No. 19-643

In the

Supreme Court of the United States

JOHN HURRY, ET AL., *Petitioners*,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC., ET AL., *Respondents*.

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

BRIEF IN OPPOSITION OF RESPONDENTS FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC. AND SCOTT M. ANDERSEN

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QUESTIONS PRESENTED

1. Every circuit to consider the question has held that self-regulatory organizations like the Financial Industry Regulatory Authority, Inc. ("FINRA") are absolutely immune from claims for money damages arising out of regulatory functions performed under the aegis of the Securities Exchange Act of 1934. The first question presented is whether the Court of Appeals for the Ninth Circuit correctly held that FINRA's regulatory immunity barred Petitioners' claims arising out of FINRA's conduct as a regulator, including its on-site examination of a FINRA member.

2. The Ninth Circuit affirmed the dismissal of Petitioners' claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on FINRA's regulatory immunity without addressing FINRA's argument that it is not a state actor. The second question presented is whether the Court should consider this alternative basis for affirming the dismissal of Petitioners' *Bivens* claim that was not reached by the Ninth Circuit or district court.

CORPORATE DISCLOSURE STATEMENT

FINRA is a private, not-for-profit Delaware corporation, and is a self-regulatory organization registered with the Securities and Exchange Commission as a national securities association pursuant to the Maloney Act of 1938, 15 U.S.C. § 78o-3, *et seq.*, amending the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq*. FINRA has no stock or parent corporation. No publicly held corporation owns 10% or more of any FINRA stock.

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BRIEF IN OPPOSITION

Respondents respectfully submit that the petition for a writ of certiorari should be denied.

OPINIONS BELOW

The unpublished memorandum opinion of the court of appeals (Pet. App. 25a–29a) is available at 782 F. App'x 600 (9th Cir. 2019). The unpublished order denying panel rehearing is available at 2019 U.S. App. LEXIS 24101 (9th Cir. 2019). The first district court opinion granting Respondents' motion to dismiss (Pet. App. 2a–24a) is unreported but available at 2015 U.S. Dist. LEXIS 180020 (D. Ariz. 2015). The second district court opinion granting in part Respondents' motion to dismiss is unreported but available at 2016 U.S. Dist. LEXIS 90147 (D. Ariz. 2016). The district court opinion granting Respondents' motion for summary judgment on the remaining claims is unreported but available at 2018 U.S. Dist. LEXIS 54551 (D. Ariz. 2018).

INTRODUCTION

This case arises out of one of FINRA's core regulatory functions: supervising its members as required by the Securities Exchange Act of 1934 ("Exchange Act"). *See* Pet. App. 27a; *see also* 15 U.S.C. § 78o-3(b)(2), (7). Petitioners do not dispute that FINRA's absolute immunity extends to its regulatory acts. Nor do Petitioners dispute that their claims "aris[e] out of FINRA's conduct as a regulator." Pet. 2. Petitioners argue only that an unpublished D.C. Circuit decision has created a circuit split by purportedly excepting investigatory functions from the scope of FINRA's regulatory immunity. *See* Pet. 2, 12–13. Petitioners are wrong,

and fail in their Petition to cite *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110 (D.C. Cir. 2008), which is controlling authority in the D.C. Circuit on the scope of FINRA's regulatory immunity. *Series 7* makes plain that the test for regulatory immunity in the D.C. Circuit is the same test used by all circuits to have considered the question, and that there is no "investigatory exception" to FINRA's regulatory immunity: "[w]hen an SRO acts under the aegis of the Exchange Act's delegated authority, it is absolutely immune from suit for the improper performance of regulatory . . . duties delegated by the SEC." *Id.* at 114. There is no reason for this Court to consider discarding this uniformly accepted approach to FINRA's regulatory immunity.

The parade of horribles that Petitioners present (Pet. 13–14, 16–17) are hypothetical scenarios that did not occur in this case, and that largely would not give rise to immunity under settled precedent. As the district court below explained, "those hypotheticals are largely beside the point because this case involves very straightforward actions by [Respondents] exercising their regulatory power." Pet. App. 11a.

Petitioners' state-actor question is equally unworthy of review. Indeed, that question is not even presented in this case. The lower courts did not, and had no need to, reach the question whether FINRA is a state actor because they held that Petitioners' claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), was barred by FINRA's regulatory immunity. Pet. App. 15a, 27a. In any event, there is no circuit split on the state-actor question, and Petitioners failed to

develop a record that would allow this Court to perform the fact-intensive inquiry that resolving state-actor questions requires.

STATEMENT

John and Justine Hurry and twenty-seven companies they own or control sued FINRA and its former Deputy Regional Chief Counsel, Scott Andersen, alleging fourteen causes of action. *See* Pet. ii. The majority of those causes of action arose out of either (1) FINRA's on-site examination of FINRA member Scottsdale Capital Advisors Corporation ("SCA"), or (2) allegedly defamatory news articles published by a reporter regarding SCA's and Petitioners' purported involvement in a pump-and-dump scheme for the penny-stock Biozoom, Inc. *See* Pet. App. 2a–7a; Doc. 46-3 at 2; Doc. 46-4 at 2.

The district court dismissed on immunity grounds the claims arising out of FINRA's on-site examination, Pet. App. 14a–15a, and entered summary judgment in FINRA's favor on all claims involving the Biozoom pump-and-dump reporting.[1] *Id.* at 27a–29a. The Ninth Circuit Court of Appeals affirmed. *Id.* at 25a–29a. Petitioners seek certiorari only on the claims dismissed on immunity grounds. *See* Pet. ii.

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[1] Because the district court dismissed Petitioners' claims arising out of FINRA's on-site examination at the pleading stage, Pet. App. 15a–16a, for the purpose of the Petition, FINRA accepts as true the complaint's allegations regarding the on-site examination. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

A. Statutory And Regulatory Background

Through the Exchange Act, Congress established a comprehensive statutory plan for "cooperative regulation" of the securities market, "under which self-regulatory organizations would exercise a primary supervisory role subject to ultimate SEC control." *Sparta Surgical Corp. v. NASD*, 159 F.3d 1209, 1213–14 (9th Cir. 1998), *abrogated in part on other grounds by Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562 (2016). Any person desiring to use any instrumentality of interstate commerce to sell securities must join an association of broker dealers registered as a national securities association. 15 U.S.C. § 78o(a)(1), (b)(1). FINRA, previously known as the National Association of Securities Dealers ("NASD"), is a private not-for-profit self-regulatory organization ("SRO"), which since 1939 has been the only registered national securities association in the United States. *See Turbeville v. FINRA*, 874 F.3d 1268, 1270 n.2 (11th Cir. 2017).

The Exchange Act requires FINRA to establish rules "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, . . . and, in general, to protect investors and the public interest . . . ." 15 U.S.C. § 78o-3(b)(6). FINRA is also required by the Exchange Act to "enforce compliance by its members and persons associated with its members," and to "appropriately discipline[]" such persons for violation of FINRA's rules or the Exchange Act. 15 U.S.C. § 78o-3(b)(2), (7).

The Hurrys own and operate non-party broker-dealers SCA and Alpine Securities Corporation ("Alpine"). Pet. App. 2a–3a. SCA and Alpine are

FINRA members. *Id.* Petitioners also own or control a variety of businesses that are not FINRA members, including Petitioners Investment Services Corporation ("ISC") and Scottsdale Capital Advisors Partners LLC ("SCAP"). Pet. App. 3a–5a.

B. FINRA's On-Site Examination

In November 2012, consistent with its longstanding inspection program, FINRA conducted an unannounced on-site examination of FINRA member SCA at its headquarters in a building owned by Petitioner SCAP. Pet. App. 3a. As part of its on-site examination, FINRA served SCA with a FINRA Rule 8210 Request seeking "immediate access to inspect and copy information in the possession, custody, or control of SCA and its subsidiaries, affiliates, predecessor corporations, principals, employees, and any other affiliated persons." *Id.* at 4a (internal alterations omitted).

During the on-site examination, Andersen asserted that FINRA was permitted to inspect all the computers in SCA's suite, including those owned by ISC (the "Copied Computers"), which had been used to conduct SCA-related business. *See* Pet. App. 4a–5a. Petitioners eventually authorized FINRA to access and image the Copied Computers. Pet. 8; Pet. App. 4a. Petitioners then brought this suit. Pet. App. 5a–6a.

C. Proceedings Below

Petitioners' complaint against FINRA and Andersen alleged fourteen causes of action, including eight that arose out of FINRA's on-site examination of SCA (collectively, the "On-Site Examination Claims"). Pet. App. 15a–16a. The district court dismissed the On-Site Examination Claims on

immunity grounds because those claims "depend on . . . actions . . . taken by [Respondents] in their regulatory capacity . . . ." *Id.* at 23a–24a; *see also Hurry*, 2016 U.S. Dist. LEXIS at *6 ("Because those actions were, under Plaintiffs' own allegations, taken by [Respondents] in their regulatory capacity, [Respondents] are entitled to absolute immunity."). The district court did not address whether Petitioners' *Bivens* claim was further barred because FINRA is not a state actor.

After the district court granted summary judgment to FINRA on the remaining claims, Petitioners appealed the district court's final judgment, which the Ninth Circuit affirmed. Pet. App. 25a–29a. The Ninth Circuit agreed that "regulatory immunity bars many of Plaintiffs' claims, including those claims alleging that Defendants exceeded the scope of their regulatory and investigatory authority." *Id.* at 27a. The Ninth Circuit did not identify a split with the D.C. Circuit, or any other court, on the issue of FINRA's regulatory immunity. *Id.*

Because the Ninth Circuit affirmed dismissal of Petitioners' *Bivens* claim on immunity grounds, it did not reach Respondents' alternative argument that Petitioners' *Bivens* claim was also barred on the ground that FINRA is not a state actor. Pet. App. 27a.

REASONS FOR DENYING THE PETITION

The Petition fails to raise any question warranting this Court's review. First, for several decades, every court to consider the scope of FINRA's regulatory immunity has applied a nearly identical test and concluded that FINRA's regulatory

immunity is absolute. No circuit split exists on this issue, and Petitioners' assertion that the D.C. Circuit does not extend regulatory immunity to investigatory functions is baseless. Moreover, FINRA's regulatory immunity—as uniformly applied by the Ninth Circuit in this case and by other courts of appeals—promotes Congress's goal of cooperative regulation of the securities markets. Petitioners' arguments for circumscribing that immunity are best directed to Congress, not this Court.

Second, the state-actor question was never decided by the courts below, is not supported by a factual record, and relates only to a single *Bivens* claim dismissed at the pleading stage on alternative grounds. In addition, every circuit to rule on the issue has held that FINRA is not a state actor, and there is no reason to reevaluate that issue here.

For these reasons, and those that follow, the Court should deny review.

I. The Ninth Circuit Correctly Applied Settled Immunity Precedent To FINRA's Regulatory Conduct.

This Court should deny review of the first question presented because there is no circuit split regarding the scope of FINRA's regulatory immunity and the Ninth Circuit's decision is manifestly correct. Petitioners' attempt to manufacture a non-existent circuit split fails in every respect.

A. There Is No Split Of Authority Regarding FINRA's Immunity.

Respondents are immune for actions taken "under the aegis of the Exchange Act's delegated authority." *Sparta*, 159 F.3d at 1214. As the Ninth

Circuit has emphasized, this immunity "admits of no exceptions" and extends to allegations that an SRO, "in its investigatory and administrative actions, went beyond the scope of its authority." *P'ship Exch. Sec. Co. v. NASD*, 169 F.3d 606, 607–08 (9th Cir. 1999).

Applying those settled principles in this case, the Ninth Circuit affirmed the district court's ruling that "regulatory immunity bars" Petitioners' "claims alleging that [Respondents] exceeded the scope of their regulatory and investigatory authority." Pet. App. 27a.

Petitioners acknowledge that longstanding Ninth Circuit authority holds that SRO immunity extends "to acts within the SRO's 'adjudicatory, prosecutorial, arbitrative or regulatory capacity.'" Pet. 12 (quoting *Sparta*, 159 F.3d at 1214). Petitioners also acknowledge that the Second Circuit has recognized that SRO immunity applies to "'delegated regulatory functions.'" Pet. 12 (quoting *Standard Investment Chartered, Inc. v. NASD*, 637 F.3d 112, 116 (2d Cir. 2011)). And Petitioners further concede that FINRA exercises delegated regulatory powers "as a rulemaker, *investigator*, prosecutor, and adjudicator." Pet. 2 (emphasis added).

Despite these concessions, Petitioners argue that review is warranted based on the unpublished decision of the D.C. Circuit in *Zandford v. NASD*, 80 F.3d 559 (D.C. Cir. 1996) (table), which they contend creates a circuit split. Pet. 2, 12–13.[2] But the entire

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[2] In *Zandford*, the D.C. Circuit remanded the plaintiff's claim that NASD had engaged in misconduct during a disciplinary hearing to the district court for further consideration of the absolute immunity and statute-of-limitations issues. 80 F.3d at *1–2. On remand, the district court concluded that the

premise of Petitioners' argument is flawed. Petitioners inexplicably fail to cite *Series 7*, 548 F.3d 110 (D.C. Cir. 2008), the D.C. Circuit's more recent, published opinion governing absolute immunity, which sets forth the circuit's controlling test. According to the D.C. Circuit, "[w]hen an SRO acts under the aegis of the Exchange Act's delegated authority, it is absolutely immune from suit for the improper performance of regulatory, adjudicatory, or prosecutorial duties." *Id.* at 114.

The D.C. Circuit's test for absolute immunity is thus materially identical to the Ninth Circuit's immunity standard applied by the decision below. *Compare Series 7*, 548 F.3d at 114, *with Sparta*, 159 F.3d at 1214 (SROs have immunity when "acting under the aegis of the Exchange Act's delegated authority" in "an adjudicatory, prosecutorial, arbitrative or regulatory capacity"), *and P'ship Exch.*, 169 F.3d at 608 ("*Sparta* admits of no exceptions: if the action is taken under the 'aegis of the Exchange Act's delegated authority,' the NASD is protected by absolute immunity from money damages."), *and* Pet. App. 27a (same).

Where exceptions to an SRO's regulatory immunity are discussed in *Series 7*, it is only in the context of expressly rejecting them. *See* 548 F.3d at 115 (declining to craft exceptions for bad faith, fraud, negligence, gross negligence, and negligent

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complaint failed both on "the doctrine of absolute immunity and statutes of limitations." *Zandford v. NASD*, 30 F. Supp. 2d 1, 4 (D.D.C. 1998). The D.C. Circuit affirmed the district court's ruling in another unpublished opinion without mentioning immunity, holding that the "magistrate judge correctly determined that appellant's claims were time-barred." *Zandford v. NASD*, 221 F.3d 197 (D.C. Cir. 2000) (table).

performance of ministerial functions). Indeed, the D.C. Circuit described the plaintiff's attempt in that case to avoid an SRO's regulatory immunity as facing an "impenetrable wall of contrary precedent." *Id.* at 111. The D.C. Circuit's express recognition that an SRO's regulatory immunity is "absolute" is incompatible with Petitioners' contention that, in the D.C. Circuit, regulatory immunity does not attach to supervisory activities that might be labeled "investigatory" functions performed in furtherance of FINRA's statutory obligation to supervise its members. *See* 15 U.S.C. § 78o-3(b)(2), (7).

Every other circuit that has addressed the issue applies a materially indistinguishable approach to SRO immunity and cites approvingly the similar formulations of other circuits. The Second Circuit has described its regulatory immunity test in nearly identical terms as the Ninth and D.C. Circuits: "[t]here is no question that an SRO and its officers are entitled to absolute immunity when they are, in effect, 'acting under the aegis' of their regulatory duties." *DL Capital Grp., LLC v. NASDAQ Stock Mkt., Inc.*, 409 F.3d 93, 97 (2d Cir. 2005) (quoting *Sparta*, 159 F.3d at 1214); Pet. 12.

Nor is there any question that the Second Circuit's application of SRO immunity extends to "investigatory" functions. For instance, in *D'Alessio v. NYSE*, 258 F.3d 93 (2d Cir. 2001), the Second Circuit held that an SRO was absolutely immune for alleged "improper performance of its interpretive, enforcement and referral functions," including allegations that the SRO "provided false information when it cooperated with and assisted the United States Attorney's Office and the SEC in their investigations into alleged violations." *Id.* at 106; *see*

id. at 105 (SROs immune "for conduct falling within the scope of the SRO's regulatory and general oversight functions"). And in *In re NYSE Specialists*, 503 F.3d 89 (2d Cir. 2007), the Second Circuit held—in an opinion authored by then-Judge Sotomayor—that an SRO was absolutely immune from allegations that it had alerted firms "to impending internal NYSE investigations so that the Firms could conceal evidence of wrongdoing." *Id.* at 100–01.

Similarly, the en banc Eleventh Circuit in *Weissman v. NASD*, 500 F.3d 1293 (11th Cir. 2007), directly quoted the Ninth Circuit's test for SRO immunity in *Sparta* when recognizing that SROs are immune when "'acting under the aegis of the Exchange Act's delegated authority.'" *Id.* at 1297 (quoting *Sparta*, 159 F.3d at 1214).

Petitioners are alone in suggesting that the D.C. Circuit's regulatory immunity test differs from that of its sister circuits. The D.C. Circuit itself did not recognize any such split, and instead cited with approval leading regulatory immunity cases from other circuits. *See Series 7*, 548 F.3d at 115 (citing *DL Capital*, 409 F.3d at 98; *Sparta*, 159 F.3d at 1215). Nor did the Ninth Circuit in the decision below suggest that there was a circuit split regarding the scope of regulatory immunity. Pet. App. 27a. In fact, no post-*Series 7* court of appeals decision has recognized the existence of such a split. *See*, *e.g.*, *Std. Inv. Chartered*, 637 F.3d 112; *City of Providence v. Bats Glob. Mkts., Inc.*, 878 F.3d 36 (2d Cir. 2017).

Petitioners' narrow approach to SRO immunity is not only inconsistent with uniform circuit precedent but also undermines the core purposes of regulatory immunity identified by the courts of appeals. The D.C. Circuit in *Series 7* reasoned that an SRO

performing regulatory functions must be afforded absolute immunity to effectuate Congress's policy choice in the Exchange Act of governing the securities industry through self-regulation. *See Series 7*, 548 F.3d at 114–15. The court explained that:

> [T]he Exchange Act reveals a deliberate and careful design for regulation of the securities industry. This regulatory model depends on the SEC's delegation of certain governmental functions to private SROs . . . . Absent the unique self-regulatory framework of the securities industry, these responsibilities would be handled by the SEC—"an agency which is accorded sovereign immunity from all suits for money damages." . . . The comprehensive structure set up by Congress is suggestive both of an intent to create immunity for such duties and of an intent to preempt state common law causes of action.

Id. (quoting *DL Capital*, 409 F.3d at 97).

This basis for granting SROs unqualified and absolute immunity for their performance of regulatory functions has also been recognized by the Second, Ninth, and Eleventh Circuits. In *D'Alessio*, 258 F.3d at 105, the Second Circuit explained that affording SROs absolute immunity when performing "regulatory functions that would otherwise be performed by the SEC 'is a matter not simply of logic but of intense practicality, since, in the absence of such immunity, [an SRO's] exercise of its quasi-governmental functions would be unduly hampered by disruptive and recriminatory lawsuits.'"

The Ninth Circuit in *Sparta*, 159 F.3d at 1213, similarly reasoned that "[e]xtending immunity when a self-regulatory organization is exercising quasi-governmental powers is consistent with the structure of the securities market as constructed by Congress." *See also Weissman*, 500 F.3d at 1296 ("Because they perform a variety of vital governmental functions, but lack the sovereign immunity that governmental agencies enjoy, SROs are protected by absolute immunity when they perform their statutorily delegated adjudicatory, regulatory, and prosecutorial functions.").

The D.C. Circuit's stated basis in *Series 7* for recognizing regulatory immunity would be entirely frustrated by crafting a gaping exception that would obviously swallow the rule and subject SROs to recriminatory lawsuits arising out of their regulatory investigations—as Petitioners erroneously contend the D.C. Circuit permits. Courts have for good reason rejected similar attempts to transform an SRO's absolute regulatory immunity into an easily cleared pleading hurdle. As the Second Circuit explained in rejecting a "fraud exception to the absolute immunity of an SRO," it is "hard to imagine the plaintiff (or plaintiff's counsel) who would—when otherwise wronged by an SRO but unable to seek money damages—fail to concoct some claim of fraud in order to try and circumvent the absolute immunity doctrine." *DL Capital*, 409 F.3d at 99.

The Ninth Circuit below correctly applied the uniformly accepted approach to SROs' regulatory immunity by holding that FINRA's on-site examination was a regulatory function and therefore subject to absolute immunity. Pet. App. 27a; *see also*, *e.g.*, *Series 7*, 548 F.3d at 114; *Sparta*, 159 F.3d at

1214; *DL Capital*, 409 F.3d at 97; *Weissman*, 500 F.3d at 1297. Petitioners do not dispute that FINRA's on-site examination was a regulatory function, *see* Pet. 2; they contend only that the examination falls within the scope of a purported exception to regulatory immunity that is not recognized by any circuit and that would undermine the important purposes animating SROs' absolute immunity.

This Court has repeatedly declined requests in recent years that it weigh in on the scope of SRO immunity. *See Std. Inv. Chartered*, 637 F.3d 112, *cert. denied* 565 U.S. 1173 (2012); *NYSE Specialists*, 503 F.3d 89, *cert. denied* 552 U.S. 1291, 1292 (2008); *D'Alessio*, 258 F.3d 93, *cert. denied* 534 U.S. 1066 (2001). It should do so again here.

B. A Multitude Of Other Reasons Also Warrant Denying The Petition.

In addition to the absence of a circuit split, there are several other compelling reasons that this Court should deny review.

First, FINRA's regulatory immunity does not leave it unaccountable and "totally out of control" as Petitioners argue. Pet. 1. Not even close. As the Second Circuit explained in *NYSE Specialists*, "[t]he SEC . . . retains formidable oversight powers to supervise, investigate, and discipline [an SRO] for any possible wrongdoing or regulatory missteps." *NYSE Specialists*, 503 F.3d at 101; *see also United States v. NASD*, 422 U.S. 694, 732 (1975) ("The SEC's supervisory authority over the NASD is extensive." (citations omitted)). The SEC can suspend or revoke FINRA's registration, restrict FINRA's activities, remove from office or censure any

FINRA officer or director, seek civil penalties, or enjoin FINRA. *See* 15 U.S.C. §§ 78u(d)(1), (d)(3)(a); *see also* 15 U.S.C. §§ 78s(c), (h)(1), (h)(4).

Accordingly, Petitioners' rank speculation, Pet. 11, 13, 16–17, that the circuits' approach to SRO immunity *could* allow FINRA to wreak havoc on "everyone who participates in the securities markets"—by "imprison[ing] employees" and engaging in "tortious, outrageous, or injurious" conduct including even "acts of violence and brutality"—does not justify reconsideration of FINRA's well-settled regulatory immunity. Petitioners have not identified any court that has adopted such a boundless interpretation of FINRA's immunity, and Petitioners' assertion that false imprisonment and violent acts would fall within the circuits' uniformly accepted definition of "regulatory activity" is simply wrong. The Exchange Act authorizes FINRA to discipline its members and associated persons "by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction." 15 U.S.C. § 78o-3(b)(7). In addition, FINRA members have the right to SEC review and judicial review of SRO conduct. *See*, *e.g.*, SEC Rules of Practice 420; 15 U.S.C. § 78y. Neither the Exchange Act nor FINRA's rules empower FINRA to regulate the securities industry through violence.

Moreover, Petitioners' complaints about the current scope of SRO immunity should be addressed to Congress, not the courts. Congress chose "cooperative regulation as the primary means" for regulating the securities markets, and "the consequence was that self-regulatory organizations

had to enjoy freedom from civil liability when they ac[t] in their regulatory capacity." *Sparta*, 159 F.3d at 1215; *see also Series 7*, 548 F.3d at 115 ("The comprehensive structure set up by Congress is suggestive of both an intent to create immunity for such duties and of an intent to preempt state common law causes of action."). Any reevaluation of the scope of FINRA's regulatory immunity is best performed by Congress in the first instance so that it can properly balance competing policy goals.

Denial of the Petition is further warranted because the scope of FINRA's immunity is of no practical consequence to this case. *See* Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.4(e) (11th ed. 2019) (explaining that the Court rarely reviews judgments that can be affirmed on alternative grounds). Each of the claims that were dismissed on immunity grounds fails on additional independent grounds.

As but two examples, in addition to being barred by FINRA's regulatory immunity, all of the On-Site Examination Claims could also have been dismissed because (1) they are predicated on the assertion that FINRA violated FINRA Rule 8210, but there is no private right of action against an SRO for violation of its own rules, and (2) Petitioners did not plead that FINRA accessed the Copied Computers without authorization, and conversely admitted that they gave FINRA such access. *See*, *e.g.*, *Sparta*, 159 F.3d at 1213 ("[A] party has no private right of action against an [SRO] for violating its own rules or for actions taken to perform its self-regulatory duties under the Act."); *Desiderio v. NASD*, 191 F.3d 198, 208 (2d Cir. 1999) (same); *MM&S Fin., Inc. v. NASD*, 364 F.3d 908, 910–11 (8th Cir. 2004) (same,

collecting cases); *Turbeville*, 874 F.3d at 1276 (same); *see also* Doc. 71 at 19–22.[3] There is no reason for this Court to expend its resources reviewing an immunity question that is only one of multiple alternative grounds for rejecting Petitioners' legally and factually baseless claims.

II. The State-Actor Question Is Procedurally Deficient And Is Not Cert-Worthy.

A. The State-Actor Question Is Not Presented By The Decision Below.

"In the ordinary course [this Court does] not decide questions neither raised nor resolved below." *Glover v. United States*, 531 U.S. 198, 205 (2001). Contrary to Petitioners' representation, Pet. 14, the courts below did not hold (or make any reference to the argument) that FINRA is not a state actor. Rather, the district court dismissed on immunity grounds the only claim to which the state-actor question was relevant—the *Bivens* claim—and the Ninth Circuit affirmed that ruling. *See* Pet. App. 15a, 27a. Because the state-actor question was not reached by the lower courts and has no bearing on the outcome of this case, there is no reason for this Court to resolve that purely academic question in the first instance.

Furthermore, Petitioners' state-actor argument has been a moving target throughout this litigation.

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[3] FINRA was also authorized to inspect the Copied Computers pursuant to FINRA Rule 8210 because the company that purportedly owned the computers, ISC, was controlled by a FINRA member, John Hurry. *See In re Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 1350, at *14, 17 (Apr. 14, 2014).

In the district court, Petitioners argued only that FINRA was a state actor under the joint activity test. That argument was abandoned on appeal, when Petitioners argued for the first time that FINRA was a state actor under the public functions test. In this Court, Petitioners contend for the first time that the relevant question is whether FINRA is a state actor "by virtue of its close nexus with the federal government and the fact that it has been delegated extensive law enforcement powers." Pet ii. But Petitioners do not develop that argument. Instead, in the body of the Petition, Petitioners attempt to resuscitate the argument they advanced for the first time in the Ninth Circuit by contending that FINRA is a state actor under the public functions test. *See* Pet. 15–16. There is not a single state-actor theory that Petitioners have advanced throughout all stages of this action, and neither court below addressed any aspect of these arguments. This procedural history is a sufficient reason, standing alone, for the Court to deny review of the state-actor question.

B. Additional Reasons Counsel Against Consideration Of The State-Actor Question For The First Time In This Court.

In addition to the procedural posture, there are several other reasons not to consider Petitioners' state-actor question.

As with immunity, Petitioners attempt to conjure a circuit split that does not exist. Only the Second and Third Circuits have ruled on the issue of FINRA's status as a state actor, and each circuit has concluded that FINRA is *not* a state actor. *See Desiderio*, 191 F.3d at 206 ("The NASD [FINRA's predecessor] is a private actor, not a state actor. It is

a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee."); *D.L. Cromwell Invs., Inc. v. NASD*, 279 F.3d 155, 162 (2d Cir. 2002) ("It has been found, repeatedly, that [FINRA] itself is not a government functionary."); *Epstein v. SEC*, 416 F. App'x 142, 148 (3d Cir. 2010) ("[Appellant] cannot bring a constitutional due process claim against [FINRA], because [FINRA] is a private actor, not a state actor."); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 699 n.5 (3d Cir. 1979) ("NASD is not a state agency; therefore, First Jersey is unable to state a claim under section 1983.").

The Fourth and Seventh Circuits have also strongly suggested that FINRA and other SROs are not state actors. *See Jones v. SEC*, 115 F.3d 1173, 1183 (4th Cir. 1997) ("While the NASD is a closely regulated corporation, it is not a governmental agency, but rather a private corporation organized under the laws of Delaware. As such, it is highly questionable whether its disciplinary action of members, even if it is considered to be a quasi-public corporation, can implicate the Double Jeopardy Clause."); *Gold v. SEC*, 48 F.3d 987, 991 (7th Cir. 1995) ("The argument for treating [the NYSE] as an arm of the federal government [has] . . . the agency analogy . . . upside down. The exchange is the principal rather than the agent; the purpose of the [Exchange Act] is to strengthen the power and responsibility of the exchange in performing a policing function that preexisted federal regulation.").

Petitioners erroneously contend that the Tenth Circuit in *Rooms v. SEC*, 444 F.3d 1208 (10th Cir.

2006), held that FINRA was a state actor. Pet. 15. On the contrary, the issue in that explicitly non-precedential decision was whether "*the SEC* violated [Rooms's] due process rights by upholding the bar without finding a violation of Rule 8210." *Rooms*, 444 F.3d at 1210 (emphasis added). The passing statement in *Rooms* that "[d]ue process requires that an NASD rule give fair warning of prohibited conduct" was at most dicta, as the First Circuit concluded in *Cody v. SEC*, 693 F.3d 251 (1st Cir. 2012). *Id.* at 257, n.2. (*Rooms* "has dicta referring to due process as governing NASD rules.").

A more recent Tenth Circuit opinion confirms that *Rooms* did not decide the state-actor issue. In *McCune v. SEC*, 672 F. App'x 865, 869–70 (10th Cir. 2016), the Tenth Circuit declined to "resolve whether constitutional mandates apply" to FINRA because it could resolve the case without deciding that issue. *Id.* If the Tenth Circuit had already decided that FINRA is a state actor, it would have said so when acknowledging the appellant's reliance on *Rooms*. It did not. *See id.*

Even if this Court were inclined to address the state-actor question in the absence of a circuit split, this case would be a poor vehicle for doing so. There is no factual record regarding FINRA's (lack of) connection to the federal government because Petitioners' only claim requiring a state actor was dismissed at the pleading stage. Determining whether a private organization should be treated as a state actor is a fact-intensive inquiry. *See*, *e.g.*, *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001); *Crissman v. Dover Downs Entm't*, 289 F.3d 231, 239 (3d Cir. 2002) (recognizing "the fact-intensive nature of the state

action inquiry"). Thus, this Court should wait for a case with a more fully developed record if it has any interest in addressing the state-actor issue.

Deciding that question here is particularly unwarranted because the two state-actor theories advanced by Petitioners are so plainly unavailing. For a party to be deemed a state actor under the public functions test, the function performed must have been both traditionally and exclusively governmental. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (The relevant question for the public functions test "is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)) (emphasis in original)). Petitioners did not allege that regulating securities markets meets either of those requirements, and this Court has already explained that it does not. *See Silver v. NYSE*, 373 U.S. 341, 350–53 (1963) (The securities industry was traditionally self-regulated, and "[t]he pattern of governmental entry [after the stock market crash of 1929] . . . was by no means one of total displacement of the exchanges' traditional process of self-regulation."); *see also Sparta*, 159 F.3d at 1213–14.

Petitioners' nexus argument is similarly flawed, as even the student note on which they rely concedes. *See* Michael Deshmukh, *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, 1194 (2014) ("[W]hatever the standard, FINRA is likely a private actor under the nexus theory."). Here, there are no allegations that the government compelled or coerced FINRA to perform the specific Rule 8210 on-site examination

at issue. *See Brentwood Academy*, 531 U.S. at 295 (State action requires "such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" (quoting *Jackson*, 419 U.S. at 351)). And the mere fact that regulation may be "extensive and detailed" does not convert private action to state action under the nexus test. *See Jackson*, 419 U.S. at 350.

Finally, consideration of Petitioners' state-actor argument is unwarranted because it would not change the outcome of this case. Petitioners had a single *Bivens* claim against Andersen that was conditioned on FINRA's being a state actor. That claim fails for multiple reasons independent of the fact that FINRA is a private actor.

First, the claim fails as a result of FINRA's regulatory immunity. *See* Pet. App. 12a–13a ("Another important feature of the absolute immunity recognized by the Ninth Circuit is that its logic extends to cover the actions of FINRA employees."); Pet. App. 27a (affirming district court's immunity holding); *see also Std. Inv. Chartered*, 637 F.3d at 115 ("There is no question that an SRO *and its officers* are entitled to absolute immunity from private damages suits in connection with the discharge of their regulatory responsibilities." (emphasis added)).

Second, the claim fails because Petitioners cannot satisfy this Court's *Ziglar* test for implying a new *Bivens* claim. *See Ziglar v. Abassi*, 137 S. Ct. 1843, 1857 (2017) (Expanding the *Bivens* remedy is "a disfavored judicial activity." (quotation omitted)). Under *Ziglar*, if the present case "is different in a meaningful way from previous *Bivens* cases decided

by the Court," then no *Bivens* claim will be recognized if there exist "special factors counselling hesitation in the absence of affirmative action by Congress." *Id*. at 1857, 1859.

This case involves the authorized inspection of computers pursuant to FINRA Rule 8210, *see infra* 4–5, and thus bears "little resemblance to the three *Bivens* claims the Court has approved in the past: a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary [on the basis of sex]; and a claim against prison officials for failure to treat an inmate's asthma." *Ziglar*, 137 S. Ct. at 1860 (citing *Bivens*, 403 U.S. 388; *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980)).

Moreover, Congress's enactment of a comprehensive statutory scheme to regulate the securities industry, including a "multi-layered hearing and appeals process that governs disciplinary actions against FINRA-affiliated brokers and dealers," *Turbeville*, 874 F.3d at 1271, and a prohibition on civil claims for rules violations, are, in the words of the *Ziglar* Court, "special factor[s] counseling hesitation" that defeat Petitioners' *Bivens* claim, *Ziglar*, 137 S. Ct. at 1857. *See Turbeville*, 874 F.3d at 1271, 76; *Series 7*, 548 F.3d at 115 ("The elaboration of duties, allowance of delegation and oversight by the SEC, and multi-layered system of review show Congress's desire to protect SROs from liability for common law suits."); *see also* FINRA Rule 9200 *et seq*.; 15 U.S.C. § 78s(d)(2); 15 U.S.C. § 78y(a)(1). Under *Ziglar*, whether a damages action should be allowed against an SRO employee performing an allegedly unreasonable search is a

decision reserved for Congress. *See Hernandez v. Mesa*, 542 U.S. ___ (2020) (slip op. at 19–20) ("When evaluating whether to extend *Bivens*, the most important question is who should decide whether to provide for a damages remedy, Congress or the courts? . . . The correct answer most often will be Congress." (citation and internal quotation marks omitted)).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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