No. 19-643

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

FINRA has filed a grossly misleading Opposition to the Petition for Certiorari. There is, as demonstrated by the Petition, a conflict in the decisions of the lower courts with respect to both Questions Presented. The fact that another panel of the D.C. Circuit endorsed a test that was more favorable to FINRA does not change this fact.

FINRA also has engaged in a shameful misrepresentation to this Court in claiming that the constitutional issue was not preserved for review. In fact, it was raised and ruled upon by the trial court, raised and ignored by the Ninth Circuit, and raised again in a Petition for Rehearing. FINRA informs this Court of none of these facts.

The issues raised by the Petition are extremely important. FINRA continues to assert that it is not accountable for its actions either under the common law of torts or the Constitution. This Court must step in and decide these important questions.

ARGUMENT

1. The Petition Should Be Granted on the First Question Presented.

FINRA argues that there is no "real" conflict in the circuits because after the D.C. Circuit decided *Zandford v. National Ass'n of Securities Dealers, Inc.*, 80 F.3d 559 (table), 1996 WL 135716 (D.C. Cir. Feb. 14, 1996), a different panel of the D.C. Circuit decided *In re Series 7 Broker Qualification Exam*

Scoring Litigation, 548 F.3d 110 (D.C. Cir. 2008) ("*Series 7*"). Importantly, the result in *Series 7* is entirely consistent with *Zandford*: *Zandford* held that FINRA immunity did not extend to claims arising out of FINRA's investigatory powers. *Series 7* involved a court challenge to an examination that was given to applicants for membership in a stock exchange. Thus, *Series 7* did not arise out of any investigatory power. Nonetheless, in dicta, the *Series 7* panel endorsed a different, broader test for SRO immunity than was applied in *Zandford*, and which would, if applied, immunize SRO's from suits arising out of their investigations.

Of course, the *Series 7* panel had no power to overturn *Zandford*; only the D.C. Circuit sitting en banc, or this Court, could do that. *LaShawn A. v. Berry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) ("One three-judge panel, therefore, does not have the authority to overrule another three-judge panel of the court.").

Thus, the existence of inconsistent dicta in *Series 7* does not negate the circuit split between *Zandford* and the other decisions (including the Ninth Circuit's decision in the case at bar) discussed in the Petition.

The other arguments raised by FINRA against review of the first Question Presented also have no merit. FINRA argues it is not unaccountable because the SEC could, in theory, seek civil or criminal redress against FINRA. (Notably, FINRA does not cite to any case where this actually happened.) However, the argument ignores the extensive authorities cited in the Petition, including

scholarship, that SEC oversight is insufficient, and also defies common sense. Surely every regulatory and law enforcement agency would claim that they are honest and conscientious and that there is no need for court oversight of their actions, because they are strictly regulated by the political appointees that ostensibly supervise their conduct. Nonetheless, the judicial system, correctly, does not accept this, holding that those involved in the enforcement of our laws are governed by common law tort liability, statutory liability, or liability for violation of constitutional rights, or some combination of the three. FINRA, in saying it is accountable only to the SEC, is effectively saying that it is above the law that applies to every other law enforcement agency.[1]

FINRA's argument that all of Petitioners' claims were decided on independent grounds is also false. The District Court held that eight separate counts of the Complaint were barred by FINRA's immunity. Pet. Appx. 15a. The District Court specifically stated that it was **only** reaching the merits on the other claims, not barred by SRO immunity. Pet. Appx. 16a ("All aspects of Claims I, II, III, IV, V, VI, and XIII

[1] Similarly, FINRA makes much of the fact that a member can seek review of a FINRA decision in the SEC or the D.C. Circuit. However, this review obviously does not contain any provision at all for tort damages to compensate victims of FINRA's misconduct and, in addition, is extremely limited even as to review of FINRA's decisions. It applies only to final orders, and factual findings are deemed conclusive. 15 U.S.C. § 78y(a).

are barred by absolute immunity as is the portion of Claim IX based on statements during investigatory interviews. The portion of Claim IX based on statements to a reporter is not barred. The remaining claims—Claims VII, VIII, X, XI, XII, and XIV—as well as the surviving portion of Claim IX, must be analyzed on their merits.").[2]

2. The Court Should Review the Second Question Presented.

FINRA grossly misleads this Court in arguing that the constitutional issue was not preserved. It is undisputed that in Claim XIII of their Complaint, Petitioners pleaded a claim that FINRA violated their constitutional rights in the conduct of the raid.

Also contrary to FINRA's representations to this Court, Petitioners briefed and argued the issue of state action before the District Court. Appellants'

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[2] FINRA's argument that claims arising out of its raid of Petitioners' offices are not subject to review because Petitioners' consented both ignores Petitioners' contentions and is telling as to how FINRA views its power. As noted in the Petition, FINRA coerced consent to its raid by threatening to issue a "Wells Notice" that would put the Petitioners out of business if they did not consent. Pet. at 7-8. Obviously no law enforcement agency is allowed to use such threats to obtain consent for a search. FINRA, with no shame, tells this Court that the consent it procured by that tactic was fully voluntary.

Excerpts of Record Vol. 4, *Hurry v. Financial Industry Regulatory Agency, Inc.*, No. 18-15748, Dkt. 11-4 at 982-84 (9th Cir. Aug. 10, 2018) (setting out two pages of argument as to how FINRA is a state actor and its officers are subject to liability for constitutional torts, e.g., "FINRA owes its existence to the government, exists for the purpose of performing government functions, operates subject to government oversight, and wields government power…. Despite Defendants' non-binding cases, holding that FINRA is not a state actor leads to illogical and unjust results in the law.").[3]

The District Court dismissed the constitutional tort claim: the dismissal was purportedly based on FINRA enjoying immunity as an SRO—a plainly erroneous ground if FINRA is in fact a state actor (obviously, if FINRA is a state actor, it is bound by the Constitution). Pet. Appx. 15a. The District Court also held that FINRA was not a state actor under the Privacy Act. Pet. Appx. 17a.

Petitioners, in their appeal to the Ninth Circuit, argued that FINRA was a state actor, appealing the District Court's conclusion to the contrary, as well as arguing that FINRA's immunity did not bar their claims. Appellants Opening Bf., *Hurry v. Financial Industry Regulatory Authority, Inc.*, No. 18-15748, Dkt. 11 at 25 et seq. (SRO immunity), 34 (state

[3] To the extent such a request is necessary, Petitioners request that this Court take judicial notice of the portions of the Ninth Circuit docket referred to herein.

action) (9th Cir. Aug. 10, 2018). In other words, Petitioners raised all the issues necessary to obtain a reversal of the District Court's findings of no state action, absolute SRO immunity, *and* dismissal of the constitutional claims.

In Petitioners' reply brief, Petitioners once again briefed the state action issue. Reply Bf., *Hurry v. Financial Industry Regulatory Authority, Inc.*, No. 18-15748, Dkt. 22 at 7 (9th Cir. Mar. 18, 2019).

The Ninth Circuit did not mention the state action issue in its memorandum disposition. Accordingly, Petitioners petitioned for rehearing, raising that specific issue to preserve it for review. Petition for Rehearing, *Hurry v. Financial Industry Regulatory Authority, Inc.*, No. 18-15748, Dkt. 40 (9th Cir. Aug. 12, 2019). The Ninth Circuit denied rehearing. There was no waiver.

Reaching the merits of the second Question Presented, FINRA argues that *Rooms v. SEC*, 444 F.3d 1208 (10th Cir. 2006) somehow does not "count" as creating a conflict even though, as FINRA admits, it applies due process standards to FINRA that would not apply if FINRA was a private actor. The fact that the First Circuit disagreed with *Rooms*' statement that due process is applicable does not mean that the First Circuit's decision in *Cody v. SEC*, 693 F.3d 251, 257 n. 2 (1st Cir. 2012), does not conflict with *Rooms*. In fact, it means that it does.

Similarly, the fact that a different Tenth Circuit panel "declined to resolve" the issue does not mean that *Rooms* is not good law or does not create a

conflict with other Circuit Court decisions; it is equally reasonable to infer that the panel in *McCune v. SEC*, 672 F. App'x 865, 869–70 (10th Cir. 2016), did not wish to announce a rule that conflicted with *Rooms*, thereby inviting en banc review in that case.

FINRA's other arguments against review of the second Question Presented are equally without merit. First, the reason that there are no facts in the record on the issue of FINRA being a state actor is that FINRA successfully moved to dismiss and obtained a ruling that it was not one. If this was error, it was invited error.

Nor is FINRA's claim to be correct on the merits a reason to deny review. Every litigant believes it is correct on the merits. Nonetheless, there are serious issues, as discussed in the Petition, both as to a conflict in the lower courts on the issue **and** as to whether FINRA should be permitted to obtain a sort of super-immunity where, no matter what it does in its capacity as a law enforcement agency, it cannot be sued and held to account, whether under tort law or under the Constitution. The fact that FINRA believes it is right does not refute the existence of these serious issues, it underscores it.

FIRNA also argues that SRO immunity extends to constitutional claims. Essentially, this is a claim that FINRA is not bound by the United States Constitution. That, again, underscores the need for review.

Finally, FINRA argues that this Court has limited liability under *Bivens v. Six Unknown*

Named Agents, 403 U.S. 388 (1971). While this is true, the Fourth Amendment context that this case arises out of (specifically, conducting a completely unconstitutional search with no particularity and after obtaining consent only through threats and intimidation) requires no expansion of *Bivens*; *Bivens* itself arose out of the context of an unlawful search.

In any event, the issues of whether this is a claim that will ultimately be permissible under *Bivens* are factual and await development of the record in the lower courts, a process FINRA pretermitted with its motion to dismiss. This is no reason to decline to decide the important question of whether FINRA is governed by the United States Constitution at all.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition should be granted.

Respectfully submitted,

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