No. 21-82

In the Supreme Court of the United States

ALPINE SECURITIES CORPORATION, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 17(a) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, requires brokers and dealers to "make and keep for prescribed periods such records * * * and make and disseminate such reports as the [Securities and Exchange] 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." 15 U.S.C. 78q(a)(1). The Commission promulgated Exchange Act Rule 17a-8, 17 C.F.R. 240.17a-8, under that authority. Rule 17a-8 requires broker-dealers to comply with the reporting obligations adopted by the Department of the Treasury under the Bank Secrecy Act (BSA), 31 U.S.C. 5311 *et seq.*, including the obligation to report suspicious transactions conducted through the broker-dealer. The question presented is as follows:

Whether the BSA precludes the Commission from bringing suit under Exchange Act Section 17(a) and Rule 17a-8 against a broker-dealer for failing to file those reports or for filing deficient reports.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (2d Cir.):

In re Alpine Sec. Corp., No. 18-1875 (Aug. 7, 2018)

SEC v. *Alpine Sec. Corp.*, No. 18-2045 (May 28, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–33a) is reported at 982 F.3d 68. The opinions and orders of the district court (Pet. App. 34a-67a, 68a-176a, 177a-255a) are reported at 413 F. Supp. 3d 235, 354 F. Supp. 3d 396, and 308 F. Supp. 3d 775. Additional opinions and orders of the district court (Pet. App. 257a-264a, 265a-270a) are not published in the Federal Supplement but are available at 2018 WL 3198889 and 2019 WL 4071783.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2020. A petition for rehearing was denied on February 19, 2021 (Pet. App. 256a). The petition for a writ of certiorari was filed on July 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a registered broker-dealer specializing in clearing low-priced securities transactions that Congress has recognized are particularly susceptible to fraud and abuse. The Securities and Exchange Commission (SEC or Commission) brought this civil enforcement action to enforce petitioner's obligations under the securities laws to make and keep reports regarding suspicious transactions conducted through a broker-dealer. Pet. App. 3a, 73a-77a. On summary judgment, the district court held petitioner liable for 2720 violations of those obligations, enjoined petitioner from further violating the relevant securities laws, and imposed a $12 million civil penalty. *Id.* at 34a-67a. The court of appeals affirmed. *Id.* at 1a-33a.

1. a. Section 17(a) of the Securities Exchange Act of 1934 (Exchange Act), ch. 404, 48 Stat. 881 (15 U.S.C. 78a *et seq.*), requires brokers and dealers to "make and keep for prescribed periods such records * * * 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." 15 U.S.C. 78q(a)(1). In 1981, acting pursuant to Section 17(a), the Commission promulgated Exchange Act Rule 17a-8. 46 Fed. Reg. 61,454, 61,455 (Dec. 17, 1981). Rule 17a-8 requires that "[e]very registered broker or dealer who is subject to the requirements of the Currency and Foreign Transactions Reporting Act of 1970 shall comply with the reporting, recordkeeping and record retention requirements of chapter X of title 31 of the Code of Federal Regulations," 17 C.F.R. 240.17a-8, which are promulgated by the Department of the Treasury.

The Currency and Foreign Transactions Reporting Act, Pub. L. No. 91-508, Tit. II, 84 Stat. 1118, more commonly known as the Bank Secrecy Act (BSA), 31 U.S.C. 5311 *et seq.*, "require[s] the maintenance of records, and the making of certain reports, which 'have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.'" *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 26 (1974) (citation omitted). Before enacting the BSA, Congress heard "[c]onsiderable testimony," including from "the Securities and Exchange Commission," regarding the ways in which "[s]ecret foreign bank accounts and secret foreign financial institutions" had (*inter alia*) "allowed Americans and others to avoid the law and regulations governing securities and exchanges," "served as essential ingredients in frauds," and been used to facilitate money laundering. *Id.* at 28 (citation omitted).

In promulgating Rule 17a-8, the SEC concluded that requiring broker-dealers to make the reports and keep the records specified by Treasury's regulations under the BSA was "consistent with the purposes of the Exchange Act and the Commission's obligation to enforce broker-dealer recordkeeping requirements." 46 Fed. Reg. at 61,455. At the time, Treasury regulations required broker-dealers "to file three types of reports" regarding "domestic currency transactions * * * and the import and export of currency and monetary instruments" above a certain dollar threshold, and to maintain records regarding those transactions. *Id.* at 61,454, 61,455. The SEC adopted Rule 17a-8 to "require[ ] brokers and dealers to make [those] records and reports." *Id*. at 61,455. In releases issued by the agency when it proposed and later adopted Rule 17a-8, the Commission explained that the Rule "does not specify the required

reports and records so as to allow for any revisions the Treasury may adopt in the future." 46 Fed. Reg. 44,775, 44,776 (Sept. 8, 1981); see 46 Fed. Reg. at 61,455 (same).

b. In 2001, Congress amended the BSA through the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272. See 67 Fed. Reg. 44,048, 44,048 (July 1, 2002). The Patriot Act "required Treasury, after consultation with the Securities and Exchange Commission * * * , to publish proposed regulations * * * requiring broker-dealers to report suspicious transactions under 31 U.S.C. 5318(g)." *Id.* at 44,049; see § 356, 115 Stat. at 324-325. The Treasury Secretary delegated that authority to the Financial Crimes Enforcement Network (FinCEN), a Treasury bureau. See 67 Fed. Reg. at 44,048.

In 2002, FinCEN promulgated such a regulation "after close consultation with Commission staff." *The Financial War on Terrorism and the Administration's Implementation of Title III of the USA Patriot Act: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 107th Cong., 2d Sess. 34 (Jan. 29, 2002) (statement of Annette L. Nazareth, Director, SEC Division of Market Regulation). The regulation requires that "[e]very broker or dealer * * * shall file with FinCEN * * * a report of any suspicious transaction relevant to a possible violation of law or regulation." 31 C.F.R. 1023.320(a)(1). A broker-dealer must file a suspicious activity report (SAR) if a transaction "is conducted or attempted by, at, or through a broker-dealer, it involves or aggregates funds or other assets of at least $5,000, and the broker-dealer knows, suspects,

or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part)": (1) "[i]nvolves funds derived from illegal activity"; (2) is designed "to evade" the BSA and its regulations; (3) "[h]as no business or apparent lawful purpose"; or (4) "[i]nvolves use of the broker-dealer to facilitate criminal activity." 31 C.F.R. 1023.320(a)(2).

FinCEN adopted a specific SAR form for broker-dealers, requiring them to identify the "instrument type" and the "type of suspicious activity" they have encountered, such as "market manipulation" or "securities fraud." Pet. App. 168a-170a (capitalization omitted). The form also requires a "narrative" of the "suspicious activity information," directing filers to "[p]rovide a clear, complete and chronological description * * * of the activity, including what is unusual, irregular or suspicious about the transaction(s)," using the form's checklist "as a guide." *Id.* at 173a.

In the ensuing years, FinCEN has provided additional information on proper completion of SAR forms. Pet. App. 94a-97a. For the broker-dealer form, FinCEN incorporated guidance from staff of the SEC and the Financial Industry Regulatory Authority (FINRA). That guidance identified several "red flags" that signal "potentially suspicious activity" subject to broker-dealers' reporting obligations, including "red flags for the sale of unregistered securities, and possibly even fraud and market manipulation." D. Ct. Doc. 75-3, at 24 (Dec. 14, 2017). Among those "red flags" was the "'[s]ubstantial deposit . . . of very low-priced and thinly traded securities' followed by the '[s]ystematic sale of those low-priced securities shortly after being deposited.'" Pet. App. 97a (citation omitted; brackets in original).

c. In adopting reporting requirements that apply specifically to broker-dealers, FinCEN recognized that "[t]he regulation of the securities industry in general and of broker-dealers in particular relies on both the Securities and Exchange Commission * * * and the registered securities associations and national securities exchanges"—self-regulatory organizations (SROs) like FINRA—to which "[b]roker-dealers have long reported securities law violations." 67 Fed. Reg. at 44,049. FinCEN explained that it already had delegated to the Commission the authority to examine broker-dealers for compliance with the BSA, *id.* at 44,055 n.19, and that "[t]he SEC adopted rule 17a-8 in 1981 under the [Exchange Act], which enables the SROs, subject to SEC oversight, to examine for BSA compliance," *id.* at 44,049. See 31 C.F.R. 1010.810(b)(6) (delegating examination authority to the Commission). FinCEN also observed that "[t]he SEC and the SROs have taken measures to address money laundering concerns at broker-dealers" by including "BSA compliance with non-suspicious activity reporting related provisions * * * in the SEC's examination and enforcement programs since the 1970s, and in the SROs' programs since 1982." 67 Fed. Reg. at 44,049 & n.4. And FinCEN noted that, since the passage of the Patriot Act, SROs had adopted rules that "will * * * require broker-dealers to have compliance programs for suspicious transaction reporting." *Id.* at 44,049. "Accordingly," FinCEN stated, "both the SEC and SROs will address broker-dealer compliance with this rule." *Ibid.*

2. Petitioner "is a registered broker-dealer and [FINRA] member that 'acts as a clearing firm.'" Pet. App. 8a (citation omitted). Clearing firms "handl[e] the recording of transactions, the exchange of funds, and the

delivery of securities after a transaction has been executed." *Id.* at 77a.

Petitioner "principally provides brokerage clearing services for penny stocks and microcap securities traded in the over-the-counter market." Pet. App. 36a. As Congress found in passing the Penny Stock Reform Act of 1990, Pub. L. No. 101-429, Tit. V, 104 Stat. 951, that market is "rife with fraud and abuse" due to "'a serious lack of adequate information concerning price and volume of penny stock transactions,' involvement by individuals banned from the securities markets in roles such as 'promoters' or 'consultants,' and the use of shell corporations to facilitate market manipulation schemes." Pet. App. 36a (quoting Penny Stock Reform Act of 1990 § 502(6)-(8), 104 Stat. 951).

"In 2012, FINRA found that [petitioner had] failed to file SARs over a two-month and a four-month period in 2011 and that many SARs that [petitioner] did file were inadequate." Pet. App. 8a; see *id.* at 40a-42a. Three years later, "the SEC found that for half of the SARs it reviewed, [petitioner had] failed to provide a clear and complete description of the financial activity reported and that frequently [petitioner] was intentionally trying to obscure the suspicious nature of that activity." *Id.* at 8a; see *id.* at 42a-44a.

Despite these warnings from FINRA and SEC examiners, petitioner persisted in inadequately reporting suspicious transactions. On June 5, 2017, the Commission filed a civil enforcement action alleging that, through its deficient SARs practices, petitioner had committed thousands of violations of its reporting, recordkeeping, and record-retention obligations under Exchange Act Section 17(a) and Rule 17a-8. Pet. App. 8a-11a.

3. Petitioner argued in the district court that, "[b]ecause the gravamen of the SEC's complaint is [petitioner's] alleged failure to comply with the BSA SAR regulation, * * * this suit is not actually brought under Rule 17a-8, despite what the complaint itself says." Pet. App. 214a-215a. On summary judgment, the court rejected that contention. The court explained that the "plain text of [Exchange Act Rule 17a-8] requires broker-dealers to 'comply with the reporting, recordkeeping and record retention requirements of chapter X of title 31 of the Code of Federal Regulations,'" and that the SEC had brought this suit "pursuant to the Exchange Act" in order to enforce that obligation. *Id.* at 215a (citation omitted).

The district court separately determined that Rule 17a-8 represents a lawful exercise of the Commission's authority under Section 17(a) of the Exchange Act. See Pet. App. 215a-218a. The court observed that Section 17(a) "expressly commits to the SEC discretion to determine which reports are 'necessary or appropriate' to further the goals of the Exchange Act." *Id.* at 216a (citation omitted). The court found it "reasonable to conclude that the same reports that help the Treasury target illegal securities transactions for its purposes also help protect investors by providing information to the SEC that may be relevant to whether a stock or a market is being manipulated in violation of the nation's securities laws." *Id.* at 217a.

The district court also rejected petitioner's argument that the SEC had violated the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, when it promulgated Rule 17a-8. See Pet. App. 218a-220a. The court observed that "the text of the regulation itself, as well as the SEC's 1981 notice of final rule, unambiguously demonstrate the SEC's intent for the nature of the Rule 17a-8 reporting obligation to evolve over time through the

Treasury's regulations." *Id.* at 218a. The court further held that "incorporating the obligations that had been and would be imposed by the Treasury" was permissible, and it found that doing so was a "more efficient" approach than "imposing a separate and competing set of reporting obligations." *Ibid.* The court also observed that both FinCEN and the SEC had confirmed their understanding, including in a formal SEC adjudication, that Rule 17a-8 requires compliance with post-2002 BSA regulations. *Id.* at 219a (citing *In re Bloomfield*, SEC Release No. 9553, at 22-26 (Feb. 24, 2014), vacated in part, SEC Release No. 9743 (Apr. 8, 2015), petition denied, 649 Fed. Appx. 546 (9th Cir. 2016)).

Having rejected petitioner's challenge to the SEC's authority to bring this action, the district court granted the Commission's motion for summary judgment as to 2720 alleged violations of Rule 17a-8, and denied it as to hundreds of other alleged violations (which the SEC then declined to prosecute further). See Pet. App. 68a-176a; see also *id.* at 10a-11a. The court determined that petitioner "had a duty to file a SAR where [(1)] the underlying transaction involved a large deposit of [low-priced securities]," *id.* at 113a, and (2) petitioner's own files "contained information about a qualifying red flag" that indicated suspicious activity, *id.* at 116a. The court found that (1) in more than a thousand instances, petitioner had failed to file a required SAR to disclose "transaction sequences that reflected 'a hallmark of market manipulation,'" *id.* at 53a (citation omitted); see *id.* at 154a-161a; and (2) in many other instances, petitioner had filed SARs that were "woefully inadequate" because they "fail[ed] to include multiple pieces of information that the SAR Form and its instructions require[d] to be included," *id.* at 41a-42a; see *id.* at 112a-154a. The court observed that petitioner did

"not contest in a large number of instances that it failed to include information in SAR narratives that the SAR Form itself directs a broker-dealer to include." *Id.* at 105a.

The district court found that petitioner had "acted knowingly and with disregard for its obligations under the law," Pet. App. 53a-54a, and that its misconduct was "egregious," *id.* at 52a-53a, and "recurrent," *id.* at 56a-57a. It accordingly enjoined petitioner from further violating Section 17(a) and Rule 17a-8, *id.* at 65a-66a, and imposed a $12 million civil penalty—$5000 for each failure to file a SAR or filing of a deficient SAR, and $1000 for each failure to produce a SAR support file upon request, *id.* at 64a & n.27. The court emphasized that petitioner's "obstruction of government oversight of the [low-priced securities] market was an ingrained, multi-year enterprise," and that "[i]nstead of undertaking the scrutiny and reporting of individual transactions required by law, [petitioner] chose to run a high-volume business" in that market without providing regulators "information necessary to timely investigate and squelch fraudulent and abusive trading practices," *id.* at 56a, 62a. The court concluded that petitioner's "contempt for the SAR reporting regime" had "increased the risk to investors that they would suffer substantial losses." *Id.* at 56a.

4. The court of appeals affirmed. Pet. App. 1a-33a. The court first rejected petitioner's contention "that the SEC is not authorized to bring this civil enforcement action because the Treasury Department has sole authority to enforce the BSA." *Id.* at 12a. The court concluded that, because "[t]his enforcement action was brought solely under Section 17(a) of the Exchange Act and Rule 17a-8 promulgated thereunder," it "falls within the SEC's independent authority as the primary federal regulator of

broker-dealers to ensure that they comply with reporting and recordkeeping requirements of those provisions." *Ibid.* It further held that Rule 17a-8's incorporation of requirements imposed under the BSA "does not constitute SEC enforcement of the BSA." *Ibid.*

The court of appeals further held that Rule 17a-8 is a permissible exercise of the SEC's rulemaking authority. Pet. App. 14a. The court explained that "[t]he Exchange Act expressly delegates to the SEC the authority to determine which reports from covered entities, including brokers and dealers, are 'necessary or appropriate' to further the goals of the Exchange Act." *Id.* at 13a. It concluded that the Commission had reasonably "determined that the SARs, which assist the Treasury Department in targeting illegal securities transactions, would also serve to further the aims of the Exchange Act by protecting investors and helping to guard against market manipulation." *Id.* at 13a-14a.

Petitioner argued that, "in authorizing the Treasury to regulate suspicious activity in recordkeeping and reporting by broker-dealers under the BSA, Congress has precluded the SEC from regulating recordkeeping and reporting under the Exchange Act." Pet. App. 15a. The court of appeals rejected that contention. The court explained that, "[w]hen '[c]onfronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" *Ibid.* (quoting *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018)) (second set of brackets in original). The court concluded that "[h]ere, the statutory and regulatory provisions are easily harmonized" because the "duties imposed on broker-dealers by the BSA are 'consistent with the purposes of the Exchange

Act and the [SEC]'s obligation to enforce broker-dealer recordkeeping requirements.'" *Id.* at 15a-16a (quoting 46 Fed. Reg. at 61,455).

The court of appeals also rejected petitioner's argument that Rule 17a-8 "impermissibly allows the SEC to bypass the notice-and-comment requirements of the APA." Pet. App. 20a. The court explained that "the public was afforded the requisite notice and opportunity to comment on Rule 17a-8 and, in particular, its potential to require additional reporting requirements should the Treasury regulations specify them." *Id.* at 21a. The court further observed that "[t]he suspicious activity recordkeeping and reporting requirements of Section 1023.320(a)(2), incorporated into Rule 17a-8, were also subject to public notice-and-comment." *Id.* at 22a.

The court of appeals likewise held that petitioner had "failed to demonstrate either that the SEC has impermissibly delegated authority to the Treasury under the Exchange Act, or that it has abdicated its final reviewing authority relating to broker-dealer recordkeeping and reporting requirements." Pet. App. 23a-24a. The court explained that "the SEC has worked together with FinCEN on the SAR regulation, 'update[d] the reference to the BSA implementing regulations' in 2011, and in a formal adjudication, reiterated that requiring broker-dealers to maintain records and file reports of suspicious activity is consistent with the purposes of the Exchange Act." *Id.* at 23a (citation omitted).

The court of appeals also affirmed the district court's findings of liability. Pet. App. 25a-30a. Finally, noting "[t]he breadth and duration of [petitioner's] deficient reporting and recordkeeping activity"—which constituted a "'systematic and widespread evasion of the

law,'" *id.* at 31a, 33a (citation omitted)—the court of appeals held that "the district court did not abuse its discretion in imposing the $12 million civil penalty." *Id.* at 31a.

ARGUMENT

Petitioner contends (Pet. 12-17) that, in exercising its Exchange Act authority to require broker-dealers to make and keep reports on suspicious transactions, the Commission is impermissibly "assert[ing] * * * independent BSA enforcement power." The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. "This enforcement action was brought solely under Section 17(a) of the Exchange Act and Rule 17a-8." Pet. App. 12a. The suit "therefore falls within the SEC's independent authority as the primary federal regulator of broker-dealers to ensure that they comply with reporting and recordkeeping requirements of those provisions." *Ibid.*

a. Section 17(a) authorizes the Commission to promulgate rules requiring broker-dealers to "make and keep * * * such records," and "make and disseminate such reports," as the SEC determines are "necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes" of the Exchange Act. 15 U.S.C. 78q(a)(1). That authority plainly encompasses records and reports about the sorts of suspicious transactions at issue here, which are "essential ingredients in frauds" and can undermine the integrity of stock acquisitions and other corporate transactions. *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 28 (1974) (citation omitted); see *In re Bloomfield* 32 ("The Commission's 'proactive review of SARs

has resulted in a number of * * * investigations' in areas such as 'insider trading, offering frauds, market manipulation, [and] embezzlement of client funds.'") (citation omitted; brackets in original).

Petitioner does not dispute that requiring broker-dealers to report suspicious transactions furthers the purposes of the Exchange Act, or that the same reports that "assist the Treasury Department in targeting illegal securities transactions, would also serve to further the aims of the Exchange Act by protecting investors and helping to guard against market manipulation." Pet. App. 13a-14a. Indeed, petitioner concedes that, "[u]nder Section 17(a)," the Commission "can require a broker-dealer 'to keep records,' including copies of SARs filed with FinCEN." Pet. 19 (quoting *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 569 (1979)). Petitioner identifies no logical reason why Congress would authorize the SEC to require a broker-dealer to "make and keep * * * records" about suspicious transactions, yet disable the Commission from exercising its parallel Section 17(a) authority to require the broker-dealer to "make and disseminate * * * reports" about the same transactions. 15 U.S.C. 78q(a)(1).

The Commission could have exercised its authority under Section 17(a) by imposing on broker-dealers "a separate and competing set of reporting obligations" regarding suspicious transactions. Pet. App. 218a. But that approach would have increased the costs of compliance for broker-dealers—who would then need to file two sets of reports and keep two sets of records—without any offsetting benefit. See *id*. at 16a. The SEC therefore chose instead to "incorporat[e] * * * the BSA's

reporting obligation" in Rule 17a-8, "minimizing regulatory costs on broker-dealers, who need only comply with one set of reporting requirements." *Ibid.*

As the Commission emphasized when it finalized Rule 17a-8 in 1981 (and reiterated when making a minor amendment to the Rule in 2011), the Rule imposes "no burden on competition" because "[a]ll brokers and dealers affected by this rule are already subject to identical Treasury regulations." 46 Fed. Reg. at 61,455; see *Technical Amendments to Rule 17a-8: Financial Recordkeeping and Reporting of Currency and Foreign Transactions*, 76 Fed. Reg. 11,327, 11,328 (Mar. 2, 2011). This sort of burden-minimizing incorporation is neither impermissible nor unusual. In the financial context, for instance, both the Office of the Comptroller of the Currency (a Treasury bureau) and the Federal Reserve Board require the institutions they regulate to "comply with the rules, regulations, and forms adopted by the SEC" pursuant to various provisions of the securities laws. 12 C.F.R. 11.2(a)(1) (Office of the Comptroller of the Currency); see 12 C.F.R. 208.36(a)(1) (Federal Reserve Board).

b. Nothing in the BSA displaces the SEC's authority under Section 17(a) of the Exchange Act to require broker-dealers to report suspicious transactions.

This Court has applied a "strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018) (brackets, citation, and internal quotation marks omitted). Petitioner, as the "party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing"

such "'a clearly expressed congressional intention.'" *Ibid.* (citation omitted). The court of appeals correctly held that petitioner had not met that burden. See Pet. App. 19a-20a.

No BSA provision "purports to govern the relevant interaction between" that statute and the Exchange Act. *POM Wonderful LLC* v. *Coca-Cola Co.*, 573 U.S. 102, 113 (2014). And the BSA "by its terms, does not preclude" the SEC from requiring broker-dealers to make records and file reports related to suspicious activity or any other subject. *Ibid.* Other statutory provisions, by contrast, illustrate the means by which Congress can clearly express its intent to vest a single regulator with sole executive authority over a particular area. For instance, Congress expressed its "purposeful decision * * * that the SEC should not have oversight jurisdiction with respect to banks" by excluding banks from the Exchange Act's definitions of "'broker'" and "'dealer.'" *American Bankers Ass'n* v. *SEC*, 804 F.2d 739, 743-744 (D.C. Cir. 1986). Likewise, to "reserve[] discretion to prosecute tax violations to the IRS," Congress expressly provided that the False Claims Act "'does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.'" *United States ex rel. Lissack* v. *Sakura Global Capital Mkts., Inc.*, 377 F.3d 145, 152-153 (2d Cir. 2004) (quoting 31 U.S.C. 3729(e) (2000)).

Here, by contrast, the statutes and regulations on which petitioner relies (Pet. 12-14) demonstrate only that Congress granted Treasury authority (subsequently delegated to FinCEN) to administer the BSA and to obtain the civil money penalties authorized by that statute. See 31 U.S.C. 310(b)(2)(I) and (J), 321(b)(2), 5321(a)(1), (a)(6), and (b)(2); 31 C.F.R.

1010.810. Those provisions do not preclude the Commission from using its own authority under the Exchange Act in a complementary manner. Nor do they require that Treasury exercise exclusive authority in this area, particularly since Congress authorized Treasury to delegate any of its "duties and powers under" the BSA, including the authority to pursue penalties, "to an appropriate supervising agency." 31 U.S.C. 5318(a)(1). "That Congress never proposed to silo SAR enforcement authority in the Treasury strongly suggests that Congress intended for the SEC to maintain its compliance authority and from the outset, it was envisioned by both agencies that the SEC would have enforcement authority over broker-dealers." Pet. App. 19a; see pp. 4-6, *supra*.

c. Congress has received numerous reports detailing the Commission's actions under Rule 17a-8, including while it was considering extending the BSA's suspicious-activity reporting requirements to broker-dealers. See, *e.g.*, U.S. Gov't Accountability Office (GAO), GAO-19-582, *BANK SECRECY ACT: Agencies and Financial Institutions Share Information but Metrics and Feedback Not Regularly Provided* 10-11, 33-34 (Aug. 2019); GAO, GAO-02-111, *ANTI-MONEY LAUNDERING: Efforts in the Securities Industry* 22-23 (Oct. 2001); GAO, GAO-01-474, *MONEY LAUNDERING: Oversight of Suspicious Activity Reporting at Bank-Affiliated Broker-Dealers* 12-13 (Mar. 2001). "If Congress had concluded, in light of experience," that the Commission's enforcement of the Exchange Act in this area "could interfere" with Treasury's enforcement of the BSA, "it might well have enacted a provision addressing the issue." *POM*, 573 U.S. at 113.

Instead, legislation enacted shortly after the court of appeals' decision confirms Congress's understanding that FinCEN is not the sole federal entity with authority to enforce suspicious-activity reporting requirements. In the William M. (Mac) Thornberry National Defense Authorization Act of Fiscal Year 2021 (2021 NDAA), Pub. L. No. 116-283, 134 Stat. 3388 (see H.R. 6395, 116th Cong. (2020)), Congress directed FinCEN, "in consultation with," *inter alia*, "Federal functional regulators" such as the SEC, to assess "whether to establish a process for the issuance of no-action letters by FinCEN" about the application of "the [BSA] * * * or any other anti-money laundering or countering the financing of terrorism law (including regulations) to specific conduct." § 6305(a)(1), 134 Stat. 4587; see 15 U.S.C. 6809(2)(F) (defining the term "Federal functional regulator" to include the SEC); see also Former FinCEN Officials Amici Br. 9 (discussing no-action letter provision). Congress anticipated that such no-action letters might be issued in response to "a request for a statement as to whether FinCEN *or any relevant Federal functional regulator* intends to take an enforcement action against the person with respect to such conduct." 2021 NDAA § 6305(a)(1), 134 Stat. 4587 (emphasis added). That law demonstrates Congress's understanding that FinCEN does not hold exclusive authority to take enforcement actions with respect to activities covered by the BSA or "anti-money laundering * * * regulations," *ibid.*, and its active consideration of ways to coordinate enforcement efforts between agencies with overlapping regulatory jurisdiction (see Pet. 27-31).

2. Petitioner's contrary arguments lack merit.

a. Petitioner contends (Pet. 14) that the Commission lacks authority to bring this action because "Congress

has amended the BSA many times over the decades" but has "never authorized the SEC to enforce the BSA." As the court of appeals correctly recognized, however, this is a suit to enforce the Exchange Act, not the BSA. Pet. App. 12a.

Petitioner asserts 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." Pet. 18 (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1570 (2016)) (brackets in original). But the Court in *Merrill Lynch* addressed a distinct jurisdictional question under a statutory provision that is not implicated here. Section 27 of the Exchange Act gives federal district courts exclusive jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder." 15 U.S.C. 78aa(a). The Court held that, "[i]f * * * a state-law action necessarily depends on a showing that the defendant breached the Exchange Act, then that suit could * * * fall within § 27's compass" because "[a] plaintiff seeking relief under that state law must undertake to prove, as the cornerstone of his suit, that the defendant infringed a requirement of the federal statute." *Merrill Lynch*, 136 S. Ct. at 1569. The Court did not suggest that whenever one federal statute or regulation incorporates requirements imposed by another, a regulator may enforce the former only if it has also been vested with separate authority to enforce the latter. And while petitioner refuses to acknowledge that the SEC brought this suit to enforce the Exchange Act, the Court in *Merrill Lynch* recognized that even when a state-law cause of action has as an element an Exchange Act violation, the suit retains

its character as a "state-law action" and "state-created claim[]." *Ibid.*

In *Pasquantino* v. *United States*, 544 U.S. 349 (2005), the Court held that the Department of Justice could pursue wire-fraud prosecutions of defendants who had sought to evade a foreign country's tax laws through conduct in the United States, notwithstanding the defendants' claim that the prosecution amounted to "'indirect' enforcement of [foreign] revenue laws" that the Department was not authorized to enforce directly. *Id.* at 366. The Court held that the prosecution was an exercise of the United States government's "sovereign [authority] to punish domestic criminal conduct," *id.* at 362, rather than an attempt to enforce the foreign tax laws themselves. This suit likewise is a legitimate exercise of the Commission's authority under Section 17(a) of the Exchange Act to regulate broker-dealers. See Pet. App. 12a.

b. Petitioner contends (Pet. 22) that "the implied-repeal canon and its 'heavy burden' have no application here." But the lone decision it cites for that contention, *United States* v. *Fausto*, 484 U.S. 439 (1988), does not support it.

In *Fausto*, "[a]ll that" this Court found "to have been 'repealed' by the [Civil Service Reform Act of 1978 (CSRA)] is the judicial interpretation of the Back Pay Act—or, if you will, the Back Pay Act's implication—allowing review in the Court of Claims of the underlying personnel decision giving rise to the claim for backpay." 484 U.S. at 453. The Court thus viewed the CSRA as simply influencing the choice between two otherwise-reasonable interpretations of the pre-existing statutory language. See *id.* at 454 (invoking the CSRA as an aid to construing the term "appropriate authority" in the

Back Pay Act). The Court viewed the bar for finding such an effect as substantially lower than the bar for finding "[r]epeal by implication of an express statutory text." *Id.* at 453. That reasoning is inapposite here. If the BSA did not exist, Section 17(a) would unambiguously authorize the SEC to require broker-dealers to file reports regarding suspicious activity. Accordingly, petitioner's argument—that Congress's subsequent enactment of the BSA impliedly divested the SEC of that authority—squarely implicates the established rule that implied repeals of express statutory language are disfavored.

In any event, application of the "general/specific canon," *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012), that petitioner favors (Pet. 23-25) does not yield a different result. That canon is designed to avoid contradiction (where "a general authorization and a more limited, specific authorization exist side by side") and superfluity (to ensure that a specific provision is not "swallowed" by the general one). *RadLAX*, 566 U.S. at 645; see *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (absent a "clear intention," a "specific statute will not be controlled or nullified by a general one") (citation omitted). In *United States* v. *Estate of Romani*, 523 U.S. 517 (1998), on which petitioner relies (Pet. 24), this Court had to decide which of two statutes controlled the priority of claims in an estate dispute because there was a "plain inconsistency" between the statutes. *Estate of Romani*, 523 U.S. at 520 (citation omitted). Nothing in the BSA, however, is inconsistent with anything in the Exchange Act or the Commission's regulations. On the contrary, Rule 17a-8 ensures consistency by referencing the regulations issued under the BSA. And Section 17(a) and

Rule 17a-8 do not "swallow[]" the BSA's grant of authority to Treasury to require broker-dealers to make records and file reports. *RadLAX*, 566 U.S. at 645.

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), likewise does not support petitioner's position. See Pet. 23-24. There, three considerations led the Court to conclude that the FDA lacked the authority to regulate tobacco: (1) the FDA's view would have required it "to remove [tobacco products] from the market entirely," but such a ban "would contradict Congress' clear intent" to permit those products, *Brown & Williamson*, 529 U.S. at 143; (2) the FDA's assertion of regulatory authority contradicted its earlier "consistent and repeated statements that it lacked authority * * * to regulate tobacco," and Congress had "ratified" that previous position by enacting legislation that "foreclosed the removal of tobacco products from the market," *id.* at 137, 144, 156; and (3) the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion," *id.* at 160.

"Nothing approaching these circumstances is present here." Pet. App. 17a. Section 17(a) and Rule 17a-8 do not make unlawful any conduct that other legislation permits. And far from previously disclaiming the authority it now asserts, the SEC consistently has taken the position that Rule 17a-8 "encompasses" all relevant recordkeeping and reporting requirements Treasury has imposed on broker-dealers under the BSA, including "the post-2002 * * * regulations." *Id*. at 219a.

Petitioner emphasizes that, unlike FinCEN when administering the BSA, the SEC under the Exchange Act "can establish a violation and obtain penalties on a strict-liability basis," and the penalties available to the

Commission "are harsher." Pet. 27.[1] Those differences simply confirm that this is not an action to enforce the BSA. And any lack of "harmon[y]" in available penalties is a consequence of the statutes Congress has enacted. 67 Fed. Reg. at 44,051 n.11. Regardless of their different penalty structures, the BSA and the Exchange Act can be, and have been, fully implemented without conflict.

"[T]he SEC has worked together with FinCEN on the SAR regulation" that applies to broker-dealers, Pet. App. 23a, and "the Treasury and the SEC have plainly worked in tandem, issuing policy statements and reports, and initiating enforcement actions since the BSA's inception," *id.* at 16a & n.41 (citing examples). "[F]rom the outset, it was envisioned by both agencies that the SEC would have enforcement authority over broker-dealers." *Id.* at 19a. When it adopted the SAR regulation in 2002, FinCEN "expressly referenced Rule

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[1] The penalty the district court imposed here—$5000 for each failure to file an SAR or filing of a deficient SAR, and $1000 for each failure to produce a SAR support file upon request, Pet. App. 64a & n.27—is within the limits allowed by the BSA. For each willful violation, the BSA authorizes a penalty that is "the greater of the amount (not to exceed $100,000) involved in the transaction (if any) or $25,000." 31 U.S.C. 5321(a)(1). For purposes of civil enforcement, "to establish that a financial institution or individual acted willfully, the government need only show that the financial institution or individual acted with either reckless disregard or willful blindness." *In re B.A.K. Precious Metals, Inc.*, FinCEN, No. 2015-12, at 3 n.6 (Dec. 30, 2015). Here, the district court found that petitioner had "acted knowingly and with disregard for its obligations under the law." Pet. App. 53a-54a. And petitioner does not contest the reasonableness of the penalties the district court imposed. See *id.* at 32a n.95. "The total [penalty] amount was driven by the 'unprecedented number of violations'" that petitioner had committed. *Id.* at 32a (citation omitted).

17a-8," *id.* at 16a & n.42 (citing 67 Fed. Reg. at 44,049); noted that the SEC had included compliance with BSA reporting obligations in its "examination *and enforcement* programs since the 1970s," 67 Fed. Reg. at 44,049 n.4 (emphasis added); and "stated that 'both the SEC and SROs * * * will address broker-dealer compliance' with the SAR reporting rule," Pet. App. 16a (quoting 67 Fed. Reg. at 44,049). FinCEN recently reiterated that the SEC is among several regulators "which may have their own enforcement authority" in this area. FinCEN, U.S. Dep't of the Treasury, *Statement on Enforcement of the Bank Secrecy Act* 1 n.4.

Consistent with this decades-long understanding, FinCEN and the Commission share "examination and enforcement information relating to SEC-regulated firms' compliance with the [BSA]." Press Release, SEC & FinCEN, *SEC and FinCEN Sign Information Sharing Agreement*, Joint Release 2006-217 (Dec. 21, 2006). While Treasury is unquestionably an "expert" agency on financial matters, Pet. 1, it has consistently drawn on the SEC's expertise in overseeing broker-dealers, including guidance from Commission and FINRA staff about how to comply with SAR obligations. See pp. 4-6, *supra*.

Contrary to petitioner's suggestion (Pet. 28), the courts below did not establish any "bright line rule[s]" regarding broker-dealers' suspicious-activity reporting obligations, let alone rules "inconsistent with FinCEN's view[s]." "[T]he district court recognized that each 'SAR must, of course, be examined individually' and, without announcing a mechanical or bright-line test, reviewed all of the alleged deficiencies before concluding that, given the 'sheer number of [petitioner's] lapses at

issue in this case[,]' summary judgment was warranted." Pet. App. 29a. Nor did the courts below "effectively defer[] to the SEC's view," Pet. 31, in reaching that conclusion. The Commission never requested deference, and "there is no indication in this record that the district court improperly deferred to the SEC." Pet. App. 26a; see Gov't C.A. Br. 61 (stating that the Commission "never sought [*Auer*] deference and does not do so here"). Rather, "[t]he district court did nothing other than independently interpret the supporting FinCEN documentation" and conclude that it "was consistent with the SEC's interpretation." Pet. App. 26a.

Before the SEC commenced this action, petitioner was warned by two different regulators, including the Commission, that its SAR practices were deficient. Pet. App. 8a, 40a-44a. Petitioner knowingly failed to file more than a thousand SARs regarding "transaction sequences that reflected 'a hallmark of market manipulation,'" *id.* at 53a (citation omitted), and many of the SARs it did file were "woefully inadequate" because they "fail[ed] to include multiple pieces of information that the SAR Form and its instructions required to be included," *id.* at 41a-42a.[2] "Indeed, [petitioner] did not 'contest in a large number of instances that it failed to include information in SAR narratives that the SAR Form itself directs a broker-dealer to include.'" *Id.* at 29a (citation omitted).

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[2] The settled actions petitioner identifies (Pet. 37) likewise involved willful, recurrent violations. See, *e.g.*, *In re GWFS Equities, Inc.*, SEC Release No. 91,853, at 6 (May 12, 2021) (427 violations, including 130 failures to report fraudulent transactions and 297 instances in which SARs failed to include critical details regarding cybersecurity events that were "necessary to make the SARs effective tools").

c. Finally, the district court correctly determined (Pet. App. 217a) that the "parade of horribles" petitioner invokes, in which it imagines (Pet. 23) the SEC bringing actions "to enforce tax-deduction rules or labor laws administered by other agencies," is unfounded. See Pet. 35-36. Section 17(a) authorizes the Commission to require broker-dealers to "make and keep for prescribed periods such records * * * and make and disseminate such reports" as are "necessary or appropriate" to further the Exchange Act's purposes. 15 U.S.C. 78q(a)(1). With respect to some obligations imposed by other regulatory bodies, any connection to the Exchange Act's purposes may well be too attenuated to support SEC imposition of a reporting requirement under Section 17(a). But petitioner has not disputed that requiring broker-dealers to comply with suspicious-activity reporting obligations regarding transactions that occur through their firms assists the Commission in fulfilling its Exchange Act mandate to protect investors and the markets. Those reports identify possible instances of fraud, market manipulation, and other securities-law violations. Broker-dealers' compliance with those requirements bears directly on their fitness to operate in the financial industry and to handle investor funds. See pp. 13-15, *supra*.

3. Petitioner contends (Pet. 20) that "[t]he 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." Petitioner's Question Presented does not fairly encompass that issue, however, instead raising only the distinct question whether the SEC's exercise of its "broad authority" un-

der the Exchange Act "contravene[s] Congress's decision to entrust enforcement of the BSA[] * * * to the Treasury Department." Pet. i.

In any event, the court of appeals correctly rejected petitioner's notice-and-comment argument. The public had notice of and the opportunity to comment on every facet of Rule 17a-8 that is implicated in this case. When the SEC proposed and adopted Rule 17a-8, it "made clear that the Rule would 'allow for any revisions the Treasury may adopt in the future.'" Pet. App. 21a (citation omitted). "The suspicious activity recordkeeping and reporting requirements of Section 1023.320(a)(2), incorporated into Rule 17a-8, were also subject to public notice-and-comment." *Id.* at 22a. In particular, when FinCEN proposed Section 1023.320(a)(2), it "publicly stated that both the SEC and SROs would 'address broker-dealer compliance' with its requirements, including through enforcement actions, as they had done with other BSA recordkeeping and reporting requirements for decades." *Ibid.* (citation omitted).

The court of appeals also correctly rejected petitioner's argument (Pet. 21) that Rule 17a-8's incorporation of current and future reporting requirements amounts to an "improper delegation [to Treasury] of rulemaking authority under the Exchange Act." Pet. App. 22a (citation omitted; brackets in original). "Rule 17a-8 does not charge the Treasury with deciding which recordkeeping and reporting requirements would further the purposes of the Exchange Act." *Id.* at 23a. "Instead, the SEC determined, through notice-and-comment rulemaking, that any reporting requirements that the Treasury imposed on broker-dealers pursuant to its independent authority under the BSA would be 'consistent with the purposes of the Exchange Act and

the [SEC's] obligation to enforce the broker-dealer recordkeeper requirements.'" *Ibid.* (citation omitted; brackets in original). "[T]he SEC has not taken the position that Rule 17a-8 obliges the SEC to automatically adopt any changes the Treasury may make to the BSA's recordkeeping and reporting requirements." *Ibid.* Rather, "the SEC has worked together with FinCEN on the SAR regulation, 'update[d] the reference to the BSA implementing regulations' in 2011, and in a formal adjudication, reiterated that requiring broker-dealers to maintain records and file reports of suspicious activity is consistent with the purposes of the Exchange Act." *Ibid.* (citation omitted; brackets in original).

4. The decision below does not conflict with any decision of this Court or of any other federal or state court. Indeed, as petitioner emphasized to the court of appeals, this case presents "issues of first impression." Pet. C.A. Mot. to Recall Mandate 2; see Pet. 35.

Petitioner notes (Pet. 37-38) that in *Liu* v. *SEC*, 140 S. Ct. 1936 (2020), this Court granted review despite the absence of a circuit split. In *Liu*, however, the Court granted a writ of certiorari to resolve a question—whether disgorgement is an available remedy in SEC enforcement actions, see *id.* at 1940—that numerous courts of appeals had previously decided and as to which the Court had recently reserved judgment, see *Kokesh* v. *SEC*, 137 S. Ct. 1635, 1642 n.3 (2017). Here, by contrast, petitioner identifies no other appellate court that has even addressed the question presented, let alone done so in a way that differs from the decision below.

Petitioner suggests (Pet. 36) that other courts of appeals are unlikely to address the question presented here because the SEC generally can bring enforcement actions in the Second Circuit. But all of the comparable

SEC enforcement actions that petitioner identifies (Pet. 37) were administrative proceedings that could have been reviewed in "the United States Court of Appeals for the circuit in which [the defendant] resides or has [its] principal place of business, or for the District of Columbia Circuit." 15 U.S.C. 78y(a)(1). If future challenges to SEC administrative orders produce divergent answers to the question presented, this Court can then consider whether the issue warrants its review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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