No. 21-82

IN THE
Supreme Court of the United States

ALPINE SECURITIES CORPORATION,
Petitioner,
v.
UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF FORMER FINCEN OFFICIALS JAMES H. FREIS, JR. AND CHARLES M. STEELE AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

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BRIEF OF FORMER FINCEN OFFICIALS JAMES H. FREIS, JR. AND CHARLES M. STEELE AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

STATEMENT OF INTEREST

James H. Freis, Jr. and Charles M. Steele respectfully submit this brief as *amici curiae* in support of certiorari.[1]

James H. Freis, Jr. is the former Director of the Financial Crimes Enforcement Network (FinCEN),

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amici curiae*'s intent to submit this brief at least 10 days before it was due, and all parties have consented to the filing of this brief.

serving from March 2007 to September 2012. Freis is the longest-serving Director of FinCEN and oversaw an expansion and restructuring of FinCEN's regulations and framework for cooperation with federal and state financial supervisors; a modernization of FinCEN's information-technology systems for collecting and disseminating reports, data, and analysis; and active and continuing support of law enforcement and national security efforts ranging from combatting money laundering and financial fraud to counterterrorism, anti-corruption, and cross-border trafficking crimes. Freis had his first exposure to FinCEN matters acting under delegated authority as a financial regulator within the Federal Reserve System; supported international regulatory coordination at the Bank for International Settlements; then oversaw legal support to FinCEN within the Treasury Department Office of General Counsel before becoming FinCEN Director; and he subsequently served as an anti-money laundering (AML) compliance officer for internationally active banks.

Charles M. Steele is a former Deputy Director of FinCEN, serving from October 2009 to August 2011, where he provided oversight and direction to FinCEN's staff across the full range of the agency's operations. Steele also served in several other senior government law enforcement, national security and regulatory roles in the FBI, the National Security Division of the Department of Justice, the Office of Foreign Assets Control, and the Office of the Comptroller of the Currency, where, as a Deputy Chief Counsel, he supervised lawyers responsible for AML and economic sanctions efforts. Steele was a federal prosecutor for 12 years, handling, among others, financial-crime and money-laundering cases.

Freis and Steele have both worked as lawyers and non-lawyer consultants in the private sector, advising clients on AML and economic sanctions issues. Together, they have extensive expertise with and insights into FinCEN's operations; its unique placement at the intersection of financial institutions, their supervisory authorities, and law enforcement and national security agencies; and the carefully crafted AML and countering the financing of terrorism regime enacted by Congress in the Bank Secrecy Act (BSA).

Freis and Steele have no interest in the facts of Petitioner's dispute with the Securities and Exchange Commission. But they do have a strong interest in seeing that Congress's regime is honored, and that FinCEN is able to fully and effectively carry out its important statutory role. They are concerned that the Second Circuit's misunderstanding of FinCEN's delegated enforcement authority will lead to confusion among the financial institutions that must comply with the BSA; create multiple, conflicting BSA regulatory regimes; decrease American influence over global financial regulators; and hamper U.S. law enforcement and national security efforts by diminishing the value of BSA data.

SUMMARY OF ARGUMENT

Supervisory agencies should not be able to unilaterally take BSA enforcement authority for themselves. If the United States is going to replace its carefully crafted statutory AML regime—which purposely gives enforcement authority to the Treasury Department and its bureau FinCEN—with a diffused, multi-pronged approach, limited only by the number of federal, state, local and tribal regulators, and with

myriad standards, requirements, penalties, and levels of judicial oversight, then it should be for Congress to do so.

The Second Circuit erred in conflating delegated compliance examination efforts with the exercise of enforcement authority and let stand SEC and lower-court decisions applying materially different legal standards with a lower level of judicial oversight and review than that established by Congress. This Court should grant certiorari to clarify the law and avoid the undermining of this important framework contributing to the country's law enforcement and national security efforts.

ARGUMENT

I. FINCEN ENFORCES CONGRESS'S CAREFULLY CRAFTED AML FRAMEWORK.

A. BSA Reporting Provides Critical Information To Law Enforcement Through A Legally Protected Framework.

1. Crime runs on money. Most criminals are in the business to make money, and most who aren't—such as terrorists—need money to carry out their schemes. But criminals and terrorists don't just need money; they need money they can *spend*. Millions under the literal or proverbial mattress get them nothing.

That's where money laundering comes in. It "disguis[es] financial assets so they can be used without detection of the illegal activity that produced them." *What Is Money Laundering?*, FinCEN, https://tinyurl.com/26zvzchn (last visited Aug. 20, 2021). Money laundering facilitates criminal activity ranging from drug and human trafficking and organized

crime to cybercrime, fraud and public corruption. *See* U.S. Dep't of the Treasury, *National Money Laundering Risk Assessment* 8-19 (2018).

Congress recognized as much. It found that money laundering "provides the financial fuel that permits transnational criminal enterprises to conduct and expand their operations to the detriment of the safety and security of American citizens" and that money laundering is "critical to the financing of global terrorism and the provision of funds for terrorist attacks." USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 302, 115 Stat. 272, 296 (codified at 31 U.S.C. § 5311 note). Congress also found that "money launderers subvert legitimate financial mechanisms and banking relationships by using them as protective covering for the movement of criminal proceeds and the financing of crime and terrorism," which "can threaten the safety of United States citizens and undermine the integrity of United States financial institutions and of the global financial and trading systems upon which prosperity and growth depend." *Id.*

2. The BSA and its implementing regulations serve as "important tools for law enforcement and regulators to detect and deter the use of financial institutions for illicit financial activity." U.S. Gov't Accountability Off., GAO-20-574, *Anti-Money Laundering: Opportunities Exist to Increase Law Enforcement Use of Bank Secrecy Act Reports, and Banks' Costs to Comply with the Act Varied* 1 (2020). The BSA requires a broad range of specified financial institutions to file and keep "certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations * * * or proceedings," or in the conduct of "intelligence or counterintelligence activities,

including analysis, to protect against terrorism." 31 U.S.C. § 5311(1). Consistent with this purpose, the BSA and its implementing regulations impose on covered financial institutions recordkeeping and reporting requirements and authorize civil and criminal penalties for violations. *See* 31 U.S.C. §§ 5313-5316, 5321-5322; 31 C.F.R. §§ 1010.300-1010.370, 1010.400-1010.440, 1010.820-1010.840.

Shortly after the BSA's enactment, this Court upheld the constitutionality of its reporting requirements. *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21, 77 (1974). And law enforcement has come to increasingly rely upon this valuable source of information and has repeatedly reaffirmed its usefulness. *See, e.g.*, Christopher Wray, Dir., FBI, *Keeping Our Economy, Our Citizens, and Our Companies Safe, Secure, and Confident in a Digitally Connected World* (Dec. 8, 2020), https://tinyurl.com/hw68dyzv (explaining that "[t]he financial intelligence generated by BSA reporting is critical to law enforcement's investigation and prosecution of both criminal activities and national security threats").

3. Congress subsequently expanded the BSA to authorize the Secretary of the Treasury to require financial institutions "to report any suspicious transaction relevant to a possible violation of law or regulation." 31 U.S.C. § 5318(g)(1). These suspicious activity reports, or SARs, are the kind of report at the core of this case. Among other things, institutions must report to FinCEN transactions that have "no business or apparent lawful purpose" or which are "not the sort in which the particular customer would normally be expected to engage, and the [institution] knows of no reasonable explanation for the transaction after

examining the available facts, including the background and possible purpose of the transaction." 31 C.F.R. § 1023.320(a)(2)(iii).

SARs are statutorily protected from public disclosure, 31 U.S.C. § 5318(g)(2), and leakers have been criminally prosecuted, *see, e.g.*, U.S. Dep't of Just., U.S. Att'y's Off. S. Dist. of N.Y., *Former Senior FinCEN Employee Sentenced to Six Months in Prison for Unlawfully Disclosing Suspicious Activity Reports* (June 3, 2021), https://tinyurl.com/x78wumvd; Press Release, FBI, *Former Chase Bank Official Convicted of Taking Bribes and Disclosing Existence of a Suspicious Activity Report* (Jan. 11, 2011), https://tinyurl.com/m6bpmces. Financial institutions are also immune from third-party liability for filing SARs and may not notify customers that the institution has filed a SAR. *See Lee* v. *Bankers Tr.*, 166 F.3d 540, 544 (2d Cir. 1999).

These confidentiality and immunity provisions reflect the distinction between SARs and other types of BSA reports that disclose objective facts, such as cash transactions exceeding $10,000. SARs require financial institution employees to exercise judgment as to whether reporting is appropriate and required under FinCEN's regulations; SARs identify signs of possible criminality that law enforcement agencies use as leads and to build cases. James H. Freis, Jr., Dir., FinCEN, Prepared Remarks at the 10th Anti-Money Laundering and Financial Terrorism International Seminar: Promoting Information Sharing in Our Global Anti-Money Laundering/Counterterrorism Finance Efforts (Oct. 9, 2008), available at https://tinyurl.com/y63pty38 ("It is also important to note that SAR reports are not evidence. Rather, they are lead

information, which in some cases can be the first tip that starts an investigation.")

B. FinCEN Has A Statutory Mandate To Oversee The BSA Regulatory Framework Necessary To Achieve Congress's Intent To Support Law Enforcement Efforts.

1. The BSA permits the Treasury Secretary to establish minimum standards for AML programs, 31 U.S.C. § 5318(h), and enforce compliance with the BSA and related regulations through civil penalties, *id.* §§ 5320-5321. Congress has also empowered the Treasury Secretary to "delegate duties and powers" under the BSA "to an appropriate supervising agency." *Id.* § 5318(a)(1).

FinCEN is that supervising agency. The Treasury Secretary has delegated "[o]verall authority for enforcement and compliance, including coordination and direction of procedures and activities of all other agencies exercising delegated authority" to the Director of FinCEN, a civil servant appointed and removable by the Secretary. 31 C.F.R. § 1010.810. The FinCEN Director's delegated responsibilities also include "[o]verall authority for [BSA] enforcement and compliance." *Id.* § 1010.810(a). And this Court has recognized that the BSA cannot function without FinCEN's regulation and oversight. *See California Bankers Ass'n*, 416 U.S. at 26 (observing that the BSA's "civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone").

2. Congress directly conferred on FinCEN's Director the duty and power to support law enforcement on

matters related to criminal financial investigations and enforcement, financial intelligence, and government initiatives against money laundering. 31 U.S.C. § 310. Congress has also repeatedly affirmed FinCEN's position as the lead government agency in the country's AML efforts. In the USA PATRIOT Act, Congress transformed FinCEN from an administratively established component of the Treasury Department to a statutory bureau. Congress also gave FinCEN's Director a range of formal duties and powers related to financial crime and intelligence, and expanded the scope of the AML reporting requirements overseen by FinCEN. Pub. L. No. 107-56, §§ 361, 362, 365, 115 Stat. at 329-333 (codified at 31 U.S.C. §§ 310, 310 note, 311, 5331).

In 2020, Congress further confirmed FinCEN's primary AML role in the Anti-Money Laundering Act (AMLA). Section 6305, for example, requires FinCEN to assess whether to establish a "no-action" letter process for the enforcement of the BSA and other AML laws and regulations. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6305, 134 Stat. 3388, 4587 (codified at 31 U.S.C. § 310 note). The "no-action" letter process the statute envisions would allow FinCEN to issue interpretations that would bind not just itself but other agencies as well, and would avoid conflicting interpretations of the BSA by agencies with overlapping authorities or enforcement means independent of FinCEN. James H. Freis, Jr., *New Legislation Expands FinCEN Powers*, Mkt. Integrity Sols. (Jan. 1, 2021), https://tinyurl.com/hjpdjs2r/.

Two other provisions in AMLA further express Congress's intent for FinCEN to retain its lead role with

respect to interagency and law enforcement AML coordination. Section 6201 requires the Attorney General to report to FinCEN annually on the use of BSA data by law enforcement, intelligence, and national security agencies, and federal regulators so that FinCEN can consider whether the BSA or its reporting requirements need modification. Pub. L. No. 116-283, § 6201, 134 Stat. at 4565-66 (codified at 31 U.S.C. § 5331 note). Section 6306 requires all law enforcement agencies—at the federal, state, tribal, and local levels—to notify FinCEN whenever they request that a financial institution keep open an account so as not to disrupt an ongoing investigation. This notification triggers a safe harbor for financial institutions from any liability for keeping the requested account open. *Id.* § 6306, 134 Stat. at 4588 (codified at 31 U.S.C. § 5333). Taken together, these new statutory provisions mandate that FinCEN continue and expand its leading role in coordinating BSA enforcement across government agencies and with law enforcement at all levels.

3. FinCEN and its lean staff of only about 300 people cannot audit every entity covered by the BSA. FinCEN's regulations apply not only to entities commonly understood to be financial institutions such as banks, credit unions, and broker-dealers. They also apply to many other entities that store money and facilitate financial transactions, such as insurance companies, casinos, non-bank mortgage lenders, money transmitters, check cashers and other "money services businesses," 31 C.F.R. §§ 1020.100-1026.670, some of which are regulated only at the state, local or tribal level. FinCEN's regulations also apply to a range of actors perhaps not immediately associated with financial activity at all, such as precious-metals, jewelry,

and, recently, antiquities dealers. *Id.* §§ 1027.100-1029.670. They also apply to individuals who engage in certain large-dollar cash transactions or keep certain foreign bank accounts. *See, e.g.*, *id.* § 1010.311 (large-dollar cash transactions); *id.* § 1010.350 (foreign bank accounts). These regulations apply broadly because any means of value intermediation could be abused by criminal money launderers, and that is precisely the risk FinCEN's implementing framework is designed to mitigate.

Faced with this broad range of regulated entities, the Treasury Department has delegated authority to other specialized regulators to *examine* entities for BSA compliance, typically as part of a broader regulatory examination within the agency's purview. *See id.* § 1010.810(b). Indeed, Congress amended the BSA as FinCEN requested to allow the bureau to further rely on compliance examinations by additional state supervisors as FinCEN expanded the sectors under its purview. *See* 31 U.S.C. § 5318(a)(6) (implementing legislative amendments requested in the Treasury Department's fiscal year 2012 budget request).

Treasury, however, has never delegated to another agency the authority to *enforce* the BSA. Regulators conducting BSA compliance examinations must submit "reports" to FinCEN's Director, including "[e]vidence of specific violations." 31 C.F.R. § 1010.810(e). FinCEN retains control over the "direction of procedures and activities of all other agencies exercising delegated authority" under the BSA, *id.* § 1010.810(a), and retains the sole authority to impose civil monetary penalties or refer a matter to the Department of Justice for criminal prosecution. *See id.* § 1010.810(d); U.S. Dep't of the Treasury, FinCEN, *Financial Crimes*

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II. IN CARRYING OUT ITS CONGRESSIONAL MANDATE, FINCEN PLAYS AN INDISPENSABLE ROLE IN SAFEGUARDING THE NATION'S FINANCIAL SYSTEM, COMBATING MONEY LAUNDERING, AND FIGHTING TERRORISM.

A. FinCEN Promulgates, Interprets, And Enforces Compliance With Vital Regulations.

1. Although FinCEN receives multiple types of reports, SARs are in many ways the most valuable because they serve as potential lead information for law enforcement agencies. But the low reporting threshold of mere suspicion—as opposed, for example, to probable cause—and the fear of regulatory second-guessing and enforcement leads financial institutions to file many reports. FinCEN received 2,504,509 SARs in 2020, almost half of them from banks. FinCEN, *SAR Stats*, https://tinyurl.com/379ypkv5/ (data last updated on July 31, 2021).

2. For decades, law enforcement has used BSA reports and data to prevent and solve crimes. SARs, for example, have helped shut down illegal money-sending businesses, stop ATM fraud, and bust crooked attorneys and telemarketers. FinCEN, *The SAR Activity Review: Trends, Tips & Issues*, 14 The SAR Activity Rev. 1 (Oct. 2008), https://tinyurl.com/3km37xxb. More recently, FinCEN has helped the government prevent and combat COVID-19-related fraud, with BSA data alerting the FBI of fraudulent activity involving the Paycheck Protection Program. Press Release, FinCEN, *FinCEN Recognizes the Significant*

Impact of Bank Secrecy Act Data on Law Enforcement Efforts (June 24, 2021), https://tinyurl.com/4nm54mj9 ("*Significant Impact of Bank Secrecy Act Data*").

FinCEN and BSA data also help fight cross-border crime. Just this year, SARs helped prevent drug trafficking and money laundering by Mexican and Colombian cartels, leading to the seizure of over $47 million, 289 kilograms of narcotics, and 70 arrests. *Id.*

Perhaps most importantly, FinCEN helps prevent terrorists from financing their operations. *See, e.g.*, U.S. Dep't of the Treasury, FinCEN, *Anti-Money Laundering and Countering the Financing of Terrorism National Priorities* 6-8 (June 20, 2021), https://tinyurl.com/325e2jnd; Scilla Alecci, *EU to Propose Watchdog to Tackle Anti-Money Laundering Failures Exposed by FinCEN Files*, Int'l Consortium of Investigative Journalists (July 16, 2021), https://tinyurl.com/fnc82tc. Recently, a BSA filing indicated that the military wing of a U.S.-designated terrorist group was using cryptocurrency to finance its operations. *Significant Impact of Bank Secrecy Act Data*, *supra*. The Department of Homeland Security's ensuing investigation obtained information that provided "a blueprint of the organization's online recruitment, financing, domain, and network infrastructure." *Id.* Investigators were also able to seize money and cryptocurrency accounts and shut down terrorist-owned website domains and servers. *See id.*

B. FinCEN's Central Role Makes It Critical To The Nation's AML Efforts.

1. FinCEN's success derives in substantial part from its strong relationship with the private sector, which facilitates FinCEN's receipt of a wide array of information and enables it to put the information into

broader context. *See Why the Financial Crimes Enforcement Network (FinCEN) is an Important Institution*, Comply Advantage, https://tinyurl.com/mjy4mp7m (last visited Aug. 20, 2021); Linda McGlasson, *Anti-Money Laundering Update: Interview with FinCEN Director James Freis*, Bank Info Sec. (Apr. 15, 2008), https://tinyurl.com/txsrc5ar. Far from a traditional regulator-regulated relationship, the "fight against money laundering is really * * * a partnership between [FinCEN] and the financial services industry, tackling the real threat of criminals moving money through our financial institutions." McGlasson, *supra*. To that end, FinCEN offers guidance and advice to financial institutions designed to help with BSA compliance. *See* Mary K. Treanor, *FinCEN and Other Federal Banking Agencies Provide Much-Needed Guidance on Suspicious Activity Reports*, Money Laundering Watch (Jan. 26, 2021), https://tinyurl.com/9bcbu9rz; U.S. Dep't of the Treasury, FinCEN, *FinCEN Guidance Regarding Due Diligence Requirements Under the Bank Secrecy Act for Hemp-Related Business Customers* (June 29, 2020), https://tinyurl.com/zet85efz.

FinCEN also supports other regulators that examine financial institutions under the BSA. FinCEN has information-sharing agreements with state and federal partners. To that end, FinCEN frequently enters into memoranda of understanding with state supervisory agencies and provides guidance, expertise, and information to these agencies. *See* James H. Freis, Jr., Dir., FinCEN, Remarks of James H. Freis, Jr. at the American Bankers Association/American Bar Association Money Laundering Enforcement Conference (Nov. 15, 2011) ("Nov. 2011 Remarks") ("[W]e have a strong relationship with State banking supervisors.");

Stanley Foodman, *Did You Know That FinCEN Maintains Data Access Memoranda of Understanding (MOUs) That Have Over 12,700 Authorized Users?*, JDSupra (Nov. 5, 2020), https://tinyurl.com/fkmvkpn5. FinCEN also allows state agencies to audit institutions for BSA violations, so as to maintain cooperative and efficient regulatory systems. *See* Nov. 2011 Remarks (stressing that States can engage in *implementation* of FinCEN regulations).

3. FinCEN plays an important role in global AML efforts, including by serving as an influential advocate for effective international standards. *International Programs*, FinCEN, https://tinyurl.com/5hdzx3bb (last visited Aug. 20, 2021); Peter Stone, *How America Became the Money Laundering Capital of the World*, The New Republic (May 7, 2021), https://tinyurl.com/27uy5p5n (explaining that FinCEN has a "unique position at the nexus of global finance, law enforcement, and national security").

FinCEN also works with foreign financial crime investigatory agencies to help stop crime. The Egmont Group in 1995 began as a small collection of financial intelligence units—including FinCEN, the United States' only financial intelligence unit—working to "explore ways of cooperation among themselves." *The Egmont Group of Financial Intelligence Units*, FinCEN, https://tinyurl.com/w7mxtp5j (last visited Aug. 20, 2021) ("*Egmont Group*"); *see also* Fin. Action Taskforce, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* 24 (updated June 2021) (recommending that countries create a "financial intelligence unit" that receives and analyzes "(a) suspicious transaction

reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis"). The Egmont Group now represents more than 160 countries' financial intelligence units. *List of Members*, Egmont Group, https://tinyurl.com/p5r6sx7p (last visited Aug. 20, 2021). Through FinCEN and others' leadership, the Group serves as an effective international network to improve "communications, information sharing, and training coordination." *Egmont Group*, *supra*.

III. THE COURT OF APPEALS' DECISION THREATENS TO UNDERMINE THE BSA STATUTORY REGIME AND HARM U.S. EFFORTS TO FIGHT MONEY LAUNDERING AND TERRORIST FINANCING.

The Second Circuit's decision failed to appreciate the nature of the AML regime and therefore FinCEN's unique expertise and central role. FinCEN works daily with federal, state, local, and tribal agencies in direct support of AML objectives, and it serves as the country's sole financial intelligence unit. No other regulator of financial institutions plays these critical roles. Moreover, only FinCEN among financial sector regulators has insights into BSA-compliance issues and challenges across all financial institutions, because it is the only regulator with responsibility for and authority over all of them. The decision below, if left unreviewed, would harm the United States' AML efforts by allowing agencies without FinCEN's expertise, unique role, and statutory mandate to unilaterally take FinCEN's BSA enforcement authority for themselves. That usurpation will result in different standards, confusion, increased risk-aversion and

over-compliance, and degradation of the value of BSA data, especially SARs.

A. The Court Of Appeals Erroneously Conflated Examination With Enforcement.

The Second Circuit concluded that the SEC has authority to enforce the BSA's AML requirements through its Exchange Act powers. Pet. App. 11a-20a. But the court of appeals fundamentally misunderstood the difference between authority to examine and authority to enforce.

FinCEN has often delegated the authority to examine financial institutions for BSA compliance. Money Remittances Improvement Act of 2014, Pub. L. No. 113-156, 128 Stat. 1829. This delegation increases efficiency and enables FinCEN's relatively small staff to ensure regular examinations of the greatest number of financial institutions possible. Financial institutions often have primary regulators—such as the Office of the Comptroller of the Currency for nationally chartered banks or the state Casino Control Commissions for state-regulated casinos—that have plenary authority to examine for compliance with all applicable laws and regulations, including the BSA. *See, e.g.*, Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. 75,593, 75,596 (Dec. 3, 2010) (describing state-law authorities for compliance examinations).

But the power to examine is distinct from the power to enforce. The BSA reserves to the "Secretary of the Treasury" the authority to impose civil monetary penalties on noncompliant financial institutions, 31 U.S.C. § 5321, and the Secretary has delegated that authority to FinCEN's Director. 31 C.F.R. § 1010.810(d). The SEC, by contrast, has been delegated only the power to "examine institutions to

determine compliance with the requirements of" the BSA "with respect to brokers and dealers in securities and investment companies." *Id.* § 1010.810(b)(6). FinCEN has repeatedly emphasized that granting the power to examine is "not the same as blessing independent enforcement." Pet. 26. Indeed, although FinCEN has been directed to delegate its enforcement authority to *bank regulators*, the BSA does not similarly direct FinCEN to delegate its enforcement power to the SEC or other non-federal-bank regulators. 31 U.S.C. § 5321(e). The Second Circuit's opinion missed these distinctions.

The Second Circuit sidestepped the fact that FinCEN had not delegated its enforcement power to the SEC by holding that the SEC was exercising its separate Exchange Act enforcement powers. Pet. App. 13a-20a. But this Court has held that a suit relying on one statute for its claim is also enforcing another statute if the suit's "success depends on" showing a violation of the second statute. *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1569-70 (2016). The SEC's enforcement action against Petitioner relies on a Commission regulation that incorporates FinCEN's SAR regulations and thus the success of the Commission's enforcement action depends on showing a violation of FinCEN's regulations. The SEC is enforcing the BSA and infringing on authority granted exclusively to FinCEN by the Treasury Secretary.

B. The Court Of Appeals Applied An Incorrect Regulatory Standard, Imposed Different Liability Requirements, And Subjected The SEC's Enforcement Action To A Less-Demanding Judicial-Review Standard.

1. Petitioner correctly points out that, separate and apart from the fact that the SEC lacks authority to enforce the BSA, the Commission imposed in this case an enforcement regime materially different than FinCEN's carefully constructed SAR framework. The SEC applied a lower scienter requirement, imposed harsher civil monetary penalties, and took an inflexible and harmful position as to what constitutes an actionable SAR violation. Pet. 27-31.

But there is more. The SEC can subject financial institutions to an entirely different adjudicatory framework. FinCEN can only directly impose civil monetary penalties for BSA violations. 31 U.S.C. § 5321. FinCEN does not have an administrative law judge to conduct evidentiary hearings, and its penalties are subject to immediate challenge in U.S. District Court. *See* Robert B. Serino, *FinCEN's Lack of Policies and Procedures for Assessing Civil Money Penalties in Need of Reform*, Am. Bar Ass'n (July 20, 2016), https://tinyurl.com/ucb4u49a. FinCEN can also pursue injunctions against violators in only U.S. District Court, 31 U.S.C. § 5320, which requires the Department of Justice to agree that enforcement is warranted.

The SEC, by contrast, has more powerful remedies at its disposal. The SEC can—and has—pursued SAR violators in its own internal administrative proceedings, which can lead not only to significant civil

monetary penalties, but also to severe administrative sanctions such as the revocation of a broker-dealer's license and a bar from association with the securities industry. *See* GWFS Equities, Inc., Exchange Act Release No. 91853, 2021 WL 1911733 (May 12, 2021); Interactive Brokers LLC, Exchange Act Release No. 89510, 2020 WL 4596109 (Aug. 10, 2020); *How Investigations Work*, SEC (last modified Jan. 27, 2017), https://tinyurl.com/kny7byfj/. The SEC's approach delays judicial review of contested cases and gives the Commission significant leverage over regulated entities.

2. Faced with these prospects, regulated broker-dealers and investment companies are likely to react to the Second Circuit's decision with a better-safe-than-sorry approach to SAR reporting. That is, SEC-regulated financial institutions are likely to file SARs defensively—even when they do not believe the conduct meets the threshold set forth in FinCEN's regulations and guidance for suspicious activity—out of fear that if they do not, the Commission later will unreasonably second-guess their decisions.

In a vacuum, more SARs may seem like a good thing. But extracting useful intelligence from the more than two million SARs filed each year can at times be like looking for needles in a haystack—but with too much hay and too few needles. Carl Brown, *Not Enough Needles and Too Much Hay: The Problem with Suspicious Activity Reports*, GRC World Forums (Feb. 2, 2021), https://tinyurl.com/ywm8mbxd/ (quoting Steele). A SEC-driven infusion of low-value SARs into FinCEN's database would only exacerbate this phenomenon and harm law enforcement and national security efforts. Defensive filing of SARs by

Commission-regulated entities will also divert industry resources away from Congress's goal of entities reporting the types of information that is, in FinCEN's judgment, most useful to law enforcement. The decision below, in short, threatens to both add more hay and subtract some needles, harming law enforcement's efforts to stamp out financial crime.

C. The Court Of Appeals' Decision Could Affect Other Regulators And Classes Of Regulated Entities.

The principles underlying the Second Circuit's decision are not limited to the SEC. The Second Circuit's reasoning would allow *any* federal or state regulator that has been delegated BSA examination authority or that has general authority to enforce compliance with applicable laws and regulations to assert BSA enforcement authority like the SEC did here. That could lead to different regulators interpreting FinCEN's regulations differently, imposing different requirements and standards on different institutions in different States or regions.

After all, FinCEN has delegated BSA examination authority not only to federal entities like the SEC but also to state agencies with authority over a broad range of regulated entities. *See supra* p. 11. Under the Second Circuit's decision, all these state agencies could impose state penalties for perceived violations of FinCEN regulations. Those penalties would then be appealed to state courts, which would come to their own conclusions as to the meaning and import of the BSA and FinCEN's regulations. The result would be multiple—and potentially conflicting—regulatory regimes being imposed on financial institutions, increased compliance costs, less cooperation with

FinCEN enforcement priorities and objectives, and more defensive SAR filings, to the detriment of law enforcement and national security efforts.

D. The Court Of Appeals' Decision Could Undermine The United States' Global AML Leadership.

Finally, allowing other state and federal agencies to enforce the BSA would undermine FinCEN's role on the global AML stage. FinCEN works with the Egmont Group to share information, best practices, and security measures, *see Egmont Group*, *supra*, and works with other nations to combat trans-national organized crime and terrorism. In fact, "FinCEN is one of the most active [financial intelligence units] in the world in terms of exchanging information with counterpart[s]." *International Programs: International Information Exchange and Analysis*, FinCEN, https://tinyurl.com/5hdzx3bb (last visited Aug. 20, 2021).

This openness allows FinCEN—in close coordination with government policymakers—to help shape global standards and practices. FinCEN encourages global partners to have clear enforcement policies developed by effective and collaborative financial intelligence units. But by allowing the SEC—and any other regulator with examination powers—to enforce the BSA, the Second Circuit's decision undermines FinCEN's message of consistency on the global stage. That will leave the United States less able to help shape global policy and share information in a centralized manner, damaging American interests and making it harder to stop cross-border financial crimes.

IV. THE COURT SHOULD GRANT CERTIORARI.

This Court should grant review without waiting for further percolation in the courts of appeals. The Second Circuit's error is clear, and the question presented is important to AML and national security efforts both home and abroad. *See* Sup. Ct. R. 10(c). Granting certiorari would allow the Court to clarify the limits of BSA enforcement, which would benefit regulators, financial institutions, and national AML efforts, while at the same time providing guidance to lower courts.

If the Court turns this case down, it may never again have the chance to address this important and recurring issue. The great majority of SAR-related enforcement actions are resolved without litigation, largely because regulated entities prefer to maintain harmonious relationships with their regulators. Litigation can be costly and time-consuming; financial institutions would rather maintain working relationships with regulators instead of turning to the courts. *See* Danné L. Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 Fordham J. Corp. & Fin. L. 627, 628 (2007) ("It is not coincidental that alleged violators * * * prefer settlement as an alternative to litigation."). Even institutions that believe they have meritorious claims or defenses often decide to settle given the specter of potentially embarrassing, costly, and burdensome public enforcement proceedings.

Finally, this case is an appropriate vehicle to resolve the question presented. Unlike many examinations, where a BSA violation is only one among multiple reporting deficiencies, the SEC's enforcement action against Petitioner rested solely on alleged failures to submit required SARs. *See* Pet. App. 68a-176a. The question presented is therefore outcome-

determinative. The Court should take this unique opportunity to make clear to the courts, regulators, and industry alike that absent express authorization from Congress, FinCEN has exclusive authority to enforce the BSA and its regulations.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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