No. 14-

IN THE

Supreme Court of the United States

ALAN SANTOS-BUCH,

Petitioner,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1997, petitioner Alan Santos-Buch, a former stockbroker, settled disciplinary charges filed by NASD Regulation, Inc. ("NASDR"), a predecessor of respondent Financial Industry Regulatory Authority, Inc. ("FINRA"). The terms of the settlement prohibited NASDR from— to use its own terminology—"proactively" publishing the disciplinary action on its website. Long after that settlement, FINRA has embedded a report of the disciplinary action against Santos-Buch in its website in a manner that made the report readily accessible by means of a simple internet search for Santos-Buch's name. FINRA has thus "proactively" published the disciplinary action in violation of the terms of the settlement, and has done so despite its own repeated acknowledgments in rulemaking notices that former brokers have a privacy interest in limiting the publication of disciplinary actions against them.[*]

Santos-Buch sued to enjoin FINRA's "proactive" website publication as a violation of his due process rights, asserting that FINRA was sufficiently entwined with the Securities Exchange Commission to render it a state actor and subject to Fifth Amendment due process under this Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 292 (2001).

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* *See U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 770-771 (1989) ("The fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information." (internal citation omitted))

The Second Circuit rejected the claim, holding that FINRA was not a state actor and not subject to due process. As a result of the Second Circuit decision, a split now exists within the Circuits, since the Fifth and Tenth Circuits have previously held that FINRA is subject to due process claims. The existence of the split has been acknowledged by the Eleventh Circuit, which, itself, has declined to weigh in on the issue.

Thus the specific question presented is:

> Whether FINRA's performance of its responsibilities in disciplining members and associated persons and disclosing disciplinary information about them to the public is subject to the restraints of the due process clause of the United States Constitution, Fifth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Santos-Buch respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (pet. app. 1a - 6a) is reported at 591 Fed.Appx. 32. The opinion of the district court (pet. app. 7a - 26a) is reported at 32 F.Supp. 3d 475.

JURISDICTION

The Second Circuit issued its decision on January 30, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PART OF THE CONSTITUTION

The relevant part of the United States Constitution is the Fifth Amendment, which is set forth in Appendix C

STATEMENT OF THE CASE

A. Summary of Santos-Buch's Position

Santos-Buch seeks review of the Second Circuit's ruling which rejected his claim that FINRA violated his due process rights by "proactively" publishing, and continuing to publish, on its website a report of Santos-Buch's 1997 settlement of NASDR disciplinary charges. (The charges alleged that Santos-Buch entered into an

improper agreement with a customer.) Indisputably, and as the Second Circuit confirmed (pet. app. 5a), neither FINRA nor the SEC provides any means for Santos-Buch to challenge the wrongful website publication.

In its ruling, the Second Circuit held that FINRA was not subject to the due process clause since it was not a "state actor." (Pet. App. 5a-6a.) The ruling was stated in an entirely conclusory fashion, and the decision did not explain why FINRA's entwinement with the SEC was not sufficient to render it a state actor under *Brentwood Academy*, *supra*. The Second Circuit also rejected a second claim by Santos-Buch, in which he challenged a retroactive amendment to a FINRA rule concerning its BrokerCheck program, on precisely the same "absence of state action" grounds. (Pet. App. 5a.)

Certiorari should be granted to review the Second Circuit's holding that FINRA is not a state actor and therefore not subject to due process claims.

The decision ruling creates a split among the Circuits, raises important issues of constitutional and administrative law, and presupposes that Santos-Buch has no entitlement to a remedy whatsoever, regardless of the merit of his wrongful website publication claim, or the extent of the reputational injury he has suffered and will continue to suffer.

Brentwood Academy held that a private organization will be considered a state actor and subject to due process if it is substantially entwined with a governmental agency. Congress, the SEC and state securities regulators have not only imposed numerous and extensive quasi-

governmental roles upon FINRA, they have also leveraged FINRA's regulatory capabilities in order to achieve purely governmental objectives. Only willful blindness can yield a finding that FINRA is not a state actor under *Brentwood Academy*. Either entwinement is the test and FINRA is a state actor and subject to due process, or entwinement is no longer the test, in which case the Court should make that clear to the rest of the judiciary. Either way, *certiorari* is warranted.

In *Standard Investment Chartered Inc. v. National Association of Securities Dealers*, 637 F.3d 112, 114-15 (2d Cir. 2011) the Second Circuit held that NASD was absolutely immune from private tort law damages actions for all activity "incident to" regulatory acts, and this Court denied *certiorari* in that case (*id.*, 132 S. Ct. 1093 (2012)). *Standard Investment Chartered* amounts to a dispositive rejection of efforts to use private tort law to curb perceived regulatory abuses by FINRA.

The freeing of FINRA from the coercive effect of private tort law, which *Standard Investment Chartered* achieved, militates urgently in favor of making FINRA subject to due process restraints. After all, a general agreement exists that the threat of tort liability is a potent deterrent to undesirable behavior, especially at the governmental level, because organizations tend to act rationally.[1] Under *Standard Investment Chartered*,

1. Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970); William Martin Landes & Richard A. Posner, The Economic Structure of Tort Law 11 (1987) (noting the widespread agreement that imposing tort liability on professionals, for example through medical malpractice, affects behavior)

since FINRA is no longer restrained by this economic deterrent, there is increased need for applicability of the due process clause as a legal deterrent.

As many legal scholars have concluded, if FINRA is to receive the benefit associated with governmental status—insulation from private tort damages claims—it should also be made subject to same due process obligations which the government assumes.

Intriguingly, *Standard Investment Chartered* seemed to hint at this: finding that NASD "bylaws are intimately *intertwined* with the regulatory powers delegated . . . by the SEC" to an extent that NASD was entitled to the same immunities accorded a government agency. *Id.* at p. 116-117 (emphasis added). It is a bizarre and unsettling outcome—not to mention a linguistic violation—that, under the Second Circuit decisions in *Standard Investment Chartered* and this case, FINRA is simultaneously so "intertwined" with the SEC that it is entitled to the same absolute immunity from private tort damages actions that an administrative agency obtains, yet not so "entwined" with the SEC to make it, like a government agency, subject to due process. Even Eleventh Amendment sovereign immunity does not preclude due process claims against state officials for injunctive relief to enforce due process rights. *Alden v. Maine*, 527 U.S. 706, 754-757 (1999). These arguments were not acknowledged by Second Circuit, which necessarily, but illogically, concluded that FINRA was both so like an administrative agency that it was immune from Santos-Buch's money damages claims and yet so unlike an administrative agency that it could not be subject to due process claims seeking declaratory and injunctive relief.

The Second Circuit ruling also results in a Circuit split, since the Fifth and Tenth Circuit have concluded that securities SROs are subject to due process. This petition will demonstrate that absence of a clear answer to this issue has created substantial jurisprudential incoherence within the federal judiciary, as well as documented problems for regulators.

Finally, given the growth of FINRA and its status as a co-regulator essentially equal in size and power to the SEC, and its lack of political or economic accountability, it should be made legally accountable under the due process clause.

B. Factual Background

The terms of Santos-Buch's settlement with NASDR specified that disclosure of the disciplinary action would be governed by IM 8310-2, an NASD rule then in place. The settlement stated:

> [Santos-Buch] understand[s] that NASDR will make such public announcement concerning this agreement and the subject matter thereof as NASDR may deem appropriate, *which shall be consistent with the Resolution of the Board of Governors. (See NASD Manual, Procedural Rule 8310 and I[nterpretive] M[atter]-8310-2).*

(Emphasis added.)

At the time of the settlement, IM-8310 provided:

> Notices imposing sanctions of $10,000 or more or penalties of expulsion, revocation,

> suspension and/or barring of a person from being associated with all members *shall promptly be transmitted to the membership and to the press concurrently*; . . .

(Emphasis added.)

The “transmitted to the membership and the press concurrently language” in this version of IM 8310-2 had been in effect since prior to 1987, as confirmed by NASD Notice to Member 87-22.[2]

Until 1989, NASDR “transmitted” notices of disciplinary action *via* monthly updates to the member lists in NASDR manuals maintained by member firms. *Id.* Following a 1989 rule change and until after the time of Santos-Buch’s settlement, the disciplinary actions were reported in a printed (non-digital) newsletter entitled “Notice to Members” which was distributed to members on a monthly basis. NASD Notice to Members 89-47.[3]

In a 1997 rulemaking notice (SEC Release No. 34–38380, 62 Fed. Reg. 12866), NASDR acknowledged that when the “transmitted to the press and the membership concurrently” language (that in effect when Santos-Buch and NASDR settled) was “adopted, it was most likely assumed that *only NASD members would have access to information published to the membership and the general public would have access to such information only through the press*” (*id.*, 62 Fed. Reg. at 12870 n.8).

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2. http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=1029

3. http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=1370

Thus, in 1997 when Santos-Buch and NASDR settled, NASDR itself understood that, under the version of IM 8310-2 then in effect, only the NASD membership *but not the general public* would have access to the August 1997 Notice to Members reporting that settlement.

In late 1997, *subsequent* to Santos-Buch's settlement, IM 8310-2 was modified to replace references to the "membership and the press" with "a general reference requiring the 'public' release of information on . . . decisions." SEC Release No. 34–38380, *supra*, 62 Fed. Reg. at 12868.

This amendment was adopted because, as NASDR stated in a rulemaking notice, the "transmitted to the membership and to the press concurrently" language—the language in effect when Santos-Buch settled—did not permit NASDR to be "*proactive* in providing notification to the membership and the press" regarding a disciplinary decision. *Id.* (emphasis added)[4] By contrast, according to this rulemaking notice, the new "release to the public" language, would permit NASDR "to choose any appropriate methodology to release" the disciplinary decision (*id.*, at 12869 n.7) and it was "anticipated that the information would be released . . . *through the NASD Regulation WebSite*" (*id.* (emphasis added)). This clearly reveals that, under the prior "transmitted to the membership and the press concurrently language" in place when Santos-Buch settled, NASDR was not permitted to publish this type of disciplinary action on its website.

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4. This rule making notice stated: It is believed that the current focus of the Interpretation on releasing information "'to the membership and the press'" makes a distinction between forms of publication that is no longer meaningful." *Id.* (emphasis added)

However, the "release to the public language" adopted *after* Santos-Buch's settlement, cannot be used to justify ongoing publication of Santos-Buch's disciplinary information on FINRA's website. As FINRA acknowledged concerning a 2013 amendment to a successor of IM 8310-2: "[P]ublication of any order accepting an offer of settlement or AWC entered into prior to the effective date of the proposed rule change would be governed by the version of the rule in effect as of the date of such offer or [settlement]." SEC Release No. 34-69178, p. 25 n.22; *see also:* NASD Notice to Members 97-55 ("The application of the new Code to a [settlement] . . . is based on when a member or an associated person executes an AWC. . . . [I]f a member or an associated person executes a [settlement] . . . before August 7, 1997, the [settlement] . . . will be subject to review and acceptance under the old Code.") Contract law is the same. *United States v. Winstar Corp.*, 518 U.S. 839, 896-897 (1996) (recognizing that abrogation by legislation of clear, unqualified contract rights requires a remedy, even in a highly regulated industry, because the contracts embodied the commitments of the contracting parties).

Notwithstanding the absence of any contractual provision or rule authorizing "proactive" website publication, FINRA has embedded the 1997 report of the disciplinary action against Santos-Buch as portable digital format (PDF) within its website, which makes the report readily available to anyone who performs an internet search for Santos-Buch's name.

In 1988 NASD instituted its "Public Disclosure Program" which permitted members of the public to submit inquiries regarding individual brokers. FINRA's

BrokerCheck system is the current version of this program. Prior to 2000 information about former brokers could not be released under this program and during the period from 2000 through 2009, no information could be released about brokers who had been out of the industry for more than two years. However, in 2009 FINRA, with SEC approval, adopted a new rule which retroactively permitted release of information concerning former brokers, regardless of how long they had been out of the industry. As a result of this retroactive amendment, the then-12 year old NASDR action against Santos-Buch could be accessed via *BrokerCheck* for the first time.

In 2013 Santos-Buch learned that, due to the retroactive rule, the disciplinary action against him could now be obtained by the public *via* an inquiry to BrokerCheck.

At about the same time Santos-Buch also discovered that, separate and apart from responses to BrokerCheck inquiries, as a result of FINRA's proactive website publication, the 1997 report was typically the first "hit" that would be returned in response to an internet search for his name. The disciplinary action would thus be the first thing that an inquiring prospective employer would learn about him.

C. Procedural History

Santos-Buch challenged both the website publication and the retroactive 2009 amendment to the BrokerCheck rules in *Santos-Buch v. Financial Industry Regulatory Authority, Inc.*, Civil Case No. 14-00651 (S.D.N.Y.). His principal challenge to the wrongful website publication

was under the Fifth Amendment due process clause. His main challenge to the retroactive BrokerCheck rule was under the Separation of Powers doctrine, contending that Congress had granted only prospective—and not retroactive—rulemaking authority to the SEC. His amended complaint sought declaratory, injunctive and monetary relief for each claim.

After dismissal by the District Court (pet. app. 7a-26a), Santos-Buch sought to have his complaint reinstated on appeal. The Second Circuit's affirmance is entirely dependent on a finding that FINRA is not a state actor. Specifically:

Based on its finding that no state action was involved, the Second Circuit held that FINRA's website publication of the disciplinary action could not be challenged under the Fifth Amendment due process clause, even though, as the decision also found, there was no avenue for administrative review of this claim before the SEC. (Pet. App. 5a-6a.)

Based on the same finding that no state action was involved, the Second Circuit held that Santos-Buch's challenge to the retroactive BrokerCheck rule did not raise the type of Constitutional law issue which would excuse Santos-Buch's failure to first challenge that rule before the SEC. (Pet. App. 5a.)

REASONS FOR GRANTING THE PETITION

If FINRA were considered a state actor, at minimum Santos-Buch's due process claims seeking declaratory and injunctive relief to terminate the wrongful website publication would proceed since neither sovereign

immunity (*Alden v. Maine*, 527 U.S. 706, 757 (1999)) nor common law absolute immunity (*Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000); *Tarter v. Hury*, 646 F.2d 1010, 1012 (5th Cir.1981)) bars non-monetary claims.

The Second Circuit, however, affirmed the dismissal of Santos-Buch's due process claims for declaratory and injunctive relief aimed at terminating FINRA's wrongful "proactive" publication of the 17-year old disciplinary action on its website.

The Second Circuit held that FINRA was not a state actor—*i.e.*, was *not* sufficiently like the government—to be subjected under a due process theory to Santos-Buch's claims for declaratory and injunctive relief terminating the wrongful website publication.

With respect to Santos-Buch's claims for money damages, the Second Circuit did an about face and found that FINRA *was* sufficiently like the government that it should be afforded absolute immunity.

Notably, the Second Circuit decision strongly suggests that, had FINRA been a state actor, a due process violation would have occurred since, as the decision found, there was no avenue for Santos-Buch to obtain administrative review of his wrongful website publication claim before the SEC. (Pet. App. 6a.)

I. *Certiorari* Should Be Granted to Resolve the Circuit Split

Prior to this case, the Second Circuit had indicated that whether securities SRO disciplinary proceedings were

subject to the due process clause was an open question.[5] *D'Allesio v. Securities and Exchange Commission*, 380 F.3d 112 (2d Cir. 2004) squarely identified the issue, stating:

> In considering an [NYSE] disciplinary proceeding, such as the present one, in which the disciplinary violations alleged include violations of federal securities laws and SEC regulations, *the argument that the nexus between the State and the challenged proceeding is sufficiently close that the Exchange's behavior may be fairly attributable to the State may not be trivial.*

Id. at 120 n. 12 (emphasis added) However, having identified it, *D'Allesio* did not reach the question (*id.*:

5. Apart from *D'Allesio*, the Second Circuit decisions concerning whether securities SROs were subject to due process arose in challenges to industry arbitration awards. Those cases, *e.g.*, *Desiderio v. National Association of Securities Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999), are irrelevant because SROs do not provide arbitration services pursuant to a Congressional mandate. Instead, securities industry arbitration results from contracts between private parties. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), overruled on other grounds by *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 745 (9th Cir. 2003) ("No federal law required Duffield to waive her right to litigate employment related disputes by signing the Form U-4 [arbitration agreement] in 1988[.]"); John F. X. Peloso and Ben A. Indek, "A Question of Fairness, *New York Law Journal,* June 21, 2001, p. 3, col. 3. ("The result in *Desiderio* is not inconsistent with *Barbara* because the arbitration function in *Desiderio* was not mandated by federal law."), available at http://www.morganlewis.com/~/media/files/publication/outside%20publication/article/nylj_aquestionoffairness_21jun01.ashx

"Whatever the merits of the constitutional argument, we need not reach it today.")

It was not until this case that the Second Circuit definitively rejected attempts to hold securities SROs accountable under the due process clause, and its decision has created a split among the Circuits. The Tenth Circuit reached a contrary conclusion in *Rooms v. Securities Exchange Commission*, 444 F.3d 1208, 1214 (10th Cir. 2006), which stated: "Due process requires that an NASD rule give fair warning of prohibited conduct before a person may be disciplined for that conduct." Much earlier, in *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 940-941 (5th Cir. 1971), the Fifth Circuit held that: "[t]he intimate involvement of the [American Stock] Exchange with the Securities and Exchange Commission brings it within the purview of the Fifth Amendment controls over governmental due process[.]"

Even before the Second Circuit decision in this case, the Eleventh Circuit concluded that there was Circuit split on the issue (though it declined to weigh in on it), stating in *Busacca v. Securities Exchange Commission,* 449 Fed. Appx. 886, 890 (11th Cir. 2011) that: "Other circuits have reached conflicting holdings on this question.[6]"

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6. *Busacca* assumed the *D'Allessio* had rejected the contention that securities SRO disciplinary proceedings should be subject to due process. That assumption is incorrect, as demonstrated above. This mistake by the *Busacca* court is identified in Note, "Much Ado about Nothing: How the Securities SRO State Actor Circuit Split Has Been Misinterpreted and What it Means for Due Process at FINRA," 47 *Georgia L. Rev.* 923, 950-951 (2013)

It is important that this Court resolve the issue one way or another. Steven Irwin, the Pennsylvania Securities Commissioner, testified before Congress in 2011 that the unsettled state of the law was causing FINRA to resist cooperation with state regulators out of an "extreme sensitivity to being labeled a state actor." He also opined that "[s]ettling the question of whether or not FINRA or any other SRO is or is not a 'state-actor' is of vital importance to effective regulation." *Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals To Improve Investment Advisor Oversight: Hearing Before the H. Subcomm. on Capital Mkts. and Gov't Sponsored Enterprises*," 112th Cong. (2011) (statement of Steven D. Irwin, Comm'r, Pennsylvania Securities Commission, and Chairman, Federal Legislative Committee of the North American Securities Administrators Association, Inc.)

The uncertainty as to whether FINRA is a state actor causes what might be described as jurisprudential dissociation at the Circuit Court level. For example, despite the Second Circuit's refusal to recognize that securities SROs have the legal obligations of "state actors," it routinely describes them as such. *Standard Investment Chartered*, *supra*; *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49, 59 (2d Cir. 1999) (NYSE "performs a variety of regulatory functions that would, in other circumstances, be performed by the [SEC]" and characterizing NYSE disciplinary proceedings as "federally-mandated conduct" and a "governmental function."); *DL Capital Group, LLC v. Nasdaq Stock Market, Inc.*, 409 F.3d 93, 95 (2d Cir. 2005) (SROs "'stand . . . in the shoes of the SEC' because they perform regulatory functions that would otherwise be performed by the SEC[.]")

Other Circuits also routinely described securities SROs as state actors, without holding them accountable as such. *E.g, NASD, Inc. v. Securities and Exchange Commission*, 431 F.3d 803, 812 (D.C. Cir. 2005) ("NASD is the private equivalent of an ALJ, and "its enforcement process essentially supplants an enforcement action that might otherwise start with a hearing before an ALJ." * * * "[T]hus, "NASD has no more authority than would an ALJ to seek review of a Commission decision under 25(a) [.]"); *R.J. O'Brien & Associates v. Pipkin*, 64 F.3d 257, 262 (7th Cir. 1995) (National Futures Association is engaged in governmental conduct when it provides registration services).

II. The Court Should Grant Review In Order to Clarify Whether *Brentwood Academy* is Still Good Law

In *Brentwood Academy v. Tennessee Secondary School Athletic Association,* 531 U.S. 288, 292 (2001) this Court found that an incorporated membership organization which included private high schools was a state actor and subject to due process due to the extent to which it was "entwined" the State Board of Education. 531 U.S. at 295.

Brentwood Academy listed, as factors relevant to the entwinement determination, whether (1) the "challenged action results from the exercise of coercive power," (2) the State provides "significant encouragement, either overt or covert," (3) the private entity "operates as a 'willful participant in joint activity with the State," (4) the private entity is "controlled by an 'agency of the State,'" (5) the private entity has been "delegated a public function by the State," (6) the private entity is "entwined with governmental policies," and (7) the government is

"entwined in [the private entity's] management or control." 531 U.S. at 295-297.

As demonstrated below, the *Brentwood Academy* factors are *amply* met here, and it cannot be credibly argued that they do not qualify FINRA as a state actor. In his briefing before the Second Circuit, Santos-Buch relied heavily on *Brentwood Academy*, and the Second Circuit did not even acknowledge existence of the decision. This Court—not the Second Circuit—has the final say on issues of constitutional law. By denying *certiorari*, this Court would be acquiescing in the Second Circuit's pretense that *Brentwood Academy* has somehow become dormant in a period of merely 14 years.

A. FINRA's Participation in the Government's Regulatory Activities

As stated in a federally-commissioned analysis of the SEC's organization and structure:

> *The SEC currently leverages SROs for a broad range of activities*. With respect to broker-dealers, SROs register members, review regulatory reports, write and interpret rules, conduct examinations, investigate and enforce rule violations, oversee all trade clearing and settling, and surveil all trading activity.

Boston Consulting Group, "U.S. Securities and Exchange Commission Organizational Study and Reform," *Study Commissioned under Dodd-Frank* 23 (2011) (emphasis added).[7]

7. www.sec.gov/news/studies/2011/967study.pdf

The activities that FINRA undertakes in cooperation with the SEC and the state securities commissions include:

(1) Rulemaking. FINRA's rule-making powers are within the authority of the SEC. Any new or amended FINRA rule must be filed with and approved by the SEC by means of an elaborate rulemaking process. 15 U.S.C. § 78s(b). Also, the SEC can initiate, abrogate, add to, or delete FINRA rules through notice-and-comment rulemaking. *Id.*, § 78s(c).

(2) Law enforcement. FINRA can enforce not only its own rules but also the federal securities laws against its members, and all securities firms are required to be members. The SEC has authority can review and overturn or revise FINRA's disciplinary decisions, either *sua sponte* or when an aggrieved party appeals.[8] 15 U.S.C. § 78s(e).

(3) Investigations. FINRA frequently joins forces with the SEC in investigating and prosecuting violators of the federal securities laws. Hearing Before the Subcomm. on Finance & Hazardous Materials of the House Commerce Comm. on Organized Crime in the Sec. Markets, 106th Cong. 33-35 (2000).

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8. *See* FINRA, "Adjudication," accessed March 25, 2014, available at ww.finra.org/Industry/Enforcement/Adjudication; 15 U.S.C. §78s(d).

(4) Market Surveillance. FINRA's Office of Fraud Detection and Market Intelligence works in close concert with the SEC's Office of Market Surveillance. FINRA's website boasts that: "The SEC has kindly acknowledged FINRA's assistance in certain of its Litigation Releases."[9]

(5) Broker-Dealer Registration. As detailed below, CRD—of which BrokerCheck is a part—was developed by state securities regulators, with input from FINRA, and FINRA operates CRD under contracts with the state securities commissions. Also broker-dealers register with the SEC by filing the necessary forms, including those for their associated persons, through CRD. (NASD Notice to Members 01-65—Request for Comment, at p. 564)

– and –

(6) Registration of Investment Advisors. Pursuant to a contract with the SEC and "undertakings" with the state securities administrators, FINRA also operates IARD, which is a registry that collects and maintains information regarding 1940 Act Companies. FINRA also, through IARD, collects and disburses investment advisor registration fees imposed by the various states. http://www.iard.com/accounting.asp.

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9. http://www.finra.org/industry/ofdmi

B. Control of FINRA and NASD By the Federal Government

NASD's assumption of expanded regulatory responsibilities over the years was not voluntary, but thrust upon it by the federal government. In 1975, "following a string of regulatory failures by the SROs,"[10] Congress passed several amendments to the Exchange Act which strengthened the SEC's oversight of NASD by, *e.g.*, requiring SEC approval of new NASD rules and granting SEC the authority to initiate NASD rulemaking. These amendments also greatly expanded NASD's regulatory responsibilities: requiring it required to enact its own anti-fraud rules, enforce the anti-fraud provisions of the Exchange Act against its members and to admit any registered broker as a member. Securities Acts Amendments of 1975, Pub. L. No. 94-29, sec. 12, § 15A, 89 Stat. 97, 127-31 (1975) (codified at 15 U.S.C. §§ 78o-3(b)(2, 3, 6 & 7)).

In 1983 Congress amended The Maloney Act to impose compulsory NASD membership upon broker-dealers. 1984 Amendments to The Maloney Act, Pub. L. 98-38, sec. 3(a), 97 Stat. 206 (1983) (codified at 15 U.S.C. §§ 78o(b)(8)-(9))).

In 1996, prompted by another series of regulatory failures, the SEC commenced an enforcement action in which it alleged that NASD's integrity as regulator was compromised by the excessive power of Nasdaq market makers. *See* Concept Release Concerning Self-

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10. Boston Consulting Group, "Organizational Study and Reform," *supra* 22.

Regulation, 69 Fed. Reg. 71,258 (finding that market makers dominated trading in Nasdaq stocks). The SEC and NASD settled this action on terms that required NASD to segregate its regulatory functions (NASDR) from business functions (NASDAQ) and installed a majority of public (non-industry) representatives on the various boards that governed NASD. Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and Nasdaq Market, Exchange Act Release No. 37,542, 2-3 (Aug. 8, 1996)

The 1996 settlement also transformed the NASD disciplinary process from the type associated with a membership organization—focused on whether a member or broker should be censured or expelled—to that of a administrative agency focused on adjudicating allegations that the securities laws had been violated. This involved replacing the Business Conduct Committee with a National Adjudicatory Council ("NAC"), which consisted of a majority of non-industry members, and overhauling the procedural rules for disciplinary proceedings to conform more closely to a judicial model. Like the 1975 Amendments, NASD's role as an *adjudicator* of alleged securities law violations by members and brokers was not assumed voluntarily. Instead, ". . . these changes [were] essentially forced upon the NASD in its settlement of the prosecution by the SEC and Department of Justice[.]" Roberta Karmel, "Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?,"14 *Stanford J.L. Bus. & Fin.* 151, 164 (2008).

The events thus show the extent to which FINRA and NASD have been controlled by an "agency of the state," as contemplated by *Brentwood Academy.*

C. Delegation of the Disciplinary and Registration Functions Previously Performed by the SEC to FINRA and NASD

Santos-Buch's wrongful website publication claim arises out NASD's and FINRA's roles in enforcing (1) disciplinary rules and securities laws against individual brokers and (2) registering brokers and maintaining and disclosing information about them. Both roles were originally performed exclusively by the SEC and have since been delegated to NASD and FINRA.

Originally, only the SEC could pursue disciplinary sanctions against an individual broker[11], and NASD was not granted authority to do this until 1964.[12]

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11. Section 15 of the 1934 Act, 15 U.S.C. §78o requires the SEC to enforce that Act's provisions against brokers and dealers (*id.*, §15(b)(4), 15 U.S.C. §78o(4)) and their associated persons (§15(b)(6), 15 U.S.C. §78o(6)).

12. See S. REP. No. 379, 88th Cong., 1st Sess. 82 (1963); Hearings Before a Subcommittee of the House Committee on Interstate and Foreign, Commerce on H.R. 6789, H.R. 6793, and S. 1642, 88th Cong., 1st & 2d Sess., pt. 1, at 230 (amendments allowing NASD disciplinary proceedings against individuals). *See* Richard M. Phillips and Morgan Shipman, "An Analysis of the Securities Acts Amendments of 1964," 1964 *Duke Law Review* 706, 834 (1964):

> The NASD's rules presently provide for the disciplining of registered representatives for any violation of NASD rules, but only in connection with a proceeding against a member. This change will allow the NASD to amend its rules to provide that proceedings may, in the NASD's discretion, be directed solely against individuals without joining members.

Likewise, prior to the 1975 amendments, *only* the SEC—and not NASD—had authority to enforce the federal securities laws against NASD members.[13] It was not until the 1975 Amendments that NASD was permitted to enforce the Exchange Act against its own members. Exchange Act, Pub. L. No. 94-29, sec. 12, § 15A, 89 Stat. 97, 127-31 (1975) (codified at 15 U.S.C. § 78o-3(b)(2,7).[14]

From its creation in 1934 through 1980, the SEC also had sole authority to register brokers-dealers and registered persons. Exchange Act, §15(b), 15 U.S.C. §78o(b). By contrast, NASD had *no* role in registering broker-dealers and associated persons (beyond keeping lists of its own members) until 1980, when NASAA, the organization of state regulators which had developed an early version of Central Registration Depository ("CRD"), hired NASD to administer and operate it. SEC Historical Society, "Interview with Lewis Brothers" 12-14, available at www.sechistorical.org/collection/ oral-histories. *See* Joseph McLaughlin, "Is FINRA Constitutional?," 43 *Securities Regulation & Law Report* 681 (2011)(when NASD took over operation of CRD, it was undertaking a role that "traditionally had been the exclusive, or near exclusive, function" of the SEC and the states)[15]

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13. *See* Barbara Black, "Punishing Bad Brokers: Self-Regulation and FINRA Sanctions," 8 Brooklyn J. of Corp., Fin. and Comm. Law 23, 35 (2013) ("Somewhat surprisingly, the NASD did *not* have express statutory authority to enforce the Exchange Act and its rules until the 1975 amendments to the Exchange Act." (emphasis added)).

14. *See* prior footnote

15. available at http://www.funddemocracy.com/IsFINRAConstitutional.pdf

Even under the stricter pre-*Brentwood* standards, a showing that the activity at issue was previously performed by the state, and then delegated to a private entity, is sufficient to establish the private entity as a state actor. *NCAA v. Tarkanian*, 488 U.S. 179, 195 (1988)).

D. The Role of the SEC and Congress in Adopting the Rules which FINRA Has Violated

The SEC and Congress have shown a strong interest in the rules at issue here.

In Notice to Members 00-16[16], NASD stated, in 2000, that it was "*continu[ing] to work with the SEC and Congress* to seek legislation that it believes is necessary in order to provide for the display of all disclosure information via the NASD Regulation Web Site." (Emphasis added.)

NASD and FINRA have also touted these rules as consistent with the privacy interests of brokers and former brokers. *See* SEC Release No. 34-38380, 62 Fed. Reg. at 12968 ("NASD Regulation believes that the interests of the public . . . must be balanced against the legitimate interests of respondents not to be subject to unfair publicity concerning unadjudicated allegations of violations."); SEC Release No. 34-61002, at 5 ("[NASDR] believed that the [prior rule] struck the appropriate balance between an investor's interest in being easily able to obtain information . . . and a person's desire for privacy once he has left the securities industry, . . .")

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16. Available at http://www.finra.org/industry/notices/00-16.

III. The Outcome in *Standard Investment Chartered* Compels A Ruling that FINRA is Subject to Due Process

If the question of whether a FINRA is a state actor is still to be determined by the degree of its "entwinement" with the government, the Second Circuit's decision in *Standard Investment Chartered Inc. v. National Association of Securities Dealers*, 637 F.3d 112, 114-15 (2d Cir. 2011), *cert. denied* 132 S. Ct. 1093 (2012) compels a finding that FINRA is a state actor since it is *intertwined* with the SEC. It states:

> [I]t is significant that NASD cannot alter its bylaws without approval from the SEC, that the SEC is authorized to develop its own procedure for receiving input on new rules from those affected by any proposed changes, *see* 15 U.S.C. § 78s(b)(1), . . . and that the SEC retains discretion to amend the rules of any SRO, *see* 15 U.S.C. § 78s(c). The statutory and regulatory framework highlights to us the extent to which an SRO's bylaws *are intimately intertwined with the regulatory powers delegated to SROs by the SEC* and underscore our conviction that immunity [from "private damages suits" for misrepresentation] attaches to the proxy solicitation here.

Id. at 116-117 (2d Cir. 2011) (emphasis added).

Nevertheless, the Second Circuit's decision seems to interpret *Standard Investment Charter* as meaning simply that FINRA is above the law. In this case, the

Second Circuit, citing *Standard Investment Chartered*, effectively concluded that FINRA was so intertwined with the SEC that it was immune from Santos-Buch's money damages claims. Simultaneously, it also implicitly found that FINRA was *not* sufficiently *entwined* with the SEC to make it a "state actor" (within the meaning of *Brentwood Academy*) to render it subject to claims for injunctive and declaratory relief to enforce Santos-Buch's due process rights.

The Second Circuit thus accords FINRA an exalted status which renders it beyond legal reproach. If FINRA were a "mere" government agency—consisting of hardworking public servants—Santos-Buch could sue under the due process clause for an injunction to terminate the wrongful website publication. If FINRA had only the rights of a "mere" private citizen, Santos-Buch could sue for money damages to redress the invasion of privacy and reputational injury inflicted upon him. Congress couldn't possibly have intended to grant FINRA—a putatively private organization that has taken its present shape largely because of the self-regulatory failures of its predecessor, NASD—such a comprehensive set of immunities. As stated in Jennifer M. Pacella, "If the Shoe of the SEC Doesn't Fit: Self-Regulatory Organizations and Absolute Immunity," 58 *The Wayne Law Review*, 201, 208-209 (2012):

> Although SROs are entitled to absolute immunity when standing in the shoes of the SEC to carry out the regulatory duties with which the SEC has tasked them, the "SRO transforms itself into a non-governmental private entity, thereby denying the party of

> any relief" when targets of SRO investigations attempt to invoke constitutional protections. In this way, SROs are benefitting from the best of both worlds—they are shielded from lawsuits as "quasi-governmental" bodies but are simultaneously not required to offer the same type of constitutional protections that are typical of government agencies

Accord: John F. X Peloso and Ben A. Indek, "A Question of Fairness," *supra* ("[W]hen carrying out the federal mandate, they are 'state actors' and the weight of judicial authority has so recognized in affording the same privileges [*i.e.*, absolute immunity] as their SEC counterparts. It is simply illogical, illegal and unfair for the SROs to decline to afford respondents in their disciplinary proceedings the same constitutional protections they claim for themselves.")

IV. There is A Nearly Unanimous Academic Consensus that FINRA Should Be Subject to Due Process, at Least with Respect to Its Disciplinary Function

In "Becoming a Fifth Branch," 99 Cornell L. Rev. 1 (2013), Professors William A. Birdthistle & M. Todd Henderson write:

> Academic commentators and courts have already noted that the phenomenon of increasing governmentalization of SROs is creating constitutional problems in the regulatory state. As SROs increasingly wield the power of the federal government, so too must they be restrained by constitutional checks on

> their authority. That is, if members of SROs may be deprived of liberty by an organization that is acting under the color of governmental power, then they must also be protected by the constitutional mechanisms that ensure liberty in our political system.
>
> * * *
>
> Although there has been some dispute about what functions of SROs may constitute government-like activity, there is broad consensus that any activities that are government-like do in fact trigger the need for constitutional protections.

Id. at 59-60 (emphasis added). *See also:* Karmel, "Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?," *supra*, 14 Stanford J. of Law, Bus. & Fin. at 154 ("[S]ince the SROs 'exercise government power . . . by imposing a disciplinary sanction, broadly defined, on a member or person affiliated with a member . . . [they] must be required to conform their activities to fundamental standards of due process.'"); US Chamber of Commerce, *US Capital Markets Competitiveness: The Unfinished Agenda* , 7-8 (2011) ("As government delegates regulatory authority, explicitly or implicitly" to FINRA . . . "it should also impose Administrative Procedure Act (APA) or similar due process . . . requirements" on the SRO.); Richard L. Stone and Michael A. Perino, "Not Just a Private Club: Self Regulatory Organizations As State Actors When Enforcing Federal Law," 1995 *Columbia Business Law Rev.* 453, 493 ("State action jurisprudence, even in its most

restrictive interpretations, requires that constitutional protections apply in federally related SRO actions in the same manner as they apply when such actions are pursued by the [SEC]."); William I. Friedman, "The Fourteenth Amendment's Public-Private Distinction Among Securities Regulators, in the United States Marketplace - Revisited," 23 Ann. Rev. Banking & Fin. L. 727, 758 (2004) ("allowing the state to freely contract out its statutory regulatory functions to the SROs, which are not bound by constitutional limitations," would permit the government to "lawfully circumvent its constitutional obligations").

The academic concern stems spans the ideological spectrum. As noted, the U.S. Chamber of Commerce Report "Competitiveness" report, *supra,* asserts that FINRA should be held accountable under the due process clause or the APA. The Joseph McLaughlin essay, *supra*, does likewise, and that essay has been republished by The Federalist Society.[17] Another cogent criticism of FINRA's lack of legal accountability is "The Financial Industry Regulatory Authority: Not Self-Regulation After All" (January 2015), a working paper by Hester Pierce, who is the Director of the Financial Markets Group, at Mercatus Center, a libertarian think tank associated with George Mason University.[18]

The common thread to these critiques is that it is not only illogical, but at least arguably offensive to

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17. *See* http://www.fed-soc.org/publications/detail/is-finra-constitutional

18. Available at http://mercatus.org/publication/financial-industry-regulatory-authority-finra-not-self-regulation-after-all

fundamental notions of fairness, to grant FINRA a comprehensive set of immunities no matter the harm it inflicts. Undoubtedly, the notion that for every legal wrong there should be a remedy is more of an aspiration than a reality. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-163 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."). Nevertheless, it is not an aspiration that should be so readily abandoned.

V. The Second Circuit's Acknowledgment that No Administrative Remedy Exists for Santos-Buch's Wrongful Website Claim Confirms the Need to Hold FINRA Accountable Under The Due Process Clause

The Second Circuit did agree with Santos-Buch that there was no path of administrative review for his wrongful website publication claim. (Pet. App. 5a.) That circumstance makes this a stronger case for imposing due process obligations on FINRA than existed in either *D'Allesio v. Securities and Exchange Commission*, 380 F.3d 112 (2d Cir. 2004) or *Gold v. Securities and Exchange Commission,* 48 F.3d 987, 991 (7th Cir. 1995), where the courts declined to reach the constitutional issue since they found that applicable SRO rules approximated the protections that the due process clause would impose.

VI. FINRA's Size and Lack of Political Accountability Also Favor Making it Subject to the Due Process Clause

FINRA has approximately 3400 employees and a budget of nearly $1 billion. FINRA, *2013 Year in Review and Annual Financial Report* 8-9 (FINRA, 2014). By comparison, the "other" securities regulator, the SEC, has a staff of approximately 4000 and a budget of approximately $1.3 billion. SEC, *Fiscal Year 2013 Agency Financial Report* 10, 38.

FINRA, of course, is not subject to the Administrative Procedure Act, 5 U.S.C. §§ 5311 *et seq.*, and, in practice, operates with substantial independence from the SEC. FINRA can set its own rulemaking and disciplinary agendas and budget without SEC input. The Government Accountability Office found has found "SEC's oversight of FINRA's programs and operations varied, with some programs and operations receiving regular oversight and others receiving limited or no oversight." GAO, *Securities Regulation: Opportunities Exist to Improve SEC's Oversight of the Financial Industry Regulatory Authority* 7 (2012). Although the SEC has the power to approve or disapprove FINRA rules, the SEC's Division of Trading and Markets typically exercises this authority (17 C.F.R. § 230.30-3(a)(12)) which means that FINRA rules do not typically attract close attention from the politically accountable SEC's commissioners.

There are also glaring gaps in SEC oversight, as this case graphically reveals with the Second Circuit itself acknowledging that there is no SEC review for Santos-Buch's wrongful website publication claim.

As noted, the *Standard Investment Chartered* outcome also frees FINRA from the threat of tort liability (n.1, *supra,* and accompanying text), meaning FINRA lacks not only political but also economic accountability. In these circumstances, imposition of *legal* accountability upon FINRA by making it subject to the basic fairness requirements required under the due process clause is a very modest proposition.

CONCLUSION

The writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JANUARY 30, 2015

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

14-2767-cv

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of January, two thousand fifteen.

PRESENT: DENNIS JACOBS, GUIDO CALABRESI, RICHARD C. WESLEY,
Circuit Judges.

ALAN SANTOS-BUCH,

Plaintiff-Appellant,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,

Defendant-Appellee.

Appeal from a judgment of the United States District Court for the Southern District of New York (Scheindlin, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

Alan Santos-Buch appeals from the judgment of the United States District Court for the Southern District of New York (Scheindlin, *J.*), granting defendant-appellee's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

Santos-Buch worked until 1996 as a stock broker employed by firms that were members of the National Association of Securities Dealers, Inc. ("NASD"). NASD was a self-regulatory organization ("SRO") under the Securities and Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78s(a), and the Maloney Act of 1938, *id.* § 78o-3. NASD delegated regulatory responsibility to a subsidiary, NASD Regulation, Inc. ("NASDR").

In 1997, NASDR began disciplinary proceedings against Santos-Buch for an alleged 1994 violation of NASDR's fair practice rules. Santos-Buch and NASDR resolved the disciplinary proceedings through a settlement contract called an Acceptance, Waiver and Consent ("AWC"). In the AWC, Santos-Buch agreed to a fine of $10,000 and a 30-day suspension. The AWC also contemplated public notice of the disciplinary action, by providing that "NASDR will make such public announcement concerning this agreement and the subject matter thereof as NASDR may deem appropriate"—a provision limited only by NASD rules. (AWC ¶ 4.) Santos-Buch argues that NASD rules at the time of the AWC limited such public notice to a one-time publication of the disciplinary action.

In 2007, the Financial Industry Regulatory Authority, Inc. ("FINRA") succeeded NASD and NASDR, and assumed their self-regulatory functions. Santos-Buch alleges that FINRA currently maintains two internet databases that disclose his disciplinary history to the public: one that includes his disciplinary records pursuant to 1999 and 2009 amendments to NASD and FINRA rules ("BrokerCheck"), and the other, without authorization by any rule at all ("Web File").

Santos-Buch alleges causes of action for: publishing the 1997 disciplinary records in an internet database without authorization from the FINRA Rules, violation of due process under the Fifth Amendment, violation of the constitutional prohibition against *ex post facto* laws, invasion of privacy in violation of Washington law, breach

of contract, and failure to provide "a fair procedure for the disciplining of members and persons associated with members" of SROs as required by 15 U.S.C. § 78o-3(b)(8). The claims variously seek monetary damages, declaratory relief, and injunctions.

The district court granted FINRA's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), on the grounds that: (1) the claims for declaratory and injunctive relief were subject to the (unfulfilled) requirement that Santos-Buch exhaust his administrative remedies before filing a civil action, and (2) the claims for monetary damages were barred by FINRA's immunity to suits for damages in its regulatory capacity. On an appeal from dismissal for lack of subject matter jurisdiction, this Court reviews factual findings for clear error and legal conclusions *de novo*. *Luckett v. Bure*, 290 F.3d 493, 496 (2d Cir. 2002). The Court reviews *de novo* the district court's dismissal for failure to state a claim. *MFS Secs. Corp. v. New York Stock Exch., Inc.*, 277 F.3d 613, 617 (2d Cir. 2002).

The doctrine of exhaustion requires a would-be plaintiff to seek available administrative remedies before seeking judicial relief "in cases where the relevant statute provides that certain administrative procedures shall be exclusive." *McKart v. United States*, 395 U.S. 185, 193 (1969). Challenges to SROs' rules must proceed exclusively before the Securities and Exchange Commission ("SEC"), in accordance with "the comprehensive review procedure established by the Exchange Act." *Barbara v. New York Stock Exch., Inc.*, 99 F.3d 49, 57 (2d Cir. 1996) (internal

quotation marks omitted). Specifically, no such challenge "may be considered by the court unless it was urged before the [SEC] or there was reasonable ground for failure to do so." 15 U.S.C. § 78y(c)(1). Exhaustion is not required, however, when an agency lacks the power to grant effective relief, including when the agency would be called upon to resolve a substantial constitutional issue. *See McCarthy v. Madigan,* 503 U.S. 140, 147 (1992).

The exhaustion requirement bars Santos-Buch's claims for injunctive and declaratory relief with regard to publication of his disciplinary action via BrokerCheck. *See Barbara*, 99 F.3d at 56-57. Since this case involves no state action, there is no substantial constitutional issue. As a private actor whose conduct in this case is not "fairly attributable" to the government, FINRA could not have violated Santos-Buch's due process rights or the *Ex Post Facto* Clause. *See D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161-62 (2d Cir. 2002); *Desiderio v. Nat'l Ass'n of Secs. Dealers, Inc.*, 191 F.3d 198, 206-07 (2d Cir. 1999); *cf. O'Neil v. Vermont*, 144 U.S. 323, 364 (1892) (Field, J., dissenting) (noting that the *Ex Post Facto* Clause is an "inhibition against state action").

While Santos-Buch's claims for injunctive and declaratory relief for publication of his disciplinary action via Web File are not subject to the Exchange Act's exhaustion requirement because they challenge neither the disciplinary action taken by FINRA, nor a FINRA rule, they were also properly dismissed. Santos-Buch alleges that the Web File publication violates his substantive due process rights, but he fails to state a due

process claim because FINRA is not a state actor that can be held to constitutional standards. To the extent that his claims for injunctive and declaratory relief rest instead on FINRA's failure to comply with its own rules, as is required by statute, *see* 15 U.S.C. § 78s(g)(1) ("Every [SRO] shall comply with . . . its own rules."), we have held that there is no implied private right of action to enforce this statutory obligation, *see Desiderio*, 191 F.3d at 208.

Santos-Buch's claims for monetary relief are foreclosed by immunity: "an SRO and its officers are entitled to absolute immunity from private damages suits in connection with the discharge of their regulatory responsibilities." *Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Secs. Dealers, Inc.*, 637 F.3d 112, 115 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1093 (2012). Because all of the relevant conduct by FINRA (and by NASD and NASDR before it) was undertaken in furtherance of its regulatory responsibilities as an SRO, it is immune from Santos-Buch's claims for damages.

For the foregoing reasons, and finding no merit in Santos-Buch's other arguments, we hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

/s/ ______________________________

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, FILED JULY 8, 2014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN SANTOS-BUCH,

Plaintiff,

- against -

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,

Defendant.

OPINION AND ORDER

14-cv-651 (SAS)

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Alan Santos-Buch brings this action for breach of contract and invasion of privacy against the Financial Industry Regulatory Authority ("FINRA").[1] Santos-Buch seeks (1) a declaratory judgment to prohibit notice of a 1997 FINRA disciplinary action as a WebFile,

1. *See* Second Amended Complaint ("Am. Compl.") ¶¶ 63-139.

(2) removal of the 1997 notice of disciplinary action from FINRA's BrokerCheck database, (3) a judgment permanently enjoining FINRA from disclosing Santos-Buch's disciplinary action in responses to inquiries it receives on its BrokerCheck database, (4) damages for breach of contract, and (5) damages for invasion of privacy.[2] Santos-Buch seeks both compensatory and punitive damages related to these claims.[3] FINRA now moves to dismiss the Amended Complaint arguing that the Court lacks subject matter jurisdiction to hear this case because Santos-Buch has failed to exhaust his administrative remedies.[4] For the reasons set forth below, FINRA's motions to dismiss are GRANTED.[5]

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2. *See id.*

3. *See id.*

4. *See* Defendant's Memorandum of Law in Support of Motion to Dismiss ("Def. Mem.") at 1.

5. On March 3, 2014, FINRA moved to dismiss the original Complaint. *See* Docket No. 9. After Santos-Buch twice amended the Complaint, FINRA moved to dismiss the Second Amended Complaint. *See* Docket No. 19. However, FINRA neither renewed nor withdrew its original motion. As such, this Order closes both motions.

II. BACKGROUND

A. The Parties

1. FINRA

FINRA is a self-regulated organization ("SRO") incorporated in Delaware.[6] Under the Maloney Act of 1938, FINRA is registered with the SEC as a national securities association.[7] FINRA was established in 2007 to assume the member firm regulatory functions of the National Association of Securities Dealers, Inc. ("NASD") and the New York Stock Exchange.[8] FINRA is the successor to and has assumed the legal responsibilities of the regulatory subsidiary of the NASD, NASD Regulation, Inc. ("NASDR").[9]

2. Alan Santos-Buch

From 1986 through 1996, Santos-Buch was a Series 7 licensed registered financial services advisor (stockbroker) employed by several members of the NASD.[10] As an employee of NASD registered firms, Santos-Buch was

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6. *See* Am. Compl. ¶ 2.

7. *See* 15 U.S.C. § 78-o3.

8. *See* Am. Compl. ¶ 2.

9. *See id.*

10. *See id.* ¶ 17.

subject to the NASD's disciplinary rules.[11] Santos-Buch has not been employed by any NASD registered firm since 1996.[12]

B. The Central Registry Depository and BrokerCheck Databases

FINRA is required to maintain registration information, including records related to disciplinary proceedings.[13] FINRA maintains the necessary information in a computer database called the Central Registry Depository ("CRD").[14] The Securities Exchange Act ("Exchange Act") requires that certain aspects of a representative's CRD file be made available to the public through BrokerCheck.[15]

On December 18, 1998, the NASDR submitted a proposal to make a portion of the CRD's registration information available on the Internet.[16] The SEC approved the proposal, and on August 16, 1999, the NASDR made certain BrokerCheck information available on the Internet.[17] To obtain BrokerCheck information one must

11. *See id.* ¶ 18.

12. *See id.* ¶ 19.

13. *See id.* ¶ 9.

14. *See id.*

15. *See id.*

16. *See id.* ¶ 33.

17. *See id.*

go to FINRA's website, submit an information request form, and agree to FINRA's terms of service.[18] In addition, to obtain information on a representative whose registration expired prior to August 16, 1999, one must take the additional step of clicking "Get Detailed Report."[19]

C. Santos-Buch's Settlement with the NASDR

In 1997, Santos-Buch executed an Acceptance, Waiver, and Consent ("AWC") Agreement with NASDR to accept a settlement for an alleged rule violation.[20] Pursuant to the settlement, Santos-Buch agreed to a thirty day suspension and a ten thousand dollar fine.[21]

D. Public Disclosure of Santos-Buch's Disciplinary Action

At the time of Santos-Buch's settlement, NASD Rule IM 8310-2 ("IM-8310-2") governed public disclosure of disciplinary actions.[22] Under IM 8310-2, disciplinary information was promptly released to "the membership and to the press concurrently."[23]

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18. *See id.* ¶ 34.

19. *See id.*

20. *See id.* ¶ 22.

21. *See id.* ¶ 24.

22. *See id.* ¶¶ 25-26.

23. *Id.* ¶ 26.

Originally, the CRD did not provide access to information of people who were no longer associated with an NASD member firm.[24] On February 7, 2000, however, the SEC approved an amendment to IM 8310-2 that allowed the CRD to include disciplinary information for individuals who had been associated with a member firm within the prior two years.[25] Because Santos-Buch had not been associated with a member firm in four years, his disciplinary information was not initially included in the CRD.[26]

E. 2009 Amendment to Rule 8312

In 2009, FINRA proposed and the SEC approved an amendment to FINRA Rule 8312.[27] The rule provided that "Final Regulatory Actions," as defined by U4 registration forms, for people who were formerly associated with a member firm would become permanently available.[28] Under the U4 registration form, Santos-Buch's AWC is a final regulatory action.[29] Thus, information regarding Santos-Buch's AWC became available on the BrokerCheck website.[30] In addition to BrokerCheck and FINRA's Final

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24. *See id.* ¶ 32.

25. *See id.* ¶ 36.

26. *See id.*

27. *See id.* ¶ 37.

28. *Id.*

29. *See id.* ¶ 38.

30. *See id.* ¶ 39.

Disciplinary Action online database, FINRA has also created a WebFile that includes Santos-Buch's disciplinary action as a searchable PDF.[31]

F. Santos-Buch's Claims

Santos-Buch asserts that FINRA Rule 8310-2, which governed public disclosure at the time of the settlement, allowed only a one time dissemination to members and the press.[32] Thus, Santos-Buch argues that FINRA should not be allowed to publish his disciplinary action on FINRA's website.[33] Santos-Buch alleges that public disclosure of his disciplinary action violates FINRA's own rules and the terms of his AWC Agreement.[34] Additionally, Santos-Buch alleges that FINRA is giving retrospective effect to the 2009 Amendment to Rule 8312, depriving him of vested Fifth Amendment constitutional rights.[35]

III. APPLICABLE LAW

A. Rule 12(b)(1) Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(1) allows a party to assert by motion the defense that the Court lacks subject

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31. *See id.* ¶ 49.

32. *See id.* ¶ 26.

33. *See id.* ¶¶ 27-28.

34. *See id.* ¶¶ 9, 57.

35. *See id.* ¶¶ 9, 39.

matter jurisdiction to hear a claim. Federal courts have limited subject matter jurisdiction and may not entertain matters when they do not have jurisdiction.[36] "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence."[37] Courts also have an "independent obligation to establish the existence of subject-matter jurisdiction."[38] In considering a motion to dismiss for lack of subject-matter jurisdiction, the court must assume the truth of material facts alleged in the complaint.[39] In cases where the defendant challenges the factual basis of the plaintiff's assertion of jurisdiction, the plaintiff must show jurisdiction "affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it."[40] In fact, "in dismissing a complaint for lack of subject-matter

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36. *See In re Standard & Poor's Rating Agency Litig.*, No. 13 MDL. 2446, 2014 WL 2481906, at *8 (S.D.N.Y. June 3, 2014) (citing *Purdue Pharma L.P. v. Kentucky,* 704 F.3d 208, 213 (2d Cir. 2013)).

37. *Al-Khazraji v. United States*, 519 Fed. App'x 711, 713 (2d Cir. 2013) (citing *Liranzo v. United States*, 690 F.3d 78, 84 (2d Cir. 2012) (quotation marks omitted)).

38. *In re Standard & Poor's Rating Agency Litig.*, 2014 WL 2481906, at*2.

39. *See Hijazi v. Permanent Mission of Saudi Arabia to United Nations*, 403 Fed. App'x 631, 632 (2d Cir. 2010).

40. *Jordan v. Verizon Corp.*, 391 Fed. App'x 10, 12 (2d Cir. 2010) (citing *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (quotation marks omitted)).

jurisdiction under Rule 12(b)(1), a court may 'refer to evidence outside the pleadings.'"[41]

B. Failure to Exhaust Administrative Remedies

The exhaustion of administrative remedies doctrine is a well-established precept of administrative law.[42] The doctrine "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency."[43] Quite often a party cannot seek judicial relief until he has exhausted the "prescribed administrative remedies."[44] The doctrine applies in many situations, most notably where the "relevant statute provides that certain administrative procedures shall be exclusive."[45] A party seeking to challenge the NASD rules must fully exhaust all available administrative remedies.[46]

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41. *Burfeindt v. Postupack*, 509 Fed. App'x 65, 67 (2d Cir. 2013) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)).

42. *See McKart v. United States*, 395 U.S. 185, 193 (1969).

43. *McCarthy v. Madigan,* 503 U.S. 140, 145 (1992).

44. *Id.* at 144 (citing *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51 (1938)). *Accord American Benefits Grp., Inc. v. National Ass'n of Sec. Dealers,* No. 99 Civ. 4733, 1999 WL 605246, at *5 (S.D.N.Y. Aug. 10, 1999) (citing *Touche Ross & Co. v. SEC*, 609 F.2d 570, 574 (2d. Cir. 1979) (holding that "a litigant is required to pursue all of his administrative remedies before he will be permitted to seek judicial relief")).

45. *McKart*, 395 U.S. at 193.

46. *See American Benefits Grp., Inc.*, 1999 WL 605246, at *8;

This Circuit has previously stated that "normally we will not tolerate the interruption of the administrative process to hear piecemeal appeals of a litigant's claims on the merits" because the exhaustion doctrine was created to prevent such litigation.[47] The doctrine gives agencies the opportunity to apply their expertise and "build a record upon which the reviewing administrative agency may engage in effective review."[48]

C. Exceptions to the Exhaustion of Remedies Doctrine

The doctrine, however, is also subject to numerous exceptions.[49] In *Guitard v. U.S. Secretary of Navy*, the Second Circuit acknowledged that a party may not need to exhaust administrative remedies when:

> (1) available remedies provide no genuine opportunity for adequate relief;
>
> (2) irreparable injury may occur without immediate judicial relief;

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see also MFS Sec. Corp. v. SEC, 380 F.3d 611, 622 (2d Cir. 2004) (holding that the exhaustion of remedies doctrine applies to self-regulated organizations).

47. *Touche Ross & Co.*, 609 F.2d at 574-75.

48. *MFS Sec. Corp.*, 380 F.3d at 622. *Accord McKart*, 395 U.S. at 192.

49. *See McKart*, 395 U.S. at 193.

(3) administrative appeal would be futile; and

(4) in certain instances a plaintiff has raised a substantial constitutional question.[50]

Furthermore, in *McCarthy v. Madigan*, the United States Supreme Court recognized that "an agency, as a preliminary matter, may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute."[51]

D. Stigma-Plus Claim

A "stigma-plus" claim is a subset of procedural due process. It is "brought for injury to one's reputation (the stigma) coupled with the deprivation of some 'tangible interest' or property right (the plus), without adequate process."[52] A stigma-plus claim has three elements requiring statements (1) by the government that call

50. 967 F.2d 737, 741 (2d Cir. 1992).

51. 503 U.S. at 147-48.

52. *DiBlasio v. Novello*, 344 F.3d 292, 302 (2d Cir. 2003) (quotation marks omitted). *Accord S & D Maintenance Co., v. Goldin*, 844 F.2d 962, 970 (2d Cir. 1988) ("A government employee's liberty interest is implicated where the government dismisses him based on charges that might seriously damage his standing and associations in his community or that might impose on him a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities.") (quotation marks and alterations omitted).

into question plaintiff's "good name, reputation, honor, or integrity" or "denigrate [his] competence as a professional and impugn [his] professional reputation in such a fashion as to effectively put a significant roadblock on [his] continued ability to practice [his] profession;" (2) that were public; and (3) that "were made concurrently in time to [his] dismissal from government employment."[53]

E. State Action

The Second Circuit has held that "[a] threshold requirement of plaintiff's constitutional claims is a demonstration that in denying plaintiff's constitutional rights, the defendant's conduct constituted state action."[54] A private entity can be engaged in state action if its actions are "fairly attributable" to the state.[55] In *Blum v. Yaretsky*, the Supreme Court established criteria to help determine

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53. *Patterson v. City of Utica*, 370 F.3d 322, 330 (2d Cir. 2004) (quotation marks omitted). With regard to the publication requirement, "[t]he defamatory statement must be sufficiently public to create or threaten a stigma; hence, a statement made only to the plaintiff, and only in private, ordinarily does not implicate a liberty interest." *Velez v. Levy*, 401 F.3d 75, 87 (2d Cir. 2005).

54. *Desiderio v. National Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999). *Accord D.L. Cromwell Inv., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002) (stating that "the Fifth Amendment restricts only governmental conduct, and will constrain a private entity only insofar as its actions are found to be fairly attributable to the government") (quotation marks omitted)).

55. *D.L. Cromwell Inv., Inc.*, 279 F.3d at 161.

if a private entity has the requisite nexus to the state such that it can be held to a constitutional standard:

> First, . . . [t]he complaining party must . . . show that there is a sufficiently close nexus between the State and the challenged action . . . [C]onstitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains . . .
>
> Second, . . . a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval . . . is not sufficient to justify holding the State responsible for those initiatives. . .[56]

IV. DISCUSSION

FINRA maintains that the Court lacks subject matter jurisdiction to hear this case because Santos-Buch failed to exhaust his administrative remedies.[57] Santos-Buch, citing *Guitard*, contends that the exhaustion of remedies

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56. *Desiderio,* 191 F.3d at 206 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)).

57. *See* Def. Mem. at 1.

doctrine does not apply to him.[58] Santos-Buch's argument fails because none of the *Guitard* exceptions apply. In short, Santos-Buch was required to challenge FINRA rules with the SEC before seeking judicial review.

A. Santos-Buch Has Not Met His Burden of Establishing the Substantial Constitutional Question Exception

Santos-Buch argues that he raises a "substantial constitutional question" which renders the exhaustion of remedies doctrine inapplicable.[59] To meet this requirement, Santos-Buch claims that the retrospective effect of FINRA's 2009 Amendment to Rule 8312 deprives him of constitutionally protected interests under the Fifth Amendment Due Process Clause.[60] This argument fails for two reasons. *First*, Santos-Buch has no constitutionally vested rights. *Second*, FINRA is not a state actor that can be held to constitutional standards.

1. Santos-Buch Has No Constitutionally Vested Rights

Although Santos-Buch relies on *Doe v. City of New York* to assert that his due process privacy rights have been violated, the privacy claim asserted in *Doe* is

58. *See* Am. Compl. ¶ 16.

59. *Id.*

60. *See id.* ¶ 9.

distinguishable from the privacy claim at issue here.[61] In *Doe*, the plaintiff was seeking to protect the confidentiality of his medical information.[62] The *Doe* court reasoned that "the right to confidentiality [of] personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over."[63] Santos-Buch, by contrast, is seeking to limit public disclosure of a disciplinary action. Santos-Buch's disciplinary action is not comparable to highly confidential medical information.

Next, Santos-Buch alleges a constitutionally vested interest in his reputation under the "stigma-plus" test.[64] This argument also fails. *First*, Santos-Buch has not satisfied the "stigma-plus" test because he is not a government employee.[65] *Second*, relying on *Valmonte v. Bane*, Santos-Buch argues that public disclosure of his disciplinary action places an undue burden on his employment prospects and injures his reputation.[66] In *Valmonte*, however, the court held that "Valmonte is not going to be refused employment because of her reputation; she will be refused employment simply because

61. 15 F.3d 264, 266 (2d Cir. 1994).

62. *See id.* at 267.

63. *Id.*

64. *See* Am. Compl. ¶ 41.

65. *See Patterson,* 370 F.3d at 330.

66. 18 F.3d 992, 1001 (2d Cir. 1994).

her inclusion on the list results in an added burden on employers who will therefore be reluctant to hire her."[67] But public disclosure of Santos-Buch's disciplinary action places no undue burden on employers. Instead, it reveals to potential clients that Santos-Buch has previously violated a fair practice rule. As such, Santos-Buch has no vested due process interests and raises no "substantial constitutional questions" that would allow him to avoid exhausting the administrative remedies made available to aggrieved parties under the Exchange Act.[68]

2. FINRA Is Not a State Actor

Santos-Buch's claims also fail to raise a "substantial constitutional question" because FINRA is not a state actor. Santos-Buch argues that because Congress and the SEC have authorized FINRA to regulate member firms, it is "entwined" with the state and should be considered a state actor.[69] When entwinement exists it will support the conclusion that a private organization's actions are

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67. *Id.*

68. *See* 15 U.S.C. § 78o-3. In any event, Santos-Buch's breach of contract and invasion of privacy claims likely lack merit because he agreed to the terms of the AWC, which allows public dissemination of his disciplinary action as the NASDR may deem appropriate. *See* Letter of Acceptance, Waiver and Consent No. C11960032, Ex. A to Def. Mem. at 4 (stating that the NASD may "make such public announcement concerning this agreement . . . as NASDR may deem appropriate").

69. Plaintiff's Opposition to Motion to Dismiss ("Opp. Mem.") at 6.

fairly attributable to the state.[70] In *Brentwood Academy v. Tennessee Secondary School Athletic Association,* the Supreme Court noted that "[s]tate Board members are assigned ex officio to serve as members of the [Tennessee Secondary School Athletic Association's] board of control and legislative council, and the Association's ministerial employees are treated as state employees to the extent of being eligible for membership in the state retirement system."[71] As a result, the Court held that the Tennessee Secondary School Athletic Association was entwined with the state and engaged in state action.[72] By contrast, the NASD is not engaged in state action because it receives no federal funding, is a private corporation, and its Board of Governors and Board of Directors are not required to be government officials or appointed by government officials.[73] Moreover, the Second Circuit has repeatedly held that the NASD is a private actor.[74] Even after *Brentwood*, the Second Circuit has reiterated that

70. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 302 (2001).

71. *Id.* at 300.

72. *See id.* at 302.

73. *See Desiderio*, 191 F.3d at 206. Moreover, the Exchange Act offers no private right of action against FINRA for failing to follow its own rules. *See id.* at 208 (holding that "there is no private right of action available under the Securities Exchange Act . . . to challenge an exchange's failure to follow its own rules").

74. *See, e.g., Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 138-39 (2d Cir. 2002) (holding that even after *Brentwood* the NASD is not a private entity engaged in state action).

"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."[75]

B. Santos-Buch Has Not Met His Burden of Establishing Any Other Exception

First, relying on *Barbara v. New York Stock Exchange, Inc.*, Santos- Buch claims that the available administrative remedies offer "no genuine opportunity for relief" because he is seeking money damages which cannot be obtained through the administrative process.[76] But this reliance is misplaced. In *Barbara*, the Second Circuit held that a plaintiff seeking money damages under the Exchange Act was not required to exhaust his administrative remedies because "the administrative review provisions of the [Exchange] Act do not provide for money damages."[77] Nevertheless, the court dismissed the suit, which sought primarily damages, holding that a self-regulated organization, like the Exchange, is "immune from damages claims with respect to its conduct of disciplinary proceedings."[78] Therefore, because Santos-

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75. *Id.* at 138. (quoting *Desiderio*, 191 F.3d at 206).

76. 99 F.3d 49, 57 (2d Cir. 1996) (citations and quotation marks omitted) (holding that when a plaintiff primarily seeks money damages under the Exchange Act the court should not dismiss the plaintiff's money damages claims for failure to exhaust administrative remedies).

77. *Id.*

78. *Id.* at 59 (holding that "absolute immunity is particularly

Buch's claim for money damages must be dismissed, his remaining claims require exhaustion.

Second, Santos-Buch argues that an appeal to the SEC would be futile because the SEC is not competent to hear questions of constitutional law.[79] Because Santos-Buch does not raise a "substantial constitutional question" he has also failed to meet his burden of proving that he is entitled to this exception.[80] *Third*, Santos-Buch has failed to allege any facts establishing that irreparable injury may occur without immediate judicial relief. In sum, Santos-Buch has failed to exhaust his administrative remedies prior to bringing this action.

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appropriate in the unique context of the self-regulation of the national securities exchanges"); *see also Scher v. National Ass'n of Sec. Dealers, Inc.*, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005) ("it is by no means inconsistent to find that, on the one hand, the NASD exercises insufficient state action to trigger constitutional protections . . . while nevertheless holding that the NASD is entitled to absolute immunity in the exercise of its quasi-public regulatory duties.").

79. *See* Opp. Mem. at 18-19.

80. This argument misapplies the exhaustion of remedies doctrine, which "require[s] that the agency be given a chance to discover and correct its own errors." *McKart*, 395 U.S. at 195. *Accord MFS Sec. Corp.*, 380 F.3d at 622 (stating that even obvious errors by an agency do not excuse a party from exhausting available administrative remedies).

V. CONCLUSION

For the reasons set forth above, FINRA's motions to dismiss are GRANTED. The Clerk is directed to close these motions [Docket Nos. 9, 19] and this case.

SO ORDERED:

/s/ Shira A. Scheindlin
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
July 7, 2014

APPENDIX C — AMENDMENT V OF THE CONSTITUTION OF THE UNITED STATES

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.