No. 26-514

In the

Supreme Court of the United States

ERIC S. SMITH,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a statutory issue-exhaustion requirement bars a court of appeals from considering a constitutional claim challenging the inherent nature of the agency proceeding itself, if the party did not present that claim to the agency.

2. Whether a party may satisfy 15 U.S.C. § 78y(c)(1)'s issue exhaustion requirement by showing that presentation of a claim to the agency would have been clearly useless or, instead, must show that the agency was formally powerless to grant the relief requested.

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INTERESTS OF AMICI CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. To those ends, WLF often appears as amicus curiae to urge this Court to ensure that core federal constitutional claims do not escape Article III review. *Johnson v. United States Congress*, No. 25-735 (U.S., brief filed June 8, 2026); *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023).

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the Nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

National Association of Wholesaler-Distributors (NAW) is an employer and a nonprofit,

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* No party's counsel authored any part of this brief. No person or entity, other than amici and their counsel, paid for the brief's preparation or submission. Counsel for all parties received timely notice of amici's intent to file this brief.

non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is made up of direct-member companies and a federation of national, regional, and state associations across 19 commodity lines of trade which together include approximately 35,000 companies operating nearly 150,000 locations throughout the Nation. The overwhelming majority of wholesaler-distributors are small-to-medium-size, closely held businesses. As an industry, wholesale distribution generates more than $8 trillion in annual sales volume providing stable and well-paying jobs to more than six million workers.

INTRODUCTION AND SUMMARY OF ARGUMENT

"No doubt the political branches have a role in interpreting and applying the Constitution," but it is a "'permanent and indispensable feature of our constitutional system' that 'the federal judiciary is supreme in the exposition of the law of the Constitution.'" *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (quoting *Miller v. Johnson*, 515 U.S. 900, 922–23 (1995)).

As Hamilton put it, our system of ordered liberty "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." The Federalist No. 78 (Hamilton). The great Federalist Fisher Ames, speaking from the floor of the First

Congress, concurred. With Article III judicial power, "the people are gainers. The administration of justice," under the confines of the Constitution, "is the very performance of the social bargain on the part of Government." 1 Annals of Cong. 837 (1789).

But the people can be "gainers" only if their cases make it to the merits in a federal forum.

Starting in the late nineteenth century, and with considerable acceleration from the Progressive Era through the Great Society, our Nation embarked on a novel experiment with administrative agencies. Although generally housed within Article II, these agencies quickly assumed a posture of independence. No president could fire their principal officers, and no court, chief executive, or head-of-department need appoint their inferior ones. Agency law—rules and regulations—commanded deference from the courts, even when unfaithful to the best meaning of a statutory text. And the Founders' "dominant strategy to keep agents of the central government under control" via "the populist and local institution of the jury," Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 83 (1998), was pushed aside. In-house adjudicators, chosen by the agency itself, could do that work instead.

Much of that was unconstitutional, and it took the federal courts to stop those illegitimate acts. Yet, here, the Sixth Circuit, joining with several of its sisters, Pet. 14–21 (discussing circuit splits), contends that a statutory issue-exhaustion mandate applies to such structural constitutional claims. To keep a claim viable for federal court, one must ask an agency to consider itself ultra vires. That odd, kabuki outcome

is the result of a simple category error: the lower courts are mistaking administrative remedies, which must always be exhausted before an agency, for constitutional ones, which are the special province of the Judicial Branch. The Court should grant the writ to set them straight.

After all, most recipients of unlawful agency action aren't going to run to a lawyer specializing in constitutional work when summoned. They'll seek out experts that regularly appear before that agency to make a defense. Lawyers familiar with FINRA's National Adjudicatory Council or the SEC hearing process. Those attorneys aren't thinking of clever ways to dismantle the administrative state; they engage with it. They won't focus on properly preserving a clever constitutional theory—an "error" that a lawyer bringing a test case from scratch would never make. Only down the line, after suffering through an unconstitutional administrative process and finally able to appeal to an Article III court, might a target of agency action think to seek sophisticated constitutional counsel. But under the Sixth Circuit's rule—and in much of the rest of the Nation—that's just too late. A rule that privileges activist test cases over the rough-and-tumble of day-to-day practice shouldn't become the national norm.

This mistaken theory of issue exhaustion creates absurdities in the context of so-called quasi-governmental organizations. Take FINRA, a background actor here. Pet. 12 n.2. By statute, FINRA "regulates and oversees large parts of the securities industry," while enforcing federal law against its regulated community. *Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1318 (D.C. Cir. 2024). 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. Yet despite those weighty executive powers, FINRA carries no appointed officers at all—principal or inferior.

And yet, even the D.C. Circuit, which is ostensibly on the right side of one of the circuit splits here, Pet. 19–20, demands that a constitutional objection to FINRA's structure be pleaded to the SEC. If it isn't, the claim's lost forever. *Springsteen-Abbott v. SEC*, 989 F.3d 4, 7–9 (D.C. Cir. 2021); *cf. Doe v. SEC*, 176 F.4th 32, 40 (D.C. Cir. 2026) (relying on *Springsteen-Abbott*). Yet in that same case, the D.C. Circuit conceded that "regulatory agencies are not free to declare an act of Congress unconstitutional." *Springsteen-Abbott*, 989 F.3d at 8 (internal quotation marks and citation omitted). In other words, the circuit held that petitioner's position may well be right, but circuit precedent forecloses it. That's odd, at best.

The writ should be granted.

ARGUMENT

I. REVIEW IS NECESSARY TO SAFEKEEP THE SEPARATION OF POWERS.

The Constitution's separation of powers forms an "essential precaution in favor of liberty," and the preservation of that careful division is "the sacred maxim of free government." The Federalist No. 47 (Madison). That's no easy task—the natural inclination of those who wield power is to find reasons

to accumulate more. This "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *INS v. Chadha*, 462 U.S. 919, 951 (1983).

Take the so-called administrative state—those sprawling departments tasked by Congress with the faithful execution of the laws. Agency principal officers once claimed immunity from presidential scrutiny. Inferior officers avoided the rigors of the Appointments Clause. The departments themselves demanded deference to their rules and regulations, even when their expositions upon Congress's statutory language conflicted with the "single, best meaning" of the legislative text. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024). They enforced the law via in-house adjudicative processes, and so, neatly avoided putting those claims before a jury—undoing the Founders' "dominant strategy to keep agents of the central government under control." Amar, *The Bill of Rights* 83. Some of these innovations were structurally unconstitutional, unlawfully blending legislative or judicial powers with the Executive's or denying one Branch's core prerogatives for ostensibly "desirable objectives." *Chadha*, 462 U.S. at 951.

But those benighted errors could be cashiered only because of Article III. *Trump v. Slaughter*, 609 U.S. 422, 464 (2026); *Lucia v. SEC*, 585 U.S. 237, 252 (2018); *Loper Bright*, 603 U.S. at 412–13; *SEC v. Jarkesy*, 603 U.S. 109, 141 (2024); *cf. Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (observing "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"). The "sacred maxim of

free government," The Federalist No. 47, "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." The Federalist No. 78. "Without this," Hamilton warned, "all the reservations of particular rights or privileges would amount to nothing." *Id.*

To safeguard the separation of powers and ensure individual liberty, jurisdiction over claims of manifest constitutional moment cannot be shirked. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Article III courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given"). And yet, the courts of appeals are deeply divided twice over on whether jurisdiction "is given," *id.*, when a litigant ensnared before an unconstitutional agency declines to engage in the kabuki theater of asking an agency to deem itself antithetical to our national charter. Pet. 14–21 (recounting circuit splits). That splintering alone calls for certiorari.

Worse yet, the percolation is moving the wrong way. Six circuits insist that statutes governing the exhaustion of administrative remedies reach structural constitutional claims, while only two give due weight to separation-of-powers concerns. Pet. 14–19. Most of the Nation lives in the "passing strange" world where federal courts must "overlook and insulate from review" "ultra vires agency actions" because a challenge to those unconstitutional acts wasn't directly raised before the scofflaw agency. *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 600 (3d Cir. 2016) (cleaned up).

For a time, those litigants wrestling with the constitutional harms posed by the actions of the SEC or its sidekick FINRA could take solace that two circuits took the Exchange Act's provision forgiving a failure-to-raise where "there was reasonable ground . . . to do so," 15 U.S.C. § 78y(c)(1), to cover circumstances "where raising the [structural] objection would be 'clearly useless.'" Pet. 19 (quoting *Doe*, 176 F.4th at 40); *id*. at 20 (citing *Malouf v. SEC*, 933 F.3d 1248, 1257 (10th Cir. 2019)). In practice, the D.C. Circuit is somewhat inconsistent about this. *Infra* at 12.

But the Sixth Circuit has embarked on a new path, taking away even that particularized protection. The Sixth Circuit now insists on "a showing that the agency formally lacked power to grant relief." Pet. 20. That standard—which will not stay cabined to SEC or FINRA challenges, Pet. 25 (collecting similar issue-exhaustion statutes governing, among others, FDA, NLRB, and the Occupational Safety and Health Review Commission)—will undo virtually any objection to an agency's unconstitutional design. It's almost always theoretically true that an excessive agency could flip from heel to face. Although the SEC could theoretically decline to affirm a legal-remedy sanction against Smith, Pet. App. 18a, no sensible litigant could expect the SEC to do so. The Sixth Circuit did not dispute the point; it held only that a litigant is not excused "simply because the argument is destined to lose." *Id*. And the Sixth Circuit's rule governs even when reality shoves theory aside. Pet. 22 (noting "the SEC renewed its objection to jury trial claims, even in the wake of *Jarkesy*"). On these facts, the cure is an Article III forum declining to enforce a sanction

imposed via § 78s(e)'s in-house path on Seventh Amendment grounds—relief the SEC has refused in every case where asked.

And so, for those harmed by a misuse of administrative power sourced to the Exchange Act, respondents are losing the security of both belt (general right to bring a structural challenge) and suspenders (the Act's futility exception). This is intolerable and counsels certiorari.

Those who have made a career in public-interest litigation, which sometimes involves identifying a statutory or regulatory defect and then seeking to shape a case against it, might be forgiven for wondering what the big deal is. Just be sure that you've dropped a footnote in your papers before the agency. "We know that you can't set aside X as unconstitutional. So we preserve the argument for review on appeal." But that's not how things work for normal people in the hurly-burly of defending themselves against an agency wielding unconstitutional power.

A respondent's first thought, assuming they can secure counsel, won't be the big-picture, separation-of-powers concerns that animate the public-interest bar. A target of government action is going to want to fight the allegations, bring them to a close, and hopefully win on the merits. She's going to hire lawyers competent in administrative defense, not dismantling the administrative state. Only later, maybe by the time she has recourse to the federal courts—bodies capable of voiding an act of Congress or agency regulation forever—may she even think to acquire counsel that spend their days ruminating

about the Constitution. Any structural constitutional claim she has shouldn't be lost because she prudently sought specialists at each segment of the proceeding. Nor should the Court allow a rule to gather force that privileges test cases brought by the ideological bar over those birthed from mine-run enforcement.

At core, both circuit splits rely on the misbegotten premise that, in drafting an administrative exhaustion rule, Congress meant for that statute to govern constitutional remedies, as well as administrative ones. But "the SEC should not be the decider of its own constitutionality," Linda D. Jellum, *The SEC's Fight to Stop District Courts from Declaring Its Hearings Unconstitutional*, 101 Tex. L. Rev. 339, 412 (2022), and Congress couldn't have intended it to be so. After all, setting aside an agency's make-up on constitutional grounds isn't an *administrative* remedy, it's the province of Article III. *See Carr v. Saul*, 593 U.S. 83, 92 (2021) ("[T]his Court has often observed that agency adjudications are generally ill suited to address structural constitutional challenges . . ."); *see also Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987) (citing "the well-known principle that regulatory agencies are not free to declare an act of Congress unconstitutional") (hyphen added).

Administrative-exhaustion statutes shouldn't apply to structural constitutional claims, full stop. At the very least, declining to bring them up in the face of a consistently held agency practice of operating counter to the Constitution should serve as a "reasonable ground" for failure-to-exhaust. 15 U.S.C. § 78y(c)(1). The Court should grant the writ on both questions so it can make one of those things happen.

II. DRACONIAN ISSUE EXHAUSTION CREATES ABSURDITIES FOR FINRA CHALLENGES.

Left to stand, a parsimonious issue-exhaustion rule generates other rather odd outcomes. Consider a background actor in this very case: FINRA. Pet. 12 n.2 (flagging that petitioner initially brought claims against FINRA under the private non-delegation doctrine and the Appointments Clause).

FINRA acts "'subordinately'" to the SEC as its "adjunct," Pet. App. 7a, 10a, and carries out Congress's mandatory licensing scheme for securities broker-dealers. 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 v. Olson*, 487 U.S. 654, 691 (1988). FINRA's enforcement role is written into federal law, 15 U.S.C. §§ 78o-3(b)(7), 78s(d)-(e), and 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).

FINRA, in short, is an administrative agency. It can't beat that rap just by pointing to its fee- and penalty-funded budget. *Cf. CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 437–38 (2024) (agencies may be funded outside of direct appropriations). Nor can it point to its Form 990 as evidence that it's not a state actor—the federal government doesn't cease to be so "by simply resorting to the corporate form." *Lebron v. Nat'l R.R. Passenger*

Corp., 513 U.S. 374, 397 (1995). This "adjunct" to the SEC, like the SEC itself, exercises federal enforcement powers and must be staffed by properly appointed officers.

But FINRA wields this executive power through private hearing officers with "the same degree of authority" as the administrative law judges found unlawfully appointed in *Lucia*. *Alpine*, 121 F.4th at 1345 (Walker, J., concurring in the judgment in part and dissenting in part). FINRA's appellate body, the National Adjudicatory Council (a government-sounding name if there ever was one), suffers from the same defect. Until FINRA is brought within the Appointments Clause, its every action does violence to the constitutional order. At some point, this Court will have to weigh in on this serious question—but it can only do so if cases get heard on the merits below in the first place.

Which brings us back to issue-exhaustion (and this case). A litigant must raise her constitutional objections to FINRA before the SEC if she wants to keep them live for federal court. *Springsteen-Abbott*, 989 F.3d at 7–9 (turning aside Appointments Clause challenge to FINRA for failure to exhaust); *cf. Doe*, 176 F.4th at 40 (relying on *Springsteen-Abbott*). Yet, in *Springsteen-Abbott* itself, the D.C. Circuit conceded that "'regulatory agencies are not free to declare an act of Congress unconstitutional,'" 989 F.3d at 8 (quoting *Meredith*, 809 F.2d at 872)—even as it insisted that an Appointments Clause challenge against FINRA be urged before the SEC anyway.

Surely, judicial review of a constitutional claim can't be predicated on asking the impossible. Yet,

unless the Court grants the writ in this case, that's exactly the absurdity that the lower courts will insist on in the next one.

CONCLUSION

Courts shouldn't turn aside structural constitutional challenges because a litigant declined to ask an agency to deem itself or its actions unconstitutional. But the lower courts are doing just that. Only this Court can set them right. The writ should be granted.

Respectfully submitted,

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