No. 21-

IN THE

Supreme Court of the United States

ALPINE SECURITIES CORPORATION,

Petitioner,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

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 enacting and amending the Bank Secrecy Act (BSA), Congress vested the Secretary of the Treasury with the authority to administer, interpret, and enforce a comprehensive anti-money-laundering regime, including the requirement that financial institutions file suspicious activity reports (SARs) for transactions meeting certain criteria. The Treasury Department has never delegated its SAR-enforcement authority to the Securities and Exchange Commission (SEC). The SEC, however, has decided that it can interpret and enforce the BSA's SAR requirements under its own standards, with a lower mens rea requirement and with harsher penalties than the BSA prescribes. In asserting independent power to enforce the BSA, the SEC cites its broad authority under the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a)(1), to make rules governing the records and reports that broker-dealers must produce and keep.

The question presented is:

Does the SEC's assertion of independent authority to interpret and enforce the BSA contravene Congress's decision to entrust enforcement of the BSA's comprehensive anti-money-laundering regime to the Treasury Department, a politically accountable executive agency?

RELATED PROCEEDINGS

United States Court of Appeals for the Second Circuit:

SEC v. Alpine Securities Corp., No. 19-3272 (2d Cir. Dec. 4, 2020) (opinion and judgment), *rehearing denied* Feb. 19, 2021, *motion to recall and stay mandate denied* Apr. 13, 2021.

United States District Court for the Southern District of New York:

SEC v. Alpine Securities Corp., No. 17-cv-4179 (S.D.N.Y. Mar. 30, 2018) (granting summary judgment in part), *rehearing denied* June 18, 2018.

SEC v. Alpine Securities Corp., No. 17-cv-4179 (S.D.N.Y. Dec. 11, 2018) (granting summary judgment in part), *rehearing denied* Aug. 29, 2019.

SEC v. Alpine Securities Corp., No. 17-cv-4179 (S.D.N.Y. Sept. 26, 2019) (granting motion for remedies in part).

United States District Court for the District of Utah:

Alpine Securities Corp. v. SEC, No. 18-cv-504 (D. Utah Apr. 20, 2021) (extending stay order pending resolution of petition for writ of certiorari).

CORPORATE DISCLOSURE STATEMENT

Alpine Securities Corporation's parent company is SCA Clearing, LLC. No publicly held corporation owns 10% or more of Alpine's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RELATED PROCEEDINGS.................................... ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vii

INTRODUCTION 1

OPINIONS AND ORDERS BELOW........................ 3

JURISDICTION... 4

STATUTORY AND REGULATORY PROVISIONS INVOLVED... 4

STATEMENT OF THE CASE................................. 4

REASONS FOR GRANTING THE WRIT.............. 12

I. This Court's Review Is Necessary To Vindicate Congress's Decision To Assign Enforcement Of The BSA To The Treasury Department. 12

A. Congress charged the Secretary of the Treasury with enforcing the BSA... 12

B. Congress made a deliberate choice not to empower the SEC to enforce the BSA. 14

II. The Decision Below Contravenes This Court's Precedents. 17

A. The Second Circuit was wrong in holding that the SEC is not enforcing the BSA. 18

B. The Second Circuit's reasoning that the SEC has authority under the Exchange Act to independently enforce the BSA is fundamentally flawed and contrary to this Court's precedents. 21

III. This Court Should Step In To Protect The Public From The Severe Consequences Of The SEC's Power Grab. 27

A. Allowing the SEC to enforce the BSA subjects the financial industry to two conflicting enforcement regimes. 27

B. The SEC's independent enforcement undermines uniformity, expertise, efficiency, and accountability. 31

C. This Court should not wait for a circuit split to intervene. 35

CONCLUSION 38

APPENDIX A Opinion of the Second Circuit (Dec. 4, 2020) 1a

APPENDIX B Opinion of the District Court (Sept. 26, 2019)............................34a

APPENDIX C Opinion of the District Court (Dec. 11, 2018) 68a

APPENDIX D Opinion of the District Court (Mar. 30, 2018) 177a

APPENDIX E Rehearing Opinion of the Second Circuit (Feb. 19, 2021)..............256a

APPENDIX F Rehearing Opinion of the District Court (Aug. 29, 2019) 257a

APPENDIX G Rehearing Opinion of the District Court (June 18, 2018)................256a

APPENDIX H Relevant Statutes and Regulations

15 U.S.C. § 78q(a)(1)..................................271a

15 U.S.C. § 78u(d).......................................272a

31 U.S.C. § 5318 ....280a

31 U.S.C. § 5321 ....305a

17 C.F.R. § 240.17a-8 ....313a

31 C.F.R. § 1010.810 ....314a

31 C.F.R. § 1023.320 ....317a

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Page(s)

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488 U.S. 204 (1988) 12, 22

Buckman Co. v. Plaintiffs' Legal Comm.,
531 U.S. 341 (2001) 32

Cal. Bankers Ass'n v. Shultz,
416 U.S. 21 (1974) 4, 5

City of Idaho Falls v. FERC,
629 F.3d 222 (D.C. Cir. 2011) 21

Elgin v. Dep't of Treasury,
567 U.S. 1 (2012) 22

Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018) 22, 26, 33

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 24

Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,
561 U.S. 477 (2010) 34

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 21, 31

Liu v. SEC,
140 S. Ct. 1936 (2020)....................................3, 37

Martin v. Occupational Safety & Health Rev. Comm'n,
499 U.S. 144 (1991)..32

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning,
136 S. Ct. 1562 (2016)..18

Morton v. Mancari,
417 U.S. 535 (1974).......................................24, 25

POM Wonderful LLC v. Coca-Cola Co.,
573 U.S. 102 (2014)...........................19, 25, 28, 30

RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
566 U.S. 639 (2012)..24

Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1976)..24

State Farm Fire & Cas. Co. v. United States ex rel Rigsby,
137 S. Ct. 436 (2016)..16

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994)..22

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979)..19

United States v. Est. of Romani,
523 U.S. 517 (1998)..24

United States v. Fausto,
484 U.S. 439 (1988)..23

United States v. Picciotto,
875 F.2d 345 (D.C. Cir. 1989).............................21

Statutes

12 U.S.C. § 1464(d)(6) 15

12 U.S.C. § 1786(k)(2)(A)(i).....................................16

12 U.S.C. § 1786(q)(1) 15

12 U.S.C. § 1786(q)(3) 15

12 U.S.C. § 1813(q)..14

12 U.S.C. § 1818(i)(2)(A)(i).......................................16

12 U.S.C. § 1818(s)(1)..15

12 U.S.C. § 1818(s)(3)..15

15 U.S.C. § 78aa...36

15 U.S.C. § 78q(a)(1) 2, 4, 7, 8, 21

15 U.S.C. § 78u(d)(3)...4, 8

15 U.S.C. § 78u(d)(3)(B)(i) 8

15 U.S.C. § 78u(d)(3)(B)(ii) 9

15 U.S.C. § 78u(d)(3)(B)(iii) 9

28 U.S.C. § 1254(1)..4

31 U.S.C. § 5318 4

31 U.S.C. § 5318(a) 12, 13

31 U.S.C. § 5318(a)(1) 5, 13, 15, 33

31 U.S.C. § 5318(b)(2) 15, 33

31 U.S.C. § 5318(g) 5, 12

31 U.S.C. § 5318(h) 12

31 U.S.C. § 5318(h)(4)(A) 32

31 U.S.C. § 5320 12

31 U.S.C. § 5321 .... 4, 12, 16

31 U.S.C. § 5321(a) 6, 8, 9

31 U.S.C. § 5321(a)(1) 6

31 U.S.C. § 5321(a)(6)(A) 6, 9

31 U.S.C. § 5321(a)(6)(B) 6

31 U.S.C. § 5321(e)(1) 15

31 U.S.C. § 5321(e)(3)(A) 15

31 U.S.C. § 5321(e)(3) 16

31 U.S.C. § 5321(e)(3)(B) 15

44 U.S.C. § 3502(5) 34

Anti-Money Laundering Act of 2020,
Pub. L. No. 116-283, § 6204(a) 17

Anti-Money Laundering Act of 2020,
Pub. L. No. 116-283, § 6309...................................7

USA PATRIOT Act, Pub. L. No. 107-56,
§ 356(a), 115 Stat. 272 (2001)..........................6, 17

Other Authorities

12 C.F.R. § 21.21 15

12 C.F.R. § 208.63 15

12 C.F.R. § 211.5(m)..15

12 C.F.R. § 211.24(j)..15

12 C.F.R. § 326.8 15

12 C.F.R. § 748.2 15

17 C.F.R. § 240.17a-8..............................4, 7, 8, 9, 11,
18, 19, 20, 21, 35

31 C.F.R. § 1010.810 4

31 C.F.R. § 1010.810(a)...5, 13

31 C.F.R. § 1010.810(b)(6) 7, 13, 26

31 C.F.R. § 1010.810(d)..................................5, 14, 26

31 C.F.R. § 1010.810(e) 14

31 C.F.R. § 1010.810(g) 26

31 C.F.R. § 1020.320 5

31 C.F.R. § 1022.320 5

31 C.F.R. § 1023.320 ....4, 18

31 C.F.R. § 1023.320(a)(2) 6, 30

116 Cong. Rec. H16961 (daily ed. May 25, 1970)...13

46 Fed. Reg. 61,455 (Dec. 17, 1981)..........................10

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In re GWFS, Release No. 91853 (SEC May 12, 2021)..37

In re Interactive Brokers LLC, Release No. 89510 (SEC Aug. 10, 2020) 37

In re Wells Fargo Advisors, LLC, Release No. 82054, 2017 WL 5248280 (SEC Nov. 13, 2017).............................37

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William J. Fox, Dir., FinCEN,
Statement Before H. Comm. on Fin.
Servs., Subcomm. on Oversight and
Investigations (June 16, 2004),
https://tinyurl.com/2dz2byxa 29, 34

In re Windsor Street Capital, L.P.
(f/k/a Meyer Assocs., L.P.) and John
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10293 (SEC Jan. 25, 2017),
https://tinyurl.com/5cn5s6aa 34

INTRODUCTION

Beginning in 1970, Congress enacted and amended a series of statutes that together form the Bank Secrecy Act (BSA). Congress entrusted administration and enforcement of the BSA to the Treasury Department, a politically accountable and expert executive agency. Under the powers assigned to it by the BSA, Treasury issued regulations mandating that financial institutions, including broker-dealers, file suspicious activity reports, or SARs, in specified circumstances. Those reports help law enforcement investigate money laundering and other illegality. The Treasury Department tasked its Financial Crimes Enforcement Network (FinCEN) with administering and enforcing the BSA, including through rulemaking. When FinCEN brings SAR-enforcement actions, it follows the scienter and penalty standards that Congress specified in the BSA.

The SEC, an independent agency, has decided that it too can interpret and enforce the FinCEN-promulgated SAR regulations even though neither Congress nor the Treasury Department has empowered it to do so. Worse still, in asserting this independent power, the SEC does not follow the BSA's scienter and penalty standards. Instead, it applies the Securities Exchange Act of 1934's lower mens-rea standards and higher penalties. It also takes a much more stringent view than FinCEN regarding when SARs must be filed and what information they must contain.

In asserting independent authority to enforce the BSA and FinCEN's regulations, the SEC relies on a books-and-records provision of the Exchange Act,

15 U.S.C. § 78q(a)(1). That provision authorizes the SEC to require broker-dealers to make and keep records that the SEC, by regulation, deems appropriate. But it does not allow the SEC to substantively enforce a statute assigned to another agency. And it certainly does not permit the SEC to usurp enforcement authority that Congress specifically vested in the Treasury Department and thereby upend the carefully calibrated BSA-enforcement regime.

In allowing the SEC to enforce the BSA under the guise of books-and-records powers from a separate statute, the Second Circuit flouted Congress's decisions to assign enforcement powers to Treasury and create a consistent remedial scheme for BSA violations. The court erroneously cited the implied-repeal framework, which applies where a later-enacted statute might have repealed powers that an earlier statute granted to an agency. That analytical framework has no application here: The Exchange Act does not authorize the SEC to enforce the BSA or Treasury's SAR regulations promulgated under the BSA. The court's flawed analysis led it to place a heavy burden on Alpine to show an irreconcilable conflict between the two statutes, when it should have focused on whether Congress or Treasury ever delegated any authority to the SEC to enforce FinCEN's SAR regulations. Indeed, the court ignored the many ways in which the text, structure, and context of the BSA reveal Congress's deliberate decision not to imbue the SEC with independent enforcement power. The court's analytical error reflects broader disarray about how to resolve apparent conflicts between broad, earlier-enacted statutes and specific, later-enacted statutes.

This Court should grant review to restore the uniform enforcement regime that Congress entrusted to the politically accountable Treasury Department. The need for review is urgent given the serious consequences of the SEC's power grab, which imposes on regulated parties stricter standards and higher penalties than those enacted by Congress and FinCEN.

As in the past, this Court should not shy away from reining in the SEC. Indeed, the case for granting review is even stronger here than in *Liu v. SEC*, 140 S. Ct. 1936 (2020), where the Court granted review (without a circuit split) to stop the SEC from asserting powers not granted to it by Congress. Here, the SEC is not just accreting power—it is also arrogating authority that Congress assigned to a different, more politically accountable agency. And although only the Second Circuit has weighed in so far, a circuit split is unlikely to arise because the SEC can always bring enforcement actions in the Second Circuit or in its own administrative forum, and it has enormous leverage to extract settlements.

OPINIONS AND ORDERS BELOW

The Second Circuit's decision is reported at 982 F.3d 68 and reproduced at Pet. App. 1a-33a. The order denying rehearing is reproduced at Pet. App. 256a. The district court's decisions are reported at 413 F. Supp. 3d 235, 354 F. Supp. 3d 396, and 308 F. Supp. 3d 775, and reproduced at Pet. App. 34a-67a, 68a-176a, and 177a-255a. The orders denying rehearing are unpublished and reproduced at Pet. App. 257a-264a and 265a-270a.

JURISDICTION

The Second Circuit entered judgment on December 4, 2020, Pet. App. 1a, and denied a timely petition for rehearing on February 19, 2021, Pet. App. 256a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant portions of the BSA, 31 U.S.C. §§ 5318, 5321, are set forth at Pet. App. 280a-313a. The relevant portions of the Exchange Act, 15 U.S.C. §§ 78q(a)(1), 78u(d), are set forth at Pet. App. 271a-280a. The relevant regulations promulgated under the BSA, 31 C.F.R. §§ 1010.810, 1023.320, are set forth at Pet. App. 314a-325a. The relevant regulation promulgated under the Exchange Act, 17 C.F.R. § 240.17a-8, is set forth at Pet. App. 313a.

STATEMENT OF THE CASE

Congress enacts the BSA and assigns enforcement authority to the Treasury Department.

Starting in 1970, Congress enacted and amended a series of statutes, known collectively as the Bank Secrecy Act (BSA), to combat money laundering and other illegality. Among other things, the BSA imposes a series of reporting requirements on financial institutions to aid that effort. *See Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 26-29 (1974). Specifically, the BSA authorizes the Treasury Secretary "to prescribe by regulation certain recordkeeping and reporting

requirements for banks and other financial institutions," and it sets forth a carefully calibrated scheme of penalties for violations of those regulations. *Id.* at 26; *infra* at 6.

Congress also authorized the Treasury Secretary to "delegate duties and powers" to "an appropriate supervising agency," including the power to (1) examine entities for compliance with the BSA and its regulations, and (2) bring enforcement actions. 31 U.S.C. § 5318(a)(1). Consistent with the statute, the Secretary assigned "[o]verall authority for enforcement and compliance, including coordination and direction of procedures and activities of all other agencies exercising delegated authority," to the Financial Crimes Enforcement Network (FinCEN), a bureau within the Treasury Department. 31 C.F.R. § 1010.810(a). And "[a]uthority for the imposition of civil penalties" also "lies with the Director of FinCEN." § 1010.810(d).

The Treasury Department requires the reporting of suspicious transactions, including by broker-dealers, and FinCEN enforces those rules.

In 1992, Congress amended the BSA to authorize the Treasury Secretary to require financial institutions "to report any suspicious transaction relevant to a possible violation of law or regulation." Pub. L. No. 102-550, § 1517, 106 Stat. 3672, 4060 (1992) (codified at 31 U.S.C. § 5318(g)). The Secretary, through FinCEN, did just that with respect to certain types of financial institutions. *See, e.g.*, 31 C.F.R. § 1020.320 (banks); § 1022.320 (money services businesses).

Ten years later, the Treasury Department, via FinCEN, extended that requirement to broker-dealers, after Congress directed Treasury to do so as part of 2001's USA PATRIOT Act. Pet. App. 5a. The SAR regulation requires broker-dealers to report to FinCEN transactions of at least $5,000 when the broker-dealer "knows, suspects, or has reason to suspect" that the transactions meet certain criteria, such as "involv[ing] funds derived from illegal activity." 31 C.F.R. § 1023.320(a)(2). The SAR form has a series of data fields for information about the filer, the customer, and the transaction. *See* Pet. App. 166a-169a; Update and Revision of the FinCEN Suspicious Activity Reports Electronic Data Fields, 82 Fed. Reg. 9109, 9111-14 (Feb. 2, 2017). It also includes boxes to check about the type of activity (such as structuring or fraud), along with a narrative section that asks the filer to describe what made the activity suspicious. Pet. App. 169a-176a; 82 Fed. Reg. at 9114.

Since 2002, FinCEN has enforced the SAR requirement and secured civil penalties that adhere to the scheme Congress set forth in the BSA. That scheme requires at least negligence before a violation becomes punishable by civil penalty. 31 U.S.C. § 5321(a). The maximum penalty is: $500 for a negligent violation, § 5321(a)(6)(A); up to $50,000 for a "pattern of negligent violations," § 5321(a)(6)(B); and up to $100,000 for a willful violation, § 5321(a)(1). Adjusting for inflation, those penalties are currently $1,180, $91,816, and $236,071, respectively. Inflation

Adjustment of Civil Monetary Penalties, 86 Fed. Reg. 7348 (Jan. 28, 2021).[1]

The SEC asserts independent power to enforce the SAR requirements against broker-dealers and does so under a more severe regime.

The SEC is an independent agency that neither Congress nor the Treasury Department has ever empowered to enforce violations of the BSA or FinCEN's SAR rules. *See* 31 C.F.R. § 1010.810(b)(6) (delegating to the SEC only the authority to "examine [broker-dealers] to determine compliance with the requirements of" the BSA). The district court recognized as much. *See* Pet. App. 100a ("Alpine is correct that FinCEN has not expressly delegated BSA enforcement authority to the SEC."). Yet in recent years the SEC has extracted millions of dollars from broker-dealers for what the SEC considered to be violations of FinCEN's SAR rules. *Infra* § III.C.

The SEC claims that it can independently enforce the SAR requirements under Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a)(1), and a regulation promulgated thereunder, 17 C.F.R. § 240.17a-8, known as Rule 17a-8. Pet. App. 3a. Section 17(a), which predated the BSA by several

[1] Per the Anti-Money Laundering Act of 2020, Treasury also may impose on "repeat violators" of the BSA an additional civil penalty no more than the greater of "3 times the profit gained or loss avoided" through the violation or "2 times the maximum penalty with respect to the violation." Pub. L. No. 116-283, § 6309 (to be codified at 31 U.S.C. § 5321(f)).

decades, is a general books-and-records provision that requires broker-dealers to "make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter." § 78q(a)(1). Rule 17a-8, promulgated approximately 20 years *before* SAR rules first applied to broker-dealers, purports to incorporate by reference FinCEN's existing and future BSA regulations. *See* § 240.17a-8 (requiring broker-dealers to "comply with the reporting, recordkeeping and record retention requirements" promulgated under the BSA). The SEC thus asserts plenary authority to treat anything it perceives to be a violation of FinCEN's later-adopted SAR rule as a violation of Rule 17a-8 and therefore the Exchange Act. Pet. App. 21a.

The SEC's SAR-enforcement regime differs substantially from FinCEN's. Whereas the BSA requires at least negligence before FinCEN imposes a civil penalty, *see* 31 U.S.C. § 5321(a), the Exchange Act creates strict liability, allowing the SEC to impose its first tier of penalties without any evidence of a culpable state of mind, *see* 15 U.S.C. § 78u(d)(3)(B)(i); Pet. App. 223a ("[T]he SEC has no burden to prove scienter to show a violation of Rule 17a-8."). Those strict-liability penalties—per violation, the greater of $50,000 or "the gross amount of [the defendant's] pecuniary gain," 15 U.S.C. § 78u(d)(3)(B)(i)[2]—exceed the BSA's $500/$1,180 penalty for negligent violations by orders

[2] This petition discusses only the penalties relevant to companies and not those for "natural person[s]." § 78u(d)(3).

of magnitude, 31 U.S.C. § 5321(a)(6)(A). Adjusted for inflation, the possible per-violation strict-liability penalty under the Exchange Act is now the greater of $97,523 or the defendant's pecuniary gain. SEC, Adjustments to Civil Monetary Penalty Amounts, Release No. 5664 (Jan. 8, 2021), https://tinyurl.com/3jux2xx4.

Similarly, the Exchange Act's penalties for deliberate or reckless violations—per violation, the greater of $250,000 (now $487,616 when adjusted for inflation, *id.*) or "the gross amount of [the defendant's] pecuniary gain," 15 U.S.C. § 78u(d)(3)(B)(ii)—dwarf the BSA's penalties for willful violations. Under the BSA, FinCEN may impose a maximum penalty capped at about $236,000, adjusting for inflation. Inflation Adjustment, *supra*. And if the SAR violation "resulted in substantial losses or created a significant risk of substantial losses to other persons," the Exchange Act allows a maximum penalty per violation of the greater of $500,000 (now $975,230) or "the gross amount of [the defendant's] pecuniary gain." § 78u(d)(3)(B)(iii); Release No. 5664, *supra*. The BSA has no corresponding penalty enhancement. *See* 15 U.S.C. § 5321(a).

And, as explained below (*infra* § III.A), the SEC does not adhere to FinCEN's enforcement standards: It takes a far more stringent view of the SAR requirements.

Despite these significant departures from FinCEN's enforcement scheme, the SEC has never subjected its SAR-enforcement activities to notice-and-comment rulemaking. When Rule 17a-8 underwent (for the only time) notice-and-comment rulemaking in

1981, SAR reporting requirements did not even exist. 46 Fed. Reg. 61,455 (Dec. 17, 1981); Pet. App. 20a. And when FinCEN promulgated its broker-dealer SAR rule via notice-and-comment rulemaking in the early 2000s, it did not mention any role for the SEC in bringing SAR-related enforcement actions; the SEC's role was limited to examination. *See* Proposed Amendment to the Bank Secrecy Act Regulations—Requirement of Brokers or Dealers in Securities to Report Suspicious Transactions, 66 Fed. Reg. 67,670 (Dec. 31, 2001); Requirement that Brokers or Dealers in Securities Report Suspicious Transactions, 67 Fed. Reg. 44,048-49 (Jul. 1, 2002) (final rule). That was so even though FinCEN, at Congress's direction, consulted with the SEC before releasing the proposed rule. 66 Fed. Reg. 67,670.

The SEC brings a civil enforcement action against Alpine.

Alpine is a registered broker-dealer specializing in micro-cap securities. Pet. App. 3a. In 2017, the SEC brought a civil enforcement action against Alpine, alleging that Alpine failed to file certain SARs and omitted required information from others. Pet. App. 3a. FinCEN did not join the action or inform Alpine or the court of its views; in fact, the SEC did not discuss with FinCEN any specific SAR or SAR guidance. D. Ct. Dkt. 85-2 at 6.

The parties filed cross-motions for summary judgment. Pet. App. 3a. As relevant here, Alpine contended that the SEC lacked authority to enforce violations of the BSA, including the SAR requirements, because that authority belongs to Treasury.

Pet. App. 214a. Alpine also argued that the SEC's Rule 17a-8 violated the Administrative Procedure Act (APA) by automatically incorporating new Treasury regulations without notice-and-comment rulemaking. Pet. App. 215a-216a. The district court rejected those arguments, entered summary judgment for the SEC, and imposed on Alpine $12 million in civil penalties. Pet. App. 66a, 215a-220a.

The Second Circuit affirmed. Pet. App. 4a. The court first concluded that "[t]his enforcement action was brought solely under Section 17(a) of the Exchange Act and Rule 17a-8," so it "falls within the SEC's independent authority" and "does not constitute SEC enforcement of the BSA." Pet. App. 12a. Next, the court held that the BSA did not preclude the SEC from enforcing the SAR requirements via the Exchange Act. The court misunderstood Alpine to be arguing that "the Exchange Act and the BSA cannot be 'harmonized,'" and the court held that the two regimes did not "conflict[]." Pet. App. 15a-16a. The court also said that the "specific authorization" to the Treasury Department in the BSA did not override the earlier-enacted Exchange Act's "general authorization to the SEC," pointing to the absence of "expressed congressional intent" to "repeal[] by implication" the SEC's enforcement authority. Pet. App. 15a, 18a-19a. Finally, the court rejected Alpine's contention that Rule 17a-8—which incorporates by reference any future changes to FinCEN's SAR regulation—violates the APA. Pet. App. 20a-25a.

REASONS FOR GRANTING THE WRIT

I. This Court's Review Is Necessary To Vindicate Congress's Decision To Assign Enforcement Of The BSA To The Treasury Department.

"It is axiomatic that an administrative agency's power … is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Congress entrusted enforcement of the BSA to the Treasury Department. Neither Congress nor Treasury has delegated any BSA enforcement authority to the SEC. Instead, they deliberately assigned the SEC different and more modest roles, including consulting on certain BSA regulations and examining firms for BSA compliance. The SEC's assertion of independent BSA enforcement power violates Congress's clear intention and cannot stand.

A. Congress charged the Secretary of the Treasury with enforcing the BSA.

Congress set forth a specific, comprehensive regime of BSA enforcement—including for SARs—under the Treasury Department's auspices. The BSA confers on the Treasury Secretary "[g]eneral powers" to ensure "compliance" with the act. 31 U.S.C. § 5318(a). And Congress specifically empowered the Secretary to: prescribe the standards for anti-money-laundering programs, § 5318(h); require financial institutions to report suspicious transactions, § 5318(g); and enforce the BSA through civil actions and a reticulated scheme of tiered monetary penalties and other remedies, *id.* §§ 5320-5321.

By placing the Treasury Department in charge of BSA enforcement, Congress ensured that enforcement would be consistent for all financial institutions, with standards and penalties calibrated to Treasury's enforcement priorities. Congress also ensured that one expert, politically accountable agency would oversee enforcement, thereby protecting the financial industry from unduly onerous regulation and inconsistent, overzealous enforcement. *See* 116 Cong. Rec. H16961 (daily ed. May 25, 1970) (statement of Rep. Rees) ("Perhaps the most important safeguard that the financial community has against overly burdensome recordkeeping requirements is that the legislation … rests with the [Treasury] Secretary.").

Congress further authorized the Treasury Secretary to "delegate duties and powers" under the BSA. 31 U.S.C. § 5318(a), (a)(1). The Secretary assigned "[o]verall authority for enforcement and compliance, including coordination and direction of procedures and activities of all other agencies exercising delegated authority," to FinCEN. 31 C.F.R. § 1010.810(a). The Secretary has not delegated to the SEC any enforcement powers regarding the BSA. Rather, Treasury delegated only the "[a]uthority to examine" broker-dealers "to determine compliance" with the BSA. § 1010.810(b)(6).

The SEC's role, then, is limited to "compliance examination,"[3] while FinCEN "retains enforcement

[3] "Examination" means periodically "assess[ing] the adequacy of" a financial institution's "Bank Secrecy Act/anti-money laundering (BSA/AML) compliance program … and [its] compliance with

authority, including authority to impose [civil monetary penalties] for violations." Office of Inspector General, Dep't of Treasury, OIG-17-016, FinCEN Needs to Improve Administration of Civil Monetary Penalty Cases, at 3-4 (Nov. 16, 2016), https://tinyurl.com/yannpucu. Thus, the SEC "shall" report to FinCEN "[e]vidence of specific violations" for FinCEN to act on. § 1010.810(e); *see also* § 1010.810(d) ("Authority for the imposition of civil penalties for violations of this chapter lies with [FinCEN's] Director.").

B. Congress made a deliberate choice not to empower the SEC to enforce the BSA.

Congress has amended the BSA many times over the decades. But Congress never authorized the SEC to enforce the BSA. That was no accident. Congress knew how to empower other agencies when it wanted to, but it instead assigned the SEC a more modest role.

1. When Congress wanted other agencies to participate in enforcing the BSA, it affirmatively invited them to do so, subject to the Treasury Department's oversight. Consider the federal banking agencies.[4] Congress amended the BSA to expressly direct the Secretary to "delegate" to the banking agencies "any authority of the Secretary" under the BSA "to assess

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BSA regulatory requirements." Fed. Fin. Insts. Examination Couns., BSA/AML Manual: Scoping and Planning, https://tinyurl.com/4bcp73uj (last visited June 16, 2021).

[4] These are the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Board of Governors of the Federal Reserve. 12 U.S.C. § 1813(q).

a civil money penalty" on depository institutions. 31 U.S.C. § 5321(e)(1). Critically, however, Congress kept Treasury in the driver's seat, instructing the Secretary to promulgate regulations establishing "the terms and conditions which shall apply to any [such] delegation." § 5321(e)(3)(A). Congress also authorized the Secretary, in her "sole discretion," to limit "the amount of any civil penalty which may be assessed by an appropriate Federal banking agency." § 5321(e)(3)(B). And even when the Secretary delegates other enforcement powers, the Secretary must always retain final authority over the issuance of any enforcement summons to ensure consistency of enforcement. *Id.* § 5318(a)(1), (b)(2).

To further empower the banking agencies, Congress also created specific BSA-compliance provisions for them. Congress ordered the banking agencies to "prescribe regulations requiring" certain regulated entities "to establish and maintain procedures reasonably designed to assure and monitor" their "compliance" with the BSA's recordkeeping and reporting requirements. 12 U.S.C. §§ 1818(s)(1), 1464(d)(6), 1786(q)(1). They have done so. *See* 12 C.F.R. §§ 208.63, 211.24(j), 211.5(m) (Federal Reserve); *id.* § 326.8 (FDIC); *id.* § 21.21 (OCC); *id.* § 748.2 (National Credit Union Administration). And Congress gave those agencies the power to issue cease-and-desist orders to enforce their BSA regulations. 12 U.S.C. §§ 1786(q)(3), 1818(s)(3).

Congress's decision to empower the banking agencies to enforce the BSA in a limited fashion is telling. First, it shows that no agency other than Treasury has authority to enforce the BSA unless Congress

expressly grants that authority or Treasury delegates it. Neither grant of power has been made to the SEC, even though "Congress knew how to draft the kind of statutory language" that would have given enforcement power to the SEC. *State Farm Fire & Cas. Co. v. United States ex rel Rigsby*, 137 S. Ct. 436, 444 (2016).

Second, the decision to grant specific enforcement authority to the banking agencies shows that Congress did not believe that any preexisting, more general grants of authority (like that in Section 17(a) of the Exchange Act) empowered other agencies to enforce the BSA. Although the banking agencies have general authority to enforce violations of "any law or regulation," § 1786(k)(2)(A)(i); § 1818(i)(2)(A)(i), Congress still found it necessary to give them the express power to enforce the BSA.

Third, Congress showed that it wanted Treasury to retain ultimate control, even where Congress empowered other agencies to enforce the BSA. As discussed above, Congress instructed the Treasury Secretary to prescribe "the terms and conditions" under which the banking agencies could assess civil monetary penalties under § 5321, including by limiting the amount of penalties they may assess. § 5321(e)(3). A Congress that took such care to bring the banking agencies under the BSA's scheme and Treasury's oversight would not have expected or sanctioned the SEC's operating entirely outside of it.

2. Not only did Congress decline to empower the SEC like it empowered the Treasury Department and

the banking agencies, but it also chose to give the SEC a different, more limited role in the BSA regime.

First, Congress gave all "federal functional regulators," including the SEC, a consultative role in crafting SAR regulations and developing a national strategy for combating financial crimes. *See, e.g.*, USA PATRIOT Act, Pub. L. No. 107-56, § 356(a), 115 Stat. 272, 324 (2001).[5] Congress also directed the Treasury Secretary to jointly promulgate with the SEC regulations regarding procedures for verifying customer identities—confirming that when Congress wanted the SEC to operate in the BSA space, it said so and required the SEC to coordinate with Treasury. *Id.* § 326, 115 Stat. at 318. And, of course, Congress permitted Treasury to delegate examination authority to the SEC. All that is a far cry from the plenary enforcement power the SEC now asserts.

II. The Decision Below Contravenes This Court's Precedents.

The Second Circuit was wrong to hold that, notwithstanding Congress's deliberate decision to create a comprehensive anti-money-laundering scheme under the exclusive ultimate control of the Treasury Department (*supra* § I), the SEC may enforce the BSA and FinCEN's SAR regulation pursuant to its authority under the Exchange Act.

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[5] *See also* Anti-Money Laundering Act of 2020, *supra* § 6204(a) (requiring the Secretary to consult with "the Federal functional regulators" to "undertake a formal review" of the SAR requirements and "propose changes … to reduce any unnecessarily burdensome regulatory requirements").

That holding rests on two flawed conclusions—first, the fiction that the SEC isn't enforcing the BSA; and second, that the SEC has independent authority under the Exchange Act to enforce the SAR rules. Both conclusions flout Congress's decision to place enforcement power with Treasury; undermine the BSA's enforcement and penalty scheme; and are contrary to this Court's precedents regarding statutes supposedly touching on the same topic.

A. The Second Circuit was wrong in holding that the SEC is not enforcing the BSA.

The Second Circuit first erred by embracing the view that the SEC was not enforcing the BSA when it brought this SAR-enforcement action against Alpine. Pet. App. 12a. The court's analysis cannot be squared with this Court's precedents.

1. This Court has made clear that a suit seeking remedies under one statute is nonetheless "enforc[ing]" another statute if the suit's "success depends on" proving a violation of that other statute. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1569-70 (2016) (addressing the Exchange Act). Here, there is no dispute that the SEC's claims against Alpine under the Exchange Act and Rule 17a-8 are predicated on supposed violations of the BSA and FinCEN's SAR regulation. *See, e.g.*, Pet. App. 102a ("The violations that the SEC asserts occurred here arose from Alpine's failure to comply with Section 1023.320's mandates…."). Because the SEC is enforcing a regulation (promulgated under the Exchange Act) that expressly incorporates FinCEN's

SAR regulation (promulgated under the BSA), the SEC's case against Alpine can succeed only if the SEC proves a violation of that BSA regulation.

That makes this case the opposite of *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102 (2014), where this Court held that a claim for deceptive food labeling was brought "to enforce the Lanham Act, not the [Food, Drug, and Cosmetic Act] FDCA or its regulations," and was therefore not precluded by the FDCA because resolving the Lanham Act claim did not require interpreting the "FDCA and the detailed prescriptions of its implementing regulations." *Id.* at 115, 117. This suit, by contrast, turns entirely on the meaning of the BSA and FinCEN's SAR regulation. *See, e.g.*, Pet. App. 95a (district court explaining that it "principally relie[d]" on FinCEN guidance). Because the SEC is enforcing the BSA, and because Treasury never delegated that authority to the SEC, this action is *ultra vires*.

To be clear, Alpine is not arguing that the SEC cannot have anything to do with SARs. Under Section 17(a), it can require a broker-dealer "to keep records," including copies of SARs filed with FinCEN. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 569-70 (1979). If a broker-dealer, for instance, failed to keep those copies even after the SEC required their retention, an action to enforce that violation could be proper; it would be an action to enforce Rule 17a-8 and the Exchange Act, not the BSA.

Similarly, the SEC could under Section 17(a) require that a broker-dealer keep its tax returns and

payroll records, as filed with the relevant state and federal authorities. But the SEC could not bring an enforcement action against a broker-dealer because it thought the firm filed an inaccurate tax return or took an insufficiently documented deduction, or because the SEC thought the employer violated the Fair Labor Standards Act by underpaying employees. Such substantive enforcement of tax laws would remain with the IRS or corresponding state authorities, and enforcement of wage laws would remain with the Department of Labor. Likewise, the SEC cannot substantively enforce the BSA. Such enforcement must be brought by FinCEN or another entity to which FinCEN delegated enforcement powers.

2. The SEC's insistence that it isn't enforcing the BSA or FinCEN's regulation also cannot be squared with its defense of its actions under the APA. According to the SEC and the Second Circuit, it does not matter that the SEC never put its SAR-enforcement regime through notice-and-comment rulemaking because *FinCEN* put *its* SAR rule through that process some 20 years *after* the SEC promulgated Rule 17a-8. Pet. App. 20a-25a. But the APA does not permit the SEC to freeride on a different agency's subsequent rulemaking, pursuant to a different statute, and the SEC certainly can't do that while denying that it is enforcing that other agency's regime.

The SEC's failure to submit a SAR-enforcement rule for notice and comment provides an independent reason that the SEC lacks authority to bring this action. The Second Circuit relied on the fact that the

SEC's rule, which it promulgated in 1981 through notice-and-comment rulemaking, automatically incorporates all future Treasury reporting requirements. But agencies cannot avoid their obligations under the APA with this kind of prospective incorporation-by-reference. *See, e.g.*, *City of Idaho Falls v. FERC*, 629 F.3d 222, 227-31 (D.C. Cir. 2011); *United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989). The automatic absorption of the SAR element marked a substantive change to Rule 17a-8, and "[o]nce an agency issues a substantive rule through notice and comment, it can amend that rule only by following the same notice-and-comment procedures." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2435 (2019) (Gorsuch, J., concurring). The violation is particularly glaring here, because the Exchange Act limits the "reports" that broker-dealers must "make and disseminate" to those that the SEC, "by rule, prescribes as necessary or appropriate." 15 U.S.C. § 78q(a)(1). The SEC could not have said that the SAR requirement fit that bill in 1981, when FinCEN's SAR rule was still decades away. Rule 17a-8's automatic absorption mechanism, then, not only violates the APA but also violates the Exchange Act itself.

B. The Second Circuit's reasoning that the SEC has authority under the Exchange Act to independently enforce the BSA is fundamentally flawed and contrary to this Court's precedents.

As explained above (§ II.A.), the SEC is enforcing the BSA without a delegation from Treasury. For that reason alone, the Second Circuit should have concluded that the SEC's enforcement action against

Alpine was unlawful. Review is also required because, in addition to that fundamental error, the Second Circuit flouted this Court's precedents in at least three other critical ways.

1. As detailed above, the BSA's text, structure, and context demonstrate that Congress intended only for Treasury (and its delegees) to enforce the BSA. *Supra* § I. The Second Circuit ignored that powerful evidence and relied on Congress's failure to *prohibit* enforcement by the SEC. Pet. App. 19a. But this Court has repeatedly held that an express statement of preclusion is not required. *See, e.g.*, *Elgin v. Dep't of Treasury*, 567 U.S. 1, 9-10 (2012); *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 208, 216 (1994). And agencies have no authority unless Congress grants it. *Bowen*, 488 U.S. at 208. Thus, in conferring authority on one agency, Congress does not need to expressly deny that authority to other agencies.

2. In allowing the SEC to independently enforce the BSA under the guise of the Exchange Act despite Congress's clear decision that all BSA enforcement should flow though Treasury, the Second Circuit cited the strong presumption "that repeals by implication are disfavored." Pet. App. 15a. That was a fundamental error. Under the doctrine of implied repeal, Alpine would be required to show an irreconcilable conflict between the Exchange Act's books-and-records provision and the later-enacted BSA's assignment of enforcement authority to Treasury. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018).

But the implied-repeal canon and its "heavy burden," Pet. App. 15a, have no application here. Alpine

does not contend that the BSA implicitly repealed some enforcement power that Congress previously gave the SEC through the Exchange Act. Alpine's point is that the SEC never had that authority to begin with. As discussed above (§ II.A.1), the SEC has no more power under its books-and-records statute to substantively enforce the BSA than it would have to enforce tax-deduction rules or labor laws administered by other agencies. Nothing in the Exchange Act grants the SEC the power to substantively enforce other laws, including later-enacted laws—and certainly not the power to independently enforce laws assigned to another agency, under a different penalty regime.

At best, the SEC asserts an implausible argument that its book-and-records power allows it to substantively enforce other legislation that Congress enacts and assigns to other agencies in the future, as well as regulations promulgated by those agencies. As this Court has explained, "[r]epeal by implication of an express statutory text is one thing," but when an agency's assertion of authority is (as here) at most arguably "implied by a statutory text," that is "something else." *United States v. Fausto*, 484 U.S. 439, 453 (1988). In that scenario, a court does not apply the high bar of the presumption against implied repeal.

Instead, when faced with an argument such as the SEC's here, a court must perform the "classic judicial task of" "interpret[ing] [the] statutory text in light of surrounding texts that happen to have been subsequently enacted," asking whether a later, more specific law (here, the BSA) limits the reach of an earlier, broad law (here, the Exchange Act). *Id*. As this Court

explained in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000), when "a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings." *Id.* at 143. "This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *Id.*

This Court has reaffirmed that principle—that broad enactments must be read narrowly in light of later, more specific enactments—numerous times. *See, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (a "specific authorization" to act trumps a "general authorization," particularly where "Congress has enacted a comprehensive scheme" and "targeted specific problems with specific solutions") (citation omitted); *United States v. Est. of Romani*, 523 U.S. 517, 530-31 (1998) ("a specific policy embodied in a later federal statute should control our construction of the prior[] statute;" "it does not seem appropriate to view the issue in this case as whether the [later statute] implicitly amended or repealed the [earlier] statute"). Indeed, this Court has explained that, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)). Under that authority, it was the SEC's burden to prove that it had authority to enforce the BSA, not Alpine's to prove otherwise.

Had the Second Circuit adhered to this Court's precedent, it would have held that the later-enacted

BSA embodies a specific and deliberate policy choice to channel all enforcement through the Treasury Department under uniform standards and a uniform penalty regime. Indeed, the Second Circuit would have found that nothing in the Exchange Act provides that "clear intention otherwise." *Id.* (quoting *Morton*, 417 U.S. at 550).

Despite the clarity of this Court's precedents, the Second Circuit isn't alone in struggling with when and how the implied-repeal canon applies. *POM*, for instance, presented a dispute "as to which of two competing maxims establishes the proper framework for decision" when two statutes ostensibly speak to the same issue. 573 U.S. at 112. Should courts ask whether there is an "implied repeal," such that courts "must give full effect to both statutes unless they are in 'irreconcilable conflict,'" or should courts "resist[] this canon and its high standard" and instead ask "whether a more specific law … clarifies or narrows the scope of a more general law"? *Id.* *POM* did not answer the question, *id.* at 112-13, and, as this case shows, courts continue to follow the wrong path. This Court should grant review to provide clarity about when and how these interpretive canons apply.

3. In addition to applying a fundamentally flawed framework and ignoring the overwhelming evidence that Congress sought to have all enforcement powers flow through Treasury, the Second Circuit also erred in relying primarily on statements from FinCEN and the SEC that it misread as blessing the SEC's independent enforcement. Pet. App. 19a, 22a. This Court has made clear that "the reconciliation of distinct statutory regimes is a matter for the courts, not

agencies," especially where (as here) one agency is "eager to advance its statutory mission" by "bootstrap[ping] itself into an area in which it has no jurisdiction." *Epic*, 138 S. Ct. at 1629 (internal quotation marks omitted). That concern is heightened here, where a politically insulated independent agency is usurping a politically accountable agency's authority and exercising it on different terms.

Making matters worse, the Second Circuit misread those agencies' statements. When the SEC and FinCEN spoke of the SEC's authority to assure "compliance" with the BSA, they were referring to the SEC's authority (delegated by Treasury) to "examine" broker-dealers for compliance with the BSA. Pet. App. 19a (quoting 67 Fed. Reg. at 44,049). Granting an examination role to the SEC is not the same as blessing independent enforcement, a point FinCEN has long recognized. *See, e.g.*, 31 C.F.R. § 1010.810(b)(6), (d) (delegating "[a]uthority to examine institutions to determine compliance" to "the Securities and Exchange Commission with respect to brokers and dealers" while confirming that "[a]uthority for the imposition of civil penalties for violations of this chapter lies with the Director of FinCEN"); *see also* Pet. App. 100a ("Alpine is correct that FinCEN has not expressly delegated BSA enforcement authority to the SEC."); *compare* § 1010.810(g) (empowering the IRS to take various actions "for the enforcement" of specified provisions of the BSA).

III. This Court Should Step In To Protect The Public From The Severe Consequences Of The SEC's Power Grab.

Because of the SEC's lawless power grab, the financial industry now faces two conflicting BSA-enforcement regimes. One is administered by an expert, politically accountable agency, FinCEN, that adheres to the BSA itself. The other is run by an independent agency, the SEC, unbound by the BSA's scienter and penalty rules. This untenable state of affairs leaves regulated parties uncertain of their obligations, disrupts Treasury's enforcement priorities, undermines expertise and uniformity in enforcement, and dilutes political accountability. This Court has not hesitated in the past to stop the SEC from asserting broad powers that Congress never granted it. There is an urgent need for this Court to do so again to avert these serious consequences.

A. Allowing the SEC to enforce the BSA subjects the financial industry to two conflicting enforcement regimes.

The SEC's independent enforcement of the BSA differs from FinCEN's in its mens rea standard, penalties, and SAR filing and content standards. Consequently, two distinct legal regimes now exist.

For starters, the SEC's scienter standard is lower than FinCEN's. Indeed, as detailed above, the SEC doesn't have to prove a culpable state of mind; it can establish a violation and obtain penalties on a strict-liability basis. *Supra* at 8. And the SEC's penalties are harsher than FinCEN's. *Id.* Because the SEC's

penalties dramatically exceed those set in the BSA, Congress's carefully crafted plan for BSA penalties is undermined by allowing the SEC to independently enforce the Act. *POM*, 573 U.S. at 118.

This case starkly illustrates the consequences for regulated parties of dueling enforcement schemes. Because the SEC brought this enforcement action without any delegation from Treasury and under the Exchange Act's harsher penalty regime, Alpine faced a maximum civil penalty (at the lowest tier) of over $200 million. Pet. App. 62a n.25. But had FinCEN brought the action, Alpine would have faced a maximum penalty (at the lowest tier) of around $1.5 million.

The SEC has also taken a much more rigid view than FinCEN about what constitutes an actionable SAR violation. The SEC pressed, and the lower courts here adopted, the position that a broker-dealer must file a SAR whenever it is alerted to a red flag in a sizeable transaction of low-priced securities and must then enumerate in the narrative portion of the SAR form each of those red flags. Pet. App. 120a-121a; CA Dkt. 130 at 79 (SEC arguing that Alpine had to file SARs where transactions "involved a large deposit of low-priced securities and at least one of the well-established red flags").

That bright-line rule is flatly inconsistent with FinCEN's view that "[t]he presence or absence of a red flag in any given transaction is not by itself determinative of whether a transaction is suspicious," and so financial institutions "should take into account all relevant details … and should not necessarily presume

suspicious activity" from "a single red flag."[6] And it is contrary to FinCEN's position that the reporting standard is a "flexible" one[7] and enforcers should "consider[] a range of factors when evaluating an appropriate disposition upon identifying actual or possible violations of the BSA,"[8] in recognition that the filing decision entails "individual judgment calls" that the government shouldn't be "second guessing."[9] Moreover, the SEC's red flags are culled from guidance documents. Pet. App. 26a-28a; D. Ct. Dkt. 120 at 8 (SEC pointing to "guidance …. [that] presents information that filers are required to both identify and report"). But FinCEN has made clear that it "will not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of law."[10]

In short, the SEC is turning SAR enforcement into the unforgiving "gotcha game" FinCEN rejected.[11] Those and other distortions of the SAR rules

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[6] FinCEN, Advisory to Financial Institutions Regarding Disaster-Related Fraud, FIN-2017-A007, at 4 (Oct. 31, 2007), https://tinyurl.com/3ya29nmz.

[7] 67 Fed. Reg. 44,048, 44,053 (July 1, 2002).

[8] FinCEN, Statement on Enforcement of the Bank Secrecy Act (Aug. 18, 2020), https://tinyurl.com/d7n2yz5s.

[9] William J. Fox, Dir., FinCEN, Statement Before H. Comm. on Fin. Servs., Subcomm. on Oversight and Investigations (June 16, 2004), https://tinyurl.com/2dz2byxa.

[10] FinCEN, Statement on Enforcement, *supra*.

[11] FinCEN, News Release: FinCEN's Statement on Enforcement of the Bank Secrecy Act (Aug. 18, 2020), https://tinyurl.com/ye3hw9pp.

led a former FinCEN official to conclude that the SEC's theory of liability in this case "establishes a novel BSA enforcement theory" that is "contrary to" FinCEN's "SAR regulations themselves," "SAR guidance," and "the SAR reporting forms." D. Ct. Dkt. 137 at 67 (Alpine expert report). This, then, is "a case where a lawsuit is undermining an agency judgment." *POM*, 573 U.S. at 120.

The SEC has ample opportunity to deviate even further from FinCEN's SAR standards. The terms of the SAR rule are broad—requiring, for instance, reports when the broker-dealer "knows, suspects, or has reason to suspect that the transaction" "[i]nvolves funds derived from illegal activity." 31 C.F.R. § 1023.320(a)(2). The SEC can be expected to continue to read that open-ended language to require SARs to be filed in a far broader range of cases than FinCEN—or even the SEC itself—has to date, ignoring the flexible standards embodied in the BSA. That wouldn't just widen the gulf between FinCEN's and the SEC's BSA enforcement. It would also undermine the reason the SAR rules are written broadly in the first place: to give financial institutions the space to decide, from their own risk assessments, whether activity is suspicious and should be reported.

Finally, if the SEC is allowed to enforce the BSA independently from Treasury, that enforcement inherently will require the SEC to interpret the BSA and FinCEN's SAR rule that it purports to enforce. Here, for example, the SEC pursued its own understanding of what violated FinCEN's regulation, turning red flags identified by the SEC (and FINRA) staff in non-binding publications into red lines, and

persuaded the district court to adopt them. *E.g.*, Pet. App. 146a, 155a. Although the court said it relied on FinCEN's views (e.g., Pet. App. 262a-263a), its analysis focused on whether the SEC's interpretation of FinCEN's rule was reasonable, and it effectively deferred to the SEC's view. The Second Circuit erred in affirming that approach. Pet. App. 26a. As this Court recently emphasized in *Kisor*, courts may not defer to a second agency's interpretation of the assigned agency's regulation, because the second agency lacks the "knowledge and experience" that justifies such deference. 139 S. Ct. at 2417. Here, only Treasury merits deference as to the meaning of its SAR rule.

B. The SEC's independent enforcement undermines uniformity, expertise, efficiency, and accountability.

As a general matter, "[o]verlapping responsibilities means redundancy, inefficiency, conflict, and unnecessary finger-pointing." Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1470 (2009). That rule holds true here. The existence of two separate SAR-enforcement regimes undermines Treasury's responsibility to oversee SAR enforcement and set priorities based on its expertise, disturbs uniformity in SAR enforcement, imposes crushing costs on regulated parties, and threatens the efficacy of the SAR system itself. Worse, the SEC is doing all that without adequate political oversight.

1. The SEC is interfering with Treasury's "statutorily required judgment" to interpret and enforce the BSA and upsetting the "delicate balance" of "statutory

objectives." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348-50 (2001); *see* 31 U.S.C. § 5318(h)(4)(A) (directing the Treasury Secretary to "establish and make public priorities for anti-money laundering"). The SEC follows its own guidelines as to whether a violation exists and when enforcement actions should be brought. *Compare* U.S. Gov't Accountability Office, Bank Secrecy Act: Agencies and Financial Institutions Share Information but Metrics and Feedback Not Regularly Provided, GAO-19-582 at 29 (Aug. 2019), https://tinyurl.com/5e2bc8ux (describing FinCEN's process for resolving cases referred to it by other agencies' examiners), *with id.* at 34 (describing factors the SEC considers in deciding to bring enforcement actions). FinCEN considers, for instance, not just "compliance with specific BSA requirements," but also the overall "adequacy of an anti-money laundering [] program." FinCEN, Statement on Enforcement, *supra.* And once the SEC decides to act, it follows different rules. *Supra* § III.A.

Unlike the SEC, the Treasury Department also oversees SAR compliance by a broad array of other financial actors. That experience breeds expertise, giving Treasury special insight into what the SAR rules should be and how they should be enforced. *See Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 152 (1991) ("[B]y virtue of the Secretary's statutory role as enforcer, the Secretary comes into contact with a much greater number of regulatory problems than does the Commission."). The SEC doesn't have that same insight. Worse, by effectively creating special SAR rules for broker-dealers, the SEC prevents the BSA from being applied uniformly across industries.

The Second Circuit was unconcerned, contending that the SEC and Treasury work "in tandem" and citing instances where the two agencies conducted enforcement actions in *parallel*, offsetting each other's penalty assessments. Pet. App. 16a & n.41. But Congress wanted Treasury to control enforcement, not merely cooperate with other agencies. *Supra* § I; *see, e.g.*, 31 U.S.C. § 5318(a)(1), (b)(2) (summons may issue "only by, or with the approval of, the Secretary of the Treasury"). Agencies, even cooperating ones, cannot abrogate an enforcement regime that Congress created. *Epic*, 138 S. Ct. at 1629. Anyway, coordinating on selected cases is hardly the kind of substantive cooperation that ensures uniformity. As this case shows, the SEC has no qualms about going it alone: The SEC admitted that it "did not discuss any specific SARs or their content" with FinCEN, "and did not discuss interpretation of FinCEN guidance with individuals at FinCEN in connection with this case at any time." D. Ct. Dkt. 85-2 at 6.

2. Contrary to the Second Circuit's conclusion, the SEC's usurpation of the Treasury Department's enforcement authority maximizes, not "minimiz[es,] regulatory costs" on regulated parties. Pet. App. 16a. Two different regulators applying two different sets of rules dramatically increases the costs of compliance. The SEC's bright-line rule—that firms must file SARS whenever a sizable low-priced-securities transaction is accompanied by a red flag—is particularly burdensome given the volume of publications (almost all advisory) identifying supposed red flags.

A second, independent enforcement regime isn't just unfair to those caught up in the SEC's web—

which captures individuals along with companies.[12] It also undermines the efficacy of the SAR system. The SEC's overly aggressive enforcement stance and higher penalties will encourage firms to file more SARs with a rote listing of "red flags," flooding law enforcement with reports of ultimately innocent activity and making it harder to spot the real illegality afoot. *See* Fox, Statement, *supra*. Excessive "defensive[]" filings also jeopardize the privacy of parties to the transaction. *Id*.

3. The SEC's enforcement regime is more onerous and extensive than the Treasury Department's, but the SEC isn't accountable in the way Treasury is—either from above or below.

Unlike Treasury, which is a politically accountable executive agency, the SEC is an independent agency free from direct control by the President. *See* 44 U.S.C. § 3502(5) (identifying the SEC as an "independent regulatory agency"); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 487 (2010) (deciding case on the understanding that SEC commissioners can be removed only for cause). As Justice Kavanaugh has observed, it is for that reason that "overlaps between independent and non-independent agencies" are to be "avoid[ed]." Kavanaugh, *supra*, at 1474. The existence of multiple enforcers also makes it harder for Congress to exercise oversight.

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[12] *See, e.g.*, *In re Windsor Street Capital, L.P. (f/k/a Meyer Assocs., L.P.) and John David Telfer*, Order, Release No. 10293 (SEC Jan. 25, 2017), https://tinyurl.com/5cn5s6aa.

Moreover, the SEC has never submitted its SAR-enforcement regime to notice-and-comment rulemaking. *Supra* § II.A.2. The SEC thus has evaded the process that would permit the public (including regulated parties) to comment on the issues associated with the SEC's independent enforcement of the SAR rules (especially the higher penalties) and compel the SEC to account for or correct them.

C. This Court should not wait for a circuit split to intervene.

The illegitimacy of the SEC's actions is clear, and the consequences of its power grab are too serious for this Court to wait for other circuits to weigh in. Things will only get worse the longer this Court waits, for the decision below has emboldened the SEC to accelerate its anti-money-laundering enforcement program. "Fresh off its victory at the Second Circuit in Alpine, the SEC's Division of Enforcement wasted little time in solidifying compliance with the Exchange Act's AML record-keeping rules as an area of primary enforcement interest." Daniel Hawke et al., Law360, *SEC Fine Highlights AML Reporting as Enforcement Priority* (May 28, 2021), https://tinyurl.com/2dyw37dp.

It's easy to see why the SEC would make SAR enforcement a priority: With its "gotcha" standard and big paydays, "broker-dealer noncompliance with Rule 17a-8 is low-hanging fruit for the SEC." *Id*. And there is no reason the SEC would stop at SARs—its broad reading of the Exchange Act could lead it to bring enforcement actions whenever it determines that

broker-dealers failed to file (or adequately file) a report that another agency requires, such as tax returns.

Waiting for a circuit split while allowing this broad assertion of power is inadvisable. Despite the SEC's expanding exercise of independent BSA enforcement power, a circuit split is unlikely to emerge anytime soon. For one thing, the Exchange Act's broad venue provision means that the SEC will have no trouble bringing cases in the Second Circuit, something it does frequently already.[13]

For another, few such cases will make it to court in the first place. "Most SAR-related enforcement actions are resolved without litigation."[14] Indeed, over 90% of SEC enforcement actions against public companies and subsidiaries in 2020 settled[15]—unsurprising, given the SEC's draconian penalty scheme. The maximum exposure for those subject to such enforcement actions is staggering, and the cost of litigating

[13] *See* 15 U.S.C. § 78aa (authorizing suit in any district where, among other things, the defendant "transacts business"). The SEC brought this action in the Southern District of New York, even though Alpine is a Utah corporation and the SARs at issue were not prepared or filed in New York, because Alpine used the services of two New York-based companies that provide clearing services in most securities transactions. *See* D. Ct. Dkt. 1 at 4-5.

[14] Sia Partners, *Deficient Suspicious Activity Reporting – Rare Court Decision on Broker Dealer Deficient SAR Process* (July 2, 2020), https://tinyurl.com/422ezyvy.

[15] Cornerstone Research & NYU Pollack Center for Law & Business, SEC Enforcement Activity: Public Companies and Subsidiaries: Fiscal Year 2020 Update at 1, 9, https://tinyurl.com/47738yvh.

against a government agency is high. Broker-dealers process (at minimum) hundreds of thousands of transactions every year; some online broker-dealers might process thousands *per day*. Each missed or deficient SAR is a violation subject to its own civil penalty, which for a company can reach nearly $1 million a pop. *Supra* at 9.

The SEC's settlement leverage is even greater because (unlike FinCEN) the SEC doesn't need to prove scienter at the liability stage, taking that grounds of dismissal off the table. Unsurprisingly, the SEC has in recent years wielded its newly discovered power to independently enforce the BSA to secure numerous high-value SAR settlements. *See, e.g.*, *In re Interactive Brokers LLC*, Release No. 89510, (SEC Aug. 10, 2020) ($11.5 million); *In re Wells Fargo Advisors, LLC*, Release No. 82054, 2017 WL 5248280 (SEC Nov. 13, 2017) ($3.5 million); *In re GWFS*, Release No. 91853 (SEC May 12, 2021) ($1.5 million; relying on Alpine case).

This Court hasn't hesitated in the past to rein in the SEC when it exercises powers that Congress never granted it, even without a circuit split. In *Liu v. SEC*, 140 S. Ct. 1936 (2020), for instance, this Court intervened to stop the SEC's unduly broad reading of its remedial powers—one that the circuit courts had uniformly adopted. *See id.* at 1940-41. The SEC's assertion of independent BSA-enforcement authority here is even more brazen: The SEC has not only arrogated authority Congress never granted to it but also has usurped the power Congress deliberately assigned to a different, expert, and more politically accountable agency. Worse still, the SEC insists on

exercising that authority on its own terms and in conflict with Treasury's standards and priorities.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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