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No. 16-____

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IN THE

Supreme Court of the United States

SCOTTSDALE CAPITAL ADVISORS CORPORATION, et al.,

Petitioners,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress intended to restrict federal district court jurisdiction over challenges to the statutory authority of the Financial Industry Regulatory Authority to adjudicate alleged violations of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, Scottsdale Capital Advisors Corporation ("SCA"), and current and former SCA officers John J. Hurry, Timothy B. DiBlasi, and D. Michael Cruz, were plaintiff-appellants in the proceedings below. Respondent Financial Industry Regulatory Authority, Inc., was defendant-appellee.

SCA is a subsidiary of Scottsdale Capital Advisors Holdings LLC. No publicly-held entity owns 10% or more of the stock of SCA.

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PETITION FOR A WRIT OF CERTIORARI

Scottsdale Capital Advisors Corporation ("SCA"), John J. Hurry, Timothy B. DiBlasi, and D. Michael Cruz (collectively, "Scottsdale"), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the Fourth Circuit is reported at 844 F.3d 414, and reproduced at page 1a of the Appendix to this petition ("App."). The summary order of the United States District Court for the District of Maryland is unreported and reproduced at

App. 18a. A transcript of the motions hearing before the District Court, which includes the district court's reasoning, is reproduced at App. 19a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fourth Circuit was entered on December 20, 2016. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The pertinent text of the statutory provisions at issue, 15 U.S.C. §§ 78c, 78o-3, 78s, and 78y, is set forth in the Appendix at App. 57a.

INTRODUCTION

In *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), this Court held that the administrative review scheme of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (the "Exchange Act"), did not deprive district courts of subject-matter jurisdiction over a challenge to the legality of the regulatory body at issue. In this case, however, the Fourth Circuit held that the same review scheme ousts jurisdiction over a challenge to the statutory authority of a regulatory body because an administrative proceeding was pending when the challenge was made.

In so doing, the Fourth Circuit—like the Second Circuit in *Tilton* v. *SEC*, 824 F.3d 276 (2d Cir. 2016), *petition for cert. filed*, No. 16-906 (Jan. 19, 2017)—virtually rendered *Free Enterprise Fund* a dead letter by limiting it only to cases where no administrative proceeding is pending or threatened. The result is that petitioners must suffer the very harm they seek to prevent—prosecution and

punishment by an *ultra vires* body that lacks statutory authority to bring its charges—before they can even raise that challenge in court. As shown below, the Court should grant this petition (or hold it pending a decision in *Tilton*) in order to confirm that the jurisdictional holding of *Free Enterprise Fund* retains real meaning. Where, as here, an agency lacks legal authority to conduct a proceeding in the first place, it cannot credibly be argued that Congress intended for that same agency to determine for itself, without any prior judicial review, whether it has the prohibited authority at issue.

STATEMENT OF THE CASE

A. The Statutory Scheme.

Respondent, the Financial Industry Regulatory Authority, Inc. ("FINRA"), acts as a regulatory body for securities brokers and dealers doing business in the United States. FINRA is the successor to the National Association of Securities Dealers ("NASD"), and was created through the consolidation of the NASD and the regulatory arm of the New York Stock Exchange. *See Fiero* v. *FINRA*, 660 F.3d 569, 571-72 & n.1 (2d Cir. 2011). As a practical matter, any broker-dealer that wishes to conduct business in the United States is required to register with FINRA. *Id.* at 571.

FINRA's disciplinary authority is derived from, and governed by, § 15A and § 19 of the Exchange Act, 15 U.S.C. §§ 78o-3, 78s.[1] The Exchange Act authorizes FINRA to impose sanctions for violations of "***this chapter***," rules or regulations thereunder, and rules

[1] FINRA is both a registered securities association ("RSA") and a self-regulatory association ("SRO") within the meaning of the Exchange Act. *See* 15 U.S.C. §§ 78o-3, 78s.

of the association. 15 U.S.C. § 78o-3(h)(1)(B); *see also id.* §§ 78o-3(b)(2), 78s(g)(1)(B). As the Fourth Circuit itself recognized below, the reference to "this chapter" unambiguously refers to the Exchange Act, codified at Chapter 2B of Title 15 of the United States Code. *See* App. 11a. In contrast, Congress has conferred on the Securities and Exchange Commission ("SEC"), and no other body, authority to enforce the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (the "Securities Act").[2] Thus, the Exchange Act expressly precludes FINRA from initiating disciplinary actions premised upon alleged violations of the Securities Act.

For matters within FINRA's statutory jurisdiction, there is a lengthy internal review process. At the initial stage, if a FINRA Hearing Officer issues a disciplinary order, the defendant may appeal that decision to the FINRA National Adjudicatory Council ("NAC"), or the NAC may review the decision *sua sponte*. *See* FINRA Rules 9311, 9312.[3] If no appeal is sought, or if the appeal is denied, then the decision becomes final unless the FINRA Board of Governors independently calls for review. *See* FINRA Rules 9349, 9351.

After an adverse decision becomes final within FINRA, the defendant may petition the SEC for review under 15 U.S.C. § 78s(d)(2). Once the SEC

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[2] *See* Exchange Act § 19(h)(3)(B), 15 U.S.C. §§ 78s(h)(3)(B) (granting authority to "[t]he appropriate regulatory agency" to discipline members of an RSA such as FINRA for violations of "any provision of the Securities Act of 1933"); *id.* § 78c(a)(34)(E) (providing that the SEC is the "appropriate regulatory agency" for an RSA).

[3] FINRA's rules are available at finra.complinet.com/en/display/display.html?rbid=2403&element_id=607.

enters a final order, the defendant "may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit." 15 U.S.C. § 78y(a)(1). As this Court has explained, however, § 78y "does not expressly limit the jurisdiction that other statutes confer on district courts[,] * * * [n]or does it do so implicitly." *Free Enter. Fund*, 561 U.S. at 489.

B. FINRA Proceedings.

Petitioners are SCA, a FINRA-registered securities broker-dealer, and several of its current and former officers. John J. Hurry is SCA's co-founder and one of its directors, Timothy B. DiBlasi is SCA's Chief Compliance Officer, and D. Michael Cruz is SCA's former President. Mr. Hurry and his wife founded SCA in 2001. Since that time, the company has grown to become a leader in microcap-securities trading in the over-the-counter securities market. *See* 4th Cir. Joint Appendix ("J.A.") at 33.

In 2013, Mr. Hurry organized Cayman Securities Clearing and Trading SEZC Ltd. ("CSCT") to serve as an offshore broker-dealer for foreign clients. *Id.* CSCT became a customer of SCA and, through its account there, deposited and liquidated stocks on behalf of its own customers. *Id.* In early 2014, FINRA began an investigation of SCA, focusing on four foreign entities that had deposited and sold unregistered stock at CSCT, which in turn routed the transactions to SCA. *Id.* at 33-34.

As noted, the only statutory violations that Congress gave FINRA the authority to prosecute are violations of the ***Exchange Act***. *See supra* at 3-4. Nevertheless, in May 2015, FINRA initiated a

disciplinary proceeding against Scottsdale predicated entirely on alleged violations of § 5 of the ***Securities Act***, 15 U.S.C. § 77e. *See* J.A. at 36-89. Section 5 generally prohibits the public distribution of unregistered securities, absent an applicable exemption. In essence, FINRA alleges that certain transactions in unregistered securities that CSCT routed through SCA on behalf of several CSCT customers violated § 5 of the Securities Act.

Based on these alleged violations of § 5, FINRA has charged Scottsdale with violating FINRA Rule 2010, a catch-all rule which broadly provides that FINRA members "shall observe high standards of commercial honor and just and equitable principles of trade." App. 64a. According to FINRA, the alleged violations of the Securities Act necessarily violate Rule 2010. J.A. at 71. FINRA has also alleged that Scottsdale violated Rule 2010 by failing to establish and maintain an adequate supervisory system to prevent the purported violations of § 5 of the Securities Act. J.A. at 74, 82-83. And based solely on the alleged violations of § 5, FINRA has similarly charged Scottsdale with violating former NASD Rule 3010(a) (now superseded by FINRA Rule 3110), which required members to "establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules." J.A. at 74; *see also* App. 64a (FINRA Rule 3110).

In a pre-hearing motion for summary disposition, Scottsdale argued that FINRA had exceeded an unambiguous limitation on its statutory jurisdiction by charging them with violations of the Securities

Act. But a FINRA Hearing Officer adopted the view that FINRA may, by interpreting and applying its own broadly-worded rule of ethics, confer upon itself jurisdiction to enforce any statute it chooses, despite the express textual limitation on its authority. J.A. at 96-97. The FINRA Hearing Officer concluded that even though Congress has expressly conferred on FINRA the authority to prosecute violations of no statute other than the Exchange Act, FINRA may nevertheless prosecute violations of the Securities Act in the guise of enforcing its own rules. *Id.* Under this theory, even though Congress has limited FINRA's authority to prosecute statutory violations to violations of the Exchange Act, FINRA can evade that limitation merely by interpreting and applying its general rules to cover violations of other statutes, such as the Securities Act.

Petitioners have denied the allegations in FINRA's complaint, and continue to defend themselves before the organization in the FINRA proceeding, which is still ongoing. FINRA has requested that the Hearing Officer order sanctions under FINRA Rule 8310(a). J.A. at 84. Rule 8310(a) authorizes FINRA to impose a variety of penalties on its members, including censure, fines, suspension of FINRA membership or registration, expulsion from FINRA, cancellation or revocation of FINRA membership, suspension from or bars on association with FINRA members, entry of temporary or permanent cease-and-desist orders, and "any other fitting sanction." App. 65a.

C. Proceedings Below.

On March 22, 2016, Scottsdale filed suit against FINRA in the U.S. District Court for the District of Maryland (where FINRA has offices), seeking to enjoin FINRA from prosecuting the *ultra vires* disci-

plinary proceeding on the ground that FINRA had violated an unambiguous limitation on its statutory authority. FINRA moved to dismiss the complaint for lack of subject-matter jurisdiction, arguing that petitioners must first exhaust their administrative remedies before FINRA and the SEC before seeking judicial review exclusively in the Court of Appeals. The district court held a motions hearing on April 26, 2016, and issued a summary order dismissing the complaint for lack of subject-matter jurisdiction on the same day. App. 18a, 52a-56a.

The Fourth Circuit affirmed. After rejecting Scottsdale's separate argument for district court jurisdiction under *Leedom* v. *Kyne*, 358 U.S. 184 (1958), the Fourth Circuit applied the three-factor test of *Thunder Basin Coal Company* v. *Reich*, 510 U.S. 200 (1994), to hold that the administrative review scheme set forth in the Exchange Act stripped federal district-court jurisdiction over challenges to FINRA's statutory authority. App. 13a-16a. Under *Thunder Basin*, which was also the basis for this Court's decision in *Free Enterprise Fund*, "Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Free Enter. Fund*, 561 U.S. at 489 (quoting *Thunder Basin*, 510 U.S. at 212-13).

First, the Fourth Circuit held that Scottsdale "can obtain meaningful judicial review" because the severe penalties that FINRA could impose upon them, including the loss of the individual petitioners' chosen livelihoods, are, in the Fourth Circuit's view, merely "part of the social burden of living under government." App. 14a (quoting *Bennett* v. *SEC*, 844

F.3d 174, 185 (4th Cir. 2016) (in turn quoting *FTC* v. *Standard Oil of Cal.*, 449 U.S. 232, 244 (1980))). Rejecting Scottsdale's argument that it could never redress the harm of FINRA's *ultra vires* proceeding if it was ultimately to prevail on the merits before FINRA, the Fourth Circuit held that Scottsdale "could challenge FINRA Rule 2010 outside of the disciplinary proceeding" or could "petition the SEC—apart from any disciplinary action—to amend or repeal FINRA Rule 2010." App. 14a-15a.

Second, the court held that "Scottsdale's claims are not wholly collateral to the Exchange Act," reasoning that "[a]s Scottsdale's claim arises out of the proceeding against it and provides an affirmative defense, it is not wholly collateral to the statute." App. 15a. In other words, the court held that no challenge that could be raised as an affirmative defense to an ongoing administrative proceeding could ever be collateral to the Exchange Act.

Third, the Court held that the claim at issue was not outside of FINRA's expertise because "the Exchange Act lays out a comprehensive oversight scheme whereby Congress gives the SEC the authority to supervise FINRA's rules, including approving or modifying FINRA rules in any way the agency deems appropriate or necessary." App. 16a. Thus, the Court held that this *Thunder Basin* factor supported FINRA because the SEC (not FINRA) had authority to address Scottsdale's claim in the event the matter were ever appealed to the SEC.

Accordingly, the Fourth Circuit affirmed the district court's dismissal, holding that the Exchange Act's review scheme abrogated federal court jurisdiction to review Scottsdale's claim that FINRA lacked

statutory authority to prosecute violations of the Securities Act.[4] This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *FREE ENTERPRISE FUND*.

Certiorari is appropriate where a court of appeals has "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Certiorari is warranted here, as the Fourth Circuit has decided an important and recurring question of law in conflict with this Court's decision in *Free Enterprise Fund*. Indeed, if the Fourth Circuit's interpretation stands, there will be little left of the jurisdictional holding in *Free Enterprise Fund*, which would be cabined to those unusual circumstances where no administrative proceeding is pending or threatened.

In *Free Enterprise Fund*, the Court held that the administrative review scheme of the Exchange Act—the same scheme at issue here—"does ***not*** expressly limit the jurisdiction that other statutes confer on district courts[,] * * * [n]or does it do so implicitly." 561 U.S. at 489 (emphasis added). Instead, the jurisdiction expressly conferred on the federal district courts to review federal questions like those in this

[4] The court also questioned, without deciding, whether Scottsdale had identified a right of action. *See* App. 9a n.5. FINRA, however, never asserted this argument below and the argument has therefore been waived. *See Nw. Airlines, Inc.* v. *Cty. of Kent*, 510 U.S. 355, 364-65 (1994). In any event, Scottsdale has a cause of action arising under the Exchange Act. *See Fiero*, 660 F.3d at 573 n.5 (complaint alleging that FINRA acted without statutory authority "[o]n its face * * * states a claim under the Exchange Act").

case, *see* 28 U.S.C. § 1331, will not be abrogated unless "the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" 561 U.S. at 489 (alteration in original) (quoting *Thunder Basin*, 510 U.S. at 212). And the Court "presume[s] that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 212-13).

Applying these factors, the Court held that the Exchange Act did ***not*** oust district court jurisdiction over a challenge to the legal authority of an administrative body (the Public Company Accounting Oversight Board ("PCAOB")). The Court held that the plaintiffs could not otherwise meaningfully pursue their claims, *id.* at 490, that their "general challenge to the Board is 'collateral' to any Commission orders or rules from which review might be sought," *id.*, and that they raised "standard questions of administrative law, which the courts are at no disadvantage in answering," *id.* at 491. Yet in this case, the Fourth Circuit concluded that the Exchange Act ousts jurisdiction over a similar challenge to the legal authority of FINRA, holding that Scottsdale must suffer the very harm it seeks to prevent before obtaining judicial review, because its "claim arises out of the proceeding against it and provides an affirmative defense." App. 15a. As shown below, if allowed to stand, that decision would effectively gut the jurisdictional holding of *Free Enterprise Fund.*

A. As In *Free Enterprise Fund*, Post-Hoc Judicial Review Would Not Be Meaningful.

In *Free Enterprise Fund*, the Court held that requiring the plaintiffs to undergo agency review of their challenge to the PCAOB would deprive them of the ability to pursue "meaningful" relief, rebuffing the government's contention that the plaintiffs must first "incur a sanction (such as a sizable fine)" and then submit their challenge to the PCAOB's legality to administrative review before obtaining judicial review. 561 U.S. at 489-90. The Court rejected the argument that a plaintiff is required to endure "severe punishment should its challenge fail," holding that "we do not consider this a 'meaningful' avenue of relief." *Id.* at 490-91.

Yet in this case, the Fourth Circuit held that judicial review would be "meaningful" even though petitioners must endure whatever punishment FINRA might impose—potentially including both sizable fines and the loss of the individual petitioners' chosen professions—before gaining access to the courts. According to the Fourth Circuit, being subjected to *ultra vires* irreparable punishment before being able to challenge the agency's lack of statutory authority is simply "part of the social burden of living under government." *See* App. 14a (citation omitted).

There is no appreciable difference between the review this Court held was not meaningful in *Free Enterprise Fund* and the review the Fourth Circuit held was meaningful here. Under the holding of the Fourth Circuit, Scottsdale must endure what this Court held was not a meaningful avenue of relief—administrative review before the very entity at issue,

coupled with the risk of "severe punishment should its challenge fail." *Id.* at 490. Indeed, the record in this case is undisputed that the restrictions FINRA could impose on petitioners' ability to associate with broker-dealers, and the associated loss of goodwill and reputational damage, "would be irreparable given that, once a finding of liability is made by FINRA, there is no way to turn back time and erase such a finding in the minds of the public." J.A. at 35 (Decl. of Henry Diekmann ¶ 18).[5]

The only distinction between these cases is that there is a pending administrative proceeding in this case whereas no proceeding had yet been instituted in *Free Enterprise Fund.* But that is a distinction without a difference. In *Free Enterprise Fund,* the plaintiffs were not required to subject themselves to an administrative proceeding before challenging the PCAOB's authority in court because enduring the risk of severe punishment to raise a collateral claim was not "meaningful" review. So too here. And the Fourth Circuit's suggestion that petitioners "could challenge FINRA Rule 2010 outside of the disciplinary proceeding," or "petition the SEC—apart from any disciplinary action—to amend or repeal FINRA Rule 2010," App. 15a, is exactly the sort of manufactured proceeding that *Free Enterprise Fund* holds is not required. *See* 561 U.S. at 490-91.

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[5] Insofar as FINRA and its predecessor have argued, with some success, that SROs such as FINRA are immune from damages in connection with their regulatory duties, *see, e.g., Standard Inv. Chartered, Inc.* v. *NASD*, 637 F.3d 112, 115 (2d Cir. 2011), petitioners may be unable to recover damages from FINRA for the substantial harm inflicted upon them even if any of that harm were not irreparable.

Thus, the Fourth Circuit, like the Second Circuit in *Tilton*, has effectively neutered the holding of *Free Enterprise Fund*. As the dissenting judge in *Tilton* noted, "[f]orcing the appellants to await a final Commission order before they may assert their constitutional claim in a federal court means that by the time the day for judicial review comes, they will already have suffered the injury that they are attempting to prevent." 824 F.3d at 298 (Droney, J., dissenting); *see also Cont'l Can Co.* v. *Marshall*, 603 F.2d 590, 597 (7th Cir. 1979) ("If Continental is forced to defend the numerous prosecutions on the merits before the Commission prior to seeking a judicial determination that the prosecutions were unwarranted, the injury will have already been complete and uncorrectable."). In addition to the irreparable harm that would be caused by FINRA sanctions, petitioners are harmed by being compelled to submit to a disciplinary proceeding by an agency that lacks the statutory authority to do so. Later judicial review would not be meaningful since the harm sought to be prevented would already have come to pass.

B. As In *Free Enterprise Fund*, The Claims At Issue Are Wholly Collateral To The Exchange Act's Review Provisions.

Similarly, the Fourth Circuit virtually rendered *Free Enterprise Fund* a dead letter by holding that "[a]s Scottsdale's claim arises out of the proceeding against it and provides an affirmative defense, it is not wholly collateral to the statute." App. 15a.

In *Free Enterprise Fund*, 561 U.S. at 490, the Court held that the plaintiffs' "general challenge to the Board is 'collateral' to any Commission orders or rules from which review might be sought" because

they "object to the [PCAOB's] existence, not to any of its auditing standards." Likewise here, Scottsdale contests FINRA's statutory authority to prosecute disciplinary actions premised on alleged violations of the Securities Act, and not FINRA's interpretation of a substantive securities law, its factual findings, or its choice of adjudicative forum.

Yet the Fourth Circuit held that Scottsdale's claim is not collateral to the review provisions of the Exchange Act merely because the claim "arises out of the proceeding against it and provides an affirmative defense." App. 15a. That reasoning eviscerates the holding of *Free Enterprise Fund*. This Court was clear that the question of whether jurisdiction has been abrogated turns on whether "the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" 561 U.S. at 489 (quoting *Thunder Basin*, 510 U.S. at 212). Yet the Fourth Circuit's holding ignores the specific nature of Scottsdale's claim and simply asks whether there is a pending administrative proceeding in which the claim could be presented as a defense. If this Court in *Free Enterprise Fund* had intended such a simplistic test, it surely would have said so. Instead, the Court looked to whether the claim at issue was the kind of claim that Congress intended for the agency, rather than the courts, to resolve.

Here, Scottsdale's claim is plainly not one that Congress intended FINRA to resolve for itself in the pending administrative proceeding. As Scottsdale has shown in both the District Court and the Fourth Circuit, the pending proceeding is itself *ultra vires* because it is being conducted without statutory authority. Given that Congress did not authorize FINRA to prosecute members for alleged violations

of the Securities Act, it necessarily did not intend for FINRA to decide for itself whether it has such authority in that prohibited proceeding.

In reaching its contrary decision, the Fourth Circuit relied on its opinion in *Bennett* v. *SEC*, 844 F.3d at 186-87, a companion case argued together with this one. *Bennett*, in turn, relied upon an interpretation of the language from this Court's decision in *Elgin* v. *Dep't of Treasury*, 567 U.S. 1 (2012), which found that a different administrative scheme precluded initial judicial review of certain claims. But as the *Tilton* dissent explained, the portion of *Elgin* relied on by the Fourth Circuit (and other courts) "meant nothing more than that the plaintiffs were challenging actions against them under the statutes committed to the [agency] by attacking the constitutionality of those very statutes—it does not suggest that ***no challenge*** that would end ongoing proceedings could be considered collateral to a statute's review provisions." *Tilton*, 824 F.3d at 295 (Droney, J., dissenting) (emphasis in original). Indeed, "[s]uch an interpretation would swallow the rule, for there would no longer be any need to evaluate the substance of a claim as long as the claim could somehow serve to end administrative proceedings in a plaintiff's favor." *Id.*

C. As In *Free Enterprise Fund*, Petitioners' Claims Are Outside FINRA's Expertise.

In *Free Enterprise Fund*, this Court held that the plaintiffs' constitutional claims were outside of the agency's particular expertise because they did not call for an understanding of a specific industry or involve "technical considerations of agency policy," but instead were merely "standard questions of administrative law, which the courts are at no dis-

advantage in answering." 561 U.S. at 491 (alteration omitted).

That holding applies foursquare to this case. Scottsdale's claim is straightforward: because the governing statutes unambiguously give the SEC, and the SEC alone, authority to enforce the Securities Act, FINRA has no statutory authority to prosecute Scottsdale for alleged violations of the Securities Act and cannot evade that restriction by interpreting its general rules to give it the authority to prosecute any statute it wishes to enforce. Although FINRA may also enforce its own rules, the Exchange Act is the only statute that Congress gave FINRA the authority to enforce, and FINRA cannot override that clear mandate by interpreting its general requirement of "high standards" and "just and equitable principles" to become a roving commission to enforce whatever statute it wants to enforce.[6]

Just as in *Free Enterprise Fund*, these straightforward questions of statutory interpretation require no detailed industry knowledge and involve no technical considerations of agency policy, but "are instead standard questions of administrative law, which the courts are at no disadvantage in

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[6] *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 212-13 (1976) (precluding SEC from enacting rule reaching conduct not proscribed by Exchange Act because "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law," and "despite the broad view of the Rule advanced by the [SEC] in this case, its scope cannot exceed the power granted the [SEC] by Congress under [the Exchange Act]"); *see also* 15 U.S.C. § 78o-3(b)(6) (providing that FINRA's rules cannot be "designed to * * * regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the association").

answering." 561 U.S. at 491. *Cf. Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") (footnote omitted).

The Fourth Circuit, however, held that Scottsdale's claims were not outside the agency's expertise because the SEC (not FINRA) would be able to consider the claims in the event the case were ever appealed to the SEC. *See* App. 16a (noting that "the Exchange Act lays out a comprehensive oversight scheme whereby Congress gives the SEC the authority to supervise FINRA's rules, including approving or modifying FINRA rules in any way the agency deems appropriate or necessary"). But that is not what this Court held in *Free Enterprise Fund.* The third *Thunder Basin* factor does not turn on whether an agency is capable of addressing a particular question; if it did, then few, if any, issues would ever be outside of an agency's expertise because virtually any issue that could be presented to a court could also be presented to an agency. The relevant inquiry is not whether the agency is ***competent*** to consider the challenge. Rather, the issue is whether the agency possesses expertise and unique insight that puts it at a relative ***advantage*** to the courts, or whether, as in *Free Enterprise Fund* and here, the case merely involves "standard questions of administrative law, which the courts are at no disadvantage in answering." 561 U.S. at 491.

As with its consideration of the other *Thunder Basin* factors, the Fourth Circuit has effectively deprived this portion of the Court's holding in *Free Enterprise Fund* of any real meaning. If the only

inquiry is whether an agency is competent to answer a question of law, then it is hard to envision any issue that would not be within an agency's expertise, particularly where a proceeding is pending.

D. This Court's Review Is Needed To Ensure That *Free Enterprise Fund* Retains Continuing Vitality.

Given the Fourth Circuit's significant departure from this Court's holding in *Free Enterprise Fund*, this Court's review is needed to ensure that the decision retains continuing vitality. But certiorari is all the more appropriate in this case because other circuits have similarly failed to follow the guidance of *Free Enterprise Fund*.

These circuits include the Second Circuit in *Tilton*, *see supra* at 14, 16, as well as the Seventh, Eleventh, and D.C. Circuits. *See Hill* v. *SEC*, 825 F.3d 1236 (11th Cir. 2016); *Jarkesy* v. *SEC*, 803 F.3d 9 (D.C. Cir. 2015); *Bebo* v. *SEC*, 799 F.3d 765 (7th Cir. 2015). Each of these decisions repeats the errors of earlier courts by effectively cabining the jurisdictional holding of *Free Enterprise Fund* to cases in which no administrative proceeding is pending or threatened. *See, e.g.*, *Bebo*, 799 F.3d at 774 (plaintiff has access to "meaningful judicial review" because she can raise her objections in circuit court "[a]fter the pending enforcement action has run its course"); *Jarkesy*, 803 F.3d at 19 ("[b]ecause Jarkesy's constitutional claims * * * can eventually reach an Article III court," he has access to meaningful judicial review) (internal quotation marks omitted) (citing *Bebo*, 799 F.3d at 771-73); *Tilton*, 824 F.3d at 286-87 (same, citing *Bebo* and *Jarkesy*); *Hill*, 825 F.3d at 1247 (same, citing *Tilton*).

The issue is thus oft-recurring, and the widespread error in the circuit courts calls for an exercise of this Court's supervisory power to restore true meaning to its pronouncement in *Free Enterprise Fund.*

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

A pending petition for certiorari, docketed as No. 16-906, seeks review of the Second Circuit's decision in *Tilton.* Because the question presented in that case is substantially similar to the question presented here, it would be appropriate for the Court to either hold this case pending a decision on the merits in *Tilton,* or grant this petition and decide the case concurrently with *Tilton.*

But even if the Court denies the petition in *Tilton,* it should still grant certiorari here, because the availability of district court jurisdiction is even clearer in this case for at least two reasons. First, as noted above, *see supra* at 12-13, the record in this case is undisputed that the sanctions FINRA seeks to impose on Scottsdale would cause substantial, irreparable harm beyond the usual disruption of participating in an administrative proceeding. As the *Tilton* court recognized, "the Supreme Court has concluded that post-proceeding judicial review would not be meaningful because the proceeding itself posed a risk of some additional and irremediable harm beyond the burdens associated with the dispute resolution process." 824 F.3d at 286 (citing *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-97, 499 (1991)). But in *Tilton,* unlike here, "the appellants ha[d] identified no such additional, irremediable harm." *Id.*; *accord Hill,* 825 F.3d at 1247 ("This case simply does not present a situation

where the respondents are likely to suffer irreparable injury while awaiting judicial review.").

Second, while the plaintiff in *Tilton* seeks to enjoin an SEC proceeding on the ground that the manner in which the SEC appoints its administrative law judges violates Article II of the U.S. Constitution, Scottsdale argues that FINRA has no statutory authority to even conduct this proceeding in the first place. The plaintiff in *Tilton* (like those in *Bebo*, *Jarkesy*, *Hill*, and *Bennett*) did not contest the SEC's statutory authority or jurisdiction to decide the charges being brought, only the manner in which they were being decided. But Scottsdale challenges FINRA's statutory authority to even ***initiate*** a disciplinary action predicated on alleged violations of the Securities Act. Thus, district court jurisdiction is even clearer here, because Congress could not have intended for an agency without statutory authority to conduct a proceeding to determine its own jurisdiction in that *ultra vires* proceeding. *See, e.g.*, *United States* v. *Members of Estate of Boothby*, 16 F.3d 19, 21 n.1 (1st Cir. 1994) ("an action taken by an agency lacking jurisdiction is a nullity") (citing *Manual Enters., Inc.* v. *Day*, 370 U.S. 478, 499 n.5 (1962)).

Accordingly, this case presents an ideal vehicle to resolve the question presented, whether together with or in lieu of review in *Tilton*. The record on irreparable harm is undisputed; the question presented is a pure question of law, definitively resolved by the Fourth Circuit; and the conflict between the Fourth Circuit's decision and this Court's decision in *Free Enterprise Fund* is clear.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted and the judgment of the Fourth Circuit reversed.

Respectfully submitted,

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