ORAL ARGUMENT NOT YET SCHEDULED

No. 26-1006

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM JOSEPH KIELCZEWSKI,
Petitioner,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION and
FINANCIAL INDUSTRY REGULATORY AUTHORITY,
Respondent,
Intervenor for Respondent.

On Petition for Review of a Final Order
of the Securities and Exchange Commission
(Administrative Proceeding File 3-20636, SEC Release No. 104352)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER AND VACATUR

Cory L. Andrews
Zac Morgan
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
zmorgan@wlf.org

Counsel for Amicus Curiae

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Under D.C. Circuit Rule 28(a)(1), the undersigned counsel of record certifies:

A. Parties and Amici

All known parties and as-filed amici are listed in certificates in Petitioner's brief.

B. Ruling Under Review

The ruling under review is a Final Order of the Securities and Exchange Commission in Administrative Proceeding 3-20636, SEC Release No. 104352, upholding a disciplinary order of the Financial Industry Regulatory Authority.

C. Related Cases

There are no related cases.

/s/ Zac Morgan
Zac Morgan

STATEMENT ON AUTHORSHIP, MONETARY CONTRIBUTIONS, AND SEPARATE BRIEFING

No party's counsel authored any part of this brief and no one, other than Washington Legal Foundation and its counsel, contributed money intended to fund the brief's preparation and submission. Fed. R. App. P. 29(a)(4)(E).

WLF's brief is necessary to provide the Court with its unique perspective about the constitutional consequences of FINRA's governmentalization and the dangerous roadmap it offers Congress to erode Article II power if left to stand.

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GLOSSARY

CFPB	Consumer Financial Protection Bureau
DOJ	Department of Justice
FINRA	Financial Industry Regulatory Authority
IRS	Internal Revenue Service
SEC	Securities and Exchange Commission
WLF	Washington Legal Foundation

INTEREST OF AMICUS CURIAE

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free markets, individual rights, and the rule of law. To support that mission, WLF often appears as amicus curiae in the Supreme Court and this Court to ensure that executive power is lawfully wielded. *E.g.*, *Trump v. Slaughter*, 609 U.S. __ (2026); *Perkins Coie v. DOJ*, Case Nos. 25-5241, 25-5265, 25-5277, 25-5310 (D.C. Cir.).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution forbids privatizing the presidency. No outside company may issue pardons, no private military contractor gets to be Commander-in-Chief. Congress can't deputize American Express to run the IRS or place Archer Daniels Midland in control of the Department of Agriculture. Nor may a nonprofit like the Red Cross enforce (rather than follow) regulations written by the Department of Health and Human Services. Our national charter provides a straightforward blueprint for carrying out the laws. The President does so—through federal officers who work at his command and are appointed under the Constitution's dictates.

Those constitutional limits on the Executive's staffing are few but clear. Unless the Senate is in recess, the most powerful agents of the President (principal officers) must be confirmed before taking power, while those of lower rank (inferior officers) may be named by the heads of executive departments, the federal courts, or (with Congress's express sign-off) the President himself. There's no exception that allows for significant executive power to be wielded by private citizens "appointed" by a private company.

FINRA, unlike its predecessors stretching back to those twenty-four brokers meeting under a fabled buttonwood tree in 1792, Stuart Banner, *The Origin of the New York Stock Exchange, 1791-1860*, 27 J. of Legal Studies 113, 115 (1998), "regulates and oversees large parts of the securities industry" while enforcing federal law. *Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1318 (D.C. Cir. 2024) (*Alpine II*). To that end, FINRA gets to "effectively decide who can trade securities under federal law," sometimes "without *any* SEC review of its decision on the merits." *Id.* at 1328 (emphasis supplied). Yet despite those weighty powers, FINRA carries no appointed officers at all—principal or inferior. It professes to be little more than a modest nonprofit registered with the IRS, domiciled in Delaware.

Left untouched, this privatized agency structure offers a roadmap to evade the Supreme Court's recent decision in *Trump v. Slaughter*. Independent administrative agencies can be swiftly replaced with independent nonprofit corporations vested with a FINRA-like "enormous" purview. Jonathan Macey & Caroline Novogrod, *Enforcing Self-Regulatory Organization's Penalties and the Nature of Self-Regulation*, 40 Hofstra L. Rev. 963, 969 (2012). This would be even worse than the old independent administrative state, given that entities like FINRA feel free to sidestep the Constitution's procedural and substantive safeguards for defendants. The temptation to trade the Constitution's intentional "separation and equilibration of powers," *Morrison v. Olson*, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting), for a host of unbound not-for-profit federal agency knock-offs should be scrapped now. The Court should void the SEC's Final Order.

ARGUMENT

I. FINRA IS A GOVERNMENT AGENCY.

The Constitution is designed to preclude tyranny and so abhors unaccountable power. Those who work for the President must be accountable to him, *Slaughter*, Slip Op. 21, to ensure continuity of policy. A Chief Executive must be able to swiftly "check" a mischievous officer's "base intention" to betray the people's liberty or the Nation's security "before it is ripe for execution." 1 Annals of Cong. 493 (Rep. Ames); *cf. Morrison*, 487 U.S. at 727 (Scalia, J., dissenting) ("The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom"). In such cases, the public good cannot wait for "the slow formality of an impeachment" or the concurrence of the Senate before a malicious subordinate may be ousted. 1 Annals of Cong. 494 (Rep. Ames).

What if the problem runs the other way? The Constitution answers that too. The President has vast authority and remit—too much for "the circumscribed powers of human nature in one man" to truly cover. *Id.* at 492. So the Appointments Clause balances against a vile or incompetent

Chief Executive by interposing Congress between his nominees and their commissions. For principal officers and heads of the executive departments, appointment comes only "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2. And while Congress may give the President sole writ to name lower-level officials, the Legislature may, "as [it] think[s] proper," give appointing authority to "the Courts of Law, or in the Heads of Departments"—two categories of federal officers that, in turn, are Senate confirmed. *Id.*

This careful "separation and equilibration of powers" maximizes liberty. *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting). The President can countermand "obnoxious" subordinates bent on "mischief," 1 Annals of Cong. 493 (Rep. Ames), while the Senate can lock the levers of government unless a similarly mischievous Chief Executive names the diligent and law-abiding to serve as his agents. This isn't foolproof (no rubric of human hands can be) but enforcement of the laws by officers of the United States (along with impeachment, regular elections, legislative appropriations, and judicial review) hedges against arbitrary and capricious execution.

If federal law enforcement can be privatized—outsourced—that virtuous circle breaks. The President can no longer fire, the Congress can no longer set terms for office. Power would reside somewhere, but not at either end of Pennsylvania Avenue. Nor would it reside at 333 Constitution or One First Street. Even where a statute might allow for judicial review, a private club infused with public power will insist that the niceties of due process don't inherently apply. SEC Final Order 19.

That's this case. FINRA's jurisdiction is sweeping and "enormous." Macey & Novogrod, 40 Hofstra L. Rev. at 969. While it claims to be a membership organization, that description is hardly adequate. FINRA isn't a bunch of brokers making rules for their brethren—its every rule may be audited and changed (or vetoed outright) by the SEC. 15 U.S.C. § 78s(c). Its enforcement proceedings aren't limited to bespoke in-house rules, but directly apply federal law. And not voluntarily, but at Congress's command. *Id.* §§ 78o-3(b)(7); 78s(b)(1). And while FINRA is limited in enforcing its monetary penalties in the federal courts, *Fiero v. FINRA*, 660 F.3d 569, 579–80 (2d Cir. 2011), no one doubts its ability to banish brokers from the regulated community, depriving a broker of her livelihood by voiding her license.

FINRA, in short, may pose as private, but it's been thoroughly "governmentalized." William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 Cornell L. Rev. 1, 51 (2013). In "all or virtually all of its activities, it can be viewed as exercising powers delegated to it by the SEC." Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 Stan. J.L. Bus. & Fin. 151, 196 (2008). As SEC Commissioner Hester Peirce once observed, by "[o]perating on the strength of a government mandate and carrying out a regulatory mission using government-like tools, FINRA is difficult to distinguish from its patron agency." Hester Peirce, *The Financial Industry Regulatory Authority: Not Self-Regulation after All* at 20, Mercatus Ctr. Working Paper (Jan. 2015).

FINRA is less a self-regulatory organization than an SEC-regulatory one—an actor vested with independent authority to take care the securities laws apply to broker-dealers. And it can't beat that rap just by pointing to its fee- and penalty-funded budget. *Cf. CFPB v. Community Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 437–38 (2024) (agencies may be funded outside of direct appropriations). FINRA functions as the federal government, and so it must be treated as a federal government agency.

II. FINRA WIELDS EXECUTIVE POWER.

Only "powers not delegated to the United States by the Constitution . . . are reserved" and potentially available "to the people." U.S. Const. amend. X. And, of course, the executive power to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, was fully delegated to the President by the original Constitution. That assignment can't be clawed back to the public "by simply resorting to the corporate form." *Lebron v. Nat'l R. Passenger Corp.*, 513 U.S. 374, 397 (1995). So for FINRA to constitutionally apply executive power, it must be staffed by properly appointed officers of the United States.

Yet FINRA isn't composed of such lawfully appointed personnel. That's acceptable only if (1) FINRA is a non-executive body or (2) it is so ancient and essential to the Republic that, like an independent monetary authority, the Constitution presumes its permissible existence. *Trump v. Cook*, 609 U.S. __; Slip. Op. 1 (2026) ("Our Nation's first *de facto* central bank predates even our Constitution"). Neither condition applies.

At core, FINRA wields executive power. FINRA disciplinary actions aren't taken in furtherance of a state or federal judicial power, such as conditioning access to the courts by regulating bar membership. Nor does the agency conduct factual investigations to spin up later lawmaking—cornerstone legislative power. *Trump v. Mazars USA*, 591 U.S. 848, 862–63 (2020) (collecting cases). Rather, Congress set up a licensing scheme for commercial actors, which FINRA carries out. 15 U.S.C. §§ 78o-3(b)(7); 78s. It does so through examinations, investigations into lawbreaking, referrals, and other "law enforcement functions that typically have been undertaken by officials within the Executive Branch." *Morrison*, 487 U.S. at 691. Indeed, in the Final Order under review here, the SEC noted that "FINRA applied [its] rules consistently with the Exchange Act's purposes," SEC Final Order 12. That's another way of saying that FINRA faithfully executed the laws.

Indeed, the hearing officers who ruled against Mr. Kielczewski are hardly the type of temporary employees that "the Appointments Clause cares not a whit about." *Lucia v. SEC*, 585 U.S. 237, 245 (2018). As Judge Walker has noted, "FINRA's hearing officers are near carbon copies" of the administrative law judges that the Supreme Court in *Lucia* found to be officers of the United States. *Alpine Sec. Corp. v. FINRA*, 2023 WL 4703307, at *2 (D.C. Cir. July 5, 2023) (Walker, J., concurring); *Alpine II*, 121 F.4th at 1345 (Walker, J., concurring). Proper appointment must predate the use of that kind of "significant executive power." *Id.* at 3. At minimum, the hearing officer who presided over the FINRA proceeding below is an inferior officer, who must be appointed by the President, a department head, or the federal courts. *Lucia*, 585 U.S. at 251–52.

That leaves only one path for FINRA to slip out of the normal constitutional scheme: if government licensing of broker-dealers is as "unique," *Cook*, Slip Op. 13, and vital as "our Nation's tradition of central banking protected from political interference." *Id.* at 9; *id.* at 2 (Kavanaugh, J., concurring) ("Even temporary uncertainty about the status of the Federal Reserve could spark political upheaval . . . as well as turmoil in the U.S. and world economies"). It's obviously not.

As just one proof, the nascent federal government had no role standing up the Buttonwood Agreement in 1792, which "survived completely intact until 1975." Jonathan R. Macey & David D. Haddock, *Shirking at the SEC: The Failure of the National Market System*, 1985 U. Ill. L. Rev. 315, 316 (1985); *Alpine II*, 121 F.4th at 1319–21 (recounting history). Indeed, it wasn't until 1983 "that Congress made joining a self-regulatory organization mandatory for virtually all securities traders," *Alpine II*, 121 F.4th at 1321, and the process of making so-called self-regulatory organizations "a more powerful . . . front-line regulatory force" continued apace after that through the creation of FINRA itself. Peirce, *Not Self-Regulation* at 11–12.

That happened in 2007, when the SEC approved the merger of the National Association of Securities Dealers and the "enforcement arm" of the New York Stock Exchange into a single national securities association. *Alpine II*, 121 F.4th at 1321. Unless the SEC's actions under the second Bush administration are as constitutionally meaningful as the formation of the Bank of North America to secure the Revolution, *Cook*, Slip Op. 1, FINRA enforcement is constitutional only when carried out by accountable officers of the United States.

III. THE FINRA MODEL WOULD LET CONGRESS RECONSTRUCT THE INDEPENDENT ADMINISTRATIVE STATE.

Left to stand, FINRA presents a roadmap to continue the recently vanquished 90-year experiment with the "independent" execution of the laws. *Slaughter*, Slip Op. 21 (overruling *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)). Congress could juke presidential control of the administrative state through privatization, overriding *Trump v. Slaughter* by creating a plethora of nonprofit corporations endowed with law enforcement powers. Worse: this new "administrative conglomerate" needn't be staffed by properly appointed officers, as at least the pre-*Slaughter* agencies were, or bound, as the old independent administrative state largely was, by the Bill of Rights. *Cf. SEC v. Jarkesy*, 603 U.S. 109 (2024).

Presumably, Congress could replace the SEC itself with the Securities and Exchange Corporation, complete with *Lucia*-defying administrative law judges appointed by a privately appointed five-member board of governors. *Alpine II*, 121 F.4th at 1345 (Walker, J., concurring). Or it could create the Federal Trade Corporation, which would oversee a federal corporate registry of every going concern in the Nation carrying out interstate or international commerce. Of course, no business that failed to register with the Federal Trade Corporation could buy or sell from any registered company or offer goods or services on an interstate or international basis. Perhaps one of the Federal Trade Corporation's many rules would be a pre-merger review of any offer of one licensee to buy or combine with another. Failure to abide by the "company's" ruling—or any other from the FTCorp's adjudication council—could be punished by canceling the nationwide license to buy and sell. And, of course, the FTCorp regulated community wouldn't be given the usual constitutional protections afforded to civil defendants, such a right to decline to testify or some ability to confront one's accuser. It's not the government, after all.

Surely this would breach private non-delegation principles, even if FTCorp—like FINRA—couldn't enforce its monetary fines in federal court or if its orders were given some review by the Commerce Department. But if FINRA is constitutional, nothing can stop Congress from standing up FTCorp and a host of similar nonprofit clones of the Article II-defying independent administrative state. It "cannot be that" Congress could "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron*, 513 U.S. at 397. Our founding charter contains no hidden instructions for the creation of a nonprofit knock-off of the pre-*Slaughter* administrative state—complete with fewer constitutional protections for those unfortunates trapped within its purview.

CONCLUSION

FINRA is a government agency wielding Article II powers. That has consequences—and it means the Final Order was ultra vires. The Court should void it.

Respectfully submitted,

/s/ Zac Morgan
Cory L. Andrews
Zac Morgan
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
zmorgan@wlf.org

July 22, 2026

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify:

(i) That this brief complies with the relevant length limitations set forth in the Rules. It contains 2,500 words.

(ii) That this brief complies with the format, typeface, and type-style requirements of Fed. R. App. P. 32(a)(4)–(6) because it has been prepared using Microsoft Office Word and is set in 14-point Century Schoolbook font.

(iii) That I electronically filed this brief with the Clerk via the CM/ECF system, which will serve all parties automatically.

/s/ Zac Morgan
Zac Morgan
Counsel for Amicus Curiae

July 22, 2026