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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Parties to the Proceeding

Petitioners' list of parties was set forth at page ii of their Petition for a Writ of Certiorari, and there are no amendments to that statement.

Corporate Disclosure Statement

Petitioners' corporate disclosure statement was set forth at page ii of their Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Respondent does not dispute that this Petition presents an important question of federal law on which there is a deep split in authority. Indeed, he cannot. The question presented—whether the Annunzio-Wylie Anti-Money Laundering Act, 31 U.S.C. § 5318(g)(3)(A), provides absolute immunity to financial institutions that report suspicious transactions—is one of utmost importance to the federal authorities tasked with ensuring that financial institutions are not conduits for money laundering, drug trafficking, and terrorism. A well-developed split of authority exists among federal and state courts on whether that immunity from suit is absolute. The immunity question has been addressed by the courts of two states, including Louisiana in the decision below, and by three federal circuit courts. The First and Second Circuits have held, in accord with the plain text and purpose of the Act, that the immunity provided to SARs reporters is absolute. The Eleventh Circuit and state courts in Arkansas and Louisiana have added a "good faith" requirement. Because Petitioners are located in a jurisdiction on the wrong side of that split, the statutory immunity to which they are entitled has been conditioned with a "good faith" requirement that has forced Petitioners into an impending trial. Immunity provided by Congress was intended to prevent precisely this result, a result that can only be avoided if this Court grants *certiorari* and reverses the decision below.

Instead of opposing *certiorari* on substantive grounds, Respondent makes three arguments in opposition, none of which counsels against review.

First, Respondent re-asserts the allegations in his Complaint of alleged bad faith, none of which is germane to the purely legal question whether evidence of motivation is relevant to SARs immunity.

Second, Respondent argues that Petitioners' request for *certiorari* is both too early and too late. But it is certainly not too early for this Court to decide the question of whether to protect a federal right of immunity that Respondent concedes twice has been asserted by Petitioners to each level of the Louisiana state courts. See Opp. 6–7. Nor is the question presented too late, for this Petition is not untimely under the Rules. But it would be too late if this Court waits until after the trial of this action, because a key component of Petitioners' federal right of immunity—avoiding the expense and burden of trial—would be irretrievably lost if that happens.

Third, Respondent argues that this case is not a suitable vehicle for *certiorari* because the decision on review is a minute order. A lengthy recital of reasons, however, is not a prerequisite to this Court's review. Moreover, the Louisiana courts issued two written opinions explaining their reasons for denying SARs immunity in this case, and three federal circuit courts and numerous other state and federal courts have issued opinions on SARs immunity as well, giving this Court the benefit of a large body of opinion weighing in on this issue prior to its review.

A. Respondent Does Not Dispute SARs Immunity Presents an Important Federal Question

Respondent does not dispute the importance of the federal question presented by this Petition—the

extent of the SARs immunity provided by Congress. In fact, his opposition omits this topic entirely.

There can be no doubt that the extent of SARs immunity is a vital question of federal law and policy. The centrality of the immunity to the Act's reporting scheme is manifest, as is the fundamental importance of reporting financial crimes to law enforcement. And every federal regulator to weigh in on this topic has argued strongly for absolute immunity and against any limiting qualifications imposed by courts such as the Eleventh Circuit and the court below.

For example, after the Eleventh Circuit's decision in *Lopez* v. *First Union Nat'l Bank*, 129 F.3d 1186 (11th Cir. 1997), which was the first federal appellate decision to limit SARs immunity by imposing a good faith requirement, the Board of Governors of the Federal Reserve ("Board") filed an *amicus* brief in the Second Circuit urging that court not to follow *Lopez*. The Board stressed that:

> [t]he *Lopez* interpretation creates a hazardous shoal in the safe harbor. Any employee of a financial institution who imagines that he or she was mentioned in an SAR could simply accuse the financial institution of bad faith or defamation and force it to defend itself in a lengthy and costly lawsuit. Such allegations could not be dismissed on motion practice, because allegations of defamation or bad faith require a factual determination about the intent of the reporting financial institution.

Br. for the Bd. of Governors of the Fed. Reserve Sys. as *Amicus Curiae*, *Lee* v. *Bankers Trust Co.*, 1998 WL

34088671, at *19 (2d Cir. July 6, 1998). The warning was prescient, for that is precisely what happened in the courts below in the case at bar.

The Board explained further in a subsequent *amicus* brief to the First Circuit that "it is essential that there not be any confusion or uncertainty about the applicability of the statutory safe harbor provision." Br. for the Bd. of Governors of the Fed. Reserve Sys. as *Amicus Curiae*, *Stoutt* v. *Banco Popular de Puerto Rico*, 2002 WL 34231743, at 1 (1st Cir. May 13, 2002). The Board observed that:

> [t]he public objective is to protect the banking system and the public from illegal activities, such as money laundering, theft, embezzlement, and fraud; falsification of financial institution documents, records, or reports; and breaches of fiduciary duty by bank insiders. Since September 11, 2001, the SAR has also served as an important weapon in the fight to prevent terrorists from accessing the banking system.

Id. at 10–11.

It is "[i]n view of these factors[that] Congress and regulators encourage financial institutions to report liberally evidence of suspicious transactions." Br. for the Fed. Deposit Ins. Corp. as *Amicus Curiae*, *Bank of Eureka Springs* v. *Evans*, 2002 WL 32625039, at *4 (Ark. Sept. 5, 2002). As the Federal Deposit Insurance Corporation ("FDIC") explained to the Arkansas Supreme Court, "[a]ny impediments to the willingness of financial institutions to report suspicious activity would weaken law enforcement's ability to investigate possible criminal activity and

threaten the ability of bank supervisory authorities to protect the safety and soundness of the country's financial system." *Id.* at *4–5.

It was with these goals in mind that the Board, the FDIC, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Financial Crimes Enforcement Network issued an Interagency Advisory to financial institutions alerting them to a federal district court case that held, correctly in the agencies' view, that the Annunzio-Wylie Act provides complete immunity from private lawsuits to SARs reporters. See App. 1a–5a; Interagency Advisory, "Federal Court Reaffirms Protections for Financial Institutions Filing Suspicious Activity Reports" (May 24, 2004) (citing *Whitney Nat'l Bank* v. *Karam*, 306 F. Supp. 2d 678 (S.D. Tex. 2004)).

B. Respondent Concedes a Split of Authority Exists

Respondent does not dispute that a split of authority exists between the First and Second Circuits, which have found that the Annunzio-Wylie Act provides absolute immunity, and the Eleventh Circuit and Louisiana and Arkansas courts, which have added a contra-textual good faith requirement. Nor does Respondent dispute that the split in authority leads to anomalous results. A bank that reports a suspicious transaction between branches in Louisiana and New York would be immune from suit in New York, but that same activity could give rise to years of litigation and a trial in Louisiana. The Act does not contemplate such a result.

C. Respondent Provides No Grounds for Denying *Certiorari*

1. Rather than address the grounds for *certiorari*, Respondent first digresses into presenting his version of the story he hopes to prove at trial. Not only are Respondent's assertions unsupported by a single record citation, they are irrelevant. The question presented by this Petition does not turn on the truth or falsity of Respondent's allegations; it is a purely legal question about the extent of SARs immunity.[1]

2. Respondent suggests that the Louisiana courts have not issued a final decision on the issue of SARs reporter immunity. That is not the case. The Louisiana courts have twice ruled on the SARs immunity question. Both times, the courts declined to extend that immunity to Petitioners. Twice the Louisiana Supreme Court had the opportunity to intervene and spare Petitioners the burden and expense of discovery and trial, and both times that court has refused. Unless this Court intervenes, the Louisiana Supreme Court forever will have denied Petitioners important aspects of the immunity provided by Congress to Petitioners, the right to avoid trial.

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[1] Even if this factual material was pertinent, it hardly supports a conclusion that those reported for potential suspicious activity should be allowed to sue the reporters notwithstanding the Act's immunity. Doughty was indicted, after three years of investigation by law enforcement, for (among other things) making loans without authority and his testimony essentially conceded the conduct. See Exhs. to Mot. Summ. J., at 000113–116, 000265–275.

This Petition presents the paradigm situation described in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), wherein the Court noted the propriety of Supreme Court review when "the rights conferred by the statute * * * will have been lost, probably irreparably," by waiting for termination of the litigation before conducting review. *Id.* at 482 n.10. As the Supreme Court held in *Cox*, a State court judgment is final "for the purposes of 28 U.S.C. s 1257," and confers on this Court "jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts" in at least four situations. *Id.* at 477. One of those situations is presented squarely here. That is:

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 482–83.

One of the cases on which *Cox* rested was *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555 (1963), where this Court granted *certiorari* to review a State court's denial of a petitioner's federally-conferred immunity. Like the instant Petition, *Mercantile* involved a federal statute conferring

immunity on a bank; in that instance, it was a grant of immunity from being sued in certain counties. Even though trial had not yet begun, the Court granted *certiorari* in *Mercantile* to ensure that the immunity conferred by the federal statute was not lost. As this Court noted thereafter in *Cox*, quoting the rationale in *Mercantile*,

> it would serve the policy of the federal statute "to determine now in which state court appellants may be tried rather than to subject them * * * to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings."

Cox, 420 U.S. at 484 (quoting *Mercantile Nat'l Bank*, 371 U.S. at 558); cf. *Ashcroft* v. *Iqbal*. 556 U.S. 662, 685–86 (2009) (discussing the importance of deciding the applicability of immunity not only to prevent a costly trial but also to avoid the burdens and expense of discovery). Those concerns are even more pronounced here, where the federally-conferred immunity is absolute.

3. Finally, Respondent asks this Court to deny *certiorari* because the immediate decision on review is what he deems a "non-precedential" minute order. There is no federal law requiring an order to which the writ is directed to include a recital of reasons for the ruling. *E.g.*, *Behrens* v. *Pelletier*, 516 U.S. 299, 303 (1996) (granting *certiorari* where district court issued an "implicit denial" of a qualified immunity defense); *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 521 (1988) (granting *certiorari* of district court's summary denial of forum *non conveniens* plea and appellate court's one-line affirmance).

In that regard, Respondent's argument that it is not clear on what grounds the trial court denied the motion for summary judgment is misplaced. Whatever other reasons that court may have had for denying summary judgment, it necessarily must have adhered to its earlier conclusion that the Annunzio-Wiley Act does not provide absolute immunity. If the trial court had changed its opinion on that touchstone issue—an impossible scenario, given the intermediate appellate court's controlling precedent that the Act provides only qualified immunity—then it necessarily would have been required to grant the summary judgment motion.

Respondent finally seeks to invoke the maxim that this Court will not review state court decisions presenting federal questions decided on an adequate and independent state law ground. That principle is irrelevant when federal law, as here, provides an absolute immunity to suit under state law. Respondent concedes that the immunity issue was preserved for review, including specifically in Petitioners' motion that is the subject of the decision below. See Opp. at 6–7. He points to no other state law ground for the decision, and this Court has held that in the absence of "adequate and independent state grounds" for the decision below, this Court has jurisdiction. *Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985) ("[W]e will not assume that a state-court decision rests on adequate and independent state grounds when the state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." (internal quotation marks omitted)).

Conclusion

For the foregoing reasons and those in Petitioners' opening brief, the Petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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October 31, 2012

Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
Financial Crimes Enforcement Network
National Credit Union Administration
Office of the Comptroller of the Currency
Office of Thrift Supervision

May 24, 2004

Interagency Advisory

FEDERAL COURT REAFFIRMS PROTECTIONS FOR FINANCIAL INSTITUTIONS FILING SUSPICIOUS ACTIVITY REPORTS

Banks, thrift institutions, bank holding companies and non-bank subsidiaries, credit unions, the U.S. branches and agencies of foreign banks, and certain other financial institutions are required to file Suspicious Activity Reports (SARs) pursuant to regulations issued by the five federal financial institutions supervisory agencies and the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). The agencies' SAR rules are authorized by various federal laws, including the Bank Secrecy Act, and generally require these financial institutions to file SARs with law enforcement and bank supervisory authorities whenever they know or suspect suspicious or potential criminal activity. The Bank Secrecy Act and the agencies' SAR regulations also provide

protection to financial institutions and their employees from civil liability for filing a SAR or for making disclosures in a SAR. The purpose of this advisory is to tell financial institutions about a recent federal court case, *Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678 (S.D. Tex. 2004), that reaffirms the scope of that statutory protection, generally referred to as a "safe harbor."

In 1992, Congress passed the Annunzio-Wylie Anti-Money Laundering Act and provided a safe harbor for financial institutions and their employees from civil liability for reporting known or suspected criminal offenses or suspicious activity by filing a SAR. This law is codified at 31 U.S.C. § 5318(g)(3). Each of the federal financial institutions supervisory agencies and FinCEN incorporated the safe harbor provisions of the 1992 law into its suspicious activity reporting regulations.

In recent years, several courts have disagreed about the scope of the protection afforded by this safe harbor provision. Some courts have limited the safe harbor protection to disclosures based on a good faith belief that a violation has occurred, or have declined to extend the protection to financial institutions that may have misrepresented material facts to law enforcement.[1] However, the majority of courts have ruled that the safe harbor provision provides

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[1] *See, e.g.*, *Lopez v. First Union Nat'l Bank* and *Coronado v. BankAtlantic Bancorp., Inc.*, both at 129 F.3d 1186, 1195 (11th Cir. 1997); *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (Ark. 2003).

unqualified protection to financial institutions and their employees from civil liability for filing a SAR.[2]

The federal district court in *Whitney* sided with the majority of courts that have interpreted the safe harbor provision to afford unqualified protection to financial institutions and their employees from civil suit. In the *Whitney* case, individuals filed a defamation suit against a bank, claiming that the bank wrongfully accused them of illegal lending activity when it filed a SAR. In the suit, the individuals sought discovery of any oral or written communications the bank may have had with law enforcement concerning their suspected illegal conduct. The individuals did not seek a copy of the SAR because a clear provision of the Bank Secrecy Act prohibits such disclosure to the people who are reported in the SAR, so instead they sought information from the bank about any disclosures it may have made to law enforcement surrounding the possible filing of a SAR. Several of the federal financial institutions supervisory agencies jointly filed a brief with the court arguing that a financial institution that reports suspected crimes should not be subject to discovery of its communications with law enforcement.

The *Whitney* court ruled that a bank may not produce documents in discovery evidencing:

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[2] *See, e.g.*, *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544-45 (2d Cir. 1999); *Gregory v. Bank One Corp.*, 200 F.Supp.2d 1000, 1003 (S.D. Ind. 2002); *Stoutt v. Banco Popular de Puerto Rico*, 158 F. Supp. 2d 167, 175 (D.P.R. 2001).

- the existence or contents of a SAR;
- communications pertaining to the filing of a SAR or its contents;
- communications with government authorities that led to the filing of a SAR or in preparation for the filing of a SAR;
- communications that follow the filing of a SAR intending to explain or clarify the SAR; or
- the existence or content of oral communications to authorities regarding suspected or possible violations of laws or regulations that did not lead to the filing of a SAR.

The court noted, however, that the safe harbor protections do not apply to documents upon which a SAR was based that a bank may have generated or received in its ordinary course of business, unless producing these documents would confirm the existence of a SAR.

While the *Whitney* court ruled in a case involving a national bank and the rules and regulations of the Office of the Comptroller of the Currency, the five federal financial institutions supervisory agencies and FinCEN believe that the court's rulings apply to all financial institutions that file SARs in accordance with suspicious activity reporting rules.

In light of the *Whitney* decision, the agencies remain confident that financial institutions and their employees that follow the prescribed agency

regulations and SAR filing instructions should be fully protected by the safe harbor provisions of the law. The staffs of the agencies want to emphasize that all financial institutions covered by the agencies' SAR reporting rules should have internal processes to handle the filing of SARs as well as requests for sensitive information from law enforcement authorities and from litigants in private lawsuits regarding suspicious activities and reporting to law enforcement. Communicating with law enforcement authorities through these processes, or in response to a subpoena from federal, state, or local law enforcement agencies or other forms of compulsory process, such as a request from FinCEN pursuant to section 314(a) of the USA PATRIOT Act or the reporting of a blocked transaction to the U.S. Department of the Treasury's Office of Foreign Assets Control, will provide maximum legal protection for financial institutions.