No. 12-351

IN THE

Supreme Court of the United States

GEORGE W. CUMMINGS, III, PROGRESSIVE STATE BANK AND PROGRESSIVE BANCORP, INC.,
Petitioners,

v.

JOE DOUGHTY,
Respondent.

On Petition for a Writ of Certiorari to the Fifth Judicial District Court for the Parish of Franklin, Louisiana

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMERICAN BANKERS ASSOCIATION, INDEPENDENT COMMUNITY BANKERS ASSOCIATION, THE CLEARING HOUSE ASSOCIATION, LOUISIANA BANKERS ASSOCIATION MISSISSIPPI BANKERS ASSOCIATION, AND NEW YORK BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE

Pursuant to Supreme Court Rule 37.2(b), the American Bankers Association, the Independent Community Bankers of America, the Louisiana Bankers Association, the Mississippi Bankers Association, the New York Bankers Association, and The Clearing House Association (collectively, the proposed amici) respectfully request leave to submit the accompanying brief as amici curiae in support of petitioners, George W. Cummings, III, Progressive State Bank, and Progressive Bancorp, Inc. Consent to file the accompanying brief was granted by petitioners but refused by respondent.

The petition for a writ of certiorari asks the Court to decide whether the safe harbor established by the Annunzio-Wylie Anti-Money Laundering Act, 31 U.S.C. §5318(g)(3)(A), provides absolute immunity or more qualified immunity from claims that arise from the filing of a Suspicious Activity Report ("SAR"). The proposed amici have a direct and substantial interest in the issue presented by this case. As membership organizations, the proposed amici represent banks, savings banks, and savings and loan associations of every size located throughout the United States. As explained in detail by the accompanying brief, federal and state courts have issued divergent opinions on the issue of immunity from claims that arise from the filing of a SAR. The banking industry files large numbers of SARs each year and this issue needs to be resolved. Consistent with Supreme Court Rule 37.1's admonition that amici should assist the Court by bringing additional relevant information to the

Court's attention, the accompanying brief explains why this issue is important to the entire banking industry and what the impact will be if left unresolved. The Court's resolution of the question presented would provide necessary guidance regarding the immunity provisions of 31 U.S.C. § 5318(g)(3)(A) of the Annunzio-Wylie Anti-Money Laundering Act.

For the foregoing reasons, the Court should grant the proposed amici leave to file the accompanying brief.

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INTEREST OF THE AMICUS CURIAE

The American Bankers Association ("ABA")[1] is the largest national trade association of the banking industry in the country. It represents banks and holding companies of all sizes in each of the fifty states and the District of Columbia, including community, regional, and money center banks. The ABA also represents savings associations, trust companies, and savings banks. ABA members hold approximately 95% of the United States banking industry's domestic assets. The ABA frequently appears in litigation, either as a party or amicus curiae, in order to protect and promote the interests of the banking industry and its members.

The Louisiana Bankers Association is the sole trade association for the banking industry in the State of Louisiana. Approximately 98% of Louisiana's commercial banks, savings banks, and savings and loan associations operating in Louisiana are members of the LBA.

The Independent Community Bankers Association is the nation's voice for more than 7,000 community banks of all size and charter types and exclusively represents the interests of the community banking industry. With nearly 5,000 members, representing more than 23,000 locations

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a

nationwide, ICBA members hold more than $1.2 trillion in assets and $1 trillion in deposits.

Established in 1853, The Clearing House Association is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association is a nonpartisan advocacy organization representing through regulatory comment letters, amicus briefs, and white papers the interests of its owner banks on a variety of systemically important banking issues.

The Mississippi Bankers Association is a statewide trade association representing commercial banks, savings banks and savings and loan associations operating in the State of Mississippi. The MBA membership includes approximately ninety institutions holding 95% of the banking assets in the state.

The New York Bankers Association is comprised of the commercial banks and thrift institutions that engage in the banking business in New York State. Its members have aggregate assets in excess of $11 trillion and more than 200,000 New York employees.

SUMMARY OF ARGUMENT

Over one-million Suspicious Activity Reports ("SARs") were filed in 2011. United States Department of Treasury, Financial Crimes Enforcement Network, *SAR Activity Review by the Numbers, 2012, available at*

http://www.fincen.gov/news_room/rp/files/btn17/sar_by_numb_17.pdf (last visited Oct. 12, 2012). A financial institution is obligated to file a SAR with the Financial Crimes Enforcement Network ("FinCEN") if it knows, suspects, or has reason to know or suspect that a transaction involves actual or attempted money laundering or other crime, or "the transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage." 31 C.F.R. § 1020.320(a). For over twenty years, bank regulators and law enforcement officials have relied on financial institutions' discreet filing of confidential reports detailing suspicious activity to help deter and detect financial crime and protect the integrity of the American banking system. This system will be jeopardized if financial institutions are not afforded the full immunity protection of the safe harbor provision established by the *Annunzio-Wylie Anti-Money Laundering Act*, 31 U.S.C. § 5318(g)(3) (the "Act"). The Act was enacted to give financial institutions absolute immunity from all civil liability arising from SAR filings. Most courts have correctly held that the Act's safe harbor provision grants a financial institution absolute immunity from civil liability for claims arising out of the filing of a SAR. However, the Louisiana court in the decision below has now joined a small minority of courts that have added a good faith requirement to the safe harbor provision. The Court's review is now needed for three reasons.

First, the Louisiana decision, which follows the Eleventh Circuit's disposition of the questions presented, *see, Lopez v. First Union National Bank*,

129 F.3d 1186 (11th Cir. 1997), conflicts with the plain language of the statute and legislative intent. In enacting the Act, Congress included a broad safe harbor provision providing absolute immunity from any liability arising from reporting suspicious financial activity. Nevertheless, the language of the Act now has been misapplied by some courts. The Eleventh Circuit and a minority of courts have, notwithstanding the plain language of the statute, inserted a good faith requirement into the safe harbor provision that would nullify the safe harbor. The Court has never directly addressed the questions presented here and has an opportunity to provide the necessary guidance.

Second, because the Court has not yet addressed the questions presented by the Petition, and because the Louisiana courts and the federal circuit courts have rendered conflicting decisions, the Court has an opportunity to resolve this conflict. The First and Second Circuits and a majority of the courts have correctly held that the safe harbor provision of the Act provides absolute immunity to any financial institution filing a SAR. *See, Stoutt v. Banco Popular de Puerto Rico,* 320 F.3d 26 (1st Cir. 2003); *Lee v. Bankers Trust Co.,* 166 F.3d 540 (2d Cir. 1999). However, Louisiana courts have now joined the Eleventh Circuit and a minority of courts in vitiating banks' immunity by imposing a good faith requirement to the Act's safe harbor provision. If the Court does not rectify the split in authority, banks around the country, indeed the same bank, could be exposed to different degrees of liability for identical conduct. This uncertainty and confusion as to the applicable standard will likely cause financial

institutions to hesitate filing SARs, thereby undercutting the purpose of the statute, and expose banks to fines and penalties for failure to file SARs, and significantly hamper law enforcement's ability to detect criminal activity in our banking system.

Third, and finally, uncertainty caused by a good faith requirement will discourage banks from filing SARs as they seek to mitigate any potential risk and cost of litigation. This is because disgruntled employees or customers who believe they were the subject of a SAR could sue or threaten to sue the bank. Financial institutions strive to mitigate the risks and costs of potential civil litigation while complying with statutory requirements of filing SARs. Continuing uncertainty increases the threat that banks will face legal claims and consequently, limit SAR reporting to only those transactions that have been fully investigated. Either result is untenable from a bank's perspective.

ARGUMENT

I. THE LOUISIANA COURTS' DISPOSITION OF THE QUESTIONS PRESENTED, WHICH FOLLOWS THE ELEVENTH CIRCUIT'S 1997 DECISION, CONFLICTS WITH THE PLAIN LANGUAGE OF THE STATUTE.

The plain language of the Act states that a financial institution enjoys absolute immunity from all civil claims based on a SAR filing. Nothing in the Act conditions the granting of immunity on a finding of good faith in deciding to file a SAR:

> Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, *shall not be liable* to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), *for such disclosure* or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure.

31 U.S.C. § 5318(g)(3)(A) (emphasis added).

By contrast, certain provisions of the USA PATRIOT Act contain additional language, not found in the safe harbor provision, which establishes a good faith requirement. *See* 50 U.S.C. § 1861 (explaining that financial institutions must have a good faith basis when responding to an order seeking business records for foreign intelligence and international terrorist investigations); *see also* 15 U.S.C. §1681(v) (disclosing consumer reports requires a good faith reliance on a government order to be immune from liability); *see also* 20 U.S.C. § 1232j(3) (explaining educational agencies that produce records in good faith when responding to a terrorism investigation order will not be liable for such disclosures). Congress and the courts require

more definitiveness not found here. Thus, a good faith requirement is not cognizable under the Act. *See* 31 U.S.C. § 5318(g)(3)(A); *see also* 129 S. Ct. 2343, 2349 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."); *see also Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

The safe harbor provision was enacted in 1992 as part of the Act because Congress realized that law enforcement officers could not effectively detect the financial fraud and money laundering activities infiltrating the banking system without the assistance of financial institutions and without creating bank exposure to liability stemming from that assistance. After it was determined that financial institutions were in the best position to identify suspicious activity, banks were required by Congress to cooperate with law enforcement. The Act and the grant of immunity implement mandatory reporting requirements and encourage voluntary reporting. *See* 31 U.S.C. § 5311, et seq.

II. THE ISSUE OF WHETHER THE ACT PROVIDES ABSOLUTE IMMUNITY IS UNSETTLED AND IN NEED OF REVIEW.

Because the Court has not yet addressed the questions presented by the Petition, and because the courts of appeals and some state courts have rendered conflicting decisions, the Court should grant the Petition to review those decisions and

resolve the questions presented to clarify the confusion and uncertainty financial institutions face over this issue.

A. A majority of the federal circuits and lower courts have held that the safe harbor provision gives banks absolute immunity from liability for SAR disclosures.

The First and Second Circuit and a majority of federal district courts have correctly concluded that the Act's safe harbor provision provides absolute immunity to financial institutions that file SARs. *See e.g*. *Stoutt v. Banco Popular de Puerto Rico*, 320 F.3d 26 (1st Cir. 2003); *Gibson v. Regions Financial Corp.*, No. 4:05CV01922 JLH, 2008 WL 110917 (E.D. Ark. Jan. 9, 2008); *Nieman v. Firstar Bank*, No. C03-4113-MWB, 2005 WL 2346998 (N.D. Iowa Sep. 26, 2005*); Quiles-Gonzalez v. United States*, No. 09-1401CCC, 2010 WL 1415993 (D.P.R. March 31, 2010*); Whitney Nat'l Bank v. Karam,* 306 F. Supp. 2d 678, 680 (S.D. Tex. 2004); *Gregory v. Bank One, Indiana, N.A.*, 200 F. Supp. 2d 1000, 1002 (S.D. Ind. 2002). The courts have endorsed this reading of the Act by examining the plain language of the statute, studying the legislative history, and analyzing the practical implications of not enforcing the law as written.

The first court to hold that the Act provides absolute immunity was the Second Circuit in *Lee v. Bankers Trust Co.*, 166 F.3d 540 (2d Cir. 1999). In *Lee*, a bank employee sued his employer alleging that the bank had filed a SAR and that the SAR was defamatory. The employee discovered the SAR's

existence and sued the bank, alleging that the SAR was defamatory. First, the court observed that "the plain language of the safe harbor provision describes an unqualified privilege, never mentioning good faith or any suggestive analogue thereof." *Lee*, 166 F.3d at 544. The court stated there is "not even a hint that the statements must be made in good faith" to take advantage of the Act's immunity. *Id.* Second, the court applied a "common sense appraisal" to the safe harbor provision and concluded it would be impractical to permit lawsuits based on SAR disclosures because banks are prohibited from revealing whether a SAR was ever filed. *Id.* at 544; *See* 12 C.F.R. § 353.3(g) (2012). Finally, the court examined the Act's legislative history and found that an earlier version of the Act contained a good faith requirement, but that requirement was deleted from later drafts of the legislation and was not included in the final law. *Id.* at 544 (citing 137 Cong. Rec. S16642 (1991).

The Louisiana decision follows a minority of courts, including the Eleventh Circuit, that have inserted a good faith requirement into the safe harbor provision. *See Lopez v. First Union Nat'l Bank of Florida*, 129 F.3d 1186 (11th Cir. 1997); *Bank of Eureka Springs v. Evans*, 109 S.W. 3d 672 (Ark. 2003); *Hoffman v. Bank of America, N.A.*, No. 8:02CV1780T27TGW, 2006 WL 1360892 at *8-9 (M.D. Fla. 2006); *Shayesteh* v. *Cent. Bank*, No. 2:04-CV-488-CW, 2010 WL 417413 at *5 (D. Utah Jan. 29, 2010). *Lopez* held that a bank must show that the SAR was filed in good faith to trigger the protections of the safe harbor provision. *Lopez,* 129 Fd3. at 1192-93. Notably, the Second Circuit observed, that *Lopez* court failed to explain where

the requirement of a good faith suspicion came from or why it was necessary…" *Lee*, 166 F.3d at 544.

B. The split in authority among the courts has subjected banks to uncertainty and inconsistent bases for liability.

To avoid confusion and inconsistent rulings, banks need one rule that addresses their potential civil liability when SARs are filed. The conflicting legal authority is particularly troubling for financial institutions that have branches in multiple states, and suspicious activity that spans numerous jurisdictions. A single SAR could subject a bank to varying civil liability. In fact, conflicts have arisen within the same state. Approximately five years after the Arkansas Supreme Court limited the immunity of the Act in *Evans,* a federal district court in Arkansas disagreed and held that the statute provides absolute immunity. *Gibson v. Regions Fin Corp.*, No. 4:05CV01922, 2008 WL 110917 at *3 (E.D. Ark. Jan. 9, 2008). This uncertainty makes it difficult for banks to comply with an inconsistent standard and easy for plaintiffs to forum shop when deciding where to challenge a SAR.

III. WITHOUT ABSOLUTE IMMUNITY BANKS WILL BE HESITANT TO FILE SARS.

The bank's responsibility is to report the mere suspicion of criminal activity, not to determine the likelihood of a subject's culpability. After a SAR is filed, it is law enforcement, and not the bank, that evaluates the merits of the suspicion and decides whether an investigation, prosecution, or

enforcement action is necessary. Banks must file a SAR with FinCEN within thirty days of the initial detection of a known or suspected violation of federal law, suspected money laundering activity, or a violation of the Bank Secrecy Act. 31 C.F.R §353.1(b)(3) (2011).[2] FinCEN has made it clear that banks should not conduct their own investigations before filing by warning that a SAR must be submitted within the prescribed time even if the bank's internal investigation has not yet concluded. 31 C.F.R §353.1 (2011). The Federal Reserve has observed that a SAR is merely a "tip" which may or may not lead to a formal government action. Br. for the Bd. of Governors of the Fed. Reserve Sys as Amicus Curiae, *Lee* v. *Bankers Trust Co.*, 1998 WL 34088671 at *12 (2d Cir. July 6, 1998). Therefore, it is not the bank's job to substantiate the illegal conduct, but to merely report the suspicion of unlawful activity. Given the short time frame in which the SARs must be filed and the low threshold necessary to require such a filing, banks need absolute immunity arising from any subsequent civil litigation.

A. BankAtlantic's experience in the Eleventh Circuit illustrates the quandary that qualified immunity can pose to banks.

[2] A bank may delay the filing of a SAR for a maximum of sixty days to identify the subject of the SAR. 31 C.F.R §353.1(b)(3) (2011).

The danger that the good faith rule poses to banks is well illustrated with BankAtlantic's experience in *Lopez's* companion case, *Coronado v. BankAtlantic Bancorp, Inc.*, 222 F.3d 1315 (11th Cir. 2000). Shortly after BankAtlantic acquired MegaBank in 1995, bank officials reported suspicious activity in over one thousand accounts supervised by one its Vice Presidents, Blanca Ortiz, and cooperated with law enforcement. *Id.* at 1317. Coronado, one of the customers whose account information was released, filed a class action suit alleging that BankAtlantic's disclosures violated the Electronics Communication Privacy Act and several other federal and state laws. *Id.* at 1318. BankAtlantic moved for summary judgment arguing that the Act immunized BankAtlantic from liability. The district court agreed and dismissed Coronado's complaint with prejudice. *Id.*

On Coronado's first appeal in 1997, the Eleventh Circuit remanded the case and held that although Bank Atlantic may have detected suspicious activity in a few accounts, the bank may not have had a good faith basis to release information about many other accounts to law enforcement. *Lopez,* 129 F.3d at 1195. BankAtlantic was forced to re-litigate the issue in district court, where the court again ruled that the bank's disclosures were protected by the Act. *Id.* at 1319.

On the second appeal in 2000, the court was convinced that the disclosures made to law enforcement, based on millions of dollars of suspicious transactions into and out of Bogota, Colombia, were protected by the Act. In fact, the court appeared to soften its earlier ruling because it

did not mention the "good faith" requirement, offering just a few vague references to its earlier decision in *Lopez.* Id. at 1319-21. Instead, the court described the safe harbor provision as "complete" and "very broad," and stated that it was intended to relieve financial institutions of the fear that their disclosures "could possibly lead to litigation with disgruntled customers." *Id.* In 2001, the former bank vice president, who was suspected of the suspicious activity, was convicted of money laundering. Antonio Fins, Banker Guilty of Conspiracy, Sun-Sentinel Times. (Dec. 22, 2001); http://articles.sun-sentinel.com/2001-12-22/business/0112211069_1_bankatlantic-account-holders-blanket-immunity SunSentinel.com. (last visited Oct. 12, 2012). If the Court does not clarify the law, many more banks will be forced to endure years of expensive civil litigation such as BankAtlantic faced and may be more hesitant to file a SAR.

B. The confidentiality requirements concerning a SAR prevent a bank from defending a civil claim. Therefore, a tort claim cannot be based on the filing of a confidential SAR.

In order to preserve the secrecy and the integrity of any law enforcement or bank regulator investigation, financial institutions are prohibited from even acknowledging a SAR's existence, or discussing the contents of a SAR unless ordered to do so by the appropriate authorities. 12 C.F.R. § 353.3(g)(h) (2012). Therefore, if a SAR is filed against a bank employee, the bank is prohibited from notifying the employee that he is the subject of

the report. *Id.* Likewise, banks are prohibited from disclosing SARs requested through a subpoena or from providing any information that would disclose that a SAR has even been prepared. 31 U.S.C. § 5318(g)(2). As the Second Circuit observed, financial institutions are required by law to file SARs but are prohibited from disclosing the existence or contents of a SAR or even that one was ever filed. *Lee*, 166 F.3d at 544. Therefore, when faced with a tort claim based on SAR disclosures the bank could not reveal what, if any, disclosures were made or whether a SAR was ever filed. 12 C.F.R. § 353.3(h). As the Second Circuit correctly concluded, "it flies in the face of common sense to assert that Congress sought to impale financial institutions on the horns of such a dilemma." *Lee,* 166 F.3d at 544; *see* FIN-2012-A002, March 2, 2012 (warning financial institutions about the SAR confidentiality rules in light of the increased civil litigation requesting SARs).

The Louisiana court, following the Eleventh Circuit, also failed to address the practical realities if civil claims based on SAR filings are permitted to be filed. Under *Lopez*, any employee who suspects that he or she was the subject of a SAR can simply file a defamation or malicious prosecution claim, and allege that the SAR was filed in bad faith. In Louisiana or other jurisdictions following the Eleventh Circuit, this could force the bank to conduct discovery and extended litigation if the underlying civil claim requires a factual determination about the intent of the SAR filer. If financial institutions are required to litigate SARs claims, banks will file fewer SARs and an essential component relied on by law enforcement to protect our financial system will be significantly weakened.

C. Bankers hesitant to file SARs can be penalized.

Unless the Court resolves the split in the circuits in the manner set out by the First and Second Circuits, banks will truly be caught in a trap. The divergent holdings of the courts of appeals as to whether banks have absolute immunity from civil actions may lead banks to hesitate before filing SARs without internal investigations, while also facing penalties for failing to file SARs for such failures The Act imposes both civil and criminal penalties on banks. 31 U.S.C. § 5321 and 31 U.S.C. § 5322. Facts are not always black and white, and when circumstances are grey a bank may be hesitant to file a SAR. Yet, FinCEN may view the circumstances differently and determine that a bank's failure to file a SAR is negligent or even willful, subjecting the bank and its employees to civil and criminal penalties. For these reasons, it is important to the banking industry that the issue of immunity is addressed so that the banking industry may have clear direction on filing SARs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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