No. 21-82

IN THE

Supreme Court of the United States

ALPINE SECURITIES CORPORATION,

Petitioner,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The SEC has arrogated unto itself the authority to independently enforce the substantive provisions of the Bank Secrecy Act (BSA), free of the limitations Congress built into that statute and absent adequate accountability. This Court's review is necessary to remedy the SEC's power grab and restore Congress's carefully calibrated design.

In its opposition, the SEC concedes that Congress authorized Treasury, and not the SEC, to enforce the BSA. And the SEC has no answer to the extensive textual and contextual evidence demonstrating that Congress intended that *only* Treasury (and its delegees) enforce the BSA. What's more, the SEC admits that when it enforces FinCEN's BSA rule for suspicious activity reports (SARs), it applies a lower mens rea standard and imposes harsher penalties than FinCEN does.

Yet, the SEC insists that it can independently enforce the BSA and FinCEN's SAR regulation under Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a)(1). The breadth of the power the SEC asserts is astounding. If the SEC can substantively enforce Treasury's BSA powers under this broad books-and-records provision, it can substantively enforce any number of other laws, including those committed to more expert and politically accountable agencies. And, per the SEC, it can do that without even conducting notice-and-comment rulemaking. That assertion of ultra vires authority is too troubling to go unreviewed by this Court.

I. This Court's Review Is Necessary To Restore Congress's Decision To Assign BSA Enforcement To Treasury.

The SEC's assertion of independent authority to enforce the BSA's SAR requirements flouts Congress's deliberate decision to entrust enforcement of the BSA only to the Treasury Department and those to whom Treasury formally delegates its authority. Notably, the SEC agrees that "Congress granted Treasury authority (subsequently delegated to FinCEN) to administer the BSA" and enforce its provisions. Opp.16. But the SEC ignores the textual and contextual evidence that Congress also deliberately *declined* to vest the SEC with independent power to enforce the BSA, choosing instead to assign the SEC a more modest consultative role. Pet.14-17. Substantive BSA enforcement, the petition shows, is vested *only* in Treasury (and its formal delegees).

The SEC instead argues that Congress has acquiesced in its power grab by not stepping in to stop it. Opp.17. But "reading the tea leaves of congressional inaction" cannot justify the SEC's total disregard of the carefully calibrated enforcement scheme that Congress assigned to Treasury. *Rapanos v. United States*, 547 U.S. 715, 749-50 (2006); *see also Zuber v. Allen*, 396 U.S. 168, 185 (1969) (congressional silence is a "poor beacon to follow"). And here, unlike in *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 113 (2014) (quoted at Opp.17), there is no long history of acquiescence by Congress. *Compare id.* ("70 years" of "coexiste[nce]"), *with* Opp.17 (citing three GAO reports).

Nor is there any merit to the SEC's claim (Opp.18) that Congress's recent instruction to FinCEN to consider developing a process for issuing no-action letters in conjunction with "Federal functional regulators" somehow signals that Congress wanted the SEC to independently enforce the BSA all along. The statute refers to "any *relevant* Federal functional regulator that intends to take an enforcement action." National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6305, 134 Stat. 3388, 4587 (emphasis added); *compare id.* (requiring FinCEN to *consult* "*the* Federal functional regulators" during the process (emphasis added)). The relevant regulators are the banking agencies, 15 U.S.C. § 6809(2), because they have an express delegation to enforce the BSA, *see* Pet.14-15. A regulator that merely "*examines* a financial institution for compliance with the [BSA]," 2021 NDAA § 6003(3)(B) (emphasis added), like the SEC, isn't relevant.

The SEC next argues that Congress's decision to permit Treasury to delegate BSA-enforcement authority to other agencies proves that Congress had no qualms about the SEC independently enforcing the BSA. Opp.17. But Congress didn't give the green light to any agency to enforce the BSA in any manner it wishes. Instead, Congress permitted others, at Treasury's direction and under its auspices, to enforce the BSA according to the same terms (and limits) that apply to Treasury. *See* 31 U.S.C. § 5318(a)(1); 31 C.F.R. § 1010.810(a). It is undisputed that Treasury did *not* delegate BSA-enforcement powers to the SEC and that the SEC does *not* adhere to those same terms when it enforces FinCEN's SAR rule. Indeed, the SEC

concedes that it employs a lower scienter standard and harsher penalty rules. Opp.22-23.

The SEC tries to distinguish *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), which held that the FDA lacked authority to regulate tobacco. Opp.22. But like the FDA's actions, the SEC's actions here *do* "contradict Congress' clear intent." Opp.22 (quoting *Brown & Williamson*, 529 U.S. at 143); *see* Pet.12-17. The SEC seeks to "make unlawful [certain] conduct" (Opp.22) that the BSA, as interpreted by FinCEN, would permit: The SEC requires broker-dealers to file SARs (or include information in SARs) in circumstances in which FinCEN does not. Pet.28-29. And combating money-laundering and terrorism *is* of "such economic and political significance" that Congress wouldn't have empowered the SEC in such a "cryptic" fashion—via a books-and-records provision enacted long before those issues rose to prominence. Opp.22 (quoting *Brown & Williamson*, 529 U.S. at 160).

The SEC also notes that the FDA initially disavowed the authority it later claimed. Here, however, the SEC previously appeared to recognize that its role was limited to examination. *See, e.g.*, 46 Fed. Reg. 61,454 (Dec. 17, 1981) (discussing "on-site examinations of broker-dealer firms conducted by the Commission").

Finally, the SEC fixates on the absence of express preclusion language in the BSA. Opp.16. Such language, however, is not required to prevent an independent agency from usurping Treasury's enforcement powers. Pet.22. In *Brown & Williamson,*

the absence of such a provision did not allow the FDA to assert enforcement power not assigned to it, and it likewise does not help the SEC here. Because agencies have no authority beyond that granted to them by statute, Congress did not need to expressly preclude the SEC from enforcing the BSA. Pet.22; *see also Ry. Lab. Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony…."), *amended*, 38 F.3d 1224 (D.C. Cir. 1994).

II. The Decision Below Is Wrong And Implicates Important Interpretive And Administrative Law Questions.

A. Contrary to the Second Circuit's view, the SEC is enforcing the BSA.

The SEC insists it is just enforcing its own books-and-records rule, Rule 17a-8, 17 C.F.R. § 240.17a-8. But the SEC does not deny that the enforcement action here "rises or falls" on the SEC's "ability to prove the violation of a [BSA] duty." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1569 (2016). Thus, it is a fiction to argue that the SEC is not enforcing the BSA.

As in *Merrill Lynch*, if one law "simply makes illegal 'any violation of'" a second law, such that a party suing under that first law must prove "as the cornerstone of his suit" that the defendant violated the second law, then the suit is "brought to enforce" that second law. *Id*. It doesn't matter that the claim might

also "retain[]" in some nominal sense "its character" under the first law. Opp.19-20. When a suit *asserts* a claim under one statute (in *Merrill Lynch*, state law; here, the Exchange Act) but *enforces* another, and that other statute provides for exclusive jurisdiction (as in *Merrill Lynch*) or an exclusive enforcer (as the BSA does), the exclusive statute controls.

The SEC also cites (Opp.20) *Pasquantino v. United States*, but there the domestic prosecution enforced Canadian law only in an "attenuated sense" "at best." 544 U.S. 349, 364-66 (2005). Here, however, the SEC has wholesale adopted FinCEN's SAR rule and is punishing non-compliance with the SEC's reading of it. There is nothing attenuated about that.[1]

B. The later-enacted and more specific BSA defeats the SEC's claim of power to independently enforce the BSA.

Like the Second Circuit, the SEC errs in arguing that the implied-repeal canon, rather than the specific-general canon, applies. Opp.15, 20-22. The implied-repeal canon applies only when there is a

[1] The SEC misses our point when it says that there is "no logical reason" why it can bring an enforcement action under Section 17(a) if a broker-dealer fails to retain SARs for, say, 10 years, but not if a broker-dealer fails to file an adequate SAR in the first place. Opp.14. The difference is that the former does not turn on a violation of the BSA, *see* 31 C.F.R. § 1023.320(d) (requiring SARs to be retained only for five years), while the latter does. And there is a categorical difference between requiring record retention under a provision like Section 17(a) that is expressly geared toward examination, and independently enforcing another agency's rules regarding the making and filing of those records in the first place. Pet.19-20.

conflict between a later enactment and earlier "*express* statutory text." *United States v. Fausto*, 484 U.S. 439, 453 (1988) (emphasis added). The Exchange Act does not expressly grant the SEC any power to enforce the BSA or rules promulgated thereunder. Thus, there is nothing to repeal. And the Exchange Act cannot properly be read to grant that power impliedly, because the later-enacted BSA specifically assigned enforcement to Treasury. Pet.12-14.

The SEC can argue that *Fausto*'s "reasoning is inapposite" only by assuming away the facts that make it apt: "*If the BSA did not exist*," the SEC says, "Section 17(a) would unambiguously authorize the SEC to require broker-dealers to file reports regarding suspicious activity." Opp.21 (emphasis added). But in *Fausto*, if the later-enacted and "comprehensive" Civil Service Reform Act (CSRA) did not exist, the Back Pay Act would have permitted the remedy that the Court found foreclosed by the CSRA. 484 U.S. at 454.

The SEC is also wrong (Opp.21) that applying the specific-general canon would not matter. First, if the Exchange Act is construed to reach BSA enforcement, there is a "contradiction" with the BSA to be avoided. Opp.21. It is undisputed that the two statutes have different scienter and penalty structures. Second, there would be "superfluity." Opp.21. The SEC's reading would, for instance, render superfluous Congress's specific grants of BSA power to the banking agencies, because, under the SEC's theory, they too could independently enforce the BSA through their "general authority to enforce violations of 'any law or regulation.'" Pet.14-16.

The SEC doesn't dispute (Opp.20-21) that *POM* left unresolved the "threshold dispute" over "which of two competing maxims"—implied repeal or the specific-general canon—"establishes the proper framework for decision" when two statutes apparently overlap in scope. 573 U.S. at 112. This case implicates that dispute. The Court should grant review to confirm that the latter framework governs here.

C. The Second Circuit erred in endorsing the SEC's perpetual incorporation by reference.

The SEC's independent enforcement of the BSA is further flawed because the public has never had notice and opportunity to comment on it.[2] When the SEC promulgated Rule 17a-8 in 1981, the public could not have known, for example, that the SEC would impose hefty civil penalties for violations of the BSA because, back then, the SEC "had no penal law enforcement powers." Cato Br. 6. And, contrary to the SEC's suggestion (Opp.27), the public could not have commented on the SEC's enforcement of FinCEN's SAR rule specifically, as that SAR rule was *20 years* in the future. Pet.21.

[2] The Question Presented asks whether the SEC has authority to enforce the BSA, given Congress's decision to entrust that task to Treasury. As the petition and amicus CATO Institute explain, one reason the SEC lacks that authority is that it relies on Treasury's rulemaking pursuant to the BSA, and not its own rulemaking, as required by the Administrative Procedure Act and the Exchange Act. Thus, this issue is fairly encompassed within the Question Presented. *Contra* Opp.26-27.

Nor would the public have known in 2002, when *Treasury* promulgated the SAR rule, that it should comment on *the SEC's* possible enforcement of the rule under different standards. Notably, Treasury couched the SEC's role in "address[ing] … compliance with th[e]" rule in terms of *examination*: Self-regulatory organizations (like FINRA) would "examine for [BSA] compliance" "subject to [SEC] oversight." 66 Fed. Reg. 67,670, 67,671 (Dec. 31, 2001); *see id.* at 67,675 (discussing SEC's "jurisdiction to examine a broker-dealer for compliance").

The only reference to enforcement and the SEC came in a footnote noting that "BSA compliance with non-SAR related provisions has been included in the SEC's examination and enforcement programs since the 1970s." *Id.* at 67,670 n.7.[3] That language simply recognized that the SEC has a general examination and enforcement program encompassing several statutes. It did not suggest that the SEC possessed independent power to enforce the SAR rule, under different standards, when Treasury had delegated only limited examination powers to the SEC.

In endorsing the SEC's "evergreen incorporation by reference," Cato Br. 2, the Second Circuit created a clear split with the D.C. Circuit, *see* Pet.21—a divergence the SEC does not deny. Instead, the SEC insists this practice is "neither impermissible nor unusual." Opp.15. But the two examples the SEC offers are permissible because (unlike here) Congress expressly

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[3] The same language appeared in the final rule announcement. Opp.23-24 (quoting 67 Fed. Reg. 44,048, 44,049 & n.4 (July 1, 2002)).

authorized the piggybacking. 15 U.S.C. § 78*l*(i). And if what the SEC is doing isn't "unusual," that is a strong reason for this Court to step in and stop it.

The SEC also fails (Opp.27-28) to rehabilitate the Second Circuit's erroneous conclusion that the SEC discharged its duty under the Exchange Act to prescribe "by rule" reporting obligations it deems "necessary or appropriate" simply by incorporating by reference all future BSA reporting requirements Treasury adopts. 15 U.S.C. § 78q(a)(1). The SEC could not have reasonably determined that those unknown future requirements would serve the public interest, protect investors, or otherwise further the purposes of the Exchange Act. *Id.*; *see generally* Cato Br. And any determination made in a subsequent "adjudication," Opp.28 (quoting Pet.App.23a), cannot satisfy the Exchange Act's (and APA's) *rulemaking* requirement, Pet.21.

III. Review Is Needed Without Delay.

The consequences of the SEC's assertion of authority are too serious to delay review of these issues. The SEC does not deny that two conflicting BSA-enforcement regimes exist—one that is expert, accountable, and restrained, and one that isn't. The SEC tries to downplay the significance of this state of affairs, but its defense only heightens the concern.

A. Having two conflicting BSA-enforcement regimes is untenable.

The SEC concedes that it applies a lower scienter standard and higher penalties than FinCEN and its

delegees do. Opp.22-23; *see* Pet.8-9, 27-28. And the SEC takes a more stringent view of what constitutes an actionable SAR violation than FinCEN does. *See* Pet.28-29. The amicus brief from former high-level FinCEN officials confirms that the SEC "appl[ies] materially different legal standards." Former FinCEN Officials Br. 4; *id.* at 19.

This is unacceptable. Regulated parties can't know the rules of the game if they face two independent enforcement regimes that apply differing standards and penalties, follow different priorities, and issue different interpretations and guidance. This state of affairs also thwarts Congress's decision to place control over enforcement in one agency, Treasury, which is both an expert on this subject and politically accountable. And the SEC's rogue assertion of power prevents the United States from speaking with one voice to its international partners in the global fight against money-laundering and terrorism. *See* Pet.27-35; Former FinCEN Officials Br. 12-24.

B. There is no meaningful limit on the SEC's power grab.

Accepting the SEC's view of its authority opens the door to an even more extreme assertion of authority—both with respect to the BSA and beyond. As to the former, the SEC admits that, in its view, nothing stops it from imposing suspicious-activity "reporting obligations" that are "separate [from] and compet[e]" with FinCEN's. Opp.14 (internal quotation marks omitted).

Beyond the BSA, there is no meaningful limit on the SEC's ability to substantively enforce other statutes. The SEC suggests that, for "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)." Opp.26. But Section 17(a)'s purposes are so broadly stated—it speaks of any reports "*necessary or appropriate* in the public interest," 15 U.S.C. § 78q(a)(1) (emphasis added)—that almost any requirement in the tax code, labor code, or other statute could fit the bill—especially given the district court's view that the determination is "commit[ted] to the SEC['s] discretion," Pet.App.216a.

C. The Court should resolve the Question Presented now.

That this case is one of "first impression" (Opp.28) signals just how unlikely regulated parties are to litigate these issues, despite their obvious importance. The reason is simple: As the SEC does not dispute, its significant leverage over broker-dealers pressures them to settle rather than litigate their cases. Pet.35-37; Former FinCEN Officials Br. 23. Indeed, the pressure to settle may be even greater in administrative proceedings, where the SEC can revoke a broker-dealer's license or bar it from associating with the securities industry. Former FinCEN Officials Br. 20.

The consequences of falling afoul of the SEC's expanded SAR rules are so severe that firms will likely preempt charges by complying with the SEC's overly broad reporting requirements. This "better-safe-than-sorry approach" will dilute the quality of SARS and

make it harder for law enforcement to identify genuine instances of illegality. Former FinCEN Officials Br. 20-21; *see* Pet.34. It will also dramatically increase compliance costs for regulated parties and, in turn, their customers.

Thus, review by this Court is needed now to remedy the SEC's untenable assertion of independent power to enforce the BSA.

CONCLUSION

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

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