

NOT YET SCHEDULED FOR ORAL ARGUMENT

**United States Court of Appeals
for the District of Columbia Circuit**

No. 23-5129

ALPINE SECURITIES CORPORATION,
Plaintiff-Appellant,
SCOTTSDALE CAPITAL ADVISORS CORPORATION,
Plaintiff-Appellee,
v.
FINANCIAL INDUSTRY REGULATORY AUTHORITY,
Defendant-Appellee,
UNITED STATES OF AMERICA,
Intervenor for Defendant-Appellee.

(For Continuation of Caption See Inside Cover)

*On Appeal from the United States District Court for the District of Columbia
in No. 1:23-cv-01506-BAH, Honorable Beryl A. Howell, U.S. District Judge.*

**BRIEF FOR *AMICUS CURIAE* NORTH AMERICAN SECURITIES
ADMINISTRATORS ASSOCIATION, INC. IN SUPPORT OF APPELLEES**

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November 3, 2023

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amicus* North American Securities Administrators Association, Inc. states as follows:

Parties and Amici. All parties appearing before the district court and this Court are listed on the cover page of the August 28, 2023, Opening Brief of Plaintiff-Appellant. NASAA is aware that several other *amici* have filed or intend to file briefs with this Court.

Rulings Under Review. The ruling under review is referenced on page i of the Opening Brief of Plaintiff-Appellant.

Related Cases. The case on review was not previously before this Court or any other court. NASAA is not aware of any related cases except as referenced on page i of the October 27, 2023, Brief for Defendant-Appellee.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 29(b), Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, *amicus* North American Securities Administrators Association, Inc. affirms that it is a 501(c)(3) nonprofit membership organization incorporated in the District of Columbia. It has no parent corporation and no publicly held company owns ten percent or more of its stock.

CERTIFICATE OF COUNSEL

Pursuant to Circuit Rule 29(d), the undersigned counsel certifies that this brief is being filed separately from any other *amicus* brief and that this brief is necessary because the North American Securities Administrators Association, Inc. has a unique perspective and relationship to Defendant-Appellee, the Financial Industry Regulatory Authority, Inc. No person not associated with the North American Securities Administrators Association, Inc. has authored or contributed to this brief. All parties have consented to the filing of this brief.

Dated: November 3, 2023

/s/ Zachary T. Knepper
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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Formed in 1919, the North American Securities Administrators Association, Inc. (“NASAA”) is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and México. NASAA has 68 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands and Guam.

The overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse. NASAA supports its members in carrying out their investor protection and regulatory duties by, *inter alia*, developing and maintaining certain regulatory services for the use of all NASAA members, promulgating model rules and statutes, coordinating examination sweeps and multi-state enforcement actions, and commenting on legislative and rulemaking proposals. NASAA also offers its legal analyses and policy perspectives to state and federal courts as *amicus curiae* in cases involving the interpretation of state and federal securities laws.

NASAA and its members have a substantial interest in this case. State and federal securities laws form an interlocking and complementary regulatory system to confront and eliminate fraud and other abuses in the securities markets. Defendant-Appellee the Financial Industry Regulatory Authority, Inc. (“FINRA”) plays a crucial role in this structure, and the services FINRA provides to state and

federal regulators and to the functioning of our capital markets is essential. The reasons why FINRA is not a state actor has been thoroughly briefed to this Court through the October 27, 2023, Brief for Defendant-Appellee filed by FINRA and the Brief for Intervenor United States of America filed by the U.S. Department of Justice. We therefore do not restate or attempt to add to their analyses. NASAA submits this brief instead to discuss and support the existing structure of securities regulation instituted and maintained by Congress over the past century wherein self-regulatory organizations (“SROs”) such as FINRA are accorded an important role.

ARGUMENT

I. FINRA SERVES A CRITICAL ROLE IN THE U.S. SECURITIES REGULATORY FRAMEWORK THAT SHOULD NOT BE DISRUPTED.

A. FINRA’s role is to support state and federal securities regulation.

Our Nation’s capital markets function and prosper in large part due to investors’ trust in the fairness and efficiency of those markets. Maintaining that trust is essential to the continued primacy of the U.S. markets in an increasingly competitive global marketplace. Effective regulation, including enforcement of applicable laws and rules, is integral to maintaining investor trust and protecting both investors and the businesses that rely on our markets to raise capital. Accordingly, the securities industry in the U.S. is overseen pursuant to a carefully balanced, interlocking system of state, federal, and self-regulatory oversight. State regulators,

the Securities and Exchange Commission (“SEC”) and FINRA share responsibility for the oversight of broker-dealers and their associated financial professionals.¹ They perform distinct but complementary functions.

The earliest regulation of the offer and sale of securities in the U.S. occurred at the state level. In the early 20th century, state legislatures began to enact comprehensive laws—commonly known as “blue sky laws”—to regulate the offer and sale of securities in their states. *See, e.g., Hall v. Geiger-Jones Co.*, 242 U.S. 539, 540-41 (1917). In order to protect the public from unsubstantial schemes and “stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations,” these early blue sky laws generally prohibited “dealers” from offering or selling securities without being registered. *Id.* at 540-41, 550. By the early 1930s, virtually all states had enacted similar laws.

In the aftermath of the 1929 stock market crash and in the midst of the Great Depression, Congress began enacting the federal securities laws—including, as relevant here, the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78a *et seq.*—to confront and eliminate the various forms of fraud, manipulation, and other abuses that had contributed to those calamities. *See* H.R. REP. NO. 73-85, 1933

¹ In addition to state and federal regulators and FINRA, the securities industry is overseen by a wide variety of other SROs, including registered securities exchanges (such as the New York Stock Exchange) and the Municipal Securities Rulemaking Board.

WL 983, at *2-3 (1933); S. REP. NO. 73-792, 1934 WL 1289, at *2-5 (1934); H.R. REP. NO. 73-1383, 1934 WL 1290, at *2-5 (1934). In Congress's view, federal legislation was necessary in part because of the interstate character and impact of many transactions conducted in the secondary securities markets. *See* S. REP. NO. 73-792, 1934 WL 1289, at *2-3; H.R. REP. NO. 73-1383, 1934 WL 1290, at *6. In addition to prohibiting or regulating certain practices, the Exchange Act established a national framework for the registration and regulation of brokers, dealers, and exchanges and created the SEC to implement and enforce this framework.

However, Congress did not place the entire regulatory burden on the SEC. The Exchange Act preserved states' then-established authority in this area, *see* 15 U.S.C. § 78bb(a)(1), as well as the existing self-regulatory structures within the securities industry, *see* Marianne K. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation*, 62 N.C. L. Rev. 475, 480-83 (1984). Congress also recognized that the exchanges had not done enough to protect themselves and the markets in the lead-up to the 1929 crash. *See* S. REP. NO. 73-792, 1934 WL 1289, at *4-5; H.R. REP. NO. 73-1383, 1934 WL 1290, at *2-3. Accordingly, rather than instituting a system of pervasive federal regulation of the entire industry, Congress established a system under which the federal government would supervise the industry's continued self-regulation. *See* Smythe, 62 N.C. L. REV. at 482-83. In 1938,

Congress amended the Exchange Act to establish a supervised self-regulatory framework for broker-dealers participating in the over-the-counter markets, similar to that which existed among the exchanges. *See id.* at 483-85. *See also* 15 U.S.C. § 78o(b)(8) (requiring broker-dealers to become members of a registered securities association or national exchange) and § 78o-3 (detailing the requirements for a securities association to become registered). One of FINRA’s predecessors, the National Association of Securities Dealers (“NASD”), was formed in response to that legislation.²

Congress thus created a balanced, interlocking system of state and federal regulators, aided by self-regulatory organizations overseen by the federal government, to share responsibility for oversight of the brokerage industry and the securities markets. Responsibility for setting these federal regulatory standards now lies with the SEC (which enacts federal securities regulations) and FINRA (which proposes standards for the brokerage industry that are vetted, amended, and approved as appropriate by the SEC). FINRA performs important functions of conducting periodic and for-cause inspections of its members and enforcing

² Although FINRA is currently the only registered national securities association, this is not by operation of law. The Exchange Act does not, as one *amicus curiae* brief implies, require broker-dealers to become members of *FINRA*. *See* Brief of the New Civil Liberties Alliance as *Amicus Curiae* in Support of Plaintiff-Appellant at 4 (Sept. 5, 2023). The industry could seek to register new securities associations under the Exchange Act. For reasons of its own, the industry has not elected to do so.

FINRA's rules as approved by the SEC. States police conduct that occurs within their borders, affects their citizens, or otherwise comes within their purview. Within this system, the SEC and NASAA's member state agencies have broad authority to enact regulations, conduct examinations, and pursue civil and administrative enforcement actions. FINRA plays a narrower standard-setting role for the brokerage industry. It also performs many important cross-industry services related to licensing, qualification examinations, continuing education, and recordkeeping for the brokerage industry.

B. FINRA provides functions that are critical to regulators.

FINRA is essential to the efficient functioning of the Nation's securities markets. First, FINRA develops and enforces regulatory standards for securities brokers, dealers and their associated persons. FINRA oversees the business practices of approximately 3,400 brokerage firms and 624,000 registered persons. In 2022, FINRA expelled seven brokerage firms and 228 brokers from the industry while suspending the licenses of a further 328 brokers after finding that these respondents engaged in misconduct. *See* 2022 FINRA Annual Financial Report at 5, <https://bit.ly/4703PLm> (last visited October 30, 2023).

Second, FINRA manages critical regulatory systems including the Central Registration Depository ("CRD") and the Investment Adviser Registration Depository ("IARD") for the benefit of state and federal securities regulators,

securities firms, associated persons, and investors. CRD is the primary repository for regulatory records of broker-dealers and their associated persons. IARD is a similar system that maintains regulatory records for investment advisers registered with the SEC or state securities regulators, as well as their associated persons registered with one or more state securities regulators. FINRA maintains these systems under agreements and arrangements with regulators.

CRD and IARD contain important, legally mandated records of registrants' qualifications, business activities and disciplinary histories. Importantly, investors have access to and often rely on certain of these records to learn about financial professionals before entrusting their money to them. Registered persons and firms rely on CRD and IARD to maintain essential records, which include their registration status, disciplinary history and compliance with broker-dealer agent and investment adviser representative continuing education requirements. FINRA also provides qualification examination services to NASAA and implements NASAA's Examination Validity Extension Program for broker-dealer agents and investment adviser representatives in the CRD and IARD systems. *See* NASAA Exams (last visited October 30, 2023), <https://bit.ly/476QuRE>; NASAA Examination Validity Extension Program (last visited October 30, 2023), <https://bit.ly/3QCCVEi>.

C. FINRA provides functions that are critical to the national market system.

FINRA surveils billions of securities transactions every day for potential frauds like market manipulation or insider trading. *See* FINRA Technology, <https://bit.ly/40dOmFw> (last visited October 30, 2023). FINRA is able to do this because a substantial volume of trading data flows through FINRA. FINRA has been helping build the Combined Audit Trail (“CAT”) with other SROs. The CAT consolidates all of the separate sets of trading records maintained at each trading venue—*i.e.*, each of the separate “tapes,” as they are more commonly known—into a single, nationwide “tape.” *See* Combined Audit Trail, SEC Release No. 34-67457 (July 18, 2012), <https://bit.ly/493gkId>. Creating the CAT has been a Herculean task, and it is nearing fruition. FINRA is the Plan Processor for the CAT, meaning FINRA has primary responsibility for implementing and maintaining the CAT. *See* CAT NMS Selects FINRA as Consolidated Audit Trail Plan Processor (Feb. 27, 2019), <https://bit.ly/498nCds>.³ FINRA also runs the proprietary Trade Reporting and Compliance Engine (“TRACE”) that records trading in sovereign and corporate debt securities. *See* NASD Notice to Members 01-18, SEC Approves Rules to Require Fixed Income Transaction Reporting and Dissemination (Mar. 11, 2001),

³ Technically, a wholly-owned FINRA subsidiary called FINRA CAT, LLC is the Plan Processor. *See* Letter to Mr. Brent J. Fields Re: File Number 4-698 – Selection of Plan Processor for the National Market System Plan Governing the Consolidated Audit Trail (Apr. 9, 2019), <https://bit.ly/40rG4Kt>.

<https://bit.ly/3tNfP17>. FINRA makes a substantial amount of the data it collects available to the public. See FINRA Data (last visited October 30, 2023), <https://bit.ly/45L04Zq>.

In sum, FINRA provides essential services like these that state and federal securities regulators, thousands of firms, hundreds of thousands of registered persons, and millions of American investors rely upon. If this Court were to find that FINRA's rule writing and enforcement mechanisms were unconstitutional, this Court could disrupt the essential functioning of securities regulation and the Nation's securities markets, harming the economy.

CONCLUSION

This Court should affirm the district court's denial of a preliminary injunction and not disrupt the existing framework of securities regulation created by Congress and implemented over the past 90 years.

Respectfully Submitted

NORTH AMERICAN SECURITIES
ADMINISTRATORS ASSOCIATION, INC.

By,

/s/ Zachary T. Knepper

ZACHARY T. KNEPPER

Dated: November 3, 2023

Zachary T. Knepper
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations in Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains fewer than 6,500 words. This brief also complies with typeface and type-style requirements because it has been prepared on Microsoft Word using 14-point Times New Roman font, a proportionally spaced typeface.

Dated: November 3, 2023

/s/ Zachary T. Knepper

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CERTIFICATE OF SERVICE

I certify that on November 3, 2023, the foregoing brief was filed with the Clerk of the Court and served on all parties using the CM/ECF system to send notification of such filing to all counsel of record.

Dated: November 3, 2023

/s/ Zachary T. Knepper
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