Administrative Proceeding
File No. 3-20485

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UNITED STATES OF AMERICA

SECURITIES AND EXCHANGE COMMISSION

In the Matter of ALPINE SECURITIES CORPORATION, a Utah limited liability company Respondent	Admin. Proc. File No. 3-20485

RESPONDENT ALPINE'S MOTION FOR AN INTERIM STAY OR EXTENSION/POSTPONEMENT/ADJOURNMENT OF PROCEEDINGS
-AND-
INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Expedited Consideration and Oral Argument Requested

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MOTION FOR AN INTERIM STAY OR EXTENSION/POSTPONEMENT/ADJOURNMENT OF PROCEEDINGS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Pursuant to SEC Rule of Practice 401, Respondent Alpine Securities Corporation ("Alpine"), requests an interim stay of the above-referenced "follow-on" administrative proceedings under the Order Instituting Proceedings ("OIP"), filed on August 26, 2021 by the Division of Enforcement ("Enforcement") for the Securities and Exchange Commission ("SEC" or "Commission"), until such time as Alpine's pending petition for writ of certiorari to the United States Supreme Court ("Petition for Certiorari") with respect to the underlying court decision is resolved. In the alternative, Alpine requests that the Commission extend the deadlines, and postpone or adjourn the hearing in this matter pursuant to Rule of Practice 161, until such time as the Supreme Court issues an order granting or denying Alpine's Petition for Certiorari, without prejudice to Alpine's ability to seek an additional interim stay of proceedings in the event the Supreme Court grants Alpine's Petition.

Because the OIP was served August 30, 2021, and requires an answer in 20 days therefrom, Alpine also respectfully requests expedited consideration of this Motion.

INTRODUCTION

A stay, postponement or adjournment of the instant administrative proceeding until Alpine's Petition for Certiorari is resolved furthers the public interest and is necessary to prevent irreparable harm to Alpine. The basis for the OIP is a complaint that Enforcement filed against Alpine in the United States District Court for the Southern District of New York, *S.E.C. v. Alpine Securities Corp.,* Civil Action No. 1:17-cv-04179 ("Underlying Civil Action") alleging violations of the Suspicious Activity Report ("SAR") requirements of the Bank Secrecy Act ("BSA"), and the entry of a final judgment by that court finding violations of the strict liability provisions of

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Section 17 and imposing civil monetary penalties and a permanent injunction against Alpine. Alpine's Petition for Certiorari seeks reversal of the lower court's decisions, arguing *inter alia* that the SEC's assertion of independent authority to interpret and enforce the SAR requirements of the BSA contravenes Congress's decision to entrust BSA enforcement authority to the Treasury Department. Alpine's Petition for Certiorari has received *amici curiae* support from two former officials for the Financial Crimes Enforcement Network ("FinCEN"), including the longest-serving director of FinCEN and a former deputy director from FinCEN, as well as from a public interest group– the Cato Institute.

If the Supreme Court grants Alpine's Petition, and reverses the judgment entered against Alpine in the Underlying Civil Action, it would serve as a total defense to the allegations in the OIP since the core allegation of the OIP is that a judgment was entered against Alpine. Unless this proceeding is stayed or postponed, Alpine's defenses to the OIP will be prejudiced, particularly given that this administrative proceeding will likely be completed before the Supreme Court has an opportunity to even consider Alpine's Petition for Certiorari. In the event the Commission takes adverse action on Alpine's registration or imposes limitations on its business activities in this new proceeding, Alpine could be forced out of business based on a judgment that is still on appeal and may be reversed by the Supreme Court. Staying or otherwise postponing this proceeding until the Supreme Court has an opportunity to consider Alpine's Petition is therefore necessary to promote the public interest and to avoid irreparable harm and prejudice to Alpine.

Conversely, there is no harm that would result to the SEC or to the public if this proceeding is stayed or postponed until the Supreme Court has an opportunity to consider and resolve Alpine's Petition for Certiorari. As indicated in the OIP, the SEC's Complaint in the Underlying Civil Action involved historical conduct, occurring between 2011 and 2015. Enforcement also delayed

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filing the OIP for months after the Second Circuit affirmed the district court's decision in the Underlying Civil Action. Importantly, the Commission has *already* recognized that a stay is appropriate if the Petition for Certiorari is granted: in a stipulated installment payment plan that was approved and entered by the district court, the Commission agreed *to stay further payments* towards the civil penalties imposed in the Underlying Civil Action if the Supreme Court grants Alpine's Petition for Certiorari. The additional modest delay requested would not result in any harm to the SEC or the public.

In these extraordinary circumstances, therefore, staying or postponing these proceedings until Alpine's pending Petition for Certiorari is resolved is in the public interest and is necessary to avoid irreparable harm to Alpine's rights and to ensure that fundamental principles of fairness, efficiency and justice are preserved.

STATEMENT OF FACTS IN SUPPORT OF MOTION

A. Background on Alpine

Alpine is a small, self-clearing broker-dealer, headquartered in Salt Lake City, Utah, that has been registered with the Commission since 1984.[1] Alpine is also a member in good standing of several self-regulatory organizations ("SROs") that are necessary for its operations, including the Financial Industry Regulatory Authority ("FINRA"), the Depository Trust Corporation ("DTC") and the National Securities Clearing Corporation ("NSCC").[2]

Alpine's business focuses on clearing liquidation (or sale-side) microcap or over the counter ("OTC") stock transactions for other firms, including, frequently, stocks with a price less

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[1] Alpine was acquired by new ownership in March of 2011. *See* Declaration of Maranda Fritz ("Fritz Decl.," at ¶ 5, attached hereto as **Ex. A.**

[2] Fritz Decl., at ¶ 6.

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than $.01/share. In this capacity, Alpine facilitates tens of millions of dollars of capital financing for small business each month through the deposit, clearance and liquidation of microcap securities on behalf of its customers who provide direct financing to thousands of innovative, startup and early-stage development business that operate in the U.S.[3]

B. Summary of the Court Proceedings in the Underlying Civil Action

The SEC commenced the Underlying Civil Action on June 5, 2017 by filing a Complaint against Alpine in United States District Court for the Southern District of New York, alleging that Alpine violated the requirements of the SAR regulation promulgated by the Treasury Department, 31 C.F.R. § 1023.320, and that this regulation was incorporated into Exchange Act pursuant to Section 17(a) of the Exchange Act, 15 U.S.C. § 78q(a), and Rule 17a-8 thereunder, 17 C.F.R. § 240.17a-8.[4] The SEC's Complaint asserted that, between May 2011 through December of 2015, Alpine violated the SAR requirements because it filed SARs on relation to certain transactions but failed to include certain "red flag" information in the narratives of SARs Alpine filed. The SEC also alleged that Alpine should have filed additional SARs on certain liquidation of securities by its customers after having filed SARs on the customer's deposits of those securities; that Alpine filed certain SARs outside the time period established by 31 C.F.R. § 1023.320(b)(3); and that it failed to maintain or retain support files for certain SARs filed by Alpine.[5] The SEC sought civil monetary penalties and the entry of a permanent injunction against future violations of the SAR

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[3] Fritz Decl., at ¶ 7.

[4] *See* SEC Complaint, Underlying Civil Action, *S.E.C. v. Alpine Securities Corp.,* Civil Action No. 1:17-cv-04179, S.D.N.Y. Dkt. No. 1, at ¶¶ 2, 11-13, 29, 30, 34, 39, 42, 45.

[5] *See generally id.*

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requirements.[6]

During the Underlying Civil Action, Alpine disputed the alleged violations and asserted in summary judgment proceedings that the SEC lacked jurisdiction or authority to bring an enforcement action for asserted violations of the BSA, including the SAR requirements of the BSA, because Congress delegated the authority to administer, interpret and enforce the BSA and its regulations to the Treasury Department, and the Treasury Department, through FinCEN, retained that authority. Alpine also argued that the SEC's enforcement of the SAR requirements under Rule 17a-8 violated the Administrative Procedures Act ("APA") by, *inter alia,* automatically incorporating the new Treasury regulations, including the later-enacted broker-dealer SAR regulation, without notice and comment rulemaking.[7]

The district court in the Underlying Civil Action denied Alpine's motion for summary judgment on the issues of the SEC's jurisdiction and authority to enforce the SAR requirements of the BSA and with respect to noncompliance with the APA.[8] The district court granted the SEC's motion for summary judgment, in part, holding that Alpine was strictly liable for violating the SAR requirements by filing certain SARs that omitted "red flag" information in the narratives, failing to file SARs on certain deposit-liquidation patterns, and failing to maintain certain SAR support files.[9] Ultimately, the district court granted summary judgment to the SEC on 2,720

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[6] *See id.* at p. 20.

[7] *See generally* Alpine Cross-Motion for Partial Summary Judgment and Motion for Reconsideration in the Underlying Civil Action, S.D.N.Y. Dkt. Nos. 83-85, 94, 110-11, 123.

[8] *See SEC v. Alpine*, 308 F.Supp.3d 775, 795-98 (S.D.N.Y. 2018) ("March Opinion") *and SEC v. Alpine*, 354 F.Supp.3d 396, 416-17 (S.D.N.Y. 2018) ("December Opinion").

[9] *See* December Opinion, 354 F.Supp.3d at 425-444. The district court denied summary judgment for the SEC on its claims that Alpine failed to timely file certain SARs, and with respect other alleged violations in the other SAR categories. *See id.*

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violations of the SAR reporting and record keeping requirements.

The district court imposed a $12 million "tier 1," non-scienter, civil penalty against Alpine under Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d)(3), and a permanent injunction against future violations of section 17(a) and Rule 17a-8 with respect to the SAR requirements.[10]

On appeal, the Second Circuit affirmed the district court's decision by opinion issued December 4, 2020.[11] The Second Circuit denied Alpine's timely petition for panel rehearing and rehearing *en banc* by Alpine on February 19, 2021.[12] Mandate issued on February 26, 2021.[13]

C. Petition for Certiorari

After its petitions for rehearing were denied by the Second Circuit, Alpine timely filed its Petition for Certiorari in the United States Supreme Court on July 19, 2021.[14] The question presented in Alpine's Petition 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.[15]

Alpine argues in the Petition for Certiorari, as it did in the lower courts, that the books-and-records provisions of the Exchange Act, Section 17(a), does not allow the SEC – an independent agency – to reinterpret and enforce a statute assigned by Congress to a different agency or to usurp enforcement authority that Congress specifically vested in the Treasury

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[10] *See* Judgment in Underlying Civil Action, October 9, 2019, S.D.N.Y. Dkt No. 241.

[11] *See SEC v. Alpine,* 982 F.3d 68 (2d Cir. 2020).

[12] *See SEC v. Alpine,* Second Circuit Case No. 19:3272, Dkt. No. 189.

[13] *See SEC v. Alpine,* Second Circuit Case No. 19:3272, Dkt. No. 190-01.

[14] A copy of Alpine's Petition for Certiorari is attached hereto as **Ex. B.** The Supreme Court proceedings are styled as *Alpine Securities Corp. v. S.E.C.,* Supreme Court Case No. 21-82.

[15] *See* Petition for Certiorari, at ii., **Ex. B** hereto.

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Department.[16] Alpine urged the Supreme Court to grant certiorari to ensure adherence to the Congressional delegation of authority and restore uniformity in enforcement and interpretation of the SAR regime.[17]

Two separate *amici curiae* were filed on August 20, 2021 supporting Alpine's Petition for Certiorari and urging the Supreme Court to grant Alpine's Petition.

First, former FinCEN officials James H. Freis, Jr. and Charles M. Steele filed an *amici curiae* brief ("Former FinCEN Officials Amici") supporting Alpine's Petition.[18] Mr. Freis is the former, and *the longest-serving*, Director of FinCEN, holding the position from 2007 through 2012. Mr. Steele is a former Deputy Director of FinCEN, serving from October 2009 to August 2011. In their *amici* brief, Mr. Freis and Mr. Steele: described at length the need to maintain Congress's carefully crafted AML regime, wherein Congress purposefully gave enforcement authority to the Treasury Department and its bureau, FinCEN; argued that supervisory agencies, such as the SEC, cannot unilaterally take BSA enforcement authority for themselves; discussed the wide-ranging detrimental impacts such actions would have on the regime; and argued that the Second Circuit erred in conflating delegated compliance examination efforts with the exercise of enforcement authority on the critical BSA and SAR enforcement regime.[19] They urged the Supreme Court to grant certiorari on Alpine's Petition because "the Second Circuit's error is clear, and the question presented is important to AML and national security efforts both home and abroad," as it would allow the Supreme Court "to clarify the limits of BSA enforcement, which

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[16] *See id.* at 2, 12-26.

[17] *See id.* at 2, 27-35.

[18] A copy of the Former FinCEN Officials Amici is attached hereto as **Ex. C.**

[19] *See id.,* at 3-4, 5-22.

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would benefit regulators, financial institutions, and national AML efforts."[20]

The second *amici curiae* brief was filed by the Cato Institute ("Cato Amici"), a nonpartisan public policy research foundation, which has a "strong interest in ensuring that the Securities and Exchange Commission and other unelected administrative agencies wield their vast regulatory and law enforcement powers only as authorized by Congress."[21] The Cato Amici also observed that the SEC is impermissibly enforcing the rules of another agency without a delegation of authority to so act, but focused its argument on noncompliance with the APA; specifically, the assertion by Enforcement during the Underlying Civil Action that the SEC could place "its rulemaking process on autopilot by incorporating by reference into its own rules both the existing *and future* rules that FinCEN promulgates under the [BSA] …, without the need for the SEC to provide any further notice or opportunity for public comment."[22] The Cato Institute argued that such reliance on "evergreen incorporation by reference" of another agency's regulations contravenes the APA and constitutes an "abdication" of the Commission's administrative rulemaking responsibilities, by "effectively subdelegating those responsibilities to FinCEN." [23]

Both Alpine's Petition for Certiorari and the Amici Curiae Briefs generated a fair amount of press.[24] The popular "SCOTUSblog," for example, listed it as the lead petition of the week on August 6, 2021.[25]

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[20] *See id.*at 23.

[21] A copy of the Cato Institute Amici is attached hereto as **Ex. D.**

[22] *See id.,* at 2, 4-13.

[23] *See id.* at 2-3, 4-13.

[24] A sampling of these articles are attached hereto in **Ex. E.**

[25] The hard copy of the SCOTUSblog article is included in **Ex. E**, and is also available on line at Limits on SEC enforcement and the power of state AGs to avoid arbitration - SCOTUSblog.

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Finally, on August 16, 2021, the Office of Solicitor General ("OSG"), on behalf of the SEC, sought a 30-day extension of time from the Supreme Court to prepare and file a response to Alpine's Petition for Certiorari.[26] The extension was granted August 17, 2021.[27] That OSG sought an extension of time to respond is relevant here for two reasons: (1) it indicates that OSG considers Alpine's Petition to raise issues that are substantial enough to warrant filing an optional response without Supreme Court order;[28] and (2) it extended the date for consideration of Alpine's Petition for Certiorari by the Supreme Court. With this extension, Alpine anticipates that the decision on its Petition for Certiorari may not issue until at least December of 2021.[29]

D. Entry of Stipulated Installment Payment Plan Order

After the appellate proceedings before the Second Circuit were resolved, counsel for Alpine engaged in discussions with counsel for the SEC, who had been tasked with collections and enforcement of the judgment, regarding a payment plan to address the civil monetary penalty imposed against Alpine.[30] During those discussions, Alpine's counsel informed the SEC counsel that Alpine intended to file a petition for certiorari in the Underlying Civil Action.[31]

Following extended discussions, in June of 2015 the parties arrived at a mutually agreeable installment payment plan stipulation, whereby Alpine agreed to pay $1 million per month towards

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[26] *See* August 16, 2021 letter from the OSG, which is publicly available online in Supreme Court Docket for Case No. 21-82, at Docket for 21-82 (supremecourt.gov).

[27] *See* Supreme Court Docket, Case No. 21-82.

[28] Under Supreme Court Rule 15.1, a brief in opposition to a petition for writ of certiorari in a civil case is optional unless ordered by the Supreme Court.

[29] Fritz Decl., at ¶ 12.

[30] Fritz Decl., at ¶ 13.

[31] Fritz Decl., at ¶ 14.

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the civil penalty.[32] The district court in the Underlying Civil Action entered an Order approving the Stipulated Installment Payment Order, as presented by the parties, on June 16, 2021.[33] The Stipulated Installment Payment Order also included several stipulated provisions to protect Alpine's rights with respect to seeking certiorari review from the Supreme Court:

> F. The Commission agrees that by entering this Stipulated Payment Plan, and any payment thereunder, Alpine does not waive or otherwise prejudice its right to seek review of the Judgement in the United States Supreme Court.
>
> G. The Commission further agrees that if the United States Supreme Court grants Alpine's petition for writ of certiorari, Alpine's obligation to pay pursuant to this Stipulated Payment Plan ***shall be stayed during the pendency of that appeal***. Should the United States Supreme Court rule in favor of the Commission, the payment described herein would begin to be due on the fifth of the month after the Supreme Court upholds the Judgment.
>
> H. The Commission agrees that if the United States Supreme Court overturns the Judgment, then the Commission will within 30-days return to Alpine all funds paid pursuant to this Stipulated Payment Plan upon issuance of the United States Supreme Court's decision.[34]

Alpine has complied in all respects with the Stipulated Installment Payment Order, making timely payments when due thereunder, and has currently paid $4 million towards the penalty. Alpine has also complied in good faith with the injunction entered by the district court in the Underlying Civil Action.[35]

E. Current Follow-On Proceedings Pursuant to the OIP

On August 26, 2021, counsel for Enforcement (the same Enforcement counsel who

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[32] Fritz Decl., at ¶ 15.

[33] *See also id*. at ¶¶ 16-17. A copy of the Letter Motion to Approve the Stipulated Installment Payment Plan, and Installment Payment Plan, as endorsed and entered by the district court, is attached hereto as **Ex. F.**

[34] *See* Stipulated Installment Payment Order, **Ex. F** hereto, at ¶3(F)-(H) (emphasis added).

[35] *See* Fritz Decl., at ¶ 19.

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represented the SEC in the Underlying Civil Action) emailed counsel for Alpine to request a call. During the ensuing phone conversation, Enforcement counsel notified Alpine's counsel that Enforcement was filing the OIP to commence follow-on proceedings against Alpine pursuant to Section 15(b) of the Exchange Act. In response to questions from Alpine's counsel, Enforcement counsel confirmed during these discussions that the OIP was *not* triggered by any new alleged violations by Alpine, or any asserted failure by Alpine to comply with either the injunction entered by the district court in the Underlying Civil Action or failure to make payments towards the civil penalty when due. Rather, Enforcement Counsel indicated that the follow-on proceeding was wholly based on the judgment and injunction entered in the Underlying Civil Action.[36]

The OIP was filed on August 26, 2021 and Alpine's counsel accepted service of the OIP on August 30, 2021. In Section II of the OIP, as the factual basis for the proceeding, Enforcement alleges that a final judgment and permanent injunction was entered against Alpine on October 9, 2019, and summarizes the allegations in Enforcement's Complaint in the Underlying Civil Action.[37]

The OIP then states that administrative proceedings are being instituted to determine whether the allegations recited in Section II of the OIP regarding the Underlying Civil Action "are true," to afford Alpine "an opportunity to establish any defenses to such allegations," and to determine "[w]hat, if any remedial action is appropriate in the public interests against Respondent pursuant to Section 15(b) of the Exchange Act."[38] Other than the reference to Section 15(b), the

[36] *See* Fritz Decl., at ¶¶ 20-23 (for all statements in paragraph).

[37] *See* OIP, at §II(B)(2)-(3), attached hereto as **Ex. G.**

[38] *Id.* at § 3.

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OIP does not specify what relief Enforcement is seeking.[39]

The OIP directs Alpine to file an answer to the allegations within 20 days after service, directs a prehearing conference to occur within 14 days of the answer, and imposes a "75-day time frame" under SEC Rule of Practice 360(a)(2)(i) for completion of the hearing.[40]

Counsel for Alpine has requested that Enforcement agree to stay this proceeding until Alpine's Petition for Certiorari is resolved. Enforcement refused, without explanation.[41]

ARGUMENT

Alpine respectfully requests that the Commission grant an interim stay of this proceeding pursuant to Rule of Practice 401 until Alpine's Petition for Certiorari is resolved by the Supreme Court to prevent irreparable harm to Alpine and further the public interest. In the alternative, Alpine requests that the Commission extend the deadlines, and postpone or adjourn the hearing in this matter pursuant to Rule of Practice 161, until such time as the Supreme Court issues an order granting or denying Alpine's Petition for Certiorari, without prejudice to Alpine's ability to seek an additional interim stay of proceedings in the event the Supreme Court grants Alpine's Petition.

I. The Commission Should Grant an Interim Stay of this Administrative Proceeding to Preserve the Status Quo Pending the Supreme Court's Consideration of Alpine's Petition for Certiorari.

"Generally, the Commission may grant a stay if it finds that 'justice so requires.'"[42] The Commission weighs four factors in deciding whether to grant a stay: (1) "whether there is a strong

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[39] *See id.* Section 15(b) of the Exchange Act authorizes the Commission, after a hearing and finding that it is in the public interest, to censure, place limitations on the activities, functions or operations of a broker-dealer, suspend or revoke the registration of a broker-dealer in certain enumerated circumstances. *See* 15 U.S.C. § 78o(b)(4).

[40] OIP, at § IV, p. 3.

[41] *See* Fritz Decl., at ¶ 23; a copy of the email correspondence is attached hereto as **Ex. H**.

[42] *Application of Elec. Transaction Clearing, Inc.,* Release No. 73698, 2014 WL 6680112, at *1 (Nov. 26, 2014).

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likelihood that the moving party will succeed on the merits of the appeal"; (2) "whether the moving party will suffer irreparable harm without a stay"; (3) "whether any person will suffer substantial harm as a result of a stay"; and (4) "whether a stay is likely to serve the public interest."[43]

"The appropriateness of a stay turns on a weighing of the strengths of these four factors; ***not all four factors must favor a stay for a stay to be granted***."[44] "The first two factors are the most critical, but a stay decision rests on the balancing of all four factors."[45] As such, "a stay may be granted where there is a high probability of irreparable harm, but a lower probability of success on the merits, or vice versa." *Id.* In addition, to obtain a stay under the SEC's framework, "a movant need not necessarily establish that it is likely to succeed on the merits of its appeal, but it must at least show 'that the other factors weigh heavily in its favor' and that it has 'raised a serious legal question on the merits.'"[46]

A. Alpine Would Be Irreparably Harmed if this Proceeding is Not Stayed Pending Resolution of Alpine's Petition for Certiorari.

The concept of irreparable harm does not lend itself to exact definition, but generally requires an injury that is "actual and not theoretical" and that the "harm will directly result from the action which the movant seeks to stay."[47] These circumstances are met here: this follow-on proceeding is wholly based on Enforcement's allegations, and the final judgment and injunction

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[43] *Application of Michael Earl McCune*, SEC Release No. 77921, 2016 WL 2997935, at * 1 (May 25, 2016).

[44] *Bloomberg L.P.*, Exchange Act Release No. 83755, 2018 WL 3640780, at *7 (July 31, 2018) (emphasis added).

[45] *Id.*

[46] *In the Matter of the Application of Robbi J. Jones & Kipling Jones & Co., Ltd.,* Release No. 91045, 2021 WL 396767 at *2 (Feb. 2, 2021) (internal quotations and citations omitted);*see also Scattered Corp.*, 52 S.E.C. 1314, 1997 SEC LEXIS 2748, at *11-12 (Apr. 28, 1997) (granting a stay where it was "unclear … due to the complexity" of the case whether applicants had "a strong likelihood" of success, because the applicants had "shown this to be a substantial case on the merits and … the other three factors" supported a stay).

[47] *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *6 (Nov. 27, 2017) (further quotations and citation omitted).

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entered against Alpine in the Underlying Civil Action – the very decisions that are the subject of Alpine's pending Petition for Certiorari. That Alpine would be imminently harmed by facing a new proceeding seeking new sanctions, including revocation of its registration, based entirely upon allegations and decisions that the Supreme Court may vacate in the near future is indisputable. This is particularly so where this administrative proceeding, absent a stay or other postponement, is likely to conclude before the Supreme Court has a chance to even rule on Alpine's Petition, let alone rule on the merits of the case if certiorari is granted.

More concerning, there is simply no way to restore the status quo after the proceeding commences – the prejudice to Alpine's defenses, the time, stress and cost *to all* from this administrative proceeding, and the destruction of Alpine's business if revocation of its registration or limitations on its business are ordered – if the Supreme Court determines, on Alpine's Petition, that the SEC never had the authority to pursue the asserted violations of the SAR requirements. Even the filing of an answer to the OIP given the present circumstances would put Alpine in an untenable position.

In fact, granting a stay in these circumstances to avoid such harm is consistent with the Commission's recognized practice of granting stays where "requiring applicants to comply with the sanctions during the ***pendency of the appeal would put them in jeopardy of losing the benefit of a successful appeal***."[48] Although this case arises in a different procedural context, the rationale is equally applicable: if the Supreme Court grants Alpine's Petition for Certiorari and reverses the

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[48] *See Application of Elec. Transaction Clearing, Inc.,* 2014 WL 6680112, at *1 (emphasis added) (granting stay based on practice with little discussion of other factors); *see also Application of McCune,* 2016 WL 2997935, at * 1 (same); *Scattered Corp*., 52 S.E.C. at 1320 (staying a firm's expulsion, an executive's bar, and their respective fines "pending the resolution of this case on the merits" because "[t]he benefit of any possible reduction of [the] bar and fines ... would be lost, absent a stay at this juncture").

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lower court decisions, it would not only be a total defense to the allegations in the OIP, it would establish that there was no basis for this follow-on proceeding in the first place. As with the respondents in *Scattered Corporation, Electric Transaction Clearing* and *McCune,* allowing this proceeding to move forward would put Alpine in jeopardy of losing the benefit of a successful appeal, *plus* the imminent risk that additional sanctions could be imposed in this proceeding that destroy Alpine's business and goodwill based on the exact same conduct at issue in the Underlying Civil Action. That is irreparable harm on multiple levels: loss of the right to appeal and the destruction of a business, and loss of goodwill and customers, absent a stay.[49]

Moreover, it is notable that the Commission has already recognized that a stay of the civil monetary penalty imposed against Alpine would be appropriate if the Supreme Court grants the Petition for Certiorari. As indicated, in the Stipulated Installment Payment Order, the "Commission agree[d] that if the United States Supreme Court grants Alpine's petition for writ of certiorari, Alpine's obligation to pay pursuant to this Stipulated Payment Plan ***shall be stayed during the pendency of that appeal***."[50] It makes no sense that the Commission would agree to stay a payment of monetary sanction already imposed against Alpine in order to avoid unnecessary

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[49] The Commission has repeatedly held that "the destruction of a business, absent a stay, is more than just 'mere' economic injury, and rises to the level of irreparable injury." *Scattered Corp.*, 1997 SEC LEXIS 2748, at *15; *accord Atlantis Internet Grp. Corp.*, Exchange Act Release No. 70620, 2013 WL 5519826, at *5 n.14 (Oct. 7, 2013); *see also Wash. Metro. Area Transit Comm'n*, 559 F.2d 841 at 843 (D.C. Cir. 1977) (stating that the destruction of a business constituted "irreparable injury" for purposes of stay of permanent injunction).

The loss of goodwill and customers also constitutes irreparable harm. *See In re SIFMA and Bloomberg, L.P.,*SEC Release No. 83755, at 16-18 and n. 71 (July 31, 2018) (citing *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001) (holding that company's need to raise fees to recoup projected losses because of challenged statute constituted irreparable harm because "even if higher rates and fees do not drive customers away, loss of established goodwill may irreparably harm a company"); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co*., 22 F.3d 546, 552 (4th Cir. 1994) ("[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied." (citation removed)).

[50] *See* Stipulated Installment Payment Order, **Ex. F** hereto, at ¶3(G) (emphasis added).

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harm, while at the same time allowing Enforcement to pursue without delay a new follow-on proceeding to add new sanctions based on the same underlying conduct and asserted violations, without regarding to the Petition.

Finally, the harm would not flow to Alpine alone; it would be felt by its customers directly, and perhaps more acutely. Alpine is one of the few clearing brokers still willing to process sale-side OTC and microcap stock transactions for its customers. If Alpine's registration were revoked, or its ability to clear OTC and microcap stock transactions were restricted, as a result of this follow-on proceeding its customers would be left with no place to sell their stock. If the Supreme Court were to thereafter reverse the judgment in the Underlying Civil Action, establishing that no sanctions were lawfully imposed either in underlying court case or this follow-on proceeding, the harm to Alpine and its customers would be both catastrophic and manifestly unjust.

B. Alpine has Presented a Serious Legal Question on the Merits.

As indicated, given the clear harm that Alpine would suffer if this proceeding goes forward at this time, Alpine need not establish that it is likely to succeed on the merits, provided that it shows serious questions going to the merits. *See supra, text and fn. 46.* While it is difficult to predict whether the Supreme Court will grant certiorari, Alpine's Petition at least presents serious questions going to the merits that would be dispositive of the allegations in the OIP in Alpine's favor. More specifically, as detailed above, Alpine's Petition for Certiorari challenges the SEC's authority to pursue enforcement actions for asserted violations of the SAR requirements on the basis that the Congress delegated the authority to administer and enforce the BSA and the SAR regulations thereunder to the Treasury Department, rather than the SEC. A ruling by the Supreme Court in Alpine's favor on that issue would result in a reversal of the judgment on which the OIP is predicated.

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These issues concerning the SEC's authority to enforce the BSA or its failure to comply with the APA have never been litigated before this case. Alpine's experienced Supreme Court counsel have filed a Petition that effectively presents both the underlying law and the need for review by the Supreme Court. That Petition has garnered a fair amount of press since it has been filed, and it has received significant *amici* support from *two former heads of FinCEN* and a public interest group which commonly participates as an *amici* in significant issues involving the exercise of power by administrative agencies. The question here is not whether there is a substantial likelihood that Alpine's Petition for Certiorari will be granted, but whether the legal issues raised therein are "serious" and the dispositive impact of the issues on the merits of both the underlying judgment and this follow-on proceeding. The Commission can read the attached Petition and the *amici* briefs for itself to conclude this stay factor is met here. Moreover, as indicated, the OSG, on behalf of the SEC, has already acknowledged that Alpine's Petition presents a serious legal question by seeking and obtaining an extension of time to file a response, which is optional unless ordered by the Supreme Court.[51]

C. The Stay will not Result in Harm to Any Other Party.

The entry of a stay of these follow-on proceedings will cause no prejudice to Enforcement or any other party for several reasons. First, as the OIP demonstrates, the underlying conduct is historical, occurring between 2011 and 2015, and, the vast majority of the SAR violations found by the district court occurred in 2011-2012.[52] Alpine has had no SAR filing deficiencies alleged since 2015, and Alpine is currently operating under, and in compliance with, an injunction to

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[51] *See* Supreme Court Rule 15.1.

[52] *See* December Opinion, at 354 F.Supp.3d at 418 ("It is true that approximately two-thirds of the SARs at issue in the SEC's Motion predate the FINRA Report [dated September 28, 2012].").

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comply with the SAR requirements, and making payments towards the underlying penalty. As indicated, Enforcement counsel also confirmed that there were no additional or new violations that triggered the filing of this OIP.[53] Staying a follow-on proceeding that is based on no new alleged violations, for a modest amount of time, would not cause any harm to the Commission or the public.

Second, Enforcement itself delayed filing this proceeding for months after the Second Circuit decision was finalized. And, the OSG, on behalf of the SEC, has further delayed consideration of Alpine's Petition for Certiorari by seeking an extension of time to file an opposition to the Petition. Enforcement should not be heard to complain that this proceeding suddenly needs to move forward now, just after Alpine filed its Petition for Certiorari and before the Supreme Court has a chance to rule.

Finally, far from causing harm, a stay of these proceedings until the Supreme Court rules on Alpine's Petition would be prudential and would conserve resources for all involved. If the Supreme Court grants certiorari and reverses, this entire follow-on proceeding would have been a waste of expense and time to all and, far worse, could result in Alpine's destruction before its Petition is resolved. That fact alone greatly outweighs any interest that Enforcement may have in pursuing this action right now.

D. The Public Interest Favors a Stay.

The foregoing discussion further establishes that the public interest would be served by staying these proceedings until the Supreme Court has an opportunity to resolve Alpine's Petition. While enforcement of federal securities laws undoubtedly serves the public interest, that is only

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[53] M. Fritz Decl., at ¶ 22.

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true if they are, in fact, within the agency's jurisdiction and authorized by law. The public interest would be best served by staying these proceedings and respecting the legal process that is continuing. It is entirely consistent with the public interest to give the Supreme Court an opportunity to determine whether to address and finally decide that question, as opposed to pushing forward, on an arbitrary timeline, with a follow-on enforcement proceeding that the Supreme Court's decision could establish was unlawful at its inception. Rushing to complete a follow-on proceeding before the issue of the SEC's BSA authority, when raised in a pending petition for certiorari, is finally decided furthers no recognized interest.

II. The Commission Should Alternatively Extend the Deadlines and Postpone or Adjourn the Hearing Until the Supreme Court Decides Whether to Grant Certiorari.

The same principles detailed above supporting a stay also support alternative, but more limited, relief: extending all deadlines in the follow-on proceeding, and postponing or adjourning the hearing under Rule of Practice 161, until the Supreme Court has an opportunity to decide whether to grant Alpine's Petition for Certiorari, without prejudice to Alpine's right to seek a full stay of proceedings if the Supreme Court grants certiorari.

Rule of Practice 161 allows the Commission, at any time, to extend or shorten any time limits and to postpone or adjourn any hearing, upon a showing of good cause.[54] For the reasons stated, there is good cause to extend all deadlines and postpone or adjourn the hearing at least until the Supreme Court decides whether to grant Alpine's Petition for Certiorari. Further, this proceeding is just in its infancy; it was filed August 26, 2021, no answer has yet been filed, no pretrial conference has occurred and no hearing has been set. All of these factors support the

[54] *See* Rule of Practice 161(a).

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granting of an extension under Rule 161(b).

Alpine recognizes that the requested extension and postponement/adjournment would exceed the standard 21-day extension period in Rule 161(c). However, the Commission has the discretion to increase that timeline by written order. *See id.* In addition, Alpine anticipates that it will have a decision by the Supreme Court on its Petition for Certiorari by the end of December 2021, barring further unanticipated extensions of time to file a response by the OSG. The OIP sets a 75-day timeline under Rule of Practice 360(a)(2)(ii), which by rule allows for the hearing to occur within six months from the date of service of the OIP – or by the end of February 2022.[55] That should provide ample time for Alpine to file another motion to stay if the Petition is granted or, if the Petition is denied, for Alpine to file an answer and the parties to complete the hearing within the mandated time frame.

While an interim stay of proceedings is warranted and provides greater certainty for planning and efficiency, this alternative under Rule of Practice 161 provides an acceptable middle ground to ensure that Alpine's rights are protected.

CONCLUSION

For the foregoing reasons, Alpine Motion for an Interim Stay under Rule of Practice 401 and/or for an extension of all deadlines and postponement and/or adjournment of the hearing under Rule of Practice 161, should be granted.

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[55] *See* OIP, at § 4 p. 3 ("This proceeding shall be deemed to be one under the 75-day timeframe specified in Rule of Practice 360(a)(2)(i)…."); *see also* Rule of Practice 360(a)(2)(ii).

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DATED this 3rd day of September, 2021.

PARSONS BEHLE AND LATIMER

Aaron D. Lebenta
Jonathan D. Bletzacker

MARANDA E. FRITZ, P.C.

Maranda E. Fritz
Counsel for Alpine Securities Corporation

ATTORNEY CERTIFICATION

Pursuant to Rule 154(c) of the Commission's Rules of Practice, I hereby certify that the foregoing document contains 6,350 words, exclusive of the tables of contents and authorities.

PARSONS BEHLE AND LATIMER

Aaron D. Lebenta
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Exhibit A
[Maranda Fritz Declaration]

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UNITED STATES OF AMERICA

SECURITIES AND EXCHANGE COMMISSION

In the Matter of ALPINE SECURITIES CORPORATION, Respondent.	Admin. Proc. File. No. 3-20485

DECLARATION OF MARANDA FRITZ

I, Maranda Fritz, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury under the laws of the United States of America that the following statements are true and correct:

1. My name is Maranda Fritz and I am a resident of the State of Utah, am over 18 years of age, and make the statements herein based on my personal knowledge.

2. I am legal counsel for Respondent Alpine Securities Corporation ("Alpine"), in the above-named Administrative Proceeding. I have personally reviewed and am familiar with

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the Order Instituting Proceedings ("OIP") initiated by the Enforcement Division ("Enforcement") for the Securities and Exchange Commission for this Administrative Proceeding, on August 26, 2021, and accepted service of the OIP on Alpine's behalf.

3. I also represented Alpine in underlying proceeding that is the basis for the OIP, and in other matters, and have done so for several years, including as discussed below.

4. I submit this declaration in support of Alpine's Motion for an Interim Stay or Extension, Postponement and/or Adjournment of Proceedings ("Alpine's Motion").

5. Alpine is a small, self-clearing broker-dealer, headquartered in Salt Lake City, Utah, that has been registered with the Commission since 1984. Alpine was acquired by its current ownership in 2011.

6. It is my understanding that Alpine is also a member in good standing of several self-regulatory organizations ("SROs") that are necessary for its operations, including the Financial Industry Regulatory Authority ("FINRA"), the Depository Trust Corporation ("DTC") and the National Securities Clearing Corporation ("NSCC")

7. It is my understanding, from representing Alpine for several years, that Alpine's business focuses on clearing liquidation (or sale-side) microcap or over the counter ("OTC") stock transactions for other firms, including, frequently, stocks with a price less than $.01/share. It is also my understanding, from my on-going representation of Alpine, that Alpine facilitates millions of dollars of capital financing for small business each month through the deposit, clearance and liquidation of microcap securities on behalf of its customers who provide direct financing to innovative, startup and early-stage development businesses that operate in the U.S.

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8. I am familiar with the enforcement action that the SEC filed against Alpine in the United States District Court for the Southern District of New York, *S.E.C. v. Alpine Securities Corp.,* Civil Action No. 1:17-cv-04179 ("Underlying Civil Action") alleging violations of the Suspicious Activity Report ("SAR") requirements of the Bank Secrecy Act ("BSA"). I represented Alpine, and continue to represent Alpine, in all aspects of that matter, including all appellate proceedings to the Second Circuit, and in connection with Alpine's petition for a writ of certiorari to the United States Supreme Court ("Petition for Certiorari").

9. After Alpine's petitions for rehearing were denied by the Second Circuit, Alpine timely filed its Petition for Certiorari in the United States Supreme Court on July 19, 2021. A copy of Alpine's Petition for Certiorari is attached as Ex. B to the Alpine's Motion. The Supreme Court case number assigned to Alpine's Petition for Certiorari is 21-82.

10. Two separate *amici curiae* were filed on August 20, 2021 supporting Alpine's Petition for Certiorari and urging the Supreme Court to grant Alpine's Petition: (1) former FinCEN officials James H. Freis, Jr. and Charles M. Steele filed an *amici curiae* brief ("Former FinCEN Officials Amici") supporting Alpine's position concerning the SEC's authrotity to interpret and enforce the Suspicious Activity Reporting provisions of the Bank Secrecy Act; and (2) the Cato Institute ("Cato Amici"), a nonpartisan public policy research foundation, filed an *amici curiae* brief regarding the SEC's failure to comply with the Administrative Procedure Act in relation to its interpretation of Rule 17a-8. Copies of these *amici curiae* briefs are attached as Exs. C and D, respectively, to Alpine's Motion.

11. It is my understanding that on August 16, 2021, the Office of Solicitor General ("OSG"), on behalf of the SEC, sought a 30-day extension of time from the Supreme Court to

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prepare and file a response to Alpine's Petition for Certiorari, and that the extension was granted on August 17, 2021.

12. With that extension, Alpine anticipates that a decision on its Petition for Certiorari will not be issued until at least December of 2020, barring any additional extensions sought by OSG.

13. After the appellate proceedings before the Second Circuit were resolved, I engaged in discussions counsel for the Commission, Michael Roessner, who had been tasked with collections and enforcement of the judgment, seeking to discuss a payment plan to address the civil monetary penalty imposed against Alpine.

14. During those discussions, I informed Mr. Roessner that Alpine intended to file a petition for certiorari in the Underlying Civil Action.

15. Following extended discussions, in June of 2015 Mr. Roessner and I, on behalf of our respective clients, arrived at mutually agreeable installment payment plan stipulation, whereby Alpine agreed to pay $1 million per month towards the civil penalty.

16. Mr. Roessner and I each executed a letter motion to the district court in the Underlying Civil Action and submitted a Proposed Stipulated Installment Payment Order for approval by the court. The letter motion indicated that the "[t]he parties believe this is an appropriate and orderly method to secure full payment of the Court's judgment against Alpine. The letter motion and proposed stipulation are available in the S.D.N.Y court's docket, for Case No. 1:17-cv-04179, at Dkt. Nos. 258 and 258-1.

17. The district court in the Underlying Civil Action entered an Order approving the Stipulated Installment Payment Order, as presented by the parties, on June 16, 2021. A copy of

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the Stipulated Installment Payment Order as entered by the Court is attached as **Ex. F** to the Alpine's Motion.

18. The Stipulated Installment Payment Order, in Paragraph 3(F)-(H), included several provisions to protect Alpine's rights in relation to its Petition for Writ of Certiorari to the Supreme Court, which were agreed to by the Commission:

> F. The Commission agrees that by entering this Stipulated Payment Plan, and any payment thereunder, Alpine does not waive or otherwise prejudice its right to seek review of the Judgement in the United States Supreme Court.
>
> G. The Commission further agrees that if the United States Supreme Court grants Alpine's petition for writ of certiorari, Alpine's obligation to pay pursuant to this Stipulated Payment Plan ***shall be stayed during the pendency of that appeal***. Should the United States Supreme Court rule in favor of the Commission, the payment described herein would begin to be due on the fifth of the month after the Supreme Court upholds the Judgment.
>
> H. The Commission agrees that if the United States Supreme Court overturns the Judgment, then the Commission will within 30-days return to Alpine all funds paid pursuant to this Stipulated Payment Plan upon issuance of the United States Supreme Court's decision

19. To the best of my knowledge, Alpine has complied in all respects with the injunction entered by the district court in the Underlying Civil Action and with the Stipulated Installment Payment Order, making timely payments when due thereunder, and has currently paid $4 million towards the penalty.

20. On August 26, 2021, I was contacted by counsel for Enforcement, Zach Carlyle and Terry Miller, who were the same trial counsel who represented Enforcement in the Underlying Civil Action, to request a telephone discussion.

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21. During the ensuing phone conversation, Mr. Miller and Mr. Carlyle notified me that Enforcement was filing the OIP to commence follow-on proceedings against Alpine pursuant to Section 15(b) of the Exchange Act.

22. In response to questions from me during those discussions regarding what triggered the filing of the follow-on Administrative Proceeding, Mr. Miller and Mr. Carlyle confirmed that OIP was *not* triggered by any new alleged violations by Alpine, or any asserted failure by Alpine to comply with either the injunction entered by the district court in the Underlying Civil Action or failure to make payments towards the civil penalty when due. Instead, they indicated that the follow-on proceeding was based solely on the judgment and injunction entered in the Underlying Civil Action.

23. They reached out to me by email on Friday, August 27, 2021 to indicate that the OIP had been filed and asked whether I would accept service on Alpine's behalf and would be representing Alpine in the Administrative Proceeding going forward. I responded on August 30, indicating that I would be representing Alpine in this matter and would accept service on Alpine's behalf. In that email, I also asked whether the SEC would "agree to a stay of the OIP pending a decision on cert." They responded the same day that "[t]he Division of Enforcement would not agree to a stay of the proceedings pending a decision on cert," without further explanation. A copy of this email exchange is attached as Ex. H to Alpine's Motion.

WHEREFORE, I declare under penalty of perjury that the foregoing is true and correct.

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DATED this 3rd day of September, 2021.

MARANDA E. FRITZ, P.C.

Maranda E. Fritz
Counsel for Alpine Securities Corporation

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Exhibit B
[Alpine's Petition for Certiorari]

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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?

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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).

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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.

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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,

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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.

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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.

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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

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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).

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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

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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)).

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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).

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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

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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.

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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.

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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.

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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

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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).

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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

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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

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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.

[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").

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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

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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

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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

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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

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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

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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

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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

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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

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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).

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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

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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

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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.

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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

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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

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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.

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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—

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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.

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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

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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

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[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.

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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

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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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Exhibit C

[Former FinCEN Officials' Amicus]

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No. 21-82

IN THE
Supreme Court of the United States

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

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

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

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IN THE

Supreme Court of the United States

No. 21-82

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

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

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

STATEMENT OF INTEREST

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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IV. THE COURT SHOULD GRANT CERTIORARI.

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

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

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

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

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Exhibit D

[Cato Institute Amicus]

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NO. 21-82

In the

Supreme Court of the United States

ALPINE SECURITIES CORPORATION,

Petitioner,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Monetary and Financial Alternatives reveals the shortcomings of today's monetary and financial regulatory systems and identifies and promotes alternatives more conducive to a stable, flourishing, and free society. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Cato publishes books and studies, conducts conferences, issues the annual *Cato Supreme Court Review*, and files *amicus* briefs with courts.

Cato supports the petition because it has a strong interest in ensuring that the Securities and Exchange Commission and other unelected administrative agencies wield their vast regulatory and law enforcement powers only as authorized by Congress. Cato also has a strong interest in promoting the virtues of transparency, integrity, and accountability in agency decision-making.

[1] All parties consented to the filing of this brief after receiving timely notice pursuant to Supreme Court Rule 37.2. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

The petition correctly describes this case as another "power grab" by the Securities and Exchange Commission ("SEC"). *Cf. Liu v. SEC*, 140 S. Ct. 451 (2019); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Kokesh v. SEC*, 137 S. Ct. 1635 (2017); *Gabelli v. SEC*, 568 U.S. 442 (2013). The SEC is flexing its ever-expanding prosecutorial muscle to enforce what are, in substance, the rules of another agency—the Financial Crimes Enforcement Network ("FinCEN"), a bureau within the Treasury Department to which primary enforcement discretion under the Bank Secrecy Act has been granted directly by the Department and indirectly by Congress.

In 1981, the SEC placed its rulemaking process on autopilot by incorporating by reference into its own rules both the existing *and future* rules that FinCEN promulgates under the Bank Secrecy Act. Two decades later, FinCEN amended its rules to impose substantive new regulatory requirements on securities broker-dealers concerning the reporting of suspicious transactions. The SEC now contends that those rules automatically became part of the SEC's own rules—and are enforceable under the SEC's lower evidentiary standards and harsher penalties—without the need for the SEC to provide any further notice or opportunity for public comment.

This kind of evergreen incorporation by reference is deeply troubling. Among other concerns, the SEC has abdicated the administrative responsibilities that Congress delegated to the agency back in 1934, by effectively subdelegating those responsibilities to FinCEN. In taking that approach, the SEC has evaded

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the transparency and accountability that accompanies proper notice-and-comment rulemaking, blurring the lines of accountability and "undermining an important democratic check on government decision-making." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565–66 (D.C. Cir. 2004) (subdelegation to outside entities "aggravates the risk of policy drift inherent in any principal-agent relationship"); Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 Harv. J.L. & Pub. Pol'y 131, 133 (2013) ("The time has come to reevaluate incorporation by reference, a little known but frequently used regulatory practice with profound public policy implications."). The public and regulated parties are entitled to provide input before the SEC imposes substantive requirements subject to its own evidentiary standards and penalties. Moreover, that exercise of authority must represent the considered judgment and expertise of the SEC itself, and not the judgments of a politically controlled agency like FinCEN.

Cato respectfully urges the Court to grant the petition and provide guidance in this important area of administrative law. It is bad enough when Congress delegates its own Article I legislative responsibility to administrative agencies with only the vaguest instructions to legislate rules that are "necessary or appropriate in the public interest" or "for the protection of investors," as it did with the SEC. *See* 15 U.S.C. §§ 78q(a)(1), 78w(a)(1); *see also Gundy v. United States*, 139 S. Ct. 2116 (2019). Whatever scraps of political accountability may remain after that delegation are thrown to the wind if agencies are then free to construct their own daisy chains of successive

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subdelegations and re-delegations across the vast administrative state.

ARGUMENT

I. The Petition Raises Important Questions Involving Delegation of Legislative Power, Administrative Accountability, and Rulemaking Transparency.

Section 17(a)(1) of the Securities Exchange Act of 1934 authorizes "the Commission" to prescribe the recordkeeping and reporting obligations of broker-dealers. 15 U.S.C. § 78q(a)(1). In delegating this task to the SEC, Congress chose a bipartisan, Senate-confirmed, multi-member independent agency, rather than a politically controlled executive agency (such as FinCEN). *Id.* § 78d(a).

The relevant enabling statute provides the SEC with little in the way of "intelligible principle[s]," *see Gundy*, 139 S. Ct. at 2123, allowing the agency to promulgate any rules it deems "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). Exercising that authority, the SEC has been prolific in prescribing a bevy of books, records, and reports that broker-dealers must make and preserve in connection with their business affairs. *See* 17 C.F.R. §§ 240.17a-1 through 240.17a-25.

There is one notable exception: recordkeeping related to the Bank Secrecy Act. Congress granted the Treasury Department "[g]eneral powers" to administer and enforce that statute. 31 U.S.C. §§ 5318–5321. Congress also granted the Department

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permission to subdelegate those responsibilities to other agencies. *Id.* § 5318(a)(1). In keeping with the traditional role of the SEC, the Department subdelegated to the SEC responsibility for examining broker-dealers for statutory compliance. 31 C.F.R. § 1010.810(b)(6).

In 1981, when the SEC imposed on broker-dealers the obligation to make and preserve records relating to compliance with the Bank Secrecy Act, it did so in an unconventional way. Rather than apply its own subject-matter expertise to determine which records and reports were "necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of [the Exchange Act]," 15 U.S.C. § 78q(a)(1), the SEC adopted Rule 17a-8, which purports to incorporate by reference all existing *and future* rules promulgated by FinCEN in this area. 17 C.F.R. § 240.17a-8 (affected broker-dealers "shall comply with the reporting, recordkeeping and record retention requirements [promulgated by FinCEN]").

That kind of circular redelegation—where the Treasury Department subdelegates part of its Bank Secrecy Act authority to the SEC, which, in turn, incorporates by reference the rules of a bureau within the Treasury Department—raises obvious accountability problems.

When it adopted Rule 17a-8, the SEC particularly extolled the ingenuity and convenience of its prospective, automatic incorporation of FinCEN's *future* rules. *See* Recordkeeping by Brokers and Dealers, 46 Fed. Reg. 61,454, 61,455 (Dec. 17, 1981) (the rule imposes no burdens beyond "identical Treasury regulations" and "does not specify the

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required reports and records so as to allow for any revisions the Treasury may adopt in the future"). At the time, however, no one could have predicted the vast expansion of SEC prosecutorial power that followed. In 1981, the SEC had no penal law enforcement powers. It could only impose remedial administrative sanctions against rulebreakers, or it could ask a federal court to enjoin violative conduct. *See, e.g.*, Paul S. Atkins and Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 Fordham J. Corp. & Fin. L. 367 (2008). It is therefore unsurprising that no one commented on the rule. With no punitive enforcement sanctions available to the SEC, the rule imposed no new substantive regulatory requirements and added no new legal risk beyond what FinCEN had already put in place. *See INS v. Chadha*, 462 U.S. 919, 986 n.19 (1983) (White, J., dissenting) (noting that legislative rules have the "force and effect of law" and may be promulgated only after public notice and comment) (quoting *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977)).

Today's world of securities enforcement is vastly different. In the decades since the SEC adopted Rule 17a-8, Congress has empowered the SEC with an array of harsh quasi-criminal law enforcement tools and sanctions, and the agency has transformed itself into an aggressive quasi-criminal prosecutorial office. Atkins and Bondi, 13 Fordham J. Corp. & Fin. L. at 383–94. For example, in the Insider Trading Sanctions Act of 1984, Congress empowered the SEC to seek civil monetary penalties for insider trading in amounts up to three times the profits realized. *See* 15 U.S.C. § 78u-

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1. Congress expanded the SEC's penalty authority in the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, which also empowered the agency to impose those penalties unilaterally, through in-house administrative proceedings, against SEC-regulated broker-dealers and their personnel. *See id.* §§ 78u(d)(3), 78u-2(a)(1). And with the Dodd-Frank Act of 2010, the SEC's prosecutorial power was again vastly expanded when Congress authorized the agency to penalize *any* person—whether SEC-regulated or not—through its own administrative adjudication process. *See id.* § 78u-2(a)(2).

Certainly no one could have predicted in 1981 that the SEC would one day wield its current prosecutorial arsenal against broker-dealers for failing to file FinCEN-compliant Suspicious Activity Reports, which did not even exist until 1996, and were not required to be filed by broker-dealers until 2001. *See* USA Patriot Act of 2001, Pub. Law No. 107-56, § 356, 115 Stat. 272, 324–25; Amendment to the Bank Secrecy Act Regulations–Requirement that Brokers or Dealers in Securities Report Suspicious Transactions, 67 Fed. Reg. 44,048 (July 1, 2002).

Moreover, FinCEN and the SEC have radically different enforcement authorities. When FinCEN enforces the Bank Secrecy Act, it must show that a defendant acted at least negligently and, even then, the maximum penalty for negligent conduct is only $1,180 per violation. *See* 31 U.S.C. § 1321(a); Financial Crimes Enforcement Network; Inflation Adjustment of Civil Monetary Penalties, 86 Fed. Reg. 7348 (Jan. 28, 2021). In sharp contrast, the SEC contends that, under its enforcement regime, it need

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not prove negligence to penalize violations of its recordkeeping and reporting requirements, and the maximum SEC penalties—even without proof of negligence—can be as high as $97,523 per violation. 15 U.S.C. § 78u(d)(3)(B)(i), adjusted for inflation at 17 C.F.R. § 201.1001.

The civil enforcement tools available to the SEC dwarf those available to FinCEN or the Treasury Department under the Bank Secrecy Act. That disparity can lead to wildly inconsistent positions enforcing the same legal requirement, as well as wildly inconsistent sanctions being imposed depending on which agency takes enforcement action. Here, for example, it does not appear that FinCEN took *any* enforcement action against petitioner, while the SEC sought draconian sanctions. As the petition explains, these parallel enforcement regimes are a recipe for arbitrary law enforcement outcomes. They are particularly disturbing given that Congress specifically assigned responsibility to the Treasury Department and FinCEN—not the SEC—to enforce the Bank Secrecy Act and the rules thereunder. 31 U.S.C. §§ 5320, 5321.

The SEC's approach also defies both the letter and spirit of the statute under which the SEC sought its penalties in this case. That statute empowers the SEC to seek penalties only for violations of "this chapter [i.e., Title 15 of the United States Code], the rules and regulations thereunder, or a cease-and-desist order entered by the Commission . . . ." 15 U.S.C. § 78u(d)(3)(A). If the SEC can unilaterally expand that limited mandate through the mere stroke of an incorporation-by-reference pen, it is hard to fathom

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any principled limit on the agency's ability to expand its power by incorporating other titles of the U.S. Code and the Code of Federal Regulations into its own rules.

II. The SEC's Approach Violates the Administrative Procedure Act.

Rule 17a-8 impermissibly allows the SEC to circumvent its notice-and-comment rulemaking obligations. As the petition explains, the SEC's current use of the rule purports to allow the agency to exert additional enforcement power under lower evidentiary requirements using another agency's rules without providing the public with notice and the opportunity to comment. That rule-of-law violation subverts transparency and accountability, and it would allow the SEC to impose substantive obligations on parties without subjecting its rule to proper judicial review.

Congress delegated the responsibility for writing broker-dealer recordkeeping and reporting rules to the SEC, in the same legislation through which it created the agency as an independent one largely insulated from political pressure and influence. Section 4A(a) of the Exchange Act explicitly specifies to whom the SEC may delegate its assigned regulatory functions: "[T]o a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board." 15 U.S.C. § 78d-1(a). Neither the Treasury Department, FinCEN, nor any other agency or person outside of the SEC's control is mentioned in this grant of limited permission to subdelegate. That is in stark contrast to the much broader subdelegation power that Congress has given,

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for example, the Treasury Department in the Bank Secrecy Act. 31 U.S.C. § 5318(a)(1) (authorizing Treasury Secretary to "delegate duties and powers under this subchapter to an appropriate supervising agency and the United States Postal Service").

Allowing administrative agencies to abdicate their congressionally delegated rulemaking responsibilities through dynamic incorporation of both existing *and future* rules of other agencies makes a mockery of the APA's notice-and-comment requirements. Those requirements are designed to ensure that an agency purposefully entrusted by Congress to legislate rules in a given area will undertake a careful and transparent public rulemaking process rather than evade that step by automatically accepting the judgment and processes of another agency, which may lack expertise in or appreciation for the legislative interests and purposes behind the subdelegating agency's congressional mandate. *See U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) ("[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making"); *see also* Matthew C. Stephenson, *When and Why Agencies Must Decide for Themselves: Judge Williams's Restrictive Approach to Administrative Subdelegation,* 38 Yale J. on Reg. 752, 765 (2021) ("[T]he core value of requiring the agencies in which Congress has vested authority to take responsibility for making the hard choices trumps whatever policy benefits might be associated with devolution of federal power to [other] actors."); Jessica Bergman Asbridge, *Whose Job Is It Anyway? The Department of Labor's Authority to Make Labor*

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Market Determinations Under the H-2B Program, 64 Drake L. Rev. 273, 295 (2016) ("Permitting an agency that Congress selected to administer a statute to redelegate its discretionary authority to another agency would ignore Congress's decisions as to important policy issues."); Bremer, 36 Harv. J.L. Pub. Pol'y at 186 ("By permitting automatic modifications to administrative regulations without the agency conducting a rulemaking, dynamic incorporation robs the public of the opportunity to examine and comment on changes to the incorporated material."). The SEC's automatic incorporation by reference of yet-to-be-promulgated FinCEN rules evades its own notice-and-comment rulemaking obligations.

It is inappropriate to assume, as the court of appeals did below, that FinCEN will undertake its own notice-and-comment process whenever it amends its own rules and brush off the need for the SEC to perform its separate rulemaking responsibilities. The legal consequences of a new rule include not only the specific requirements it imposes, but also the penalties for violations. Regulated parties may be comfortable with FinCEN rules, knowing that non-negligent violations will not give rise to penalties, and that even negligent violations will result in only modest penalties. Before those rules are automatically adopted by the SEC and effectively repurposed to include strict-liability obligations and harsher penalties, regulated parties are entitled to object and seek judicial review.

Nor is there any obvious limiting principle. If the decision below is correct, nothing prevents the SEC from incorporating by reference the current and future

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rules of countless other federal agencies in addition to those of FinCEN. For example, the SEC could adopt rules requiring broker-dealers to comply with all tax filing and reporting obligations imposed by the Internal Revenue Service—and then seek harsh penalties and other law-enforcement sanctions whenever it believed a broker-dealer had filed an incomplete or misleading tax return. Or, when promulgating recently promised new rules requiring public companies to disclose detailed information concerning environmental, social, and governance ("ESG") risks, the SEC could dynamically incorporate by reference current and future rules and definitions promulgated by a range of other agencies—or even those adopted by non-governmental advocacy organizations.

These scenarios are not far-fetched. Currently pending in Congress, and already passed by the House, is an ESG disclosure bill that is chock full of dynamic incorporations by reference of lists and definitions from external statutes, agency rules, and international standards. *See* Corporate Governance Improvement and Investor Protection Act, H.R. 1187, 117th Cong. (2021) The same bill also expressly invites the SEC, when adopting new ESG disclosure rules, to "incorporate any internationally recognized, independent, multi-stakeholder environmental, social, and governance disclosure standards." *Id.* § 103(b)(4). Apart from undermining essential notice-and-comment requirements, automatic incorporation of other agencies' current and future rules invariably increases the burden and complexity of complying with ever-expanding matrices of cross-referenced rules and regulations.

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There is no evidence that Congress intended to allow the SEC to enforce substantive obligations from FinCEN's rules on broker-dealers without subjecting those obligations to proper rulemaking review, nor did it intend for the SEC to subdelegate to another agency its assigned responsibility to regulate (by notice-and-comment rulemaking) broker-dealer recordkeeping and reporting requirements. These abdications of congressionally delegated responsibility, through dynamic incorporation by reference of FinCEN's rules, are inconsistent with Congress's directives and should not be permitted.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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Counsel for Amicus Curiae

August 20, 2021

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Exhibit E

[Articles]

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PETITIONS OF THE WEEK

Limits on SEC enforcement and the power of state AGs to avoid arbitration

By **Mitchell Jagodinski**
on Aug 6, 2021 at 5:09 pm

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This week we highlight cert petitions that ask the Supreme Court to consider, among other things, the limits of the Security and Exchange Commission's independent authority to enforce a statute that it was not explicitly empowered by Congress to enforce, and the power of a state attorney general to sue a lender for state law violations that otherwise would be covered by an arbitration agreement if brought by the individual borrowers.

Last year, the Supreme Court **limited an SEC practice** of seeking disgorgement awards without deducting legitimate expenses. In ***Alpine Securities Corp. v. Securities and Exchange Commission***, the justices are again asked to rein in the power of the SEC, in what the petitioners claim is a "power grab" to exercise

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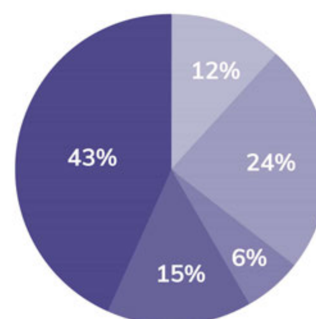

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When Congress enacted the Bank Secrecy Act, it entrusted administration and enforcement of the act to the Treasury Department. Under the act, the Treasury Department helps law enforcement investigate money laundering and other illicit activities by requiring financial institutions and broker-dealers to file suspicious-activity reports. The Treasury Department tasked its Financial Crimes Enforcement Network with administering and enforcing the BSA by bringing suspicious-activity-report enforcement actions.

Although Congress empowered only the Treasury Department with the authority to enforce the BSA, the SEC also began enforcing regulations of the act, albeit without the express consent of the Treasury Department or Congress. Instead, the SEC relies on a books-and-records provision of the Securities Exchange Act of 1934 (**15 U.S.C. § 78q(a)(1)**) to assert its independent authority. Further, the SEC applies legal standards that differ from those in the BSA and are less favorable to defendants.

The SEC independently brought a civil enforcement action against Alpine, a registered broker-dealer, for failure to file certain suspicious-activity reports. Alpine argued that the SEC lacked authority to enforce violations of the BSA, but the U.S. Court of Appeals for the 2nd Circuit held that the SEC may enforce the act under its books-and-records powers. Alpine maintains that Congress purposefully granted enforcement powers solely to the

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of the BSA.

Next, **NC Financial Solutions of Utah, LLC v. Virginia** concerns the power of a state attorney general to bring lawsuits on behalf of private parties who would otherwise be subject to an arbitration agreement. The case involves a lender, NCFS, who between 2012 and 2018 provided loans to over 47,000 people in Virginia with interest rates that ranged from 34% to 155%. The loan agreements contained broad arbitration provisions requiring individual arbitration. Further, the arbitration provisions encompassed all claims arising directly or indirectly from the loan agreements and included claims brought by another person on the borrower's behalf.

Virginia's state attorney general sued the lender anyway, alleging unlawful lending practices in violation of the Virginia Consumer Protection Act and seeking restitution for the individual consumers who had agreed to the arbitration provisions. The lender argued that the attorney general is barred by the Federal Arbitration Act and state-law contract principles from suing on behalf of the individual borrowers. But the Virginia Supreme Court rejected this argument and held that the attorney general could not be bound by the arbitration agreements because he was not a signatory to the loan agreements. The lender argues that neither the attorney general nor the borrowers should be allowed to "circumvent" the arbitration agreements and asks for the court's review to specify the limits of the FAA and determine whether a state attorney general can sue for individualized

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These and other **petitions of the week** are below:

Janis v. United States
21-68
Issues: (1) Whether Standard Condition 12 of the U.S. Sentencing Guidelines, codified in **U.S.S.G. § 5D1.3(c)(12)**, unconstitutionally delegates authority to the probation officer; and (2) whether Standard Condition 12 is unconstitutionally vague.

Alpine Securities Corp. v. Securities and Exchange Commission
21-82
Issue: Whether the Security and Exchange Commission's assertion of independent authority to interpret and enforce the Bank Secrecy Act contravenes Congress's decision to entrust enforcement of the Bank Secrecy Act's comprehensive anti-money-laundering regime to the Treasury Department, a politically accountable executive agency.

California State Lands Commission v. Davis
21-109
Issues: (1) Whether the States' consent to suit in the bankruptcy courts, found to exist in ***Central Virginia Community College v. Katz***, reaches a suit brought against a State, after the effective date of a debtor's plan of liquidation, seeking money damages from a State treasury on a claim that does not arise under federal bankruptcy law, insolvency law, or a claim that was historically brought "as a core aspect of the administration of bankruptcy estates"; and (2) whether the

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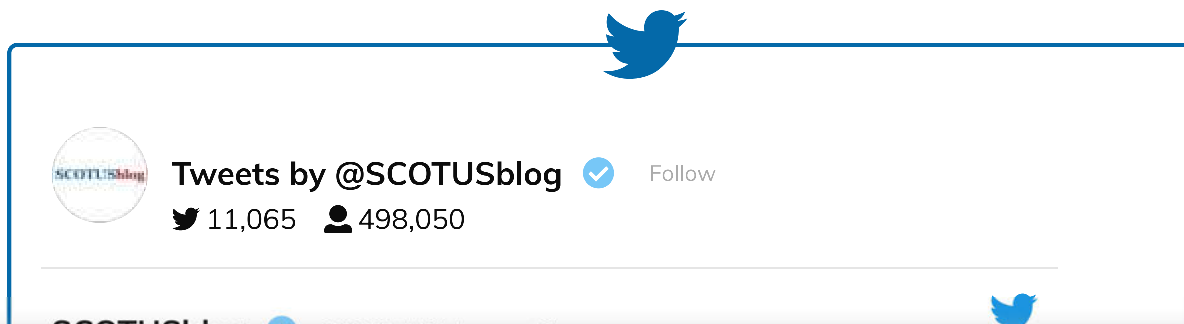
NC Financial Solutions of Utah, LLC v. Virginia
21-111
Issue: Whether a state attorney general who is not a signatory to an arbitration agreement may bring claims that are covered by the agreement and seek individualized relief on those claims on behalf of persons who are signatories to the agreement and thus would be required to arbitrate if they brought those claims themselves.

Posted in **Featured**, **Cases in the Pipeline**

Cases: **Janis v. United States**, **Alpine Securities Corp. v. Securities and Exchange Commission**, **California State Lands Commission v. Davis**, **NC Financial Solutions of Utah, LLC v. Virginia**

Recommended Citation: Mitchell Jagodinski, *Limits on SEC enforcement and the power of state AGs to avoid arbitration*, SCOTUSblog (Aug. 6, 2021, 5:09 PM), https://www.scotusblog.com/2021/08/limits-on-sec-enforcement-and-the-power-of-state-ags-to-avoid-arbitration/



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It is now 9 AM in Texas and there is still no word from SCOTUS on the abortion ban. The ban has been in effect since midnight despite the fact it defies Roe v. Wade and Planned Parenthood v. Casey. Here's **@AHoweBlogger**'s coverage of the court's inaction:

Texas abortion ban goes into effect after justices fail to act - SCOTUSblog

The Supreme Court on Tuesday night took a step that anti-abortion activists have hoped for, and

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Ex-FinCEN Heads Ask Justices To Restrain SEC

By **Dean Seal**

Law360 (August 23, 2021, 9:13 PM EDT) -- Former officials of the Financial Crimes Enforcement Network have thrown their support behind a bid for the U.S. Supreme Court to find that the U.S. Securities and Exchange Commission does not have the power to enforce a key federal anti-money-laundering law.

James H. Freis Jr. and Charles M. Steele filed a brief Friday asking the high court to take up a penny-stock brokerage firm's petition claiming that the SEC has **brazenly usurped** FinCEN's authority to enforce violations of the Bank Secrecy Act.

According to Freis, the director of the U.S. Treasury Department's financial crimes unit from 2007 to 2012, and Steele, a deputy FinCEN director from 2009 to 2011, allowing the SEC to **continue going after brokers** for shoddy reporting of suspicious activity will lead to confusion among financial institutions, diminish the value of Bank Secrecy Act data and "create multiple, conflicting" regulatory regimes.

"Supervisory agencies should not be able to unilaterally take BSA enforcement authority for themselves," Freis and Steele said.

Libertarian think tank the CATO Institute filed its own amicus brief on Friday supporting the high court petition from Alpine Securities Corp., a Utah brokerage firm that has challenged a **2017 SEC enforcement action** accusing it of Securities Exchange Act violations tied to serious lapses in its reporting of suspicious transactions.

The SEC claimed that Alpine's shoddy filings allowed "illicit actors" to escape regulatory scrutiny and maintain their market access, and that the firm violated the agency's Exchange Act recordkeeping and reporting rules, which require compliance with Bank Secrecy Act standards set by FinCEN.

Alpine was eventually found liable for more than 2,700 deficient reports of suspicious transactions and **fined $12 million** in 2019. The firm now argues that the SEC was never given authority by Congress to enforce violations of the Bank Secrecy Act. The SEC has stricter standards and higher penalties for such violations than FinCEN does.

According to Alpine, the SEC's "far more stringent" view of the reporting lapses has also led to "dueling enforcement schemes" that burden the financial industry with uncertainty, weaken accountability and are counterproductive for the purpose of rooting out money laundering.

A three-judge Second Circuit panel ruled last year that the SEC's enforcement action was properly **within the agency's authority** and not a thinly veiled attempt to enforce the Bank Secrecy Act, leading Alpine to take its case to the high court.

On Friday, Freis and Steele said the Second Circuit had erred in its review of the case because FinCEN has delegated the authority to examine financial firms for compliance with the Bank Secrecy Act, but not the authority to enforce violations.

"Indeed, although FinCEN has been directed to delegate its enforcement authority to bank regulators, the BSA does not similarly direct FinCEN to delegate its enforcement power to the SEC or other non-federal bank regulators," the two former FinCEN leaders said. "The Second Circuit's opinion missed these distinctions."

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Besides lacking authority to enforce the law, the SEC also imposed an enforcement framework upon Alpine that is materially different from the framework FinCEN has "carefully constructed," with harsher monetary penalties and an "inflexible and harmful position as to what constitutes an actionable" violation of the rules for suspicious-activity reports, they said.

Unlike FinCEN, the SEC can also rely on internal administrative proceedings to pursue violators, which can result in severe sanctions, like broker license revocations and prohibitions on associating with the securities industry, the brief argued.

Faced with those prospects, broker-dealers and financial institutions are likely to react to the Second Circuit's ruling with a "better safe than sorry" approach to suspicious-activity reporting, which will result in more reports being filed defensively, even when the underlying conduct doesn't reach FinCEN's standard for reporting, "out of fear that if they do not, the [SEC] later will unreasonably second-guess their decisions," Freis and Steele said.

"Extracting useful intelligence from the more than two million [suspicious-activity reports] filed each year can at times be like looking for needles in a haystack — but with too much hay and too few needles," their brief said. "A SEC-driven infusion of low-value [reports] into FinCEN's database would only exacerbate this phenomenon and harm law enforcement and national security efforts."

Allowing the SEC or any other regulator to enforce the Bank Secrecy Act also undermines FinCEN's role as a shaper of global standards and practices for enforcement against money laundering, the two former officials said, adding that no other case presents a better opportunity for clarifying the limits of such enforcement.

Most enforcement actions related to suspicious-activity reports are resolved without heading to federal court, since most firms would prefer to "maintain harmonious relationships with regulators instead of turning to the courts," according to the brief. And most SEC actions allege Bank Secrecy Act violations as just one of multiple reporting deficiencies — as opposed to the Alpine case, where falling short on reporting was the only accusation.

"The question presented is therefore outcome-determinative," Freis and Steele said. "The court should take this unique opportunity to make clear to the courts, regulators and industry alike that absent express authorization from Congress, FinCEN has exclusive authority to enforce the BSA and its regulations."

In its brief, the Cato Institute similarly argued that the SEC is "flexing its ever-expanding prosecutorial muscle to enforce" the rules of another agency, which it has incorporated into its own rules without "further notice or opportunity for public comment."

According to the think tank, although the SEC has a duty to regulate broker-dealer recordkeeping and reporting requirements, it is violating the Administrative Procedure Act by effectively subdelegating that responsibility to FinCEN.

"These abdications of congressionally delegated responsibility, through dynamic incorporation by reference of FinCEN's rules, are inconsistent with Congress's directives and should not be permitted," according to the Cato brief.

The Cato Institute also argued that the enforcement tools available to the SEC "dwarf those available to FinCEN or the Treasury Department under the Bank Secrecy Act," leading to "wildly inconsistent positions enforcing the same legal requirement, as well as wildly inconsistent sanctions being imposed depending on which agency takes enforcement action."

"As the petition explains, these parallel enforcement regimes are a recipe for arbitrary law enforcement outcomes," the think tank told the high court.

The government has until Sept. 20 to file a response, according to court records. A spokesperson for the SEC told Law360 on Monday that the agency would "not comment beyond the public filing."

Robert Loeb, an attorney for Alpine, told Law360 on Monday that it was "extraordinary to have former heads of FinCEN file a Supreme Court brief explaining how the SEC is improperly asserting

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BSA enforcement powers reserved to FinCEN,"

"The former FinCEN leaders' brief not only validates the unlawful SEC power grab discussed in our cert petition, but also details why the standards and penalties being applied by the SEC are improper as well," Loeb said in an email.

"We are very pleased to have their validation of the seriousness of the issue and the urgent need for Supreme Court intervention," he continued. "And, likewise, we are gratified to have the support of the Cato, which powerfully detailed in its amicus brief why the SEC's assertion of BSA enforcement powers violates fundamental principles of administrative law."

Cato attorney Jennifer Schulp said in an email that the SEC "cannot put its rule-making on autopilot by prospectively incorporating rules that another agency has yet to write."

"This is particularly problematic in the context of the Bank Secrecy Act, at issue here, where the SEC's own enforcement powers for books and records violations exceed FinCEN's enforcement powers, but the Second Circuit's blessing of the SEC's practice could encourage the Commission to skirt more notice and comment rulemaking to expand its own authority," Schulp said Monday. "Because these types of cases are rarely litigated, the Supreme Court should not pass on this opportunity to ensure that the SEC's authority is exercised consistent with Congressional intent."

Counsel for Freis did not respond to a request for comment.

Alpine is represented by Robert M. Loeb, Daniel Nathan and Lauren A. Weber of Orrick Herrington & Sutcliffe LLP; Maranda Fritz of Maranda E. Fritz PC; and Brent R. Baker, Jonathan D. Bletzacker and Aaron D. Lebenta of Parsons Behle & Latimer.

The SEC is represented by acting Solicitor General Brian Fletcher.

Freis and Steele are represented by Sean Marotta of Hogan Lovells US LLP.

The Cato Institute is represented by its own counsel — Ilya Shapiro, Jennifer J. Schulp and William M. Yeatman — and Russell G. Ryan, Ashley C. Parrish and Christine M. Carletta of King & Spalding LLP.

The case is Alpine Securities Corp. v. U.S. Securities and Exchange Commission, case number 21-82, before the Supreme Court of the United States.

--Additional reporting by Jon Hill. Editing by Karin Roberts.

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Justices Urged To Halt SEC's Bank Secrecy Act 'Power Grab'

By **Jon Hill**

Law360 (July 21, 2021, 10:38 PM EDT) -- The U.S. Supreme Court is being asked again to rein in the power of the U.S. Securities and Exchange Commission, this time by a penny-stock broker that argues the securities regulator has "usurped" authority to enforce the Bank Secrecy Act, a key federal anti-money laundering law.

Alpine Securities Corp. on Monday petitioned the Supreme Court to take up its appeal challenging a **2017 enforcement action** from the SEC that resulted in a **$12 million fine** for the Utah-based firm, which was accused of Exchange Act violations tied to serious alleged lapses in its suspicious transaction reporting.

The Bank Secrecy Act and its related rules require broker-dealers, banks and other financial institutions to file suspicious activity reports, or SARs, with the U.S. Treasury Department's Financial Crimes Enforcement Network when they spot transactions that may involve illicit funds.

But Alpine argued in its petition to the high court that the SEC's action is a "brazen" assertion of authority that the agency never had. According to the firm, the SEC cannot independently enforce violations of the BSA because that job belongs to the Treasury, but it is doing so anyway under the veil of the Exchange Act.

"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," Alpine said in its petition.

Alpine urged the justices to grant its appeal so they can restore the "carefully calibrated BSA-enforcement regime" and put the SEC in its place.

"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," the firm said.

The Supreme Court has had an appetite lately for curbing regulatory agency power. Earlier this year, for example, the justices **curtailed** the Federal Trade Commission's ability to obtain monetary relief from lawbreakers in federal court.

The high court has also notably trimmed the SEC's sails on several occasions in recent years, forcing it to rework how it staffs its in-house courts and putting a five-year limit on how far back the agency can get disgorgement. In last year's Liu v. SEC, the justices tightened the screws further by **restricting the agency's pursuit of disgorgement** to no more than a lawbreaker's "net profits."

Alpine is hoping the Supreme Court will take its side after a loss at the Second Circuit, where a three-judge panel ruled last year that the SEC's case against the firm was **properly within the agency's authority** and not a thinly veiled attempt to enforce the BSA.

The case began when the SEC sued Alpine in New York federal court in 2017, claiming the firm's shoddy SAR filing allowed "illicit actors" to escape regulatory scrutiny and maintain their market access. Alpine was eventually found liable for more than 2,700 deficient SARs and fined $12 million the next year.

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The SEC claimed that Alpine had violated the agency's Exchange Act recordkeeping and reporting rules, which require compliance with BSA standards set by FinCEN.

But Alpine argued on Monday that SEC is improperly using these rules, written 40 years ago, to bootstrap substantive enforcement authority over FinCEN's SAR filing requirements, which didn't extend to broker-dealers until the 2000s.

And when it does enforce them, the SEC does so under the Exchange Act's harsher framework of penalties and strict liability, while taking a "far more stringent view of the SAR requirements" than FinCEN has articulated, Alpine said.

The result is "dueling enforcement schemes" that burden the financial industry with uncertainty, weaken accountability and are counterproductive for anti-money laundering purposes, according to the firm.

"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," the firm said. "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."

Alpine also argued that the Supreme Court should not wait for a circuit split to develop on this issue before granting review, saying the SEC has been "emboldened" in its anti-money laundering enforcement by the firm's loss at the Second Circuit.

"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," the firm told the justices.

Representatives for the SEC did not immediately return a request for comment on Wednesday.

Alpine is represented by Robert M. Loeb, Daniel Nathan and Lauren A. Weber of Orrick Herrington & Sutcliffe LLP, Maranda Fritz of Maranda E. Fritz PC, and Brent R. Baker, Jonathan D. Bletzacker and Aaron D. Lebenta of Parsons Behle & Latimer.

The SEC was represented at the Second Circuit in-house by Rachel M. McKenzie, Michael A. Conley and Daniel Staroselsky.

The case is Alpine Securities Corp. v. U.S. Securities and Exchange Commission, case number 21-82, before the Supreme Court of the United States.

--Editing by Adam LoBelia.

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Exhibit F

[Stipulated Installment Payment Plan]

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Case 1:17-cv-04179-DLC Document 259 Filed 06/16/21 Page 1 of 7

DIVISION OF
ENFORCEMENT

UNITED STATES
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June 15, 2021

VIA CM/ECF
Honorable Denise Cote
United States District Court Judge
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street, Room 1040
New York, N.Y. 10007-1312

RE: SEC v. Alpine Securities Corporation, 17-cv-4179-DLC

Dear Judge Cote:

The United States Securities and Exchange Commission ("Commission") and Defendant Alpine Securities Corporation have conferred and agreed to a proposed installment agreement, and submit the Proposed Stipulated Installment Payment Order ("Installment Payment Order") for approval by the Court.

The Installment Payment Order provides that Alpine will fully pay the Court's Final Judgment within 12 months in equal $1 million month payments (the last payment will include outstanding interest). The parties believe this is an appropriate and orderly method to secure full payment of the Court's Judgment against Alpine.

Please contact me if you need any additional information.

Respectfully submitted,

s/Michael Roessner

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. ALPINE SECURITIES CORPORATION, Defendant.	17-cv-4179-DLC **ECF CASE**

STIPULATION FOR ENTRY OF AN INSTALLMENT PAYMENT ORDER

Plaintiff United States Securities and Exchange Commission ("SEC" or "Commission"), by its undersigned counsel, Michael Roessner, and defendant, Alpine Securities Corporation ("Alpine"), by its undersigned counsel, Maranda Fritz, (collectively "the Parties"), agree to enter a Stipulation for Entry of an Installment Payment Order.

1. On October 9, 2019, the Court entered judgment against Alpine requiring it to pay a civil money penalty in the amount of $12,000,000 plus post judgment interest pursuant to 28 U.S.C. § 1961 ("Judgment"). Dkt. No. 241. Alpine has not made a payment towards the Judgment.

2. Alpine consents to an order compelling it to make regular installment payments for application to the Judgment entered against it in this matter (the "Stipulated Payment Plan").

3. The Parties agree that good cause exists and that this Court should enter an order, reciting the following terms:

A. Alpine will pay $1,000,000 to the Commission no later than June 11, 2021;

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B. Alpine will make ten (10) additional payments to the Commission by the fifth (5th) business day of each subsequent month of $1,000,000 beginning in July, 2021; and

C. Alpine will make a twelfth (12th) payment to the Commission by June 5, 2022, but before making the final payment, Alpine's counsel shall contact the undersigned counsel for the Commission by May 15, 2022, for the amount due plus interest pursuant to 28 U.S.C. § 1961 and remit that amount to the Commission.

D. The Commission will file a Satisfaction of the monetary portion of the Judgment with the Court upon confirmation of receipt of the full amount of the final payment.

E. Alpine will remit the payments electronically to the Commission, and the SEC will provide detailed ACH transfer/Fedwire information upon request. Payments may also be made from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Payments may also be made by check or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, Oklahoma 73169

The payments should identify this case name and D-03504. A copy of the payments should be sent to SEC counsel Michael Roessner at roessnerm@sec.gov. Payments shall be credited on the date they are received by the Commission and shall be applied first to post judgment interest which has accrued pursuant to 28 U.S.C. § 1961 and then to principal.

F. The Commission agrees that by entering this Stipulated Payment Plan, and any payment thereunder, Alpine does not waive or otherwise prejudice its rights to seek review of the Judgment in the United States Supreme Court.

G. The Commission further agrees that if the United States Supreme Court grants Alpine's petition for Writ of Certiorari, Alpine's obligation to pay pursuant to this Stipulated Payment Plan shall be stayed during the pendency of that appeal. Should the United States Supreme Court rule in favor of the Commission, the payments described herein would begin to be due on the fifth of the month after the Supreme Court upholds the Judgment.

H. The Commission agrees that if the United States Supreme Court overturns the Judgment, then the Commission will within 30-days return to Alpine all funds paid pursuant to this Stipulated Payment Plan upon issuance of the United States Supreme Court's decision.

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I. As part of the consideration for this Stipulated Payment Plan, Alpine agrees to maintain sufficient capital to cover the remaining amounts owed on the Judgment and applicable post judgment interest until the total amount due under the Judgment is paid. In addition, Alpine will continue to provide the Commission: 1. monthly FOCUS reports; 2. Daily Financial Reports it provides to FINRA at the same time it provides those documents to FINRA.

J. The parties further agree that the conditions imposed by the District Court's November 26, 2019 order (Dkt. 252) will no longer remain in place, since Alpine has agreed that the amounts retained to cover the amounts owed on the Judgment and applicable post judgment interest in Paragraph (K) will be available without limitation to the satisfaction of any amounts owed on the Judgment.

K. If Alpine does not submit a timely payment of if Alpine fails to maintain sufficient capital to cover the remaining amounts owed on the Judgment and applicable post interest as required in Paragraph J, then this Stipulated Payment Plan will be void and the SEC will file a notice of noncompliance with the Court and attaching a proposed writ of garnishment for the Court to enter with respect to funds held by National Securities Clearing Corporation ("NSCC") on behalf of Alpine that are not necessary to allow Alpine to meet its obligations to NSCC as determined by NSCC's rules.

L. Alpine understands and agrees that the Court will retain jurisdiction over this matter for purposes of implementing and enforcing Stipulated Payment Plan set forth herein.

So ordered.

Denise Cote

June 16, 2021

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Dated June 14, 2021

By: s/MICHAEL J. ROESSNER

MICHAEL J. ROESSNER
Assistant Chief Litigation Counsel
Division of Enforcement
United States Securities and Exchange Commission
100 F Street, NE
Mail Stop 5631
Washington, DC 20549-0022
RoessnerM@SEC.gov
Telephone: (202) 551-4347
Facsimile: (703) 813-9366
Counsel for Plaintiff SEC

Dated June 14, 2021

By: ______________________________

MARANDA E. FRITZ
MARANDA E. FRITZ, P.C.
335 Madison Avenue 12th Floor
New York, New York 10017
Phone: 646 584-8231
Email: maranda@fritzpc.com

SO ORDERED:

Dated:

____
DENISE COTE
UNITED STATES DISTRICT JUDGE

OS Received 09/03/2021

Dated June 11, 2021

By: ______________________

MICHAEL J. ROESSNER
Assistant Chief Litigation Counsel
Division of Enforcement
United States Securities and Exchange Commission
100 F Street, NE
Mail Stop 5631
Washington, DC 20549-0022
RoessnerM@SEC.gov
Telephone: (202) 551-4347
Facsimile: (703) 813-9366
Counsel for Plaintiff SEC

Dated June 11, 2021

By: ______________________

MARANDA E. FRITZ
MARANDA E. FRITZ, P.C.
335 Madison Avenue 12th Floor
New York, New York 10017
Phone: 646 584-8231
Email: maranda@fritzpc.com

SO ORDERED:

Dated:

____
DENISE COTE
UNITED STATES DISTRICT JUDGE

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Exhibit G

[OIP]

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 92775 / August 26, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-20485

In the Matter of Alpine Securities Corporation, Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Alpine Securities Corporation ("Respondent" or "Alpine").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Alpine is a Utah corporation headquartered in Salt Lake City, Utah. Alpine is a self-clearing broker-dealer and has been registered with the Commission since 1984.

B. ENTRY OF THE INJUNCTION

2. On October 9, 2019, a final judgment was entered against Alpine permanently enjoining it from future violations of Section 17 of the Exchange Act and Rule 17a-8 thereunder in the civil action entitled Securities and Exchange Commission v. Alpine Securities Corporation, Civil Action Number 1:17-cv-04179, in the United States District Court for the

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Southern District of New York. Entry of this injunction followed the Court's grant of summary judgment as to 2,720 violations of Section 17(a) of the Exchange Act and Rule 17a-8 thereunder by Alpine. On December 4, 2020, the Second Circuit Court of Appeals affirmed the final judgment. *SEC v. Alpine Securities Corp.*, 982 F.3d 68 (2d Cir. 2020); *petition for cert. filed, Alpine Securities Corp. v. SEC*, No. 21-82.

3. The Commission's complaint alleged that, from at least May 2011 to December 2015, Alpine omitted from Suspicious Activity Reports ("SARs") material red-flags and other information of which it was aware and was required to report under its own Bank Secrecy Act compliance program, failed to file required SARs on transactions, failed to file SARs within the required time period after the suspicious activity was detected, and failed to maintain and/or retain underlying files supporting its SAR filings.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act; and

IV.

IT IS ORDERED that a public hearing before the Commission for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed by further order of the Commission, pursuant to Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.220(b).

IT IS FURTHER ORDERED that the Division of Enforcement and Respondent shall conduct a prehearing conference pursuant to Rule 221 of the Commission's Rules of Practice, 17 C.F.R. § 201.221, within fourteen (14) days of service of the Answer. The parties may meet in person or participate by telephone or other remote means; following the conference, they shall file a statement with the Office of the Secretary advising the Commission of any agreements reached at said conference. If a prehearing conference was not held, a statement shall be filed with the Office of the Secretary advising the Commission of that fact and of the efforts made to meet and confer.

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If Respondent fails to file the directed Answer, or fails to appear at a hearing or conference after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310.

This Order shall be served forthwith upon Respondent by any means permitted by the Commission's Rules of Practice.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that notwithstanding any contrary reference in the Rules of Practice to service of paper copies, service to the Division of Enforcement of all opinions, orders, and decisions described in Rule 141, 17 C.F.R. § 201.141, and all papers described in Rule 150(a), 17 C.F.R. § 201.150(a), in these proceedings shall be by email to the attorneys who enter an appearance on behalf of the Division, and not by paper service.

Attention is called to Rule 151(a), (b) and (c) of the Commission's Rules of Practice, 17 C.F.R. § 201.151(a), (b) and (c), providing that when, as here, a proceeding is set before the Commission, all papers (including those listed in the following paragraph) shall be filed electronically in administrative proceedings using the Commission's Electronic Filings in Administrative Proceedings (eFAP) system access through the Commission's website, www.sec.gov, at http://www.sec.gov/eFAP. Respondent also must serve and accept service of documents electronically. All motions, objections, or applications will be decided by the Commission.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that notwithstanding any contrary reference in the Rules of Practice to filing with or disposition by a hearing officer, all filings, including those under Rules 210, 221, 222, 230, 231, 232, 233, and 250 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.210, 221, 222, 230, 231, 232, 233, and 250, shall be directed to and, as appropriate, decided by the Commission. This proceeding shall be deemed to be one under the 75-day timeframe specified in Rule of Practice 360(a)(2)(i), 17 C.F.R. § 201.360(a)(2)(i), for the purposes of applying Rules of Practice 233 and 250, 17 C.F.R. §§ 201.233 and 250.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that the Commission shall issue a decision on the basis of the record in this proceeding, which shall consist of the items listed at Rule 350(a) of the Commission's Rules of Practice, 17 C.F.R. § 201.350(a), and any other document or item filed with the Office of the Secretary and accepted into the record by the Commission. The provisions of Rule 351 of the Commission's Rules of Practice, 17 C.F.R. § 201.351, relating to preparation and certification of a record index by the Office of the Secretary or the hearing officer are not applicable to this proceeding.

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The Commission will issue a final order resolving the proceeding after one of the following: (A) The completion of post-hearing briefing in a proceeding where the public hearing has been completed; (B) The completion of briefing on a motion for a ruling on the pleadings or a motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice, 17 C.F.R. § 201.250, where the Commission has determined that no public hearing is necessary; or (C) The determination that a party is deemed to be in default under Rule 155 of the Commission's Rules of Practice, 17 C.F.R. § 201.155, and no public hearing is necessary.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Vanessa A. Countryman
Secretary

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Exhibit H

[Email with SEC Enforcement Staff]

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Jonathan Bletzacker

From:	Aaron Lebenta
Sent:	Thursday, September 2, 2021 3:31 PM
To:	Jonathan Bletzacker
Subject:	FW: Alpine Securities Corporation, Administrative Proceeding, 34-92775

A Professional
Law Corporation

Aaron Lebenta • Attorney at Law
Parsons Behle & Latimer
201 South Main Street, Suite 1800 • Salt Lake City, Utah 84111
Main +1 801.532.1234 • Direct +1 801.536.6987

parsonsbehle.com • ALebenta@parsonsbehle.com • vCard

From: Maranda Fritz <maranda@fritzpc.com>
Sent: Monday, August 30, 2021 3:45 PM
To: Aaron Lebenta <ALebenta@parsonsbehle.com>
Subject: Fwd: Alpine Securities Corporation, Administrative Proceeding, 34-92775

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From: Maranda Fritz <maranda@fritzpc.com>
Sent: Monday, August 30, 2021 3:45:02 PM
To: Carlyle, Zachary T. <CarlyleZ@SEC.GOV>
Cc: Miller, Terry <millerte@SEC.GOV>
Subject: Re: Alpine Securities Corporation, Administrative Proceeding, 34-92775

Ok, thanks for letting me know.

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From: Carlyle, Zachary T. <CarlyleZ@SEC.GOV>
Sent: Monday, August 30, 2021 3:42:28 PM
To: Maranda Fritz <maranda@fritzpc.com>
Cc: Miller, Terry <millerte@SEC.GOV>
Subject: RE: Alpine Securities Corporation, Administrative Proceeding, 34-92775

Thank you, Maranda. The Division of Enforcement would not agree to a stay of the proceedings pending a decision on cert.

Zachary T. Carlyle
Senior Trial Counsel, Division of Enforcement

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U.S. Securities & Exchange Commission
Denver Regional Office
Byron G. Rogers Federal Building
1961 Stout Street, Suite 1700
Denver, Colorado 80294-1961
Phone: 303-844-1084
Fax: 303-295-0538

From: Maranda Fritz <maranda@fritzpc.com>
Sent: Monday, August 30, 2021 12:18 PM
To: Carlyle, Zachary T. <CarlyleZ@SEC.GOV>
Cc: Miller, Terry <millerte@SEC.GOV>
Subject: RE: Alpine Securities Corporation, Administrative Proceeding, 34-92775

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Zach,

I'll accept service and will be representing Alpine. Will the SEC agree to a stay of the OIP pending a decision on cert?

Maranda

335 Madison Avenue
New York, New York 10017
Phone: 646 584-8231
Email: maranda@fritzpc.com

From: Carlyle, Zachary T. <CarlyleZ@SEC.GOV>
Sent: Monday, August 30, 2021 11:15 AM
To: Maranda Fritz <maranda@fritzpc.com>
Cc: Miller, Terry <millerte@SEC.GOV>
Subject: RE: Alpine Securities Corporation, Administrative Proceeding, 34-92775

Hi Maranda- I am following up to see if you can confirm that you are authorized to service on behalf of Alpine and that you will be representing Alpine in this matter going forward.

Thank you- Zach

Zachary T. Carlyle
Senior Trial Counsel, Division of Enforcement
U.S. Securities & Exchange Commission
Denver Regional Office
Byron G. Rogers Federal Building
1961 Stout Street, Suite 1700

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Denver, Colorado 80294-1961
Phone: 303-844-1084
Fax: 303-295-0538

From: Carlyle, Zachary T.
Sent: Friday, August 27, 2021 2:29 PM
To: 'Maranda Fritz' <maranda@fritzpc.com>
Cc: Miller, Terry <millerte@SEC.GOV>
Subject: Alpine Securities Corporation, Administrative Proceeding, 34-92775

Maranda- the administrative proceeding against Alpine has been instituted. Please confirm that you are authorized to accept service of the Order Instituting Proceedings. A courtesy copy of the order is attached.

Thanks and have a good weekend,

Zachary T. Carlyle
Senior Trial Counsel, Division of Enforcement
U.S. Securities & Exchange Commission
Denver Regional Office
Byron G. Rogers Federal Building
1961 Stout Street, Suite 1700
Denver, Colorado 80294-1961
Phone: 303-844-1084
Fax: 303-295-0538

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