No. 20-144

IN THE

Supreme Court of the United States

SPENCER SAVINGS BANK, SLA, *et al.*,

Petitioners,

v.

LAWRENCE B. SEIDMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

REPLY BRIEF

HELEN DAVIS CHAITMAN
Counsel of Record
LANCE GOTTHOFFER
CHAITMAN LLP
465 Park Avenue
New York, New York 10022
(888) 759-1114
hchaitman@chaitmanllp.com

Counsel for Petitioners

298146

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Statutues and Other Authorities

The brief in opposition ("BiO") filed by respondent Seidman underscores why the Petition for a Writ of Certiorari should be granted.[1]

I. THE DECISIONS BELOW PLACE AN UNJUSTIFIED BURDEN ON A BANK THAT WANTS TO COMPLY WITH THE LAW AND ELIMINATE CUSTOMERS ENGAGED IN SUSPICIOUS ACTIVITIES

The gravamen of Seidman's argument is this:

> The proffered reliance upon the statute and regulations requiring the filing of SARs is frivolous for one simple reason - to wit: a SAR must be filed in good faith and based upon a reasonable belief there has been illegal activity with respect to the account. 12 C.F.R. §163.180(b) and (d).

BiO at 3-4 (footnote omitted)

But the statute and regulations say no such thing. *Lee v. Bankers Tr. Co.*, 166 F.3d 540, 544 (2d Cir. 1999). To the contrary, not only does the plain language of the statute refute Seidman's argument, but a requirement that the SAR must be filed in "good faith" to invoke the protections of the Safe Harbor provision was rejected before the provision was enacted. *See* 137 Cong. Rec. S16, 642 (1991). *AER Advisors, Inc. v. Fidelity Brokerage Services, LLC*, 921 F.3d 282, 293 (1st Cir. 2019) *cert.*

1. Defined terms will have the meaning ascribed to them in the Petition for a Writ of Certiorari filed on August 6, 2020.

denied 140 S.Ct. 1105 (2020); *Stoutt v. Banco Popular de Puerto Rico*, 320 F.3d 26, 30-32 (1st Cir. 2003). In fact, banks are supposed to file SARs based on suspicions as part of the BSA early warning system. Matthew R. Hall, An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report, 84 Ky L.J., Article 8 at 665-66 (1996), quoting 161, 137 Cong. Rec. S16, 640-01, S16, 647 (daily ed. Nov. 13, 1991) (statement of Sen. D'Amato (R-N.Y)) The Safe Harbor provision was designed to provide "the broadest possible exemption from civil liability for the reporting of suspicious transactions." *Stoutt*, 320 F.3d at 31 (quoting 139 Cong. Rec. E57–02 (1993))

Seidman fails to cite any case law to support his position. But there is a sharp split among federal circuits with the majority rejecting any good faith requirement. *See AER Advisors,* 921 F.3d 282; *Stoutt*, 320 F.3d 26; *Lee*, 166 F.3d at 544 (rejecting good faith requirement). *But see Lopez v. First Union National Bank of Florida*, 129 F.3d 1186 (11th Cir. 1997). State courts interpreting the BSA are no less divided. *See Bank of Eureka Springs v. Evans*, 109 S.W.3d 672 (Ark. 2003); *Doughty v. Cummings*, 28 So. 3d 580, 583 (La. Ct. App. 2009) (good faith required). *But see Rachuy v. Anchor Bank*, No. A09-299, 2009 WL 3426939, at *2 (Minn. Ct. App. Oct. 27, 2009) ("Appellant's contention that respondent lacked good faith in reporting to law enforcement is irrelevant because [the Act] does not contain a good-faith requirement.")

Stripped of its false premise, Seidman's argument that this case involves no important federal question fails.[2]

2. Seidman claims that Spencer did not raise the BSA issue until its petition to the New Jersey Supreme Court. This is untrue. *See* Brief of Spencer Savings Bank in Opposition to

This case presents a paradigmatic vehicle for certiorari. Requiring a bank to prove cause for termination of an account chills banks from performing their responsibilities as financial gatekeepers and undermines the strong public policy that impelled the BSA. It also places banks in an untenable position in deciding whether to terminate an account for suspicious activity. And the fact is, although Seidman denies it (without authority) (BiO at 6), the filing of a SAR and the closing of an account are inextricably intertwined.

A bank that files a SAR is, as a practical matter, bound to terminate the depositor's account at peril of being sued for aiding and abetting or complicity. "Once a decision has been made to criminally refer the customer, the bank should ordinarily sever the relationship . . ." Whitney Adams, Effective Strategies for Banks

---

Motion to Require the Bank to Open Accounts and to Strike Spencer's Defense dated July 27, 2016 at 10-11, stating, *inter alia,* that "[b]anks are subject to extensive laws and regulations pursuant to the Bank Secrecy Act . . . and the . . . regulations issued pursuant thereto. Their absolute right to close an account with or without cause is essential to their compliance with these legal requirements. . . . If a bank could be sued and be subject to a judicial determination as to whether it should or should not have closed an account, the operational framework established under federal law would be seriously compromised."; Spencer's Post-Trial Brief, September 7, 2017 at 26, stating, *inter alia,* that "[a]s a regulatory matter, it is essential that banks have this ability because they are subject to the requirements of the Bank Secrecy Act and related regulations under which they have a duty to monitor accounts for suspicious activities . . . The entire bank regulatory structure requires that banks have the unlimited right to close accounts and this is precisely why all banks have put into their terms and conditions this right" and citing to, *inter alia,* the BSA. *Seidman v Spencer*, Superior Court of New Jersey Chancery Division, Passaic County Docket No: PAS-C-53-15.

in Avoiding Criminal, Civil, and Forfeiture Liability in Money Laundering Cases, 44 Ala. L. Rev. 669, 701 (1993) Moreover, while Seidman does not dispute the legislative history confirming that a bank which files a SAR, even if based on suspicion only, should be free to terminate the subject account, there is ambiguity over whether the Safe Harbor provision applies to such terminations. Hall, *supra* at 665-66. *See also Ricci v. Key Bancshares, Inc*. 662 F. Supp. 1132, 1137-38 (D. Me. 1987).

Accordingly, a bank must file a SAR if it suspects misconduct by a customer and the bank must terminate the customer's account if it does so file. But because SARs are strictly confidential the bank cannot use the filing of the SAR to justify termination—if justification can be required—and is hamstrung in its efforts to show good cause by restrictions on making disclosures that may reveal the existence of a SAR. The BSA protects the confidentiality of documents related to a bank's internal inquiry or review of accounts even if they are not submitted to the government, and courts have extended the privilege to information far beyond the SAR itself. *See, e.g., Norton v. U.S. Bank N.A*., 324 P.3d 693, 699 (Wash. Ct. App. 2014); *Union Bank of California N.A. v. Superior Court*, 29 Cal. Rptr. 3d 894 (Cal. Ct. App. 2005). Even if a court orders the institution to disclose a report "or any information that would reveal the existence" of a report, the institution "shall decline to produce the [report] or such information." 31 C.F.R. § 1023.320(e)(1)(i). All this leaves banks to guess at their peril as to what they may or may not say in response to a claim of wrongful termination.

There is a "strong public policy that underlies the SAR system as a whole—namely, an environment that

encourages a national bank to report suspicious activity without fear of reprisal." Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. at 75,579 n.23. But under the precedent established by this case, a bank faces civil liability to a customer for breach of good faith if it terminates the account. This risk of customer retaliation is a disincentive to the bank's compliance with the duties imposed by the BSA. A bank "may be reluctant to prepare [a] SAR if it believes that its cooperation may cause its customers to retaliate." *Cotton v Private Bank & Trust Co.*, 235 F.Supp.2d 809, 815 (N.D. Ill. 2010); *see also Union Bank*, 29 Cal. Rptr. 3d at 903. Institutions will certainly think twice before reporting if expensive litigation is the cost of complying with the law. And because institutions file millions of these reports a year, if these reports were subject to litigation, financial institutions (and the courts) would be overwhelmed. *See* Suspicious Activity Report Statistics, Financial Crimes Enforcement Network, https://www.fincen.gov/reports/sar-stats (listing two million reports in 2018).

Therefore, the Court should grant this Petition and make clear that in cases where the filing of a SAR may be implicated, the Safe Harbor provision applies to termination of accounts and precludes any requirement of good faith or other cause for such termination.

II. THE PREEMPTION DOCTRINE ALSO APPLIES

Seidman tries to ridicule Spencer's showing that the decisions below violate the preemption doctrine, saying only that to merit discussion "it would first have to be established that the Bank Secrecy Act is intended to promote over-reaching misconduct that is designed to

wrongfully entrench the directors of a bank". (BiO at 7-8). Not so. Rather, as shown above, there is a "strong public policy that underlies the SAR system as a whole --namely, an environment that encourages a national bank to report suspicious activity without fear of reprisal." Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. at 75,579 n.23. But, as Congress has also recognized, the financial institution will terminate the depositor's account when it files a SAR. If it cannot terminate the account because it cannot say why it has done so, then the financial institution is less likely to file the SAR in the first place. The tension between the BSA and a state law permitting termination of an account only in "good faith" impermissibly frustrates the BSA and contravenes the preemption doctrine.

III. THIS APPEAL PRESENTS AN IMPORTANT QUESTION RIPE FOR RESOLUTION

There is a strong public purpose in encouraging banks to file SARs when they suspect wrongdoing and severe consequences for not doing so. In return, banks have been given absolute immunity for the contents of those materials. SARs and related materials are to be kept strictly confidential and cannot be used in court. A necessary by-product of filing a SAR is the termination of the customer's account. Without protection from retaliation, the willingness of banks to file SARs will be disincentivized.

Even though the purpose of the Safe Harbor provision of the BSA is to provide the broadest possible immunity for protected activities, it is unclear whether that protection applies to the claims of wrongful termination of accounts

and the pronounced split of appellate authority as to whether "good faith" in filing a SAR is required to invoke the Safe Harbor provision leaves banks in a position that impales financial institutions on the horns of a dilemma. *Lee supra*, 166 F3d at 544. This Court should take the opportunity to resolve that dilemma.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Helen Davis Chaitman
Counsel of Record
Lance Gotthoffer
Chaitman LLP
465 Park Avenue
New York, New York 10022
(888) 759-1114
hchaitman@chaitmanllp.com

Counsel for Petitioners