No. 22-215

In The
Supreme Court of the United States

HESLIN GALLAGHER,

Petitioner,

v.

FINANCIAL INDUSTRY
REGULATORY AUTHORITY, INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

HESLIN GALLAGHER
2640 Lake Shore Drive
Unit 411
Riviera Beach, FL 33404
(718) 715-6867
heslinlc@gmail.com

QUESTIONS PRESENTED FOR REVIEW

This case presents recurring issues regarding the proper application of absolute immunity when Self-Regulatory Organizations that are registered with the Securities Exchange Commission conduct private business.

SRO absolute immunity decisions among and within the courts of appeals are rife with inconsistencies.

"The text of the Constitution contains no explicit grant of absolute immunity from legal process . . . " *Trump v. Vance*, 140 S. Ct. 2412, 2434 (2020). Absolute Immunity does not appear in the Constitution or in any law passed by Congress.

Congress, however, by way of James Madison said that "in suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." *1 Annals of Cong.* 435 (1789).

The Questions Presented are:

1. Whether clarification is needed to resolve the conflicts among the various circuits when a Self-Regulatory Organization registered with the Securities & Exchange Commission invokes absolute immunity while engaged in its own private business.

2. Whether the Eleventh Circuit's equivocal standard that "quasi-governmental immunity" must be "pierce[d]" prior to a jury trial, violates the Seventh Amendment's preservation clause.

PARTIES TO THE PROCEEDING

Petitioner Heslin Gallagher was the plaintiff in the district court proceedings and appellant in the court of appeal proceedings. Respondent Financial Industry Regulatory Authority, Inc. was the defendant in the district court proceedings and appellee in the court of appeals proceeding.

STATEMENT OF RELATED CASES

- *Gallagher v. Fin. Indus. Reg. Auth., Inc.*, 21-81394-CIV. United States District Court for the Southern District of Florida Judgment Entered on Oct. 14, 2021
- *Gallagher v. Fin. Indus. Reg. Auth., Inc.*, 21-13605 United States Court of Appeals for the Eleventh Circuit Judgment Entered on June 3, 2022

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, Pet. App. 1-9 is unreported but is available at 2022 WL 1815594. The order of the United States District Court for the Southern District of Florida granting respondent's motion to dismiss, Pet. App. 10-15, is unreported but is available at 2021 WL 4931351.

On June 7, 2022, both parties filed individual motions requesting publication of the Eleventh Circuit's opinion. On June 21, 2002, both motions were denied, Pet. App. 16.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 3, 2022. Pet. App. 1. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitutional Provision

The Seventh Amendment to the United States Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial

by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. U.S. Const. Amend. VII.

Statutes

Federal SRO Absolute Immunity Statutes are nonexistent.

INTRODUCTION

Petitioner Heslin Gallagher respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

The issue presented in this case involves a current conflict in the Court of Appeals that is vital and considerably important because it will determine if a Self-Regulatory Organization (SRO) registered with Securities & Exchange Commission is entitled to a level of immunity above and beyond that accorded to any other private organization or even the President of the United States. It has become an immunity so potent that it protects an SRO from the guarantees of the Seventh Amendment of the Constitution of the United States.

A member of this Court said of a form of absolute immunity that it, "appears to be a fiction that has been

fastidiously maintained over time through the force of sheer repetition."[1] It also appears to be the case here.

In the last few years, the American public heard that "no one man is above the law, not even the president." On July 9, 2020, this Court affirmed that assertion when it denied former President Donald Trump absolute immunity. In the case before you however, you have a billion-dollar revenue producing corporation that indeed is above the law.

Another member of this Court has said that "we are becoming addicted to wanting particular outcomes, not living with the outcomes we don't like."[2] This case epitomizes that addiction. The desired results are determined in advance, producing unjust outcomes by way of clever technology and judicial creatively.

STATEMENT OF THE CASE

This is a Section 10b securities-fraud action brought by Petitioner, Heslin Gallagher. The Respondent in the case below was the Financial Industry Regulatory Authority ("FINRA"). FINRA is a Securities Exchange Commission ("SEC") registered Self-Regulatory Organization ("SRO"). Prior to 2007 FINRA was known as National Association of Securities Dealers ("NASD").

[1] *Committee on Judiciary, United States House of Representatives v. McGahn*, 415 F.Supp.3d 148 (D.D.C. 2019).

[2] Justice Clarence Thomas, in comments given about protests over the leaked draft Dobbs opinion, during his appearance at the Eleventh Circuit Judicial Conference on May 6, 2022.

SROs are delegated authority under the Securities and Exchange Act of 1934 to regulate entities in the securities market. 15 U.S.C. §78o-3.

FINRA is a Delaware not-for-profit private corporation for the purpose that it is tax exempt under Section 501(c)(6) of the Internal Revenue Code. In 2022 FINRA had annual revenues of $218.8 million and over $2.2 billion in cash and investments on hand after expenses.

In January of 2021, Petitioner received what she believed was an opportunity of a lifetime. Petitioner was offered a job as an Investment Counselor. The position was contingent on Petitioner meeting certain requirements and passing FINRA's General Securities Representative Exam (Series 7 Exam). Petitioner met all the criteria requested by the employer, including an exhaustive background check, however failed the Series 7 Exam three times. Each time Petitioner enrolled for the exam, she paid $245 (two-hundred forty-five dollars). Since the exam failures meant that Petitioner was not registered with FINRA and not licensed to solicit the public in connection to the purchases and sales of securities, Petitioner's employment was terminated.

Petitioner was a trusting securities license applicant, and she believed in the fundamental fairness of taking an exam. During the exam, however, Petitioner detected an algorithm that was intentionally increasing the difficulty of the questions and altering the exam midstream whenever Petitioner was more

deliberative. Petitioner contended that regardless of whether the questions were answered correctly, the algorithms were intentionally causing the exam failures.

On the day that Petitioner failed the exam(s) for a third time, Petitioner made numerous futile attempts to communicate with FINRA. While FINRA staff admitted to the use of algorithms in the exams, they refused to provide further explanation, due to so-called "confidentiality."

The General Securities Representative Qualification Examination, more commonly known as the Series 7, was created in 1974 by the National Association of Securities Dealers (NASD) to provide an industry-wide qualification examination for general securities representatives, more commonly known as stockbrokers. The exam is considered an entry-level exam for individuals who will work in the securities industry.

The Series 7 is a multiple-choice exam developed, designed, and administered by FINRA. It is necessary to pass this exam to be registered and qualified to solicit, purchase and/or sell a full range of securities products, including corporate securities, municipal securities, municipal funds securities, options, direct participation programs, investment company products and variable contracts.

In 2007 FINRA acquired the Series 7 Exam from the New York Stock Exchange. In 2012, FINRA trademarked its exams and filed action against *Training Consultants, LLC.* for copyright infringement.

In October 2018, FINRA restructured its representative-level qualification exam program by creating the Securities Industry Essentials (SIE or Essentials) exam and revising the representative-level qualification exams.

As part of Petitioner's complaint and briefs, in the lower courts, she cited the *Training Consultants* lawsuit FINRA filed a few years prior. The documents related to the litigation provided verified affidavits and declarations, whereby FINRA stated that the exams were a business and had become of great economic value to FINRA.

After several fruitless attempts at communication with FINRA, Petitioner realized that FINRA was stonewalling and attempting to conceal its actions. Thus, further harming Petitioner. Petitioner accused FINRA of a wrongful course of business and of employing a device and scheme to defraud in violation of 17 C.F.R. §240.10b-5. Petitioner filed action against FINRA on August 10, 2021.

In her Complaint, Petitioner alleged that FINRA rigs its exams by utilizing algorithms and secretive hidden pre-test questions for non-regulatory business purposes. Petitioner alleged that the failures were part of a fraudulent exam churning scheme and were devised not only for FINRA's enrichment, but also for other more nefarious purposes.

Petitioner filed for compensatory and punitive damages equivalent to the fine FINRA had just imposed on Robinhood Financial, LLC., for *inter alia*,

Robinhood's use of algorithms.[3] In her complaint, Petitioner *demanded a jury trial*.

FINRA moved to dismiss the complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. FINRA argued *inter alia*, that regardless of Petitioner's allegations, FINRA was entitled to absolute immunity from suit because its exams were a regulatory function. FINRA contended that because it administered the exam, it was absolutely immune from any liability related to the exams.

On October 14, 2021, the district court granted FINRA's Motion to Dismiss and dismissed Petitioner's Complaint with prejudice. Pet.App. 14. The district court ruled that FINRA was "absolutely immune," because Petitioner's allegation "arose out of FINRA's performance of a regulatory duty." Moreover, the district court ruled that Petitioner's Complaint warranted dismissal because "the Exchange Act does not provide for a private cause of action against an SRO for violation of its own rules." The district court further stated that any amendment to Petitioner's Complaint would be "futile," and thus ordered the case closed.

Petitioner timely filed a notice of appeal on October 15, 2022. On June 3, 2022, the Eleventh Circuit rejected Petitioner's argument that FINRA was not entitled to absolute immunity for the use of algorithms in the exams. The Eleventh Circuit stated, "we cannot

---

[3] Mass, Annie; Bain, Benjamin; *FINRA Orders Record Financial Penalties Against Robinhood Financial LLC*, Bloomberg Business News, 6/30/21.

say that [petitioner's] complaint states a plausible claim that could pierce FINRA's quasi-governmental immunity for performance of its delegated regulatory duties, or that [petitioner] could state such a claim if granted leave to amend." Thus, the Eleventh Circuit ruled that Petitioner's complaint was "barred" by "FINRA's quasi-governmental immunity." Pet.App. 9.

Both Petitioner and Respondent viewed the Eleventh Circuit's opinion as having precedential value, so both parties sought to have opinion published. The Eleventh Circuit denied both motions without explanation. Pet.App. 16.

It is important to bear in mind that *at no time before, during or after this case has Petitioner, Heslin Gallagher been a member of FINRA.*

REASON FOR GRANTING THE PETITION

I. There is a Lack of Circuit Uniformity in Applying Absolute Immunity to SROs Registered with the SEC

The financial markets and SROs that regulate them are mostly concentrated and prominent in certain regions of the United States. Therefore, this regional quality limits the number of circuits that encounter the SRO absolute immunity. Most notably, the Second, Eleventh and D.C. Circuits are the most often presented with the question of SRO absolute immunity. Nonetheless, when the Circuits face the

application of absolute immunity for SROs, they are applying varying standards, conflicting rulings, and inconsistent remedies.

The conflict has so deepened that mysterious derivatives are starting to take shape, e.g., arbitral immunity,[4] regulatory immunity,[5] and in this case—quasi-government immunity. Neither absolute immunity or quasi-governmental immunity appear in the Constitution of the United States, or any law passed by Congress and "[t]his Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause, U.S. Const. Art. I, § 6, cl. 1. Even here, however, the Court has been careful not to extend the scope of the protection further than its purposes require." *Forrester v. White*, 484 U.S. 219, 224 (1988).

This Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of "qualified" immunity that avoids unnecessarily extending the scope of

---

[4] *Lanza v. Fin. Indus. Reg. Auth.*, 953 F.3d 159 (1st Cir. 2020).

[5] *Hurry v. Fin. Indus. Reg. Auth., Inc.*, 782 Fed. Appx. 600 (9th Cir. 2019) (unpublished), *cert. denied*, 140 S. Ct. 2668 (2020).

the traditional concept of absolute immunity. *Ibid.* Consequently, this Court's review in this case is necessary.

a. Conflicting SRO Absolute Immunity Results Among the Circuits Merits Review

If this case were filed in the Second Circuit Petitioner prevails. Similar to Petitioner's complaint in the courts below, the case of *City of Providence, Rhode Island v. Bats Glob. Markets, Inc.*, 878 F.3d 36 (2d Cir. 2017), poses the same fact pattern. In *Providence v. Bats*, the complaint alleged that various exchange SROs registered with the SEC, had developed products that "manipulated market activity in their capacities as regulated entities, in violation of §10(b) and Rule 10b-5" they further alleged that the SROs developed "fraudulent and deceptive" complex order types. *Id.* at 43, and that the SROs utilized "algorithms," to move in and out of stock positions within fractions of a second to "make money" by arbitraging small differences in stock prices. *Id.* at 41.

Again, just like in this case, the plaintiffs in *Providence v. Bats Glob. Markets*, further alleged that the technology in question did not serve a regulatory purpose other than to benefit the SROs own private business. Lastly, like in this case, the plaintiffs alleged that the SROs "developed several fraudulent and deceptive" complex order types to "benefit" some firms over others. *Id.* at 43. The plaintiffs in *Providence v. Bats Glob. Markets*, sued the exchanges engaged in manipulative

and deceptive conduct in violation of §10(b) of the Securities Exchange Act of 1934.

As in this case, the SROs moved pursuant to Rule 12(b)(6) to dismiss the plaintiffs' complaint, again, *inter alia* that SRO exchanges were absolutely immune from suit.

The Second Circuit held *inter alia* that the SROs were *not* entitled to absolute immunity. The Second Circuit found that provision of co-location services and proprietary data feeds did "not relate to the [SRO's] regulatory function" and did not "implicate the SROs' need for immunity." The court further found the order types were preprogrammed commands traders use to tell the exchanges how to handle their bids and offers and "not regulatory commands." *Id.* at 47. The Second Circuit further stated:

> When an [SRO] engages in conduct to operate its own market that is distinct from its oversight role, it is acting as a regulated entity—not a regulator. Although the latter warrants immunity, the former does not. Accordingly, we conclude that the [SROs], in providing these challenged products and services, did not "effectively stand in the shoes of the SEC" and therefore are not entitled to the same protections of immunity that would otherwise be afforded to the SEC.

Id. at 48 (opinion of John M. Walker, Jr.).

The Second Circuit held that "a self-regulatory organization (SRO) asserting absolute immunity bears

the burden of demonstrating its entitlement to it." *Id.* at 36.

In the case before you, the Eleventh Circuit placed the burden on Petitioner to "pierce" FINRA's "quasi-governmental immunity," without specifying the elements required to pierce the non-existent law of, "quasi-governmental immunity."

Consequently, in the Second Circuit Petitioner's allegation that FINRA utilized algorithms and hidden technology to manipulate the securities exam in their capacity as a regulated entity would defeat FINRA's absolute immunity. The Second Circuit noted that the exchanges had "instituted enforcement proceedings against exchanges for providing proprietary data feeds that are not in compliance with SEC rules." *Id.* at 42. In other words, SROs and FINRA highly regulate the use of algorithms and technologies used in the securities industry and punish those who utilize deceptive technologies, i.e., Robinhood Financial Inc. It is the classic case of the pot calling the kettle black.

The district courts in the region have also found that SROs are not entitled to absolute immunity "arising from design, testing, and touting of software." *In re Facebook, Inc., IPO Securities and Derivative Litig.*, 986 F.Supp.2d 428 (S.D.N.Y. 2013).

If this case were filed in the D.C. Circuit Petitioner is directed to the SEC for redress. In the lower courts, Respondent relied heavily on the findings in the case of *In re Series 7 Broker Qualification Exam Scoring*

Litig., 548 F.3d 110 (D.C. Cir. 2008) and the Eleventh Circuit, in part, accepted Respondent's argument.

The *In re Series 7* case also has some similarities to this case in that it involved FINRA's Series 7 exam. The case concerned Series 7 exam takers who were victims of an alleged error by the National Association of Dealers (NASD).[6] At the time, the litigants' exams were inadvertently scored as having failed. The NASD informed the exam takers of the error and made the necessary corrections. The litigants, unsatisfied, filed suit against NASD for negligence. NASD prevailed in the district court by invoking absolute immunity and the case was appealed to the D.C. Circuit.

The question before the D.C. Circuit was "whether common law causes of action [could] be alleged against an SRO for negligent performance of its duties." The D.C. Circuit ruled that NASD had absolute immunity, however it did so in part because the court stated that "appeals can be brought before the SEC," *id.* at 112, and that the plaintiffs "had the benefit of every available administrative remedy," *id.* at 113. The D.C. Circuit stated that in total, applicants who believed their registration was improperly denied had four potential levels of appeal, "two with NASD, one before the SEC, and one in the federal courts of appeals." *Ibid.*

Put differently, although the D.C. Circuit ruled in favor of NASD, it did so with the understanding that plaintiffs could appeal to the SEC, then subsequently

---

[6] FINRA was formerly NASD.

the Court of Appeals for review the SEC's administrative adjudication of the claims.

Thus, according to the D.C. Circuit's findings, the next logical step for Petitioner was the SEC, except this happened . . .

The SEC stated that it does not Adjudicate fraud claims against SROs. After oral argument in *Providence v. Bats Global* action, the Second Circuit panel requested and received a "helpful" amicus curiae brief from the SEC. *Providence v. Bat Global* at 52. (Judge Raymond Lohier, *concurring*).

The SEC filed an amicus brief supporting the Plaintiffs-Appellants, and stated:

> Congress did not authorize the Commission to adjudicate fraud lawsuits against SROs brought by private parties.
>
> [T]he defendant exchanges are **not entitled to absolute immunity** from suit for the challenged conduct. The Commission believes that absolute immunity is properly afforded to the exchanges when they are engaged in their traditional self-regulatory functions—in other words, when the exchanges are acting as regulators of their members. Immune activities include the core adjudicatory and prosecutorial functions that have traditionally been accorded absolute immunity, as well as other functions that materially relate to an exchange's regulation of its members. For example, an exchange should be immune when it disciplines its members for misconduct or

> suspends from trading by its members a security listed on its market.
>
> But the Commission believes that immunity does not properly extend to functions performed by an exchange itself in the operation of its own market, or to the *sale of products and services arising out of those functions*—like the challenged activities at the center of the plaintiffs' allegations. This view is consistent with the historical rationale for the immunity doctrine, as well as with this [Second Circuit's] decisions applying it. And, ultimately, although protecting an exchange from the threat of retaliatory lawsuits when regulating its members is appropriate, the justifications for absolute immunity have less force when an exchange is itself engaged in offering the type of proprietary services challenged by the plaintiffs.

Brief of S.E.C. as *Amici Curiae Supporting Plaintiff-Appellants, City of Providence, Rhode Island v. Bats Global Markets, Inc*, 2016 WL 7030327 (C.A.2) *2, 3.

This Court has said that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages. *Butz v. Economou*, 438 U.S. 478, 512 (1978) Moreover, federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. *Id.* at 513.

"[T]he law favors providing legal remedy to injured parties, grants of immunity must be narrowly construed; that is, courts must be careful not to extend the scope of the protection further than its purposes require." *Weissman v. Natl. Ass'n of Securities Dealers, Inc.*, 500 F.3d 1293, 1297 (11th Cir. 2007).

The Eleventh Circuit's opinion in this case was silent on administrative remedies and did not speak to any form of redress. While the Eleventh Circuit acknowledged that Petitioner's had a "difficult experience," and that it was "no doubt frustrating," the Eleventh Circuit proceeded to affirm the dismissal and bar the complaint due to Petitioner's inability to "pierce FINRA's quasi-governmental immunity." App. 9 *infra*.

b. The Eleventh Circuit Erred When it Deviated from its *En Banc* Precedent in *Weissman v. NASD* and it Calls for this Court's Supervisory Power

The Eleventh Circuit affirmed the lower court's finding of absolute immunity and barred Petitioner from amending her complaint for failing to "pierce FINRA's quasi-governmental immunity." App. 9 *infra*. In doing so, the Eleventh Circuit not only erred, but also created an intra-circuit split.

In the precedent setting case of *Weissman v. Natl. Ass'n of Securities Dealers, Inc.*, 468 F.3d 1306 (11th Cir. 2006), on reh'g *en banc* in part, 500 F.3d 1293 (11th Cir. 2007). The plaintiff, Weissman, alleged that he had made stock purchases based on stock promoted by the

SRO and that SRO had failed to disclose that its revenue was directly enhanced by the trading. The Eleventh Circuit held that conduct was "private business activity," and "[w]hen conducting private business, [SROs] remain subject to liability." *Id.* at 1299. When an SRO is not performing a purely regulatory, adjudicatory, or prosecutorial function, but rather "acting in its own interest as a private entity, absolute immunity from suit ceases to obtain." *Id.* at 1297.

In the *Weissman v. NASD* case, the Eleventh Circuit found that "no quasi-governmental function served by the advertisements," in question and that the allegations did not relate to SRO's "statutorily delegated responsibility to prevent fraudulent and manipulative . . . practices, promote just and equitable principles of trade, remove impediments to and perfect the free market, or protect investors and the public interest." 15 U.S.C. §78o-3(b)(6). *Id.* at 1301.

The Eleventh Circuit differentiated between the advertisements that were regulatory and those that were not, however did not offer blanket absolute immunity for all of the SROs conduct in *Weissman*.

Like the algorithms in this case, the particular advertisements alleged in *Weissman* were in "no sense coterminous with the regulatory activity contemplated by the Exchange Act." Unlike what occurred in this case, the Eleventh Circuit, however, did not apply blanket immunity. Instead, determined which advertisements were regulatory and which were not.

Petitioner provided both the district court and the Eleventh circuit with affidavits and declarations from FINRA's earlier litigation in *Fin. Indus. Regul. Auth., Inc. v. Training Consultants, LLC*, WL 13020027 (C.D. Cal. Aug. 28, 2012). In the court documents, FINRA unequivocally stated that the exams were a "business," and that the exams were utilized for economic gain. The district court did not mention FINRA's exam business in its order, and the Eleventh Circuit treated the revenue producing aspects of FINRA's exam business in the most casual manner by stating:

> [T]hat FINRA also operates as a business and earns money from the Series 7 exam, which it treats as confidential, proprietary information, does not change the nature and function of the activity being performed." App. 7 *infra*.

It did change the nature and the function of the activity because as the court stated in *Weissman*:

> When, however, they [SROs] are not acting in the exercise of their purely governmental functions, but are performing duties that pertain to the exercise of those private franchises, powers, and privileges which belong to them for their own corporate benefit, . . . then a different rule of liability is applied and they are generally held responsible for injuries arising from their negligent acts or their omissions to the same extent as a private corporation under like circumstances. *Id.* at 1296.

Basically, the Eleventh Circuit gave FINRA *carte blanche* to do whatever it pleases, so long as it claims that it occurs during the course of its regulatory duties. This Court has stated otherwise in the case of presidential aids:

> While absolute immunity might be justified for aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. To establish entitlement to absolute immunity, a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted. *Harlow v. Fitzgerald*, 457 U.S. 800, 801 (1982).

The Eleventh Circuit inexplicably deviated from its own *en banc* precedent rule. Under the prior panel precedent rule a prior panel's holding is binding on all subsequent panels of the Court of Appeals unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by the court sitting *en banc*. *U.S. v. Archer*, 531 F.3d 1347 (11th Cir. 2008).

II. Past Denials of Certiorari on this Issue Have Fortified a Private Corporation with Superior Rights and Protections that Exceed Even those of the President of the United States

Based on past petitions, it is apparent that the circuits need guidance as to the scope of FINRA's immunity. On an almost annual basis this Court is asked to step in and assist on this issue. *See Huy Pham v. Fin. Indus. Reg. Auth., Inc.*, 589 Fed. Appx. 345 (9th Cir. 2014) (unpublished), *cert. denied*, 577 U.S. 897 (2015); *Santos-Buch v. Fin. Indus. Reg. Auth., Inc.*, 591 Fed. Appx. 32 (2d Cir. 2015) (unpublished), *cert. denied*, 577 U.S. 817 (2015) (investigations); *Lobaito, Jr. v. Fin. Indus. Reg. Auth., Inc.*, 599 Fed. Appx. 400 (2d Cir. 2015) (unpublished), *cert. denied*, 577 U.S. 1016 (2015) (violations of its own rules); *Scottsdale Capital Advisors Corp. v. Fin. Indus. Reg. Auth., Inc.*, 844 F.3d 414 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1838 (2017); *Glob. eBusiness Services, Inc. v. Fin. Indus. Reg. Auth., Inc.*, 741 Fed. Appx. 438 (9th Cir. 2018) (unpublished), *cert. denied*, 139 S. Ct. 1595 (2019) (arbitral immunity).

The Court's cert denials are aiding and abetting in the creation of a monster that has run amok. In the case of *Hurry v. Fin. Indus. Reg. Auth., Inc.*, 782 Fed. Appx. 600 (9th Cir. 2019) (unpublished), *cert. denied*, 140 S. Ct. 2668 (2020), this Court was cautioned that FINRA had become an "agency not accountable to the court system at all, and totally out of control" and that FINRA "can get away with anything, no matter how

tortious, outrageous, or injurious, including acts perpetrated upon non-members."

This Court has twice denied absolute immunity claims by Presidents in cases involving allegations of serious misconduct." *U.S. v. Nixon*, 418 U.S. 683 (1974), *Clinton v. Jones*, 520 U.S. 681 (1997), and recently denied the former President of the United States, Donald J. Trump; absolutely immunity due to an issuance of a state criminal subpoena, *Trump v. Vance*, 140 S. Ct. 2412 (2020). The Eleventh circuit, however, essentially ruled that FINRA is worthy of more protection than even that of the President of the United States for the alleged rigging of entry-level exams.

Additionally, FINRA 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 FINRA board or committee. Moreover, the fact that a business entity is subject to "extensive and detailed" state regulation does not convert that organization's actions into those of the state. *Desiderio v. Natl. Ass'n of Securities Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999) (Holding that NASD, now FINRA, was not a state actor).

a. This Case is an Ideal Vehicle for this Court to Address the Scope of SRO Immunity

FINRA is not a government agency, although it acts like one. Even if FINRA were a government

agency, there is a "recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *W. Virginia v. Envtl. Protec. Agency*, 142 S. Ct. 2587, 2609 (2022).

The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. *Butz* at 505.

This Court has approved absolute immunity in five contexts: for prosecutors performing prosecutorial acts (but not investigative or administrative tasks), judges performing judicial tasks (but not administrative tasks), legislators performing legislative tasks, police officers who testify as witnesses (covering their testimony but not the actual investigation of the defendant), and the President of the United States for certain acts while in office.

This Court has also recognized a rule of absolute immunity for certain government officials, but that rule applies even more narrowly than qualified immunity. Specifically, absolute immunity is available only to government officials performing certain narrowly defined functions, most of them associated with the judicial process. *See Rehberg v. Paulk*, 132 S. Ct. 1497 (2012) (witnesses); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Pierson v. Ray*, 386 U.S. 547 (1967) (judges); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislators); *see also Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (President of the United States).

Again, the case before this Court concerns the rigging of revenue producing entry-level securities exams. If *arguendo*, FINRA removed the malicious algorithms what would remain is a difficult securities exam. The algorithms serve no regulatory purpose other than to make money for FINRA.

FINRA's contention that because it administers the Series 7 securities exam, it is absolutely immune from any liability for damages related to the exams is "unsound." *Butz* at 485.

A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. *Owen v. City of Indep., Mo.*, 445 U.S. 622, 651 (1980).

b. The Court Below Stated that this Case Raises "Relevant and Well-Present Arguments"

Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. *Maty v. Grasselli Chem. Co.*, 303 U.S. 197, 200 (1938). The Eleventh Circuit applied a higher standard to Petitioner's *pro se* pleading. The court below completely omitted its customary statement that "a document filed *pro se* is to be liberally construed, and a *pro se* complaint, however

inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The Eleventh Circuit departed from the accepted and usual course of judicial proceedings.

Paradoxically, the Eleventh Circuit stated that its "decision to affirm the dismissal of [Petitioner's] complaint is no slight on her intelligence or character," and that the Petitioner had "represented herself quite ably in unfamiliar terrain, making relevant and well-presented arguments." App. 9. The Eleventh Circuit however, inexplicably then proceeded to find that Petitioner's complaint "did not state a plausible claim." App. 9. *Also see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Petitioner's accusation was uncomplicated. She alleged that she witnessed an algorithm while taking the exam, and that the algorithm altered the exam midway to cause intentional failures. Furthermore, she alleged that FINRA rigged the exams for money and hid behind "trade secrets" and claims of "proprietary" information to conceal the fraudulent conduct.

Bear in mind, Petitioner did not allege that FINRA's exam was produced by "little green men," or that Petitioner took a "trip to Pluto," to sit for the exam. *Iqbal*, at 696.

The Eleventh circuit did not elaborate on how, why, or what was implausible in the complaint—simply that was not plausible. It begs the question:

how plausible would the Eleventh Circuit find it if a corporation were accused of using advertising algorithms to make money and those algorithms resulted in housing discrimination;[7] or that a corporation hid behind proprietary, confidential, trade secrets as a way to conceal the ineffectiveness of a much-anticipated blood test?[8]

It appears that "plausibility" is determined not so much by the facts of a case, as the status of the accuser.

III. Petitioner's Right to a Jury Trial Exists as Provided by the First Clause of Seventh Amendment of the United States Constitution

The most straightforward and unambiguous language in the constitution is found in the seventh amendment. A guarantee of right to jury in civil cases was one of the amendments urged on Congress by the

---

[7] McKinnon, John; *Facebook Parent Meta Agrees to End Alleged Discriminatory Practices in Housing Ads*, Wall Street Journal, 6/21/2022.

[8] Randazzo, Sara; Somerville, Heather; Weaver, Christopher; *Theranos Founder is Guilty on Four of 11 Charges in Fraud Trial*, Wall Street Journal, 6/3/2022; *see also U.S. v. Holmes*, 5:18-CR-00258-EJD-1, 2021 WL 2044470 (N.D. Cal. May 22, 2021).

ratifying conventions[9] and it was included from the first among Madison's proposals to the House.[10]

This Court's interpretation of the Seventh Amendment—which provides that "[i]n Suits at common law, . . . the right of trial by jury shall be preserved"—has been guided by historical analysis comprising two principal inquiries: (1) whether the cause of action either was tried at law at the time of the founding or is at least analogous to one that was, and (2) if so, whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 688 (1999).

There is no evidence or record that the common law in England in 1791 gave judges the ability to dismiss pleadings for implausibility or for quasi-governmental immunity. Nor is there any record of private corporations and its employees receiving absolute immunity. Neither the common law nor public policy affords any support for absolute immunity. *Malley v. Briggs*, 475 U.S. 335, 335 (1986).

Judges as factfinders of plausibility or implausibility are not found in common law in England,

---

[9] J. Elliott, *The Debates in The Several State Conventions on the Adoption of the Federal Constitution* 326 (2d ed. 1836) (New Hampshire); 2, id. at 399–414 (New York); 3, id. at 658 (Virginia).

[10] *1 Annals of Cong.* 436 (1789). "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."

however one will easily locate the tort of deceit [Fraud]. Fraud, like what is alleged in this case is found in common law in England as far back as 1789.

Pasley vs. Freeman was a case tried in the Kings Bench, Hilary Term, in 1789. The argument was about a man who purposely deceived a creditor in order to defraud it. This is one of the earliest cases in court history that dealt with fraud, deceit, and misrepresentation.[11] In the case of *Pasley v. Freeman* the court held:

> A false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. *Pasley v. Freeman*, 100 Eng. Rep. 450 (K.B. 1789).
>
> The principle on which it is contended to lie is, that wherever deceit or falsehood is practised [sic] to the detriment of another, the law will give redress. *Id.* at 53.

Relevant to the case at hand is that the fraud case of *Pasley v. Freeman*, was tried by a jury in 1789, three years prior to the ratification of the seventh amendment. The *Pasley* court stated:

> It is expressly charged that the defendant knew the falsity of the allegation, and which the ***jury*** have found to be true; but non constat [sic] that the plaintiffs knew it, or had

[11] Ames, J., Smith, J. & Pound, R. (2013), *A Selection of Cases on the Law of Torts*. Cambridge, MA and London, England: Harvard University Press.

> any means of knowing it, but trusted to the veracity of the defendant. *Id.* at 62. ***Emphasis added.***

Therefore, if applying the historical test, Petitioner's right of trial by jury in this case must be preserved. The court ought to return to the approach of asking whether immunity "was historically accorded the relevant official in an analogous situation at common law". *Baxter v. Bracey*, 751 Fed. Appx. 869 (6th Cir. 2018) (unpublished), *cert. denied*, 140 S. Ct. 1862, 1864 (2020) (Justice Thomas, *dissenting*).

Those who oppose the use of juries in civil trials seem to ignore the founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the "judiciary". *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 343 (1979) (Justice Rehnquist, *dissenting*). On the common law side of the federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 (1989).

a. The Eleventh Circuit's Conclusions Violated the Seventh Amendment of the United States Constitution

"Quasi-governmental immunity," is purely an invention of the Eleventh Circuit. Thus, created on June 3, 2022, to deliver a desired result. The Eleventh

Circuit's novel finding of "Quasi-Governmental Immunity" does not exist in the Constitution or any law passed by Congress. It is not even found in any caselaw. In fact, a quick check of Westlaw© with the words "quasi-governmental immunity" [quotes included], yields a singular result—*Gallagher v. Fin. Indus. Reg. Auth., Inc.*

The Eleventh Circuit's conclusionary analysis violates the preservation clause of the seventh amendment and edges dangerously close to assailing the re-examination clause.

First the Eleventh Circuit "barred" Petitioner for her inability to purportedly "pierce FINRA's quasi-government immunity," then ruled that Petitioner could not "state such a claim if granted a leave to amend." App. 9. The Eleventh Circuit interfered with every aspect of a jury trial, including but not limited to the choosing of a jury; *voir dire*; opening statements; witness testimony and cross-examination; expert witnessed in technology—specifically algorithms; closing argument; and jury deliberation.

As this Court has long recognized, a jury and a judge can draw different conclusions from the same evidence. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 555 (1990), *quoting Railroad Co. v. Stout*, 17 Wall. 657, 664, 21 L.Ed. 745 (1874).

In its quest for implausibility, the Eleventh Circuit proceeded to cherry-pick quotes, bury portions of the record and disregard Petitioner's eyewitness account. The Eleventh Circuit hid a central piece of evidence

offered by Petitioner—the FINRA declarations from the *FINRA v. Training Consultant* litigation. The *Training Consultants* lawsuit declarations were a central part of the evidence offered by Petitioner to demonstrate FINRA's "exam business" dealings.

The Eleventh Circuit acknowledged that the lawsuit stemmed in part from "FINRA's secrecy," App. 8, nevertheless determined that the complaint was not plausible because Petitioner stated that she did not know the extent of the "functions of the algorithms." App. 8.

It seems inescapable that "some measure of discovery may sometimes be required to determine exactly what a public-official defendant did know at the time of his actions." *Harlow*, at 821 (internal quotation marks omitted).

The Eleventh Circuit then went further and served as judge, jury, and advocate for FINRA. For example, although FINRA evaded offering any explanation for the algorithms other than stating that the conduct was "in furtherance of its regulatory obligations," the Eleventh Circuit generously took it upon itself to conclude that, "FINRA's secrecy would be advisable, to some degree to ensure the integrity of the exam." App. 8. The Eleventh Circuit then stated that FINRA, "could view greater disclosure as increasing the chances of cheating." App. 9. FINRA made no mention of any of the Eleventh Circuit scenarios as defenses, yet the Eleventh Circuit played the role of

advocate on behalf of FINRA in an attempt to make FINRA's conduct—well—plausible.

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Lytle v. Household*, at 554.

After the Eleventh Circuit successfully interfered with Petitioner's right to a jury trial, implausibility became more plausible, even though the allegations ruled implausible were plausible.

b. The Fifth Circuit Held that the SEC is in Violation of the Constitution of the United States

Earlier this year, in *Jarkesy v. Securities and Exch. Commn.*, 34 F.4th 446 (5th Cir. 2022), the Fifth Circuit vacated an SEC judgment against hedge fund manager George Jarkesy and investment adviser Patriot 28 LLC.

The Fifth Circuit held that inter alia Seventh Amendment jury-trial right applied to civil enforcement action by the SEC and that Congress unconstitutionally delegated legislative power when it gave SEC unfettered authority to choose whether to bring enforcement actions in Article III courts or within agency. *Ibid.*

The court decided that SEC fraud actions that seek civil monetary penalties aren't intended to vindicate public rights but are more like traditional

common law cases to which the constitutional right to a jury trial attaches.

If the SEC itself is found to be in violation of the constitution, then it must extend to FINRA. A private corporation registered as an SRO with the SEC cannot escape constitutional questions of its own.

When approving SRO's absolute immunity, the courts have said that SROs, such as FINRA "stand in the shoes of the SEC." *D'Alessio v. New York Stock Exch., Inc.*, 258 F.3d 93, 105 (2d Cir. 2001). If the shoes no longer fit, FINRA cannot wear them.

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted and the judgment of the Eleventh Circuit Court of Appeals should be vacated.

Respectfully submitted,

HESLIN GALLAGHER
2640 Lake Shore Drive
Unit 411
Riviera Beach, FL 33404
(718) 715-6867
heslinlc@gmail.com

September 1, 2022