constitutional claims are properly before this Court.

B. SEC's Order Is Final

While SEC argues that this Court "lacks jurisdiction" over the remand portion of SEC's order because that portion is "not a final order," SEC1-2, FINRA argues there is "no final SEC order subject to this Court's jurisdiction," FINRA15.[7] FINRA argues in the alternative that the remand portion of SEC's order is not final. FINRA19 n.2. These arguments are meritless.

[7] SEC itself rebuts FINRA's outlier position. *See* SEC34 (SEC's "reman[d] does not render [SEC's] entire opinion unreviewable.") (simplified).

For an agency order to be final, it should "mark the consummation of the agency's decisionmaking process" and should be "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (simplified). Both factors are easily met here. SEC's order marks the end of *SEC*'s decisionmaking process. And via that order, SEC both determined "rights or obligations" of Black/Southeast and FINRA, and "from which legal consequences will flow," *id.*—viz., re-litigation *at FINRA* of the remanded issues carrying the penalties of lifetime bar and monetary fines.

Cases SEC/FINRA cite all relate to SEC's remand orders concerning alleged statutory or rule violations,[8] not, as here, appeals alleging constitutional deficits in the resulting re-litigation on remand. Other cases SEC/FINRA cite that do not relate to SEC or FINRA at all, also involve no structural constitutional claims about the validity of the resulting agency proceeding as are present here.[9] Black/Southeast

[8] *Saliba v. SEC*, 47 F.4th 961 (9th Cir. 2022); *Gaskill v. SEC*, No. 23-1139, 2024 WL 2734998 (D.C. Cir. May 28, 2024).

[9] *Howard County v. FAA*, 970 F.3d 441 (4th Cir. 2020); *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426 (4th Cir. 2010); *Kouambo v. Barr*, 943 F.3d 205 (4th Cir. 2019); *Carolina Power & Light Co. v. Dep't of Labor*, 43 F.3d 912 (4th Cir. 1995); *Monterey Coal Co. v. FMSHRC*, 635 F.2d 291 (4th Cir. 1980); *Fieldcrest Mills, Inc. v. OSHRC*, 545 F.2d 1384 (4th Cir. 1976); *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031 (D.C. Cir. 2014); *Eggers v. Clinchfield Coal Co.*, 11 F.3d 35 (4th Cir. 1993).

challenge the constitutional validity of administratively depriving them of property without the benefit of jury trial. SEC/FINRA do not dispute that "legal consequences will flow" from the remand to FINRA, *Bennett*, 520 U.S. at 177-78—viz., a FINRA hearing or two would occur to administratively re-litigate certain matters. That hearing would be conducted by hearing officers appointed in active noncompliance with the Appointments Clause, the adjudication would occur inside a private entity in violation of the private nondelegation doctrine, and in that quasi-private and quasi-administrative adjudication FINRA would seek to deprive Black/Southeast of their private rights in violation of Article III and the Fifth and Seventh Amendments.

SEC/FINRA's nonfinality argument is meritless.

Conclusion

SEC/FINRA present FINRA as some local amateur pickleball club that ousted a septuagenarian member from its ranks and extracted a few dollars from him to add to the club's piggy bank. There is nothing to see here, SEC/FINRA say to this Court. But SEC/FINRA's presentation does not begin to "approximate reality." *Loper*, 144 S.Ct. at 2265.

SEC/FINRA want this Court to rule on a technicality to make the 83-year-old Mr. Black repeat a decade-long administrative process just to come back to this Court, perhaps when he is 93, to vindicate his constitutional right to a jury trial. And all that for 16 missing emails that FINRA failed to prove are business-related—not to mention FINRA's

egregious blunder of destroying records perhaps in an attempt to hide the fact that FINRA's own witnesses confirmed that Black inspected their offices, directly contrary to their testimony in the FINRA hearing.

The structure of SEC/FINRA adjudication is unconstitutional for numerous reasons. The Court should so hold and grant Black/Southeast full and complete relief. The Court should vacate SEC's decision and enjoin SEC/FINRA from taking further adverse action against Black/Southeast.

DATED: August 22, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and Local Rule 32(b), I certify that the attached brief is proportionally spaced, has a typeface of 14 points, and contains 7,655 words, which is within the 11,500 words allowed by the Court's Order dated August 7, 2024.

DATED: August 22, 2024.

s/ Aditya Dynar
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