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**Media Inquiries:** [Joe Martyak](mailto:Joe.Martyak@ncla.org), 202-869-5208

## **NCLA Amicus Brief Asks Appeals Court to Topple FINRA’s Illegal ‘Private’ Enforcement Regime**

*Alpine Securities Corporation v. Financial Industry Regulatory Authority, United States of America*

**Washington, DC (September 5, 2023)** – The Financial Industry Regulatory Authority (FINRA) investigates, prosecutes, and punishes hundreds of securities firms and brokers every year for alleged violations of federal securities laws and rules, despite operating outside the government and without answering to the President. Today, the New Civil Liberties Alliance filed an *amicus curiae* [brief](#) in *Alpine Securities v. FINRA*, asking the U.S. Court of Appeals for the District of Columbia Circuit to end FINRA’s blatantly unconstitutional use of executive power.

FINRA is a nominally private non-profit corporation that regulates the securities brokerage industry subject to oversight by the U.S. Securities and Exchange Commission (SEC). But it wields vast legislative, executive, and adjudicatory powers over more than 600,000 individual brokers and thousands of broker-dealer firms nationwide. In a typical year FINRA bars hundreds of brokers from the securities industry and imposes tens of millions of dollars in aggregate fines against industry participants. The U.S. District Court for the District of Columbia concluded that FINRA is not a “state actor”—leaving the regulator unbound by most constitutional restraints when it investigates, prosecutes, and punishes alleged wrongdoers. That conclusion unwittingly confirmed, however, that FINRA violates both Article II of the Constitution, which prohibits empowering private law enforcement without close Executive Branch supervision, and the “private nondelegation doctrine,” a vital judicial principle that reserves binding federal power for the federal government alone to wield.

Though SEC explicitly pre-approves nearly all FINRA-promulgated rules on the rulemaking side of the group, the agency provides virtually no real-time supervision or direction of FINRA’s law enforcement activities. Indeed, in most cases, SEC commissioners are entirely oblivious to FINRA’s investigatory and prosecutorial activities, even as those activities routinely threaten fines and other career-altering sanctions against American citizens.

FINRA cannot have it both ways. It cannot evade the Constitution’s appointment, removal, due process, and jury trial requirements by claiming to be a mere private actor, while simultaneously wielding vast, unsupervised governmental power. The U.S. Court of Appeals for the District of Columbia Circuit should recognize this inescapable dilemma and either declare FINRA a government actor subject to constitutional strictures on its conduct and structure or demand that its enforcement activities be far more closely supervised by SEC officials.

### **NCLA released the following statement:**

“FINRA investigates, prosecutes, and punishes hundreds of securities brokers and firms each year based on alleged violations of federal securities laws and rules, imposing tens of millions of dollars in aggregate fines, yet the SEC reviews only a tiny handful of those cases, and even then only years later, after all the constitutional damage is already done and irremediable. The Constitution wisely forbids this kind of unchecked private law enforcement activity.”

— **Russ Ryan, Senior Litigation Counsel, NCLA**

**For more information visit the *amicus* page [here](#).**

## **ABOUT NCLA**

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.