No. 19-347

IN THE

Supreme Court of the United States

AER ADVISORS INC.; WILLIAM J. DEUTSCH;
PETER E. DEUTSCH,

Petitioners,

v.

FIDELITY BROKERAGE SERVICES, LLC,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Bank Secrecy Act requires financial institutions to report "any suspicious transaction relevant to a possible violation of law or regulation" by filing a suspicious activity report with the federal government. 31 U.S.C. § 5318(g)(1); 31 C.F.R. § 1023.320(a)(1), (b)(1). Institutions may not acknowledge that they filed a report or divulge "any information that would reveal the existence of a [report]." 31 C.F.R. § 1023.320(e)(1)(i); 31 U.S.C. § 5318(g)(2)(A).

The Bank Secrecy Act also immunizes institutions from liability for filing these reports: "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 … 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 …." 31 U.S.C. § 5318(g)(3)(A).

The questions presented are:

1. Is a financial institution absolutely immune from private suit under the Bank Secrecy Act when it files a suspicious activity report as required by the Act?

2. When a case is transferred between federal district courts under 28 U.S.C. § 1404(a), does the transferee court apply federal law as determined by the transferee court or the transferor court?

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INTRODUCTION

Petitioners seek this Court's review of two issues. First, they claim that courts disagree over whether a financial institution is absolutely immune from a private suit that is based on the filing of a suspicious activity report with the federal government. Second, they argue that this Court should hold (contrary to every circuit to consider the question) that when a case is transferred between federal district courts, the transferee court should not apply its own view of federal law, but the view of the transferor court. Neither issue is certworthy.

1. As to the first issue, this case does not implicate any circuit split. The Bank Secrecy Act provides three "safe harbors" from private lawsuit for financial institutions. Financial institutions are immune from private suit when they: (1) make a "voluntary disclosure" of possible violations of law to government officials, (2) make a disclosure "pursuant to" the Act, or (3) make a disclosure pursuant to "any other authority." 31 U.S.C. § 5318(g)(3)(A). Petitioners allege that Respondent Fidelity Brokerage Services LLC filed a "suspicious activity report" with the federal government. That type of report is pursuant to the Bank Secrecy Act, as implemented by Treasury Department regulations. 31 U.S.C. § 5318(g)(1); 31 C.F.R. § 1023.320(a)(1), (b)(1). And every court to consider claims (like those here) in which the only alleged wrongdoing was the filing of an allegedly wrongful suspicious activity report has held that a financial institution is absolutely immune from a private suit that is based on that filing.

If Petitioners have identified any split in authority, it involves a different situation—one that does not implicate the second safe harbor (disclosures pursuant to the Act). Rather, the "split" is about when institutions engage in conduct in addition to or different from filing a suspicious activity report (for example, making a voluntary disclosure or making a disclosure pursuant to some authority other than the Act). In those situations, some courts have held that an institution must have a good-faith basis for its *additional* disclosures or disclosures *not* made "pursuant to" the Bank Security Act. But no court has applied a good-faith requirement to immunity for filing a suspicious activity report, standing alone.

In any event, this case would be a poor vehicle for addressing Petitioner's first question presented. For starters, after an extensive adjudication of the underlying transaction, an arbitration panel has already found that Fidelity believed there was unlawful activity afoot. In other words, even under Petitioners' preferred test—a good-faith requirement—they lose. What's more, Petitioners can never prove their case. Petitioners do not have the alleged report or know its contents. And the Bank Secrecy Act forbids Fidelity from revealing the contents of any suspicious activity report, or even whether a report exists. So Petitioners could never prove that a suspicious activity report was even filed, much less that the filing was in some respect improper.

Finally, the decision below on immunity was also correct. The text, structure, and history of the Bank Secrecy Act, as well as policy considerations, all confirm that there is no good-faith limitation on financial institutions' immunity for filing suspicious activity reports.

2. As for Petitioners' second question presented, there is no disagreement about which interpretation of federal law applies when a case is transferred between federal district courts. Every circuit to consider the question—eight in all—has held that the transferee court should apply its view of the law. There is no need for this Court to intervene just to affirm that commonsense, unanimous approach.

STATEMENT

A. Legal Background

Federal law requires a financial institution like Fidelity to report "any suspicious transaction relevant to a possible violation of law or regulation" by filing a suspicious activity report with the Department of the Treasury. 31 U.S.C. § 5318(g)(1); 31 C.F.R. § 1023.320(a)(1), (b)(1). Institutions are prohibited from acknowledging the filing of the report, and from disclosing "any information that would reveal the existence of a" report. 31 C.F.R. § 1023.320(e)(1)(i). Indeed, it is a crime to willfully disclose the existence or contents of a suspicious activity report. 31 U.S.C. § 5322(a).

To protect institutions that comply with these reporting requirements, Congress granted them "the broadest possible exemption from civil liability for the reporting of suspicious transactions." *Stoutt v. Banco Popular de Puerto Rico*, 320 F.3d 26, 31 (2003) (quoting 139 Cong. Rec. E57–02 (1993)). The Bank Secrecy Act provides:

> 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 … 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 ….

31 U.S.C. § 5318(g)(3)(A).

The Act thus provides three "safe harbors" for financial institutions. Institutions are immune from private suit when they make: (1) a voluntary disclosure of any possible violation of law, (2) a disclosure pursuant to the Bank Secrecy Act, and (3) a disclosure pursuant to any other authority.

B. Factual Background

1. Petitioners William and Peter Deutsch run a "billion dolla[r]" company. Second Am. Compl. (SAC) ¶¶ 8–9. In 2011, they started pursuing an "aggressive investment strategy," which their financial advisor, Petitioner AER Advisors, recommended. SAC ¶¶ 22, 25, 29, 33. The Deutsches acquired millions of shares of China Medical Technologies, Inc., hoping they could profit from "a management buy-out" or "a strategic acquisition" by a third party. SAC ¶¶ 22, 34.

In June 2012, the stock price spiked, and the SEC suspended trading. SAC ¶ 46. Petitioners speculate "upon information and belief" that in July 2012 Fidelity filed a suspicious activity report accusing the Deutsches of manipulating the price of China Medical's stock. SAC ¶¶ 56, 70, 95. This speculation is based on an internal memorandum by a Fidelity employee, David Whitlock. Whitlock recommended that Fidelity investigate the Deutsches' activities related to China Medical, which had "the appearance of attempting to influence a short squeeze in the stock." C.A. J.A. 80 A short squeeze applies "pressure on short sellers to cover their positions as a result of sharp price increases or difficulty in borrowing the security the sellers are short." Amendments to Regulation SHO, 71 Fed. Reg. 41710, 41711 n.16 (July 21, 2006). Such a scheme is "illegal." *Id.*

In August 2012, the Securities and Exchange Commission began to investigate Peter Deutsch and AER, his financial advisor. AER received one subpoena and participated in one SEC interview. SAC ¶¶ 98–101. Peter Deutsch participated in one SEC interview. SAC ¶¶ 107–09. William Deutsch does not allege he was investigated at all. Then, in 2013, the SEC informed both AER and Peter Deutsch that it would not pursue enforcement actions against them. SAC ¶¶ 102, 110.

2. China Medical eventually failed, and the Deutsches tried to recover their losses from Fidelity. C.A. J.A. 91, 97. After extensive discovery and a hundred hearings, an arbitration panel denied the Deutsches' claims "in their entirety" and found that "nothing that Fidelity did or did not do could redeem the failure" of the Deutsches' investment strategy in China Medical. *Id.* at 94. The panel also found that Fidelity "believe[d]" the Deutsches were engaged in a short squeeze. *Id.* at 93. The Southern District of New York confirmed the arbitration award. *Fidelity Brokerage Servs. LLC v. Deutsch*, No. 17-cv-05778, Dkt. 23 (S.D.N.Y.), *aff'd*, Nos. 18-1774, 18-1896 (2nd Cir. 2019).

3. Based on the same underlying transactions, Petitioners sued Fidelity in federal court, claiming that Fidelity filed an allegedly improper suspicious activity report relating to their China Medical transactions. Even though all the parties are based in the Northeast, Petitioners sued in the Southern District of Florida. Dkt. 1. Fidelity moved to dismiss the case or transfer it to the District of Massachusetts under 28 U.S.C. § 1404(a), which allows a court to transfer a case for convenience and in the interest of justice. Dkt. 22.

The Florida District Court granted the transfer motion. The court explained that "the vast majority of the facts underpinning [P]laintiffs' cause[s] of action did not occur in … Florida"; instead, "the locus of operative facts in this case favors a transfer to the District of Massachusetts." Pet. App. 8a. (quoting Order Granting Def.'s Mot. To Transfer Venue 3–4).

After the transfer, Petitioners filed a second amended complaint with more than a dozen counts. The "common theme in each claim," however, "was that Fidelity filed an SAR [suspicious activity report] falsely accusing plaintiffs of trying to manipulate the market for China Medical stock, which sparked the governmental investigations." Pet. App. 8a–9a. Petitioners alleged that it was really Fidelity that had engaged in unlawful activity, and that Fidelity reported Petitioners to authorities to cover up Fidelity's wrongdoing. Pet. App. 9a.

Fidelity moved to dismiss, on the ground that federal law immunized it from private lawsuits based on the filing of a suspicious activity report. Applying binding First Circuit precedent, the district court agreed. Pet App. 38a–39a (applying *Stoutt*, 320 F.3d at 26). The court also rejected Petitioners' argument that Eleventh Circuit precedent (where Petitioners first sued) should apply. The court explained that, when federal-law questions arise, "the transferee court will apply the law of its own circuit." Pet App. 37a.

4. The First Circuit affirmed. Relying on its decision in *Stoutt*, the First Circuit held that Fidelity was entitled to immunity under the Bank Secrecy Act. *Stoutt* rejected any good-faith requirement, among other reasons, because the "plain language of the safe harbor provision describes an unqualified privilege, never mentioning good faith or any suggestive analogue thereof." *Id.* at 23a (citing *Stoutt*, 320 F.3d at 30). After all, a "good faith requirement … would have taken only a simple drafting adjustment." *Stoutt*, 320 F.3d at 31. *Stoutt* also looked to legislative history: "the author of the provision (there is no pertinent committee report language) [said] that it was intended to provide 'the broadest possible exemption from civil liability for the reporting of suspicious transactions.'" *Id.* (quoting 139 Cong. Rev. E57-02 (1993)). In addition, an earlier draft of the bill included a good-faith requirement, but the requirement was dropped in the final version. *Id.* "[T]urning finally to congress's policy," *Stoutt* explained that a good-faith requirement "obviously creates a risk of second guessing." *Id.* That outweighed any "risk of false charges," especially because "remedies other than private damage actions are available for willfully false reports." *Id.* at 32. Applying *Stoutt*'s holding, the court below concluded that Fidelity was immune from Petitioners' suit. Pet. App. 23a.

The First Circuit also rejected Petitioners' invitation to revisit *Stoutt*. Petitioners argued "at length that financial institutions cannot get … immunity if they acted in 'bad faith.' Which is simply another way of saying financial institutions can get … immunity only if they acted in 'good faith.'" *Id.* But, the court held, "that argument goes poof, given how it is just like the one we shot down in *Stoutt*." *Id.* Similarly, the court rejected Petitioners' argument that immunity does not apply if the suspicious activity report accuses someone of an "objectively impossible" crime like "accusing the Deutsch family of 'killing Abraham Lincoln in 2012.'" *Id.* at 23a–24a. Again, the court explained, *Stoutt* "said with crystalline clarity that this immunity applies even if a financial institution files [a report] that is 'wholly unfounded'"—a phrase "broad enough to encompass a situation where the [report] claims an 'impossible' or 'objectively impossible' violation of law." *Id.* at 24a. And the First Circuit noted that "the risk that an 'unfounded' or 'malicious' filing will result in 'false charges' is slight since 'ordinarily the disclosures will as a practical matter be made to the [government] authorities, who provide their own filter as to what investigations are pursued and made public.'" *Id.* at 22a

Finally, the First Circuit held that the district court was right to apply First Circuit precedent: "While we have yet to consider the subject every Circuit to do so has concluded that when one district court transfers a case to another, the norm is that the transferee court applies its own Circuit's cases on the meaning of federal law." *Id.* at 13a. The court joined that chorus because, "as Justice (then Judge) Ginsburg pithily put it, in 'the adjudication of federal claims,' federal courts ordinarily 'comprise a single system in which each tribunal endeavors to apply a single body of law,' and if different circuits view federal law differently, then the Supreme Court can restore 'uniformity.'" *Id.* (quoting *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175, 1176 (D.C. Cir. 1987), *aff'd on other grounds sub nom. Chan v. Korean Airlines, Ltd.*, 490 U.S. 122 (1989)).

REASONS FOR DENYING THE PETITION

Neither question presented warrants review. As to the first question presented, this case does not implicate the split that Petitioners allege. Even if it did, this would be a poor vehicle for addressing Petitioners' split. And the decision below is correct to boot. As to the second question presented, Petitioners do not even argue that there is a circuit split. Nor could they: Every circuit to consider the question has concluded that when a case is transferred between courts, the transferee court should apply its own view of federal law. The Court should deny certiorari.

I. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioners' primary ground for seeking review of the decision below is based on the holding that Fidelity was immune from Petitioners' claims arising from the filing of a suspicious activity report. That immunity, the court below held, was applicable regardless of whether Fidelity acted in good faith or whether a "possible" violation of the law occurred. But there is no split on that question. In addition, this case would be a poor vehicle for addressing Petitioners' first question presented: Petitioners would not benefit from the rule they seek and could never prove their case in any event. The decision below is also correct. There is thus no reason to grant cert.

A. There Is No Split on the First Question Presented

1. The Two Circuits To Consider the Question Presented Are in Agreement

Only two federal courts of appeals have considered the question actually presented by this case: Whether a financial institution is absolutely immune from liability in a private suit challenging the filing of a suspicious activity report. Both have held that the Bank Secrecy Act provides absolute immunity.

The Second Circuit was the first federal court of appeals to consider the question. *Lee v. Bankers Tr. Co.*, 166 F.3d 540 (2d Cir. 1999). In *Lee*, the plaintiff urged the court to graft a good-faith limitation onto the Act's grant of immunity. The Second Circuit refused to do so: "The Act broadly and unambiguously provides for immunity from *any* law (except the federal Constitution) for any statement made in [a suspicious activity report] by anyone connected to a financial institution." *Id.* at 544. The court based its conclusion on "[t]he plain language of the safe harbor provision," which "describes an unqualified privilege, never mentioning good faith or any suggestive analogue thereof." *Id.* The court also found the holding "bolstered by a common sense appraisal of the safe harbor provision's place within the Act." *Id.* Since the Act forbids financial institutions from disclosing the contents of a suspicious activity report, or even whether one was filed, it would have been illogical for Congress to allow financial institutions to be subject to suits that they could not defend. *Id.*

The First Circuit later reached the same conclusion in *Stoutt*, 320 F.3d at 30. In discussing the filing of a criminal referral form (the predecessor to the suspicious activity report), the court concluded that immunity is not "conditioned upon a finding of good faith on the part of the reporting entity." *Id.* It agreed with the Second Circuit, concluding that Congress could have easily included a good-faith requirement in the Bank Secrecy Act but chose not to. *Id.* at 31.

And here, the First Circuit applied *Stoutt*, again holding that an institution that files a suspicious activity report is absolutely immune, whether or not the institution had a good-faith basis for believing there was a legal violation. Pet. App. 23a.

Thus, the only two circuits to consider the question presented have held that financial institutions are absolutely immune from private suit that are based solely on the filing of a suspicious activity report, regardless of whether that filing was allegedly false or improperly motivated. Petitioners identify no court that disagrees with that holding.

2. This Case Does Not Implicate Petitioners' Alleged Split

Petitioners' claim of a split turns on a decision from the Eleventh Circuit, a decision from the Arkansas Supreme Court, and a handful of intermediate state court decisions. None of these decisions splits with the First or Second Circuits.

a. In *Lopez v. First Union National Bank of Florida*, 129 F.3d 1186 (11th Cir. 1997), the defendant, "First Union[,] disclosed [the plaintiff's] financial records twice in response to nothing more than 'verbal instructions' of government officials and once pursuant to a seizure warrant." *Id.* at 1192. First Union claimed immunity for all three disclosures.

The court noted that the version of the Bank Secrecy Act in effect at the time provided three "safe harbors" for: (1) the "disclosure of any possible violation of law or regulation" to government officials; (2) a disclosure made pursuant to the Act; and (3) "a disclosure made pursuant to any other authority." (Congress later amended the first safe harbor to refer to a "voluntary disclosure of any possible violation," Pub. L. 107–56 (Oct. 26, 2001), 115 Stat 272.) First Union's disclosure in response to a seizure warrant fell under the third safe harbor, to which absolute immunity applied. First Union's two disclosures in response to "verbal instructions" fell under the first safe harbor because they were not made pursuant to the Bank Secrecy Act or other legal authority. As to that first safe harbor, the Eleventh Circuit said that "a financial institution [must] ha[ve] a good faith suspicion that a law or regulation may have been violated." *Lopez*, 129 F.3d at 1192–93. However, *Lopez's* good-faith ruling did not concern the second safe harbor—the one at issue here, for disclosures made "pursuant to" the Bank Secrecy Act. Indeed, Treasury's regulations under the Act—those governing the filing of suspicious activity reports, like the one Fidelity made here—"were not in effect at the time [the] alleged disclosures were made." *Id.* at 1193. So *Lopez* did not present the situation that the First Circuit faced here.

If anything, *Lopez*'s reasoning shows that the Eleventh Circuit, if presented with the issue, would hold that immunity for filing suspicious activity reports is absolute. Those disclosures, again, fall under the second safe harbor (for disclosures made "pursuant to" the Act). After adopting a good-faith requirement for the first safe harbor, the Eleventh Circuit commented on the second, and described immunity under that safe harbor as absolute: "The second safe harbor protects *any* disclosures required by those regulations." *Id.* (emphasis added). Thus, because Petitioners' claims here are based on "disclosures required by those regulations," the Eleventh Circuit would dismiss this suit just as the First Circuit did.

b. Petitioners also rely on *Bank of Eureka Springs v. Evans*, 109 S.W.3d 672, 680 (Ark. 2003). But in that case, the defendant had engaged in activity well beyond the filing of a suspicious activity report. The bank's vice president met with county prosecutors and filed two criminal complaints against the plaintiff, alleging he had wrongfully disposed of equipment. *Id.* at 676–77. Whatever limits there may be on immunity for *that* conduct, the filing of a suspicious activity report standing alone (and subject to the Bank Secrecy Act's nondisclosure provision) presents a different question.

c. Petitioners finally cite a smattering of intermediate state court decisions. Of course, those do not constitute a split of authority that justifies this Court's review. S. Ct. R. 10(b). In any event, none involved the situation here. Three did not involve a suspicious activity report at all. *Greene v. Bank of Am.*, 156 Cal. Rptr. 3d 901, 908 (Ct. App. 2013); *Walls v. First State Bank of Miami*, 900 S.W.2d 117, 119 (Tex. App. 1995); *Digby v. Texas Bank*, 943 S.W.2d 914, 917 (Tex. App. 1997). And in the other one, the institution did more than file a report; it took affirmative steps to have criminal charges brought against the plaintiff.

Doughty v. Cummings, 28 So. 3d 580, 583 (La. Ct. App. 2009);

d. Admittedly, courts have not always specified which of the Bank Secrecy Act's safe harbors applies to the conduct before them. But "this Court reviews judgments, not opinions." *Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984). And the key point is that no court has held that immunity for the filing of a suspicious activity report—the only act alleged here—turns on whether the institution had a good-faith suspicion of illegal activity.

For example, *Lee* never specified which safe harbor it was discussing. 166 F.3d at 544. But the court made clear that whichever safe harbor applied, there was no good-faith requirement. *Id.*

Stoutt ultimately rested on the first safe harbor, not the second. But that was because the case involved acts in addition to the filing of a suspicious activity report (or a "criminal referral report" as it was called then). The institution also had "follow-up" discussions with authorities after filing the report. 320 F.3d at 30. The court questioned whether the second safe harbor covered those discussions—that is, whether they were "pursuant to" the Bank Secrecy Act. So out of an abundance of caution, the First Circuit turned to the first safe harbor and concluded that it, too, covered everything the institution allegedly did—with no good-faith requirement. *Id.*

The First Circuit's decision here, in turn, applied *Stoutt*'s broad holding. Although this case involves only the alleged filing of a suspicious activity report, there was no need for the court below to specify its reliance on the second safe harbor. The First Circuit had concluded before that the filing of a suspicious activity report was also covered by the first safe harbor, to which no good-faith requirement applied. Pet. App. 20a–26a.

In the end, no court has held that there is a good-faith requirement for immunity that applies to the filing of a suspicious activity report. This case thus does not implicate any split.

B. This Case Would Be a Poor Vehicle for Resolving the First Question Presented Anyway

Even if this case did implicate a circuit split, it would be a poor vehicle for this Court's review.

First, even under Petitioners' preferred "good-faith" rule, Fidelity would be entitled to immunity. This case is unique because, after an extensive adjudication, an arbitration panel has already concluded that Fidelity "believe[d]" that the Deutsches were trying to cause an illegal short squeeze. C.A. J.A. 93. A financial institution that believes that its customer is engaged in illegal activity has a good-faith basis for filing a suspicious activity report, and, indeed, is required to do so. 31 C.F.R. § 1023.320(a)(1), (b)(1). Thus, even if this Court read a good-faith requirement into the Act's second safe harbor, Fidelity would still be entitled to immunity.

Second, Petitioners' claims fail for reasons apart from Fidelity's immunity. Unlike some cases in which the suspicious activity report has apparently leaked (*e.g.*, *Evans*, 109 S.W.3d at 680), Petitioners do not have the alleged report or know what it contains. And Petitioners cannot obtain the report even if it exists.

Federal law prohibits institutions from disclosing the contents of a suspicious activity report, or even whether a report was filed. 31 U.S.C. § 5318(g)(2)(A). Doing so is a criminal offense. 31 U.S.C. § 5322(a). Indeed, even if a court *orders* the institution to disclose a report "or any information that would reveal the existence" of a report, the institution "shall decline to produce the [report] or such information." 31 C.F.R. § 1023.320(e)(1)(i); *see also Gregory v. Bank One Corp.*, 200 F. Supp. 2d 1000, 1003 (S.D. Ind. 2002). The "common theme" in Petitioners' claims is that Fidelity filed a suspicious activity report that was, in some respect, false. Pet. App. 8a. Petitioners can thus never prove the "common theme" of their claims—that a suspicious activity report was filed, much less that its contents were false. Thus, even if this Court were to adopt Petitioners' preferred rule, Petitioners' claims would still fail.

C. The Decision Below Was Correct

1. The Statute Affords Absolute Immunity

The text, structure, and history of the Bank Secrecy Act, as well as policy considerations, all confirm that the court below reached the right decision. Financial institutions are absolutely immune from private suits that are based on the filing of a suspicious activity report.

First, "[t]he 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; *see also Stoutt*, 320 F.3d at 31. "There is not even a hint that the statements must be made in good faith in order to benefit from immunity." *Lee*, 166 F.3d at 544. And of course a good-faith requirement "would have taken only a simple drafting adjustment." *Stoutt*, 320 F.3d at 31.

Second, the overall statutory scheme confirms that—at least when it comes to suspicious activity reports—Congress intended to confer absolute immunity. "Financial institutions are required by law to file [suspicious activity reports], but are prohibited from disclosing either that [a report] has been filed or the information contained therein." *Lee*, 166 F.3d at 544. Under Petitioners' view, however, a plaintiff can allege "on information and belief" that a bank filed a report containing false statements, or statements that were not made in good faith. If the bank sought summary judgment, it would then have to establish that the statements in the report were truthful or made in good faith, but it would be prohibited by law both from disclosing what the statements in the report were, or even whether a report was filed. "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.

Third, the history of the Bank Security Act shows that Congress intended absolute immunity in this situation. "An earlier draft of the safe harbor provision included an explicit good faith requirement for statements made in" a suspicious activity report. *Lee* 166 F.3d at 544. *See* 137 Cong. Rec. S16,642 (1991). But that requirement was dropped in later versions of the bill and was not included in the bill that Congress enacted. *See* 137 Cong. Rec. S17,910, S17,969 (1991); 31 U.S.C. § 5318(g)(3). And "the author of the provision … [said] it was intended to provide 'the broadest possible exemption from civil liability for the reporting of suspicious transactions.'" *Stoutt*, 320 F.3d at 31 (quoting 139 Cong. Rec. E57–02 (1993)).

Fourth, policy considerations favor absolute immunity. "Any qualification on immunity poses practical problems." *Id.* The most immediate problem is "a risk of second guessing." *Id.* If financial institutions face liability for filing a report, they may delay reporting or under report. *Id.* But even where a financial institution has a good-faith belief that a law has been violated, the institution may still think twice before reporting if Petitioners' view of the law prevailed. Suspicious activity reports often detail complex financial transactions. While Petitioners imply that the question of what was "possible" in such transactions is straightforward, in fact, untangling those transactions can be an immense undertaking. This case proves the point. The underlying China Medical transactions were complex: The arbitration addressing those transactions consumed five years, 100 hearings, "10,000 pages of testimony," and "thousands of pages of documents." C.A. J.A. 92. There is no reason federal court litigation would be any less onerous if the court had to adjudicate what was "possible" in terms of who caused the spike in China Medical's stock price. In the face of potential litigation burdens of this magnitude, there is a substantial risk that financial institutions would be chilled in the filing of suspicious activity reports. Institutions will certainly think twice before reporting if expensive litigation is the cost of complying with the law. And because institutions file millions of these reports a year, if these reports were subject to litigation, financial institutions would be overwhelmed. *See Suspicious Activity Report Statistics*, Financial Crimes

Enforcement Network, *at* https://www.fincen.gov/reports/sar-stats (listing two million reports in 2018).

Of course, absolute immunity may create some risk of false reporting. But the risk of damage arising from false reporting is small. The reports are made to the government, and government agents have no incentive to waste time investigating reports of "impossible" crimes. Moreover, those who "malicious[ly] or intentionally [file] false [suspicious activity reports] are hardly untouchable. Among other things … the federal government can go after them, with fines and prison time where appropriate." Pet. App. 25a. The minor risk of false reporting thus does not outweigh the serious risk of chilling the reporting of crimes.

2. Petitioners' Arguments Are Meritless

Petitioners' contrary arguments are wrong.

First, Petitioners argue that because the Bank Secrecy Act refers to "possible violation of law," the court below must be wrong when it said that financial institutions are immune even if they file a suspicious activity report alleging impossible crimes. Pet. 22–23. But it is hard to conceive how Congress could have chosen language that would set a threshold *lower* than "possible" for the filing of a report. And the regulations governing suspicious activity reports require the reporting of more than just possible violations of law; they require the reporting of suspicious activity that even might be associated with a possible legal violation. 31 C.F.R. § 1023.320(a)(1) & (b)(1).

Moreover, Petitioners have not alleged that the activity underlying the alleged report here was a legal impossibility. They may believe that whatever was in the supposed report was *factually* untrue. But, as the district court explained, "Plaintiffs allege that Fidelity's [report] accused them of manipulating stock prices by orchestrating an illegal short squeeze." Pet. App. 40a. In other words, "[b]ased on Plaintiffs' own allegations, the [report], on its face, was cast as a disclosure of a possible violation of securities law." *Id.*

Second, Petitioners cite governmental-immunity cases. Pet. 23–24. It is unclear why. There is no "good faith" requirement when it comes to absolute governmental immunities. And whatever courts have said about qualified immunity—a judicial construct—has little bearing on what Congress has done through legislative enactment.

Third, Petitioners claim that protecting those who maliciously file suspicious activity reports does not further the purpose of the Bank Secrecy Act. Pet. 24–25. But Congress concluded that the purposes of the Bank Secrecy Act are best served by removing disincentives to filing. And, as the First Circuit noted in *Stoutt*, there are multiple disincentives beyond civil litigation to the filing of false reports. 320 F.3d at 32.

II. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioners glom on a splitless question presented at the end of their brief. They seek error correction about which court's interpretation of federal law applies when a case is transferred between federal courts. But there is no split and no reason for this Court to review the circuits' unanimity.

A. There Is No Split on the Second Question Presented

"[E]very Circuit" to consider the question "has concluded that when one district court transfers a case to another, the norm is that the transferee court applies its own Circuit's cases on the meaning of federal law." Pet. App. 13a; *see also Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993); *Bradley v. United States*, 161 F.3d 777, 782 n.4 (4th Cir. 1998); *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992); *In re TMJ Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996); *Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994); *Murphy v. FDIC*, 208 F.3d 959, 966 (11th Cir. 2000); *In re Korean Air Lines*, 829 F.2d at 1175.

This rule makes sense. As then-Judge Ginsburg explained, in "the adjudication of federal claims," federal courts ordinarily "comprise a single system [in which each tribunal endeavors to apply] a single body of law," and if different circuits have different views on federal law, then the Supreme Court is the one to restore "uniformity." *In re Korean Air Lines*, 829 F.2d at 1175, 1176. Then-Judge Ginsburg did opine that the issue merited attention from "Higher Authority,"—Congress or the Supreme Court—but that was at a time when no other Circuit had considered the issue. *Id.* Now, every circuit to consider the issue (eight in all) has agreed with then-Judge Ginsburg: "Where federal claims are transferred … the principle that the transferee federal court is competent to decide federal issues correctly indicates that the transferee's interpretation should apply." *Id.* at 1175.

B. Petitioners' Arguments Are Meritless

Petitioners make two contrary arguments. Both are wrong.

First, Petitioners believe this Court's rulings in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), and *Ferens v.*

John Deere Co., 494 U.S. 516 (1990), "sugges[t]" that the unanimous circuit courts are wrong. Pet. 26. But those cases have nothing to do with interpreting federal law. *Van Dusen* and *Ferens* hold that if a federal court transfers a diversity case, the transferee court applies the *state* law that the transferor court would have applied. *Van Dusen*, 376 U.S. at 627; *Ferens*, 494 U.S. at 524–25. Those cases were not about the application of federal law. *Van Dusen* was clear: "where the defendants seek transfer, the transferee district court must be obligated to apply the *state* law that would have been applied if there had been no change of venue …." 376 U.S. at 639 (emphasis added). And the only thing *Ferens* added was that the rule did not change based on which party sought the transfer. 494 U.S. at 531,

It is true that Petitioners' case, like *Van Dusen* and *Ferens*, arose under diversity jurisdiction. But that does not affect which court's view of federal law applies. This case turns on interpreting federal, not state, law. Thus, concerns of federalism—which motivated both *Van Dusen* and *Ferens*—do not apply. *See Van Dusen*, 376 U.S. at 638; *Ferens*, 494 U.S. at 524.

Second, Petitioners argue that it would be "unjust" to apply the transferee's interpretation of federal law because it robs the plaintiff of his preferred forum. Pet. 31. This consideration does not apply when federal law is at issue. "There is no room in the federal system of review for rote acceptance of the decision of a court outside the chain of direct review. If a federal court simply accepts the interpretation of another circuit without independently addressing the merits, it is not doing its job." *In re Korean Air Lines Disaster*, 829 F.2d at 1175. In addition, this case shows how Petitioners' preferred rule would be unjust to defendants. Petitioners filed in a forum with no connection to the events or parties because Petitioners believed the Eleventh Circuit had more favorable law for them. That move wasted judicial resources and Respondent's time. And if the transferee court had to apply the transferor court's interpretation of federal law, that would simply reward and encourage Petitioners' gambit.

CONCLUSION

The petition for certiorari should be denied.

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