

ADMINISTRATIVE LAW — NONDELEGATION DOCTRINE — D.C. CIRCUIT GRANTS INJUNCTION IN CONSTITUTIONAL CHALLENGE TO PRIVATE REGULATOR. — *Alpine Securities Corp. v. Financial Industry Regulatory Authority*, No. 23-5129, 2023 WL 4703307 (D.C. Cir. July 5, 2023) (mem.) (per curiam).

If the legislative nondelegation doctrine is “dead as doctrine, but . . . alive as a subject of academic study,”<sup>1</sup> the private nondelegation doctrine could be aptly described as dead to both academia and the courts. And yet, a facial challenge by Alpine Securities Corporation, an embattled broker-dealer, to the constitutionality of the Financial Industry Regulatory Authority (FINRA), a privately incorporated trade association, could revive the doctrine. Recently, in an injunction order in *Alpine Securities Corp. v. Financial Industry Regulatory Authority*,<sup>2</sup> the D.C. Circuit found that Alpine had a substantial likelihood of succeeding on the merits of its constitutional challenge to FINRA’s structure. In a concurrence, Judge Walker reasoned that FINRA’s privately employed hearing officers likely enjoyed unconstitutional insulation from executive appointment and supervision.<sup>3</sup> If extended, Judge Walker’s reasoning implies that *Alpine Securities* may present an opportunity to apply the nondelegation doctrine to invalidate regulatory schemes involving private partners. The ramifications of a revival of the private nondelegation doctrine would be sweeping.

Under the Securities Exchange Act of 1934<sup>4</sup> (Exchange Act), the Securities and Exchange Commission (SEC) routinely delegates certain of its responsibilities of oversight and enforcement to self-regulatory organizations (SROs), private entities that perform the day-to-day mechanics of supervising and sanctioning financial actors.<sup>5</sup> The SEC requires most broker-dealers operating in the securities market to join an SRO registered with the SEC.<sup>6</sup> Conveniently, the SEC recognizes only one such organization — FINRA.<sup>7</sup> Because all broker-dealers are required to register with FINRA, its membership encompasses 3,378

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<sup>1</sup> Gary Lawson, *Delegation and Original Meaning*, at i (Bos. Univ. Sch. of Law, Working Paper No. 01-12, 2002).

<sup>2</sup> No. 23-5129, 2023 WL 4703307 (D.C. Cir. July 5, 2023) (mem.) (per curiam).

<sup>3</sup> *Id.* at \*3 (Walker, J., concurring).

<sup>4</sup> 15 U.S.C. §§ 78a–78rr.

<sup>5</sup> *Id.* § 78s; see *Self-Regulatory Organization Rulemaking*, SEC (Oct. 12, 2023), <https://www.sec.gov/rules/sro> [<https://perma.cc/KG8B-PJ86>].

<sup>6</sup> See 15 U.S.C. § 78o(a)(1)–(b)(1); *Guide to Broker-Dealer Registration*, SEC (Dec. 12, 2016), <https://www.sec.gov/about/reports/publications/investor-publications/guide-broker-dealer-registration> [<https://perma.cc/9ZN6-462N>].

<sup>7</sup> Press Release, SEC, SEC Adopts Amendments to Exemption from National Securities Association Membership (Aug. 23, 2023), <https://www.sec.gov/news/press-release/2023-154> [<https://perma.cc/Y89N-5N8G>].

firms, 150,647 branch offices, and 620,882 representatives active in the market.<sup>8</sup>

FINRA is capable of independently authoring and enforcing securities regulations against registered broker-dealers. The Exchange Act grants FINRA broad discretion to alter or clarify the meaning or enforcement of existing rules or promulgate any rule “necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds.”<sup>9</sup> FINRA’s hearing officers enforce the association’s regulations by sanctioning, fining, or expelling noncompliant members from the association after an investigation and hearing.<sup>10</sup> In response to an adverse judgment, the targeted entity may appeal to the National Adjudicatory Council (NAC), then to the SEC, then to a federal district court.<sup>11</sup> Because all brokers must be registered with an SRO, expulsion from FINRA for severe misconduct or noncompliance with a panel judgment forces an entity to exit the market, a punishment dramatically analogized to “the corporate death penalty.”<sup>12</sup>

With this framing, FINRA appears similar in form and function to any other regulatory agency — and yet, crucially, FINRA is a private corporation.<sup>13</sup> Instead of relying on congressional appropriations, FINRA is financed by mandatory membership dues paid by market participants and penalties levied on noncompliant members.<sup>14</sup> These dues-paying members — not the SEC — select FINRA’s twenty-two-member Board of Directors.<sup>15</sup> As a result, because FINRA’s mission and method match that of a government agency but its structure and funding mirror that of a private company, FINRA occupies the hazy

<sup>8</sup> *Statistics*, FINRA, <https://www.finra.org/media-center/statistics> [https://perma.cc/UA4M-6NNG].

<sup>9</sup> 15 U.S.C. § 78s(b)(3)(B). The SEC retains power to: investigate or suspend FINRA’s rules; “abrogate, add to, and delete from” any rule; and revoke FINRA’s license for improper enforcement of FINRA and SEC rules. *See id.* § 78s(b)(3)(C), (b)(2)(D), (c), (h)(1).

<sup>10</sup> *See, e.g.,* *Scottsdale Cap. Advisors Corp. v. Fin. Indus. Regul. Auth., Inc.*, No. 23-1506, 2023 WL 3864557, at \*6 (D.D.C. June 7, 2023) (describing the FINRA enforcement process).

<sup>11</sup> *See* 9348 *Powers of the National Adjudicatory Council on Review*, FINRA (Nov. 2, 2015), <https://www.finra.org/rules-guidance/rulebooks/finra-rules/9348> [https://perma.cc/Q6MA-RYZC]. An appeal stays an underlying enforcement action. 9311 *Appeal by Any Party; Cross-Appeal*, FINRA (Apr. 15, 2021), <https://www.finra.org/rules-guidance/rulebooks/finra-rules/9311> [https://perma.cc/YX4Z-M7FR]; 15 U.S.C. § 78s(d)(2). Because FINRA is not a “person aggrieved,” the association may not appeal an adverse judgment by the SEC to a district court. *See* 15 U.S.C. § 78y; *Nat’l Ass’n of Sec. Dealers v. SEC*, 431 F.3d 803, 812 (D.C. Cir. 2005).

<sup>12</sup> Second Amended Complaint for Declaratory and Injunctive Relief ¶¶ 10, 129, *Scottsdale Cap. Advisors Corp. v. Fin. Indus. Regul. Auth., Inc.*, No. 22-cv-2347 (M.D. Fla. Apr. 28, 2023), ECF No. 43 [hereinafter SAC]; *Scottsdale Cap. Advisors Corp.*, 2023 WL 3864557, at \*1; *see also* *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013) (describing expulsion as “capital punishment”).

<sup>13</sup> *About FINRA*, FINRA, <https://www.finra.org/about> [https://perma.cc/5MFE-MDAK].

<sup>14</sup> *See* *Power of the Corporation to Fix and Levy Assessments*, FINRA (July 30, 2007), <https://www.finra.org/rules-guidance/rulebooks/corporate-organization/power-corporation-fix-and-levy-assessments> [https://perma.cc/A76P-U3Z7].

<sup>15</sup> *See* SEC Order Approving Consolidation of NASD and NYSE, 72 Fed. Reg. 42169, 42170–72 (Aug. 1, 2007); 15 U.S.C. § 78s(h)(4).

no-man's-land dividing private entities from executive agencies.<sup>16</sup> As described by the D.C. Circuit, FINRA is a “quasi-governmental agency” with “quasi-governmental authority to adjudicate actions” and “quasi-governmental power to discipline its members.”<sup>17</sup>

FINRA's status as a non-state actor with regulatory authority over private individuals implicates the Article II private nondelegation doctrine, the “lesser-known cousin”<sup>18</sup> of the legislative nondelegation doctrine. The nondelegation doctrine stands for the proposition that the branches are “not permitted to abdicate or to transfer to others the essential . . . functions with which [they are] vested.”<sup>19</sup> Applied to Article II, the doctrine indicates that “[b]ecause the entire executive Power belongs to the President alone, it can only be exercised by the President and those acting under him.”<sup>20</sup> This mandate implies that neither the President nor federal lawmakers can lawfully authorize an independent, unaccountable entity to wield significant executive power. This “most obnoxious form”<sup>21</sup> of delegation poses potential violations of the Article II Vesting Clause, Take Care Clause, Appointments Clause, and Due Process Clause.<sup>22</sup> Despite its robust textual basis, the Article II nondelegation doctrine has a sparse paper trail: the doctrine has languished in relative obscurity in academia,<sup>23</sup> appears infrequently in lower court decisions,<sup>24</sup> and has been sporadically applied by the Supreme Court.<sup>25</sup>

<sup>16</sup> See *Springsteen-Abbott v. SEC*, 989 F.3d 4, 7 (D.C. Cir. 2021) (noting that the “premise that FINRA is a state actor” is “contested”).

<sup>17</sup> *Nat'l Ass'n of Sec. Dealers v. SEC*, 431 F.3d 803, 804–05, 807 (D.C. Cir. 2005). *But see* *Saad v. SEC*, 980 F.3d 103, 104 (D.C. Cir. 2020) (describing FINRA as “a private self-regulatory organization”); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010) (noting the presence of “private self-regulatory organizations” in the securities market).

<sup>18</sup> *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated*, 575 U.S. 43 (2015).

<sup>19</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (discussing legislative nondelegation).

<sup>20</sup> *Alpine Sec. Corp.*, 2023 WL 4703307, at \*1 (Walker, J., concurring) (quoting *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 143 S. Ct. 1720, 1741 (2023) (Thomas, J., dissenting)).

<sup>21</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

<sup>22</sup> See Dina Mishra, *An Executive-Power Non-delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1527–28, 1557 (2015). Debate about the correct cause of action to use to assert a private nondelegation claim remains heated. See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1758 (2002) (arguing delegations to private entities pose primarily Appointments Clause issues).

<sup>23</sup> See Mishra, *supra* note 22, at 1515–16 (summarizing the deficit of work on private nondelegation). A recent flurry of articles addresses the private nondelegation doctrine. See generally Jennifer L. Mascott, *Private Delegation Outside of Executive Supervision*, 45 HARV. J.L. & PUB. POL'Y 837 (2022); Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 FLA. L. REV. 31 (2021).

<sup>24</sup> *But see, e.g.*, *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated*, 575 U.S. 43 (2015); *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 881 (5th Cir. 2022); *Texas v. Rettig*, 993 F.3d 408, 415 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc).

<sup>25</sup> *E.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550–51 (1935) (striking down a delegation to a private industry association); *Carter*, 298 U.S. at 311 (reframing a private nondelegation challenge as a due process challenge); *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 577–78 (1939) (upholding a delegation to a private industry group).

Enter Alpine Securities Corporation, one of America's largest brokerage and clearing firms.<sup>26</sup> The saga of FINRA's efforts to discipline Alpine for various regulatory infractions spans nine years of litigation in four circuits and several FINRA hearing panels.<sup>27</sup> In February of 2023, Alpine filed a facial challenge to the constitutionality of FINRA, alleging that the SEC's partnership with FINRA violated the private nondelegation doctrine by improperly vesting significant executive authority in a private actor.<sup>28</sup> In the alternative, Alpine alleged that FINRA's mandatory membership dues compelled association in violation of the First Amendment and FINRA's "biased" and "secretive" disciplinary proceedings violated Alpine's Fifth Amendment right to due process and Seventh Amendment right to a jury trial.<sup>29</sup> In April 2023, FINRA scheduled an expedited enforcement proceeding to expel Alpine from the association — the dreaded "corporate death penalty."<sup>30</sup> To stay the enforcement action, Alpine filed for an injunction in the U.S. District Court for the Middle District of Florida.<sup>31</sup> On May 26, 2023, the court transferred the case to the U.S. District Court for the District of Columbia, which heard oral arguments on the evening before FINRA's expedited enforcement action was scheduled to begin.<sup>32</sup>

The district court denied Alpine's request for a preliminary injunction.<sup>33</sup> The court reasoned that FINRA was likely not a state actor because it was privately incorporated, independently governed, and self-financing.<sup>34</sup> As a result, despite the overlap between the SEC and FINRA's regulatory reach, the court found that there was not a sufficiently "close nexus between the State and the challenged action" to allow "seemingly private behavior [to] be fairly treated as that of the State itself."<sup>35</sup> From this premise, the district court predicted that the

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<sup>26</sup> See Press Release, FINRA, FINRA Extended Hearing Panel Expels Alpine Securities; Orders Alpine to Pay \$2.3 Million in Restitution to Customers (Mar. 24, 2022), <https://www.finra.org/media-center/newsreleases/2022/finra-extended-hearing-panel-expels-alpine-securities-orders-alpine> [<https://perma.cc/K65A-D7UR>]. SCA Clearing, Ltd. owns Alpine Securities Corporation and Scottsdale Capital Advisors, a second named plaintiff in the suit. Dep't of Enf't, Nos. FPI190001 & FPI190002 (Fin. Indus. Regul. Auth. Aug. 15, 2019) (expedited hearing panel decision).

<sup>27</sup> For a lengthy summary of the litigation, see Press Release, FINRA, *supra* note 26; and *Scottsdale Capital Advisors Corp. v. Financial Industry Regulatory Authority, Inc.*, No. 23-1506, 2023 WL 3864557, at \*3-5 (D.D.C. June 7, 2023). For a concise one, see *Alpine Securities Corp.*, 2023 WL 4703307, at \*3 (Walker, J., concurring) ("[Alpine] found itself in trouble with [FINRA].").

<sup>28</sup> SAC, *supra* note 12, ¶¶ 158-161; *Scottsdale Cap. Advisors Corp.*, 2023 WL 3864557, at \*1.

<sup>29</sup> See SAC, *supra* note 12, ¶¶ 162-171 (on mandatory dues); *id.* ¶¶ 172-176 (on due process); *id.* ¶¶ 177-180 (on the right to a jury trial). The complaint asserts similar constitutional claims to those asserted in *Jarkesy v. SEC*, 34 F.4th 446, 451 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

<sup>30</sup> *Scottsdale Cap. Advisors Corp.*, 2023 WL 3864557, at \*4.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at \*1.

<sup>34</sup> *Id.* at \*8.

<sup>35</sup> *Id.* at \*7 (quoting NB *ex rel.* Peacock v. District of Columbia, 794 F.3d 31, 43 (D.C. Cir. 2015)).

constitutional claims would automatically fail.<sup>36</sup> The court then quickly dispatched the private nondelegation claim, reasoning that Congress spoke clearly on FINRA's subordinate status and outlined adequate oversight mechanisms.<sup>37</sup> Alpine appealed to the D.C. Circuit.

A divided panel of the D.C. Circuit granted the injunction pending appeal.<sup>38</sup> The panel provided no reasoning in the brief order, but, in a concurring opinion, Judge Walker explained that Alpine demonstrated a substantial likelihood of success on the merits.<sup>39</sup> Judge Walker observed that FINRA's hearing officers likely exercised "significant executive power," implying that they must be properly appointed officers of the United States.<sup>40</sup> Yet, by dint of their private employment, the hearing officers enjoyed absolute protection from presidential appointment, supervision, and removal.<sup>41</sup> Crucially, to apply the Appointments Clause, Judge Walker tentatively observed that FINRA likely constituted a state actor — or, at a minimum, that its private incorporation was irrelevant to the Appointments Clause analysis.<sup>42</sup>

Based on these conclusions, Judge Walker noted that the delegation of legislative and judicial authority to a private company threatened to create an absurd loophole in the Appointments Clause. To accept FINRA's logic, "the Constitution [would] prohibit[] Congress from vesting significant executive power in an unappointed and unremovable government administrator but [would] allow[] Congress to vest such power in an unappointed and unremovable private hearing officer."<sup>43</sup> Denying the injunction would imply that administrative agencies could resolve unconstitutional delegations by shifting the enforcement apparatus outside the executive branch. This cure would exacerbate, not rectify, the original constitutional defect.<sup>44</sup>

FINRA's implied state actor status poses an internal contradiction within Judge Walker's concurrence: the reasoning relied on FINRA's private incorporation to prophesize success on the Appointments Clause claim, but then treated FINRA's private status as irrelevant to any other claim.<sup>45</sup> By intertwining the relevance of FINRA's private status with

<sup>36</sup> *Id.*; *cf. id.* at \*11 & n.9.

<sup>37</sup> *Id.* at \*10.

<sup>38</sup> Judge Henderson issued no statement but joined Judge Walker in granting the motion; Judge Garcia would have denied the motion. *Alpine Sec. Corp.*, 2023 WL 4703307, at \*1.

<sup>39</sup> *See id.* at \*3–4 (Walker, J., concurring).

<sup>40</sup> *See id.* at \*4.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at \*3. As Judge Walker remarked, though FINRA's agents must be properly appointed officers of the United States to wield significant executive authority, "[d]oes it make a difference that FINRA hearing officers are employees of a nominally private corporation? Probably not." *Id.*

<sup>43</sup> *Id.* (citing *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018); *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 57 (2015) (Alito, J., concurring)).

<sup>44</sup> *Id.* at \*4.

<sup>45</sup> *Id.* at \*3 (citing *Lucia*, 138 S. Ct. at 2051; *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 487 (2010)). The concurrence did not address the plaintiffs' First, Fifth, or Seventh Amendment claims. *See id.* at \*1–4.

the nature of the power its employees wield, Judge Walker's concurrence failed to evaluate the colorable private nondelegation challenge leveled at FINRA's structure. The concurrence's cabined reasoning suggested that the Appointments Clause foreclosed delegations to unaccountable hearing officers but failed to grapple with the delegation of "significant executive authority" to a privately incorporated, self-financing, and self-governing entity. Nevertheless, the concurrence's frank assessment of the sweep of FINRA's enforcement authority all but necessitates the conclusion that FINRA wields the type of power vested exclusively in the three branches. Based on unspoken conclusions in Judge Walker's concurrence, *Alpine Securities* poses a strong vehicle for federal courts to wade into the murky area of doctrine governing delegations to private regulatory actors.

FINRA's authorization to wield executive power is not particularly unusual, nor is FINRA's status as a "quasi-governmental" entity unique.<sup>46</sup> Administrative agencies routinely delegate the mechanics of enforcement to private entities, a regulatory route often required by statute. For example, the National Futures Association regulates commodity-futures merchants on behalf of the Commodity Futures Trading Commission<sup>47</sup> and for-profit corporations perform day-to-day management of prisons on behalf of the Bureau of Prisons.<sup>48</sup> The role of private industry associations in setting standards for enforcement is particularly pronounced.<sup>49</sup> Advertising associations enforce the Children's Online Privacy Act;<sup>50</sup> manufacturing associations set standards for the Consumer Products Safety Commission;<sup>51</sup> and insurance companies administer medical reimbursement programs under the Affordable Care Act.<sup>52</sup>

Of note to the legal community, the American Bar Association (ABA) and mandatory state bar associations occupy a similar "quasi-governmental" purgatory as FINRA.<sup>53</sup> Like FINRA, mandatory state bar associations are privately incorporated entities financed by membership dues that partner with the government to promulgate and enforce professional standards.<sup>54</sup> Because federal courts have not decisively concluded that bar associations are state actors, litigants may be able to

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<sup>46</sup> The district court requested supplemental briefing from the parties on the ramifications of this case on the relationship between private regulatory partners and the state. See Minute Order Directing Parties to Submit Supplemental Briefing, *Scottsdale Cap. Advisors Corp. v. Fin. Indus. Regul. Auth., Inc.*, No. 23-1506 (D.D.C. June 7, 2023), ECF No. 80.

<sup>47</sup> See 7 U.S.C. § 21; Heath P. Tarbert, *Self-Regulation in the Derivatives Markets: Stability Through Collaboration*, 41 NW. J. INT'L L. & BUS. 175, 183 (2021).

<sup>48</sup> See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 626–28 (2000); Mishra, *supra* note 22, at 1511.

<sup>49</sup> See Freeman, *supra* note 48, at 626–28.

<sup>50</sup> See 15 U.S.C. § 6503(a).

<sup>51</sup> See *id.* § 2056(b)(1).

<sup>52</sup> See 42 U.S.C. § 1395kk(a).

<sup>53</sup> See Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L.J. ONLINE 1, 2 (2020).

<sup>54</sup> *Id.*

raise colorable private nondelegation challenges to the rulemaking and enforcement authority of the ABA and mandatory state bars.<sup>55</sup> The Ninth Circuit, sitting en banc, is poised to address the state actor status of the California State Bar Association this term, implying that the reasoning in *Alpine Securities* could reverberate outside the D.C. Circuit.<sup>56</sup>

Despite the prevalence of partnerships with private regulators, the constitutionality of delegations to private non-state actors has been litigated infrequently and indirectly. Most recently, in *Department of Transportation v. Association of American Railroads*,<sup>57</sup> the Supreme Court considered the constitutionality of a federal statute that delegated to the privately incorporated National Railroad Passenger Corporation (Amtrak) the authority to set rates and enforce regulations.<sup>58</sup> The D.C. Circuit's opinion below embraced a per se bar to delegations of executive authority to private entities, stating that "[e]ven an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority."<sup>59</sup> However, the Supreme Court sidestepped the relevant question<sup>60</sup>: it held that Amtrak was a state actor, which allowed the Court to consider the narrower question of whether Amtrak's structure complied with existing Appointments Clause jurisprudence.<sup>61</sup> The lower court's logic trickled into Justice Alito's concurrence but remained absent from the majority's cabined reasoning on public entities.<sup>62</sup>

As a result, the constitutionality of delegations to unquestionably private actors remains unresolved. The lower courts have split the difference between the per se rule proposed by the D.C. Circuit and Judge Walker's implied conclusion that private nondelegation challenges present only de facto Appointments Clause claims. Instead, an entity's private status determines the extent and nature of power that the actor may properly wield.<sup>63</sup> As the Fifth Circuit generalized, private partners must "function subordinately" to an agency with "authority and surveillance" over them.<sup>64</sup> To ensure the private partner remains subordinate, "Congress may employ private entities for *ministerial* or *advisory* roles,

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<sup>55</sup> Cf. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 457 (2015) (analyzing a state bar's restriction on judicial campaigning under the First Amendment without deciding that it was a state actor); *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 629 (1985).

<sup>56</sup> See *Kohn v. State Bar of Cal.*, 75 F.4th 985, 985 (9th Cir. 2023).

<sup>57</sup> 575 U.S. 43 (2015).

<sup>58</sup> *Id.* at 45.

<sup>59</sup> *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013), *vacated*, 575 U.S. 43.

<sup>60</sup> *Ass'n of Am. R.Rs.*, 575 U.S. at 54.

<sup>61</sup> *Id.*

<sup>62</sup> See *id.* at 57 (Alito, J., concurring) ("There is good reason to think that those who have not sworn an oath cannot exercise significant authority of the United States.").

<sup>63</sup> *Oklahoma v. United States*, 62 F.4th 221, 228–29 (6th Cir. 2023).

<sup>64</sup> *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 881 (5th Cir. 2022) ("If the private entity does not function subordinately to the supervising agency, the delegation of power is unconstitutional.").

but it may not give these entities governmental power over others.”<sup>65</sup> Consequently, the private partner may not wield concurrent authority to an agency, make principal policy decisions, or regulate unilaterally.<sup>66</sup>

Even under this middle-of-the-road test, the fact that FINRA possesses the power to promulgate binding rules, investigate infractions, and enforce its rules against violators indicates that FINRA may improperly wield authority vested only in the executive branch. Judge Walker’s reasoning on the Appointments Clause all but settles the question that FINRA’s hearing officers wield significantly more than “ministerial or advisory”<sup>67</sup> executive power. As he observed, they are “near carbon copies of [the SEC’s] ALJs”<sup>68</sup> and “seem[] to exercise the executive authority of the United States.”<sup>69</sup> Similarly, FINRA’s ability to promulgate any rule that “appears . . . necessary”<sup>70</sup> as part of a scheme of “cooperative self-regulation”<sup>71</sup> implies that it enjoys concurrent — not subordinate — rulemaking power to the SEC.<sup>72</sup> Because the SEC “approves” regulations by failing to object, FINRA regulates unilaterally without affirmative review.<sup>73</sup> The SEC’s pro forma oversight does not change the locus of rulemaking or adjudicatory authority, instead merely adding a hurdle to the enactment of a regulation or the enforcement of a judgment.<sup>74</sup>

Though the narrow reasoning of Judge Walker’s concurrence forecloses delegations to unaccountable private regulatory partners, it stops short of imposing a per se bar to delegations to private actors. However, to assess the viability of the Appointments Clause claim, Judge Walker made the necessary conclusions to support an application of the private nondelegation doctrine to FINRA. The framing of the concurrence implies that *Alpine Securities* could have sweeping consequences for the regulatory partners of executive agencies. At minimum, by staving off the “corporate death penalty”<sup>75</sup> until litigants brief the court on the merits, the injunction allows Alpine to breathe new life into the dead letter of the private nondelegation doctrine.

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<sup>65</sup> *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004); see also *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940) (upholding delegations in which private entities “function subordinately”); *United States v. Frame*, 885 F.2d 1119, 1129 (3d Cir. 1989) (upholding a delegation where private entities “serve[d] an advisory function” and “a ministerial one”).

<sup>66</sup> See *Oklahoma v. United States*, 62 F.4th at 229 (citing, inter alia, *Pittston Co.*, 368 F.3d at 395–97).

<sup>67</sup> *Pittston Co.*, 368 F.3d at 395.

<sup>68</sup> *Alpine Sec. Corp.*, 2023 WL 4703307, at \*2 (Walker, J., concurring).

<sup>69</sup> *Id.* at \*3.

<sup>70</sup> 15 U.S.C. § 78s(b)(3)(B).

<sup>71</sup> *United States v. Nat’l Ass’n of Sec. Dealers*, 422 U.S. 694, 701 n.6 (1975).

<sup>72</sup> Compare *id.*, with *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 45 (2015) (describing Amtrak’s “joint authority” to promulgate regulations).

<sup>73</sup> See 15 U.S.C. § 78s(b)(3)(C), (b)(2)(D), (c), (h)(1).

<sup>74</sup> See *Ass’n of Am. R.Rs.*, 575 U.S. at 62 (Alito, J., concurring) (noting that “there is not even a fig leaf of constitutional justification” for private entities to wield rulemaking authority).

<sup>75</sup> SAC, *supra* note 12, ¶¶ 10, 129.