No. _____

In the

Supreme Court of the United States

JOHN HURRY, JUSTINE HURRY, INVESTMENT SERVICES CORP., AND SCOTTSDALE CAPITAL ADVISORS PARTNERS LLC

Petitioners,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC. AND SCOTT M. ANDERSEN,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether FINRA, an ostensibly private corporation invested with vast powers to regulate the securities industry, is absolutely immune from any claims arising out of tortious misconduct during a raid conducted at a private place of business.

2. Whether FINRA, by virtue of its close nexus with the federal government and the fact that it has been delegated extensive law enforcement powers, is a state actor for purposes of the Constitution.

LIST OF ALL PARTIES TO PROCEEDINGS BELOW

Plaintiffs:

John J. Hurry, Justine Hurry, Investment Services Corp., Hurry Family Revocable Trust d/t/d October 18, 2011 amended November 26, 2012, Investment Services Partners LLC, Scottsdale Capital Advisors Partners LLC, SCAP I LLC, SCAP II LLC, SCAP III LLC, SCAP 4 LLC, SCAP 6 LLC, SCAP 7 LLC, SCAP 8 LLC, SCAP 9 LLC, SCAP 10 LLC, BRICFM LLC d/b/a Corner of Paradise Ice Cream Store, CJ3 LLC, Association of Securities Dealers LLC, SCAP 5 LLC, Investment Services Capital LLC, Investment Services Holdings Corp., NEWCONMGT LLC, ISC LLC, ISHC LLC, NEWMGT LLC, SCAINTL LLC, FLJH

LLC, ASD Holding Company LLC, and Hurry Foundation.

Defendants:

Financial Industry Regulatory Authority, Inc., and Scott M. Andersen

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INTRODUCTION

The primary Respondent, the Financial Industry Regulatory Agency, Inc. ("FINRA"), is a corporation which has been deputized by Congress to regulate the securities industry, including by conducting searches and seizures, bringing prosecutions, and adjudicating cases. However, unlike a typical corporation which would be amenable to common law tort suits for its misconduct, or a typical regulatory agency which would be subject to the strictures of the Constitution, FINRA shifts among various doctrines and identities in order to make itself immune from any lawsuit for its activities as a "regulator", no matter how brazenly it violates the rights of citizens.

When it is convenient to call itself an arm of the sovereign and claim sovereign immunity, it claims it. When it is convenient to avoid liability as a state actor, it calls itself a private corporation. The result is an agency not accountable to the court system at all, and totally out of control.

The facts of this case demonstrate this. Plaintiff John Hurry and his company, Scottsdale Capital Advisors, are stockbrokers and subject to FINRA's jurisdiction. However, FINRA conducted a raid on the files and property of other Hurry-affiliated businesses which had no relationship with the securities industry, and demanded full forensic images of the computers used by those unrelated businesses, including their private communications, even privileged communications with attorneys. FINRA further issued a threat to issue a "Wells notice", a form of regulatory discipline that interferes with a

stockbroker's ability to do business, if Mr. Hurry and all of his companies did not comply with its demands. No state prosecutor or law enforcement officer is legally permitted to use this sort of threat to obtain consent to an intrusive, unparticularized search, but FINRA claims that it is a private corporation and can do so without bearing any responsibility for tortious conduct.

There is a split of authority as to the scope of FINRA's immunity. While the Ninth Circuit and some other courts hold that FINRA's immunity extends to any claim against it based on any theory that arises out of FINRA's conduct as a regulator, the D.C. Circuit has held that FINRA's immunity, which was developed based on concepts of absolute sovereign immunity for prosecutors and judges, does not extend to FINRA's conduct as an investigator.

Unlike judges and prosecutors, investigators, such as police officers, do not traditionally enjoy absolute immunity from tort suits, and thus FINRA should not have absolute immunity from its actions when conducting raids on private offices. This Court should grant certiorari to resolve the conflict in the circuits.

There is also a split of authority as to whether FINRA is a state actor subject to the Constitution as any other sovereign actor would be. FINRA is a creation of Congress, which has been delegated sovereign powers to regulate the securities industry, and it exercises such powers just like any other federal regulatory agency, as a rulemaker, investigator, prosecutor, and adjudicator. Under this

Court's precedents, FINRA is a state actor subject to the Constitution and this Court should grant certiorari to review this important issue as well.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25a) is reported at 2019 WL 3408894 (9th Cir. Jul. 19, 2019). The opinion of the district court (Pet. App. 2a) is reported at 2015 WL 11118114 (D. Ariz. Aug. 5, 2015).

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §§ 1331 & 1367, because the Complaint raised a federal question and there was supplementary jurisdiction over the state law claims. The Ninth Circuit had appellate jurisdiction under 28 U.S.C. § 1291.

The court of appeals entered its judgment on July 19, 2019, and denied the petition for rehearing on August 13, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> U.S. Const. amend. V
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE[1]

Petitioners John and Justine Hurry are husband and wife and own and/or operate several businesses in Arizona. At the time of the Complaint, those businesses included two registered broker-dealers and FINRA members, Scottsdale Capital Advisors Corp. ("SCA") and Alpine Securities Corp. (collectively the "Broker-Dealers"). The Broker-Dealers are among the largest firms in the "microcap" securities market,

[1] Because this is an appeal from an order dismissing the complaint under Fed. R. Civ. P. 12(b)(6), the facts as pleaded by Petitioners are taken to be true.

which is viewed with disfavor as a high risk industry by FINRA and the SEC. John Hurry, in addition to doing business in a disfavored industry, was also a public critic of FINRA.

Respondent FINRA is a "self-regulatory organization" (SRO), ostensibly a private corporation which is delegated authority under the Securities Exchange Act of 1934 to regulate entities trading securities. FINRA describes its mission as including "writing and enforcing rules governing the activities of all registered broker-dealer firms and registered brokers in the U.S.; examining firms for compliance with those rules; fostering market transparency; and educating investors". Respondent Scott Andersen was, at the time of the Complaint, the Deputy Regional Chief Counsel of FINRA.

Petitioner Scottsdale Capital Advisors Partners LLC ("SCAP") is a real estate business which owns two adjacent office complexes in Scottsdale, Arizona. SCAP is not a FINRA member or broker-dealer. SCAP leases space in the buildings to a number of businesses that have nothing to do with the Hurrys, including a dental practice, an herbal medicine specialist, an accounting practice, a physical therapy practice, a pain management clinic, a financial advisory service, and a sleep disorders institute.

Suite 6 of SCAP's office complex is leased by SCA and is used by various Hurry-related businesses. A portion of Suite 6 was subleased from SCAP to Petitioner Investment Services Corp. ("ISC") (the northwest corner office of Suite 6 is referred to herein as the "ISC Office"). FINRA was aware of this

tenancy, and ISC is not a FINRA member or broker-dealer. SCAP conducts its real-estate business (which has nothing to do with securities trading) out of the ISC Office.

In November 2012, ISC maintained three password protected computers (the "ISC Computers") in the ISC Office. The ISC Computers are used by the various non-securities related businesses of the Hurrys, including the management of ISC, SCAP, other real estate businesses, employment records and confidential customer information for non-securities businesses, and new business opportunities that arise from time to time. The ISC Computers were also used for the Hurrys' charitable endeavors and for their personal and family affairs, including their private medical, education, estate planning, banking, and tax matters. The ISC Computers also contained confidential communications between the Hurrys and their lawyers. The ISC Computers contained hundreds of gigabytes of data that had nothing to do with any FINRA member or FINRA regulated entity.

Commencing on the morning of November 12, 2012, and continuing for four days around the clock, FINRA, led by Andersen, conducted a raid of Suite 6 of the SCAP office complex. FINRA personnel intimidated the receptionist and bullied SCA personnel, interrupting their job duties. FINRA employees also roamed around the premises of ISC's office complexes, alarming the other tenants and causing them to inquire if the FINRA agents were law enforcement or government agents.

During the raid, FINRA demanded "[f]orensic

images of the hard drives of select firm employees identified onsite by FINRA staff" and threatened to bar the Broker-Dealers from the securities industry if its demands were not met. Andersen identified the hard drives of the ISC Computers as falling within this directive and demanded that FINRA be given unfettered access to them.

Andersen further demanded that the ISC Office be unlocked so that FINRA could access and forensically image all of the information on the ISC Computers. Andersen threatened to issue a "Wells Notice" within 15 minutes unless he was provided with immediate access to the ISC Office and to the entirety of the data on the ISC Computers. A Wells Notice is a notification from a regulator that it intends to recommend that enforcement proceedings be commenced against the prospective respondent. A Wells Notice, which is reported publicly and carries a significant stigma in the securities industry, can be devastating to one's business and livelihood, and can prevent any future employment in the industry.

At the time of his demands, Andersen was informed that, to the extent the ISC Computers contained any SCA-related material, that material likely comprised emails to or from John or Justine Hurry at their respective SCA-email addresses, which were independently preserved in a third-party, SEC-approved, cloud-based, verifiable and auditable, electronic data repository, which could readily provide a true and correct copy of every non-privileged email to or from John or Justine at their respective SCA-email addresses without prejudicing the privacy, privilege, and proprietary rights of ISC and the other

individuals and entities whose data was reposed on the ISC Computers.

Faced with the prospect of seeing their securities business destroyed by the threatened Wells Notice, and with FINRA personnel occupying their businesses' offices, Petitioners acceded to Andersen's demands, and FINRA accessed the ISC Office, seized the ISC Computers, and copied them in their entirety. ISC was denied the use of those computers and the data they contained for five days.

Petitioners then attempted to do whatever they could to protect the extensive amounts of private information that had nothing to do with the securities industry and which made up the bulk of the data on the ISC Computers. ISC offered to make the ISC Computers available to a third party forensic computer specialist to search and obtain any non-privileged documents relevant to FINRA's inquiry, and to share the expense. FINRA rejected this.

FINRA made several proposals, none of which were workable or sufficiently protective. First, FINRA proposed that SCA provide a "privilege log" of every single document (two terabytes of data) on the hard drives—an obviously impossible task given the amount of data. FINRA also took the position that it would retain any privileged data on the ground that privileged and non-privileged materials could not be disaggregated.

FINRA also proposed that SCA generate a list of search terms that would segregate materials having nothing to do with the securities industry. However,

not only would this approach be inexact, but FINRA insisted that it retained the right to review documents or material where there were disputes as to whether material was privileged or irrelevant. FINRA insisted on these approaches despite the availability of a solution fully protective of Appellants' rights and FINRA's desire to obtain relevant evidence—to place the computers in the hands of a third party for the purpose of copying the relevant, non-privileged information.

Having no choice but to accede to FINRA's demands, SCA provided a list of search terms likely to detect irrelevant or privileged documents. FINRA rejected many of those terms, confirming its intention to sift through as many of the Hurrys' private business records as possible. As of the time of the Complaint, FINRA continued to maintain possession of the complete forensic image of the ISC Computers' hard drives, including all privileged, confidential, and irrelevant materials relating to the Hurrys' personal affairs and their other, non-securities businesses.

The underlying action was filed on November 10, 2014, and alleged claims for improperly accessing computers, trespass upon chattels, intrusion upon seclusion, conversion, misappropriation of trade secrets, prima facie tort, violation of the Privacy Act, defamation, intentional interference with contract or expectancy, public disclosure of private facts, false light, a *Bivens* claim[2], and conspiracy to violate civil

[2] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

rights.

Respondents moved to dismiss the Complaint under Fed. R. Civ. Proc. 12(b)(6). Respondents argued, *inter alia*, that FINRA was absolutely immune from suit for any claims based on any conduct related to its regulatory mission.

On August 5, 2015, the District Court granted the motion to dismiss as to all claims, and denied leave to amend as to the claims at issue in this Petition. The District Court dismissed all tort claims arising out of the raid of the ISC offices and the seizure and improper access of the ISC Computers, because they were purportedly related to FINRA's regulatory function and thus covered by FINRA's immunity. The District Court also held that Petitioners' *Bivens* claims failed because FINRA is not a state actor.

After unrelated defamation claims were resolved on summary judgment after discovery, Petitioners timely noticed an appeal on April 25, 2018.

On July 29, 2019, the Ninth Circuit affirmed the District Court. The Ninth Circuit rejected Petitioners' argument that FINRA's immunity, because it is an offshoot of prosecutorial sovereign immunity, does not apply to investigatory conduct. Rather, the Ninth Circuit held that FINRA's immunity extends to "claims alleging that Defendants exceeded the scope of their regulatory and investigatory authority". The Ninth Circuit failed to address the issue of whether FINRA was a state actor, even though the issue was briefed by both parties.

Petitioners sought rehearing, asking the Court to address the state action issue, but the Court denied rehearing on August 13, 2019.

REASONS FOR GRANTING THE WRIT

1. There is a split of authority as to whether FINRA's immunity applies to investigatory conduct.

This Court has never before addressed the doctrine of the absolute immunity of SRO's from civil tort claims, an important issue that directly affects everyone in the securities industry, and, indirectly, everyone who participates in the securities markets as well.

SRO's are a creation of Congress- the Securities Act authorized stock exchanges to regulate themselves and the conduct of their members. 15 U.S.C. § 780-3. Notably, while the authorization statute sets out limited immunities, it does not contain any language immunizing SRO's from ordinary tort suits. SRO immunity from tort suits is wholly a creation of the inferior federal courts.

The premise of the extraordinary scope of immunity granted to these ostensibly private corporations is that they are analogous to judges and prosecutors who receive absolute immunity from suit. The absolute immunity doctrine for SRO's was first recognized in *Austin Municipal Securities, Inc. v. National Ass'n of Securities Dealers, Inc.*, 757 F.2d 676 (5th Cir. 1985), which analogized to caselaw extending immunity to federal agencies that

"performed functions similar to those of judges and prosecutors", *id.* at 688[3], and held that NASD (FINRA's predecessor) performed such functions and was entitled to the same immunities as a governmental agency which performed the same functions.

Whatever the merits of the holding in *Austin Municipal Securities* as to the adjudicatory and prosecutorial functions of SRO's, since that time, several Courts of Appeals have extended the coverage of SRO immunity far beyond functions similar to those of judges and prosecutors. Thus, in the Opinion below, the Ninth Circuit held that SRO immunity extended to investigatory conduct (and implicitly extended it to investigatory conduct that injured a non-member of FINRA). *See also Sparta Surgical Corp. v. National Ass'n of Securities Dealers, Inc.*, 159 F.3d 1209, 1214 (9th Cir. 1998), *overruled on other grounds*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S.Ct. 1562 (2016) (immunity extends to acts within the SRO's "adjudicatory, prosecutorial, arbitrative or regulatory capacity"); *Standard Investment Chartered, Inc. v. National Ass'n of Securities Dealers, Inc.*, 637 F.3d 112, 116 (2d Cir. 2011) (immunity extends to "delegated regulatory functions"; holding that NASD enjoyed absolute immunity with respect to a proxy solicitation that it

[3] *Austin Municipal Securities* held that the test set forth by this Court in *Butz v. Economou*, 438 U.S. 478 (1979), which held that administrative agency officials who hold a prosecutorial role are entitled to the same absolute immunity as an ordinary prosecutor receives, was applicable to ostensibly private SRO's as well.

issued).

These holdings are in conflict with the D.C. Circuit's decision in *Zandford v. National Ass'n of Securities Dealers, Inc.*, 80 F.3d 559 (table), 1996 WL 135716 (D.C. Cir. Feb. 14, 1996), where the Court, relying on this Court's caselaw declining to extend prosecutorial immunity to investigative functions, held that "absolute immunity does not extend to acts that are purely investigatory or administrative", *id.* at *1, and remanded the case to the District Court for a determination of whether the SRO's conduct was investigatory in nature and thereby outside the scope of absolute immunity.

The facts of this case amply demonstrate why review of this question is important. FINRA obviously exercises a substantial amount of power in conducting its investigations, including the power to threaten a member's business with a Wells Notice unless it complies with demands, no matter how onerous. FINRA can shut down business operations, copy the most sensitive and private information off of computers, effectively imprison employees and compel them to assist with the investigation, demand cell phone and computer passwords, require statements from employees, and otherwise interfere with the operation not only of a member's business, but also the businesses of any non-members who are swept up into the investigation.

Holding that such conduct is within the scope of absolute immunity would mean that FINRA enjoys a breathtaking legal privilege not even afforded to police investigating the most important murder and

terrorism cases. It would mean, potentially, that FINRA can get away with anything, no matter how tortious, outrageous, or injurious, including acts perpetrated upon non-members, so long as it occurred during the course of a FINRA investigation. This Court should grant certiorari and clarify the scope of FINRA's absolute immunity.

2. There is a split of authority as to whether FINRA is a state actor.

FINRA, and the lower courts in this case, couple the determination of absolute immunity with another holding that renders SRO's even more insulated from any responsibility for their misconduct—FINRA claimed, and the District Court held, that FINRA is not a state actor subject to the provisions of the Constitution.

This holding is not even internally consistent. The extension of *Butz* to cover SRO's was premised on the notion that SRO's exercise governmental functions (specifically, the functions of "judges and prosecutors", *Austin Municipal Securities*, 757 F.2d at 688) and thus should receive the same immunities that any other arm of the sovereign exercising such functions would receive. However, when FINRA is sued for constitutional violations, it suddenly changes hats and assumes the persona of a private business exercising no state power and is thus not a state actor subject to the strictures of the Constitution.[4]

[4] FINRA's "heads I win tails you lose" position as to whether it is part of the government has not escaped notice. *See* Emily Hammond, *Double Deference in Administrative Law*, 116 Columbia L. Rev. 1705, 1709 (2016) ("[W]hile [SRO's] are not

A number of courts, including the Second and Third Circuits as well as the Ninth Circuit in the case at bar, have held SRO's to not be state actors, *e.g., D.L. Cromwell Investments, Inc. v. National Ass'n of Securities Dealers, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) ("It has been found, repeatedly, that [FINRA] itself is not a government functionary.") (citing authorities); *Epstein v. SEC*, 416 Fed. App'x 142, 148 (3d Cir. 2010). In contrast, the Tenth Circuit treated the NASD, FINRA's predecessor, as a state actor and applied the Due Process Clause to its conduct in *Rooms v. S.E.C.*, 444 F.3d 1208 (10th Cir. 2006). As the Eleventh Circuit stated, "circuits have reached conflicting holdings on this question [of whether SRO's are state actors]". *Busacca v. S.E.C.*, 449 Fed.Appx. 886, 890 (11th Cir. 2011).

The cases holding SRO's to not be state actors are in conflict with numerous cases that hold that ostensibly private entities which are delegated traditional public functions are considered state actors.[5] Thus, for instance, *Rosborough v. Management & Training Corp.*, 350 F.3d 459 (5th Cir. 2003), holds that a private state prison, being delegated the public function of incarceration, is a

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usually considered government actors for substantive constitutional purposes, they are frequently considered government actors for purposes of common law immunity."); *id.* at 1732 ("How can an SRO be both a private actor and a government actor for the same action?").

[5] The traditional public function test for state action derives from this Court's holding in *Marsh v. Alabama*, 326 U.S. 501 (1946) (privately owned "company town" is a state actor).

state actor. Similarly, the members of a college campus' police force, which was statutorily delegated the same powers as municipal police officers, were held by the Third Circuit to be state actors. *Henderson v. Fisher*, 631 F.2d 1115, 1118-19 (3d Cir. 1980).

The cases holding SRO's to not be state actors have received criticism from the academy as well. *See, e.g.,* Michael Deshmukh, Note, *Is FINRA a State Actor? A Question that Exposes the Flaws of the State Action Doctrine and Suggests a Way to Redeem It*, 67 Vand. L. Rev. 1173, 1192 (2014) (arguing that cases holding that SRO's are not state actors ignore the fact that as demands for regulation of the securities industry have increased, SRO's have become more and more intertwined with the government: "Transformative leaps in the relationship between the government and NASD/FINRA have been accompanied by congressional declarations affirming the unique public necessity of securities regulation.").[6]

The importance of this issue is clear. If SRO's are not subject to traditional or statutory causes of action by virtue of their judge-made absolute immunity, nor subject to constitutional tort claims because they are purportedly not state actors, then they are simply not accountable at all for misconduct. They can do

[6] Indeed, a 2005 research paper published by the SEC sets forth the history of SRO's, and details how Congress and the SEC have repeatedly directed the conduct of SRO's in various ways in order to serve the public policy goals of the federal government. *See Concept Release Concerning Self Regulation*, SEC Release No. 34-50700 (viewable at http://perma.cc/8FDM-PW5R).

anything when conducting an investigation—threats, intimidation, even acts of violence and brutality—and be insulated from liability. This cannot be the law. This Court should grant certiorari for the additional purpose of confirming that the federal government cannot evade the Constitution by simply chartering a private corporation and delegating to it the sovereign responsibilities of a regulatory agency.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: Nov. 12, 2019

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