No. 26-11307

In the United States Court of Appeals for the Eleventh Circuit

FIDELITY NATIONAL FINANCIAL, INC. & FIDELITY NATIONAL TITLE INSURANCE COMPANY,
Plaintiffs-Appellants,
v.
SECRETARY, U.S. DEPARTMENT OF THE TREASURY & DIRECTOR OF THE FINANCIAL CRIMES ENFORCEMENT NETWORK,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida (Hon. Wendy W. Berger, No. 3:25-cv-554)

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

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I also hereby certify that I am aware of no persons or entities, in addition to those listed in the party and amicus briefs filed in this case, that have an interest in the outcome of this litigation other than the signatories to this brief and their counsel:

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AUGUST 7, 2026

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INTEREST OF THE *AMICI CURIAE*

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[1] *Amici* affirm that no party or counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to this filing.

the right of its members to own, operate, and grow their businesses. NFIB represents the interests of its members in Washington, D.C. and all 50 state capitals.

The National Association of Home Builders of the United States ("NAHB") is a Washington, D.C. based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and they account for roughly 80% of all homes constructed in the United States. NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated. NAHB member companies frequently acquire and sell land, finished lots, and residential real estate, and rely heavily upon private credit and other forms of non-bank financing to fund their operations. As a result, many NAHB members will be directly affected by FinCEN's Real Estate Rule, which subjects them to burdensome new compliance obligations and costs.

INTRODUCTION

In 1992, Congress first empowered the Financial Crimes Enforcement Network (FinCEN) to require that financial institutions report "suspicious transactions" in order to assist law enforcement in detecting and preventing financial crimes. In the three decades since, FinCEN has consistently exercised that authority by imposing reporting requirements that are tied to the characteristics of each specific transaction. That approach makes good sense: it ensures that financial institutions are required to report only those transactions that actually arouse some belief that the law has been violated, and it prevents law enforcement officials from wading through a mountain of unnecessary reports on benign transactions when carrying out their responsibilities.

FinCEN's Residential Real Estate Rule reflects a sharp break from that longstanding approach. By its terms, that Rule requires financial institutions to report nearly all non-financed real estate transactions that involve a trust or other legal entity—more than 850,000 transactions per year. But despite imposing that massive burden, FinCEN did not dispute that there are many legitimate reasons to carry out a non-financed real estate transaction (most obviously, to avoid the cost of a mortgage). Nor did the agency attempt to show that such transactions are always (or even typically) associated with potential wrongdoing. Instead, the agency determined that non-financed real estate transactions are categorically "suspicious" simply because its own experience suggested that *some* of those transactions may involve a violation of the law.

That categorical approach is unlawful. Under the plain language of the statute, FinCEN's authority is limited to "transactions" that are "suspicious" on their own terms. And that means FinCEN cannot require institutions to report an entire category of transactions without first showing that *every* transaction in the category is "suspicious" in some way. FinCEN has not made that showing here. And if this Court nonetheless upholds the Rule, it will invite FinCEN to apply a similar approach to many other transactions that, in the agency's view, would benefit from more regulatory oversight. That outcome would impose substantial costs on American businesses and would empower the Executive Branch to target disfavored industries without adhering to the guardrails set by Congress.

But even if this Court upheld FinCEN's categorical approach, the Rule should still be set aside. A bedrock principle of administrative law is that when Congress directs an agency to consider specific factors before adopting new regulations, that command must be followed. The Bank Secrecy Act requires FinCEN to conduct a meaningful cost-benefit analysis, and the agency ignored that statutory obligation here. Instead, it simply decreed that the benefits of the Rule (which it never attempted to measure) justified its massive and immediate costs. That casual disregard of the statute renders the cost-benefit analysis requirement meaningless, and provides an independent basis to set aside the Rule.

ARGUMENT

I. The Residential Real Estate Rule Exceeds FinCEN's Statutory Authority.

The Bank Secrecy Act authorizes FinCEN to "require any financial institution" to "report any suspicious transaction relevant to a possible violation of law or regulation." 31 U.S.C. § 5318(g)(1). Under that provision, FinCEN can impose reporting obligations only for "transactions" that are actually "suspicious," meaning there are indicia of illegality for each specific transaction. That reading follows from the plain text of the statute, the broader context of the Bank Secrecy Act, and decades of consistent agency practice. And under that construction, FinCEN lacks the authority to compel title companies to report millions of entirely *lawful* real estate transactions.

By nonetheless upholding FinCEN's Rule, the district court adopted an overly broad interpretation of the statute, which would allow FinCEN to require reporting for entire categories of transactions so long as the category happens to include a few transactions that present a heightened risk of money laundering. That approach would remove any discernable limits on FinCEN's authority, render other provisions of the Bank Secrecy Act superfluous, and impose onerous costs on American businesses. Another court has already rejected FinCEN's power grab, and this Court should do the same. *See Flowers Title Cos.* v. *Bessent*, 826 F. Supp. 3d 813, 816 (E.D. Tex. 2026).

A. FinCEN Impermissibly Deemed An Entire Category Of Lawful Transactions "Suspicious."

1. Ordinary tools of construction confirm that a "suspicious transaction" is one where the transaction itself is associated with known indicia of illegality. Accordingly, to impose a reporting requirement under § 5318(g)(1), FinCEN must determine that *every* affected transaction meets that criterion; it cannot require the reporting of an entire category of transactions based solely on the fact that some transactions in the category are "suspicious."

Text. Section 5318(g)(1) limits FinCEN's authority to "suspicious transaction[s]."[2] The ordinary meaning of the word "suspicion" is the "apprehension of guilt or fault on slight grounds or without clear evidence." *Suspicion*, sense 1.a, Oxford English Dictionary (2d ed. 1989); *see USPS* v. *Konan*, 607 U.S. 391, 399 (2026) ("[W]e interpret statutory terms according to the ordinary meanings they had when they were enacted."). And the statute uses "suspicious" to modify individual "transaction[s]," not a category of transactions. As a matter of ordinary English, Section 5318(g)(1) therefore limits FinCEN's authority to particular transactions that raise an "apprehension of guilt or fault"—*i.e.*, indicia of illegality.

Other judicial interpretations of "suspicious" confirm that understanding. When interpreting the Fourth Amendment's "reasonable suspicion" standard, for example, the Supreme Court has required law-enforcement officials to use criteria that apply to each individual suspect, rejecting attempts to define "reasonable suspicion" through broad criteria that would sweep in "a very large category of presumably innocent" people.

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[2] FinCEN also relied on Section 5318(g)(5) as authority for the Rule. As the magistrate judge recognized (at 16), however, both Section 5318(g)(1) and (g)(5) limit FinCEN's rulemaking authority to "any suspicious transaction relevant to a possible violation of law or regulation."

Reid v. *Georgia*, 448 U.S. 438, 440–441 (1980) (rejecting an attempt to satisfy the reasonable-suspicion standard through "a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics"); *see Kansas* v. *Glover*, 589 U.S. 376, 385 n.1 (2020) (holding that reasonable suspicion requires "an individualized suspicion that a particular citizen was engaged in a particular crime"). As those decisions recognize, suspiciousness is a fact-bound determination and requires a connection between a particular set of facts and potential wrongdoing.[3]

Statutory context. Surrounding provisions of the Bank Secrecy Act demonstrate that FinCEN's authority under § 5318(g)(1) turns on the characteristics of each individual transaction. *See West Virginia* v. *EPA*, 597 U.S. 697, 721 (2022) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (citation omitted). Those provisions

[3] In the proceedings below, the magistrate judge distinguished cases like these on the ground that "reasonable suspicion" is a "term of art" in Fourth Amendment law. ECF No. 82, at 19 n.10, 24 (distinguishing "suspicion" from "reasonable suspicion"). But regardless of the context, what matters is that "suspiciousness" under the Fourth Amendment turns on the characteristics of *each suspect*, just as suspiciousness under the Bank Secrecy Act turns on the characteristics of *each transaction*. The magistrate judge gave no reason for rejecting that straightforward conclusion.

make clear that where Congress authorized FinCEN to impose reporting requirements for broad categories that include lawful transactions, it said so expressly.

The first relevant provision is Section 5326(a), which authorizes FinCEN to issue "geographic targeting orders" (GTOs). FinCEN's GTO authority is very broad, and allows the agency to require reporting of any transaction above a certain dollar threshold when doing so is necessary "to carry out the purposes of this subtitle or to prevent evasions thereof." 31 U.S.C. § 5326(a). But unlike suspicious-activity obligations, which are indefinite and nationwide, GTOs are limited to a specific geographic region and last only 180 days. *See id.* § 5326(a), (d). The difference between the two authorities creates important tradeoffs for the agency: if FinCEN wants to impose reporting obligations without geographic or temporal restrictions, it must first determine that the "transactions" at issue are "suspicious"; but if it wants to sweep in an entire category of transactions without making that determination, it must comply with the strict limits of Section 5326(a).

The second relevant provision is Section 5313(a), which requires financial institutions to submit "currency transaction reports," which apply to any currency transactions above a given amount (currently $10,000 per day).

31 U.S.C. § 5313(a); *see* 31 C.F.R. § 1010.100(b). Section 5313 authorizes FinCEN to require reporting of transactions "in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation." 31 U.S.C. § 5313(a). In other words, Section 5313 imposes obligations for an entire category of transactions—*i.e.*, transactions above a particular threshold—without requiring any transaction-specific inquiry into suspiciousness.

These two provisions make plain that Congress knows how to give FinCEN the authority to impose categorical reporting requirements when it wants to. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and brackets omitted). And they stand in stark contrast to Section 5318(g)(1), which explicitly limits FinCEN's authority to only "suspicious transaction[s]."

Agency practice. FinCEN's longstanding approach to SARs confirms that § 5318(g)(1) applies only to "transactions" that are "suspicious" on their own terms. First, existing SAR regulations require particularized indicia of illegality. FinCEN's principal SAR rule requires banks to file a SAR for any "transaction" involving at least $5,000 that the bank "knows, suspects, or has reason to suspect" is individually suspicious because it (i) involves funds from illegal activities, (ii) was designed to evade the requirements of regulations promulgated under the Bank Secrecy Act, or (iii) has "no businesses 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)(2) (emphasis added).[4] The same framework applies across other SAR regulations as well—all of which turn on the characteristics of individual transactions. *See, e.g.*, 31 C.F.R. § 1021.320 (casinos); 31 C.F.R. § 1023.320 (brokers or dealers in securities); 31 C.F.R. § 1024.320 (mutual funds).

Second, FinCEN's guidance documents emphasize that "suspicious activity monitoring and reporting systems cannot be 'one size fits all.'" FinCEN, *FinCEN Ruling 2005-6: Suspicious Activity Reporting (Structuring)*, at 2 (July 15, 2005). Specifically, the agency has required financial institutions to consider "the presence or absence of numerous factors, including *facts and circumstances specific to the customer relationship*,"

[4] FinCEN first adopted that understanding of "suspicious transactions" three decades ago. *See* Amendments to the Bank Secrecy Regulations; Requirements to Report Suspicious Transactions, 61 Fed. Reg. 4,326, 4,331-4,332 (Feb. 5, 1996) (codified at 31 C.F.R. pt. 103).

when determining whether each particular transaction is "suspicious." FinCEN et al., *Joint Statement on the Risk-Based Approach to Assessing Customer Relationships and Conducting Customer Due Diligence*, at 1 (July 6, 2022) (emphasis added). And to guide financial institutions on their reporting obligations, those advisories identify "red flags" associated with categories of transactions, and reiterate that the presence of a particular red flag does not automatically warrant a SAR filing.[5] In other words, FinCEN instructs institutions to inquire into the specific facts associated with each transaction—even when its guidance is aimed at a large category.

Whether this Court looks to text, structure, or history, the result is the same: Section 5318(g)(1) requires FinCEN to determine that the specific transactions covered by its regulations are actually "suspicious." Accordingly, if FinCEN adopts a rule under that provision that applies to an entire category

[5] For example, FinCEN recently issued a notice related to payroll tax evasion and workers' compensation fraud in the construction sector. *See* FinCEN, *FinCEN Notice FIN-2023-NTC1: FinCEN Calls Attention to Payroll Tax Evasion and Workers' Compensation Fraud in the Construction Sector* (Aug. 15, 2023). In that notice, the agency provided 11 subject-matter-specific red flags and reiterated that "[n]o single red flag is determinative of suspicious activity." *Id.* at 5. Instead, "financial institutions should consider the surrounding facts and circumstances . . . before determining if a transaction" is suspicious. *Id.*

of transactions, it must first determine that *every* transaction in that category is actually "suspicious."

2. FinCEN did not stay within those statutory bounds for its Residential Real Estate Rule. *See Insurance Mktg. Coal. Ltd.* v. *FCC*, 127 F.4th 303, 311, 317 (11th Cir. 2025) (vacating agency action and noting that "exceeding statutory authority is a serious defect"). To the contrary, FinCEN acknowledged during the rulemaking process that the majority of non-financed real estate transactions are not suspicious in any way.

The Residential Real Estate Rule requires title companies to report nearly every non-financed residential real estate transaction involving a trust or other legal entity. *See* Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 Fed. Reg. 70,258, 70,265–66 (Aug. 29, 2024).[6] Those obligations are not limited for any period of time or to any geographic region. And the reporting obligations apply regardless of the purpose of the transaction or the value of the property.

Despite the breadth of the Rule, FinCEN never once concluded that non-financed real estate transactions are actually suspicious. *See Id.* at 70,260

[6] The Rule's exemptions are very narrow, and apply to transactions involving bankruptcies, divorces, deaths, and other limited circumstances. *See* 89 Fed. Reg. at 70,290.

(concluding only that those transactions "posed a high risk for illicit finance"). Nor did FinCEN dispute that buyers have many legitimate reasons to prefer non-financed real estate transactions, including freedom from mortgage payments and interest, reduced closing costs, and increased negotiating power; its own guidance acknowledges that "there are many legitimate reasons to use legal entities and trusts to own residential real property." FinCEN, *Residential Real Estate Reporting Frequently Asked Questions*, at 1 (Feb. 13, 2026). But the agency nonetheless reasoned that it was appropriate to designate all non-financed real estate transactions suspicious because "42 percent of [those transactions] captured by the Residential Real Estate GTOs were conducted by individuals or legal entities on which a SAR has been filed." 89 Fed. Reg. at 70,260.

That reasoning rests on multiple unsupported assumptions:

First, FinCEN did not explain why transactions "conducted by individuals or legal entities on which a SAR has been filed" are uniformly treated as suspicious. Only 0.5% of SARs are used in an FBI *investigation*, let alone an actual crime. *See* FinCEN, *Year in Review for Fiscal Year 2024*, at 2–3 (June 18, 2025) (noting 4.7 million SARs were filed in FY2024 but only 22,805 were used in FBI investigations). So it stands to reason that the vast majority of individuals or entities associated with SARs are not "suspicious" in any way.

Second, as explained further below (at 17–18), FinCEN did not explain why its experience with GTOs—which, by definition, apply to specific regions for short periods of time—would be representative of the nation as a whole at all times. And one would expect they are not—otherwise, there would be no reason to issue a GTO in the first place.

Third, even if FinCEN could overcome those problems, its own analysis demonstrates that most non-financed real estate transactions (58%) are *not* conducted by individuals or entities connected to a SAR. And the Rule identifies no other criteria that would cast doubt on those transactions as a category; instead, the Rule cites only a handful of prosecutions that involved non-financed real estate transactions over the past two decades. *See* 89 Fed. Reg. at 70,259 n.12 (citing 18 cases since 2004).

At most, the administrative record demonstrates that *some* non-financed real estate transactions may be associated with suspicious activity. But the same could be said of any category that includes hundreds of thousands of transactions per year. The Bank Secrecy Act does not allow

FinCEN to impose blanket reporting requirements under those circumstances.

B. The District Court Misinterpreted The Bank Secrecy Act.

None of the reasons given by the district court demonstrates that the Bank Secrecy Act authorizes the Residential Real Estate Rule.[7]

1. In accepting FinCEN's sweeping claim of authority, the magistrate judge reasoned (at 26–27) that non-financed real estate transactions are "suspicious" because they are (i) "unlike most residential real-estate transactions" and (ii) "outside the focus of other regulatory safeguards." Neither of those criteria have anything to do with whether a particular "transaction" is "suspicious"—*i.e.*, whether it warrants the "apprehension of guilt or fault" for "possible violation[s] of law or regulation." *Suspicion*, sense 1.a, Oxford English Dictionary (2d ed. 1989); 31 U.S.C. § 5318(g)(1).

To start, the fact that most real-estate transactions are financed says nothing about the suspiciousness of non-financed transactions—just as the fact that most payments are made with credit cards says nothing about the

[7] The district court adopted the magistrate judge's Report & Recommendation (R&R). *See* ECF No. 91, at 12. Regarding statutory authority, the district court agreed with the analysis in the R&R and "decline[d] to readdress Plaintiffs' interpretive objections." *Id.* at 4.

suspiciousness of debit-card or cash transactions. *See United States* v. *Townsend*, 305 F.3d 537, 542 (6th Cir. 2002) ("[U]nusual" conduct is "unrevealing of reasonable suspicion in the absence of testimony about the activity's linkage to criminal conduct."). What is missing from FinCEN's Rule is any reason *why* the difference between financed and non-financed transactions sheds light on a "possible violation" of the law. *See supra*, at pp. 14-15. The district court never grappled with that gap in FinCEN's reasoning.

It is also irrelevant that more regulations apply to financed real-estate transactions than to non-financed real-estate transactions. The absence of regulation does not signal a potential violation of the law. And Section 5318(g)(1) does not authorize FinCEN to use its SAR authority to fill gaps that Congress left open in other statutes.

2. The magistrate judge also erred (at 27–28) by relying on FinCEN's "experience with GTOs." As FinCEN explained in the Rule, it had previously addressed non-financed real estate transactions through GTOs, but found that approach insufficient because GTOs "do not address the illicit finance risks posed by certain real estate transfers on a nationwide basis" and are instead "intended to be a temporary information collection measure."

89 Fed. Reg. at 70,260. According to the magistrate judge (at 28), the "insufficienc[y]" of GTOs supported FinCEN's decision to use Section 5318(g)(1) to reach the same class of transactions.

That reasoning turns the Bank Secrecy Act on its head. As explained above, Section 5318(g)(1) and Section 5326 are separate provisions that impose different limits on FinCEN's authority. One authorized nationwide reporting limited to "suspicious transactions"; the other authorized reporting of a broader class of transactions, but only for certain regions and periods of time. Those limits reflect Congress's considered judgments about what powers to vest in the agency and what powers to withhold. FinCEN cannot invoke one authority based solely on its dissatisfaction with the other.

FinCEN's reliance on GTO statistics also makes little sense on its own terms. By definition, GTOs are directed at discrete regions during periods when illegal conduct is more likely to occur. *See* 89 Fed. Reg. at 70,259 n.14. It is not surprising that FinCEN would encounter "illicit financial activity" associated with non-financed real estate transactions in those particular circumstances. *See id.* at 70,260. But FinCEN's track record with GTOs does not suggest that non-financed real estate transactions anywhere, at any time, are suspicious in other contexts.

3. Unable to ground its decision in the text of Section 5318(g)(1), the magistrate judge concluded (at 29) that "[t]he Rule finds further statutory support in § 5318(a)(2)." That is incorrect.

Section 5318(a)(2) is a procedural provision that authorizes FinCEN to "maintain appropriate procedures . . . to ensure compliance with this subchapter." 31 U.S.C. § 5318(a)(2). To the extent that provision allows FinCEN to "includ[e] the collection and reporting of certain information," that is only to "ensure compliance" with the statute. *Id.* The most natural reading of that provision is that it permits FinCEN to adopt procedures to enforce its substantive regulations—including its SAR regulations. It is not a source of substantive authority for the agency. *See West Virginia*, 597 U.S. at 721 (citation omitted); *Ryan, LLC* v. *FTC*, 746 F. Supp. 3d 369, 385 (N.D. Tex. 2024) (holding, when "viewing the statute as a whole," that Section 6(g) of the FTC Act did not confer substantive rulemaking authority).

Reading Section 5318(a)(2) as a grant of substantive authority would also make a hash of the statute. If that provision authorizes FinCEN to require the "reporting of certain information" any time it liked, without qualification, then there is no reason for the Bank Secrecy Act to impose specific requirements for SARs and GTOs. That interpretation flies in the face of "one of the most basic interpretive canons," which requires courts to give "effect to . . . all [of a statute's] provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (citation omitted). And it would allow the agency to use a minor procedural provision to circumvent limits that Congress placed on its authority elsewhere in the statute. *See Whitman* v. *American Trucking Ass'n*, 531 U.S. 457, 468 (2001) (explaining that Congress "does not . . . hide elephants in mouseholes").

C. FinCEN's Overbroad Interpretation Of The Bank Secrecy Act Would Harm American Businesses.

The most immediate burden of the Rule will fall on title companies. According to FinCEN's own estimates, the Rule will require 800,000 to 850,000 new reports every year. *See* 89 Fed. Reg. at 70,283. Those reports will cost approximately $559.4 million in the first year, and $532.2 million annually thereafter. *See id.* at 70,284. Each report will take 2.5 hours to complete. *See id.* at 70,286. And because FinCEN refused to exempt trusts from the Rule, many employees tasked with preparing these reports will be operating well outside of their expertise—leading to training costs of more than $20 million per year. *See id.* at 70,285. Those burdens are both considerable and unprecedented—as FinCEN acknowledged, the entities targeted by the Rule have not previously been subject to SAR obligations of any kind.

The harms of FinCEN's novel approach will fall on other businesses as well. The agency's existing reporting obligations already generate millions of SARs each year. *See* FinCEN, *Year in Review for Fiscal Year 2024*, at 3 (June 18, 2025) (noting 4.7 million reports in fiscal year 2024). If courts bless FinCEN's categorical approach, that figure could increase by orders of magnitude—potentially leading to tens of millions of new reports. And if FinCEN is able to deem any category of transactions "suspicious" based on the absence of existing regulations or the participation of SAR subjects in a percentage of those transactions (as it did in the Rule), it is likely the agency will use its newfound authority to target entire industries—such as cryptocurrency platforms or fintech businesses—rather than tailoring SAR obligations to only those transactions that are likely to involve wrongdoing. That outcome would greatly expand FinCEN's authority well beyond its historical limits.

Finally, FinCEN's approach poses serious fairness concerns. The Supreme Court has consistently required law enforcement to address culpability on a case-by-case basis. *See Glover*, 589 U.S. at 385 n.1 (reasonable-suspicion standard); *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979) (probable-cause standard). Those holdings recognize the serious problems that arise when one person is swept into a law-enforcement investigation based solely on the conduct of another.[8] And the difficult "constitutional questions" raised by FinCEN's interpretation provide another reason to reject it. *See Johnson* v. *Governor of Fla.*, 405 F.3d 1214, 1229 (11th Cir. 2005) (en banc).

II. The Residential Real Estate Rule Is Arbitrary And Capricious.

The Rule is unlawful for a second and independent reason. The Bank Secrecy Act requires FinCEN to account for the costs and benefits of any rule that imposes SAR obligations on private parties. But even though FinCEN acknowledged that the Rule would impose significant burdens on title companies, FinCEN made no attempt to demonstrate that any of the Rule's speculative benefits outweigh those burdens—likely because the agency's own analysis confirms that most transactions covered by the Rule are not remotely suspicious. For that reason, the Rule should be set aside.

[8] Plaintiffs cited numerous additional authorities supporting their argument that the Rule violates the Fourth Amendment. *See, e.g.*, *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21 (1974).

A. The Bank Secrecy Act Requires A Meaningful Cost-Benefit Analysis.

Under the Administrative Procedure Act, agency action must be set aside if the agency fails to consider factors identified by Congress. *See e.g.*, *Public Citizen* v. *Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004); *Sierra Club, Inc.* v. *Leavitt*, 488 F.3d 904, 913–14 (11th Cir. 2007). Accordingly, if a statute requires a cost-benefit analysis, an agency is obligated to "determine as best it can the economic implications of the rule it has proposed." *Chamber of Com.* v. *SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005); *see Chamber of Com.* v. *SEC*, 85 F.4th 760, 777 (5th Cir. 2023) (holding agency "failed adequately to substantiate the rule's benefits and costs"); *Business Roundtable* v. *SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (holding agency failed to "adequately . . . assess the economic effects of a new rule").

To be sure, it is not always possible for agencies to quantify the precise costs and benefits of their rules. *See Investment Co. Inst.* v. *CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013) (explaining that agencies need not attempt to "measure the immeasurable"). But even in circumstances where measurement is difficult, agencies cannot substitute "mere speculation" or generalized assertions for a reasoned assessment of a rule's likely impacts. *Business Roundtable*, 647 F.3d at 1150; *see Public Citizen*, 374 F.3d at 1218 (noting "generalized reference" to empirical studies is "of doubtful legal sufficiency"). Instead, they are required to meaningfully assess costs and benefits, and to make a serious effort to evaluate whether the burdens they are imposing on private parties are actually justified.

That obligation applies with full force in this case. The Bank Secrecy Act provides that FinCEN "*shall* consider" costs and benefits before promulgating any rule that imposes new reporting obligations on private parties. 31 U.S.C. § 5318(g)(5)(B) (emphasis added); *see Bufkin* v. *Collins*, 604 U.S. 369, 379 (2025) ("It is undisputed that the word 'shall' imposes a mandatory command.").[9] Given that statutory command, FinCEN was required to evaluate "the burdens imposed . . . on persons required to provide such reporting," as well as the "efficiency" and "benefits derived" from its reporting requirements, before it adopted the Rule. 31 U.S.C. § 5318(g)(5)(B)(iii).

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[9] As the magistrate judge correctly noted (at 38 n.36), Plaintiffs' cost-benefit argument relied only on 31 U.S.C. § 5318(g)(5)(B). There is no dispute that a violation of that provision is judicially reviewable.

B. FinCEN Did Not Analyze Meaningfully The Costs And Benefits Of The Rule.

FinCEN did not conduct the analysis required by law. Although the agency determined that the Rule would impose over half a billion dollars of costs per year, it never weighed those severe burdens against any benefits it expects to derive from the Rule. Instead, it simply "inferred" that the benefits outweighed the costs. 89 Fed. Reg. at 70,285. FinCEN's reliance on "unsupported assertions [and] unstated inferences" falls well short of the APA's requirement for reasoned decision-making. *Tripoli Rocketry Ass'n* v. *ATF*, 437 F.3d 75, 83 (D.C. Cir. 2006). None of the agency's arguments in litigation demonstrates otherwise.

1. Under the Bank Secrecy Act, FinCEN was required to evaluate the (1) "burdens imposed" by, (2) "the benefits derived" from, and (3) the "efficiency" of the Rule. 31 U.S.C. § 5318(g)(5)(B)(iii). FinCEN completed the first step of that process: as explained above, the agency determined that its Rule would impose compliance costs of half a billion dollars during the first year, and nearly the same amount for each year thereafter. *See* 89 Fed. Reg. at 70,284 (estimating subsequent annual costs of approximately $532.2 million).

But its analysis stopped there. Rather than make any attempt to seriously evaluate the "benefits derived" from the Rule, FinCEN admitted "no attempt [was] made to quantify the net benefit of the rule." *Id.* And rather than compare costs and benefits to determine the Rule's "efficiency," the agency stated only that "it *might* be *inferred* that a *tacit expectation* underlying this rulemaking is that the rule will generate intangible benefits worth over $500 million per year." *Id.* at 70,285 (emphasis added). In other words, because FinCEN had decided to move forward with the Rule, that alone meant that it was justified.

That circular logic is plainly insufficient under the APA. Although FinCEN was not required to precisely quantify the benefits of its Rule, it was still required to do *something* to ensure that the massive and immediate costs of its reporting requirements were justified. *See Business Roundtable*, 647 F.3d at 1150 (explaining that a cost-benefit analysis cannot rest on "mere speculation"). By its own admission, FinCEN made no attempt to do that. If the APA is satisfied here—where an agency offers little more than its own say-so to impose extraordinary costs on private parties—the cost-benefit analysis required by Congress would be a dead letter.

2. None of FinCEN's defenses for its cost-benefit analysis withstands scrutiny.

First, FinCEN argued below (Reply Br. at 7) that it was entitled to rely on "predictive judgments" regarding the benefits of expanded reporting "even if not explicitly backed by information in the record." *Great Lakes Commc'n Corp.* v. *FCC*, 3 F.4th 470, 476 (D.C. Cir. 2021). That proposition of law is accurate but irrelevant. The problem for FinCEN is not the lack of precise estimates or quantification backed by empirical data; it is that FinCEN made no "predictive judgments" based on facts or logic that could facilitate judicial review of its decisionmaking. *See Sorenson Commc'ns Inc.* v. *FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014). Instead, it simply speculated that the massive costs of the Rule *may* be outweighed by benefits to law enforcement, even though those benefits were never explained. For example, FinCEN opined in the Rule that the new reporting requirements may "promote national security objectives," improve the efficiency of law-enforcement investigations, and reduce money laundering through residential real estate. 89 Fed. Reg. at 70,277–70,278. All of those are worthwhile goals that FinCEN should aim to achieve in its regulations and enforcement efforts. But there is a difference between merely identifying potential benefits and showing that they will be achieved. And nothing in the Rule explains *how* receiving hundreds of thousands of new reports (the vast majority of which relate to lawful transactions) could possibly prevent crime.

Worse still, FinCEN's argument has no limiting principle. According to FinCEN, it is enough to simply list potential benefits that could follow from increased reporting, deem those benefits "inestimable" and therefore unquantifiable, and then conclude that those intangible benefits outweigh the real-world financial costs of increased reporting obligations. *Id.* at 70,284. FinCEN could use that playbook to justify *any* new SAR requirements, no matter the costs. *Cf. Corrosion Proof Fittings* v. *EPA*, 947 F.2d 1201, 1217 (5th Cir. 1991) (rejecting, as "no standard at all," a generic agency explanation that would apply in nearly all circumstances).

As a final attempt to skirt meaningful judicial review, FinCEN also argued below that courts should not second-guess its analysis because agencies are entitled to "considerable discretion" and deference (Gov. Br. at 18) in conducting a "complex . . . economic analysis typical in the regulation promulgation process." *National Ass'n of Home Builders* v. *EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012). But there was no "complex economic analysis" here—as the agency admitted. *See* 89 Fed. Reg. at 70,284 ("[N]o attempt [was] made to quantify the net benefit of the rule."). And that makes this case very different from *Home Builders*, where the dispute concerned particular decisions made by the agency in calculating benefits and comparing them with costs. *See* 682 F.3d at 1040.

C. FinCEN's Approach To Cost-Benefit Analysis Harms American Businesses.

Rigorous cost-benefit analysis is vital to American businesses. The Administrative Procedure Act sets forth detailed notice-and-comment procedures precisely so that regulated entities can share information with agencies and improve the decision-making process. Because the business community often bears the costs of new regulations, it relies on those procedures to ensure that its costs are properly accounted for. *See* Br. for Chamber of Commerce of the United States of America as *Amicus Curiae* in Supp. of Pet'r at 1–2, *American Water Works Ass'n* v. *EPA*, No. 24-1376 (D.C. Cir. Apr. 17, 2026) (explaining that "businesses generally benefit from lawful, cost-effective regulations that do not impose unworkable obligations on the private sector").

When a cost-benefit analysis is inadequate, however, it is likely that businesses (and their customers) will bear the brunt of regulations that never should have been promulgated in the first place. That is the case here, as

FinCEN moved ahead with onerous rulemaking requirements without any basis to conclude that the burdens of the Rule were justified. And if agencies take the same cursory approach to cost-benefit analysis as FinCEN, businesses will have less incentive to participate in the rulemaking process going forward. That outcome will harm not only businesses and their customers, but every person and institution that benefits from sound agency regulation.

CONCLUSION

For the foregoing reasons, the district court's order should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD COUNT LIMITATIONS

I, Amanda Flug Davidoff, counsel for *amici curiae* the Chamber of Commerce of the United States of America, National Federation of Independent Business Small Business Legal Center, Inc., and National Association of Home Builders, and a member of the Bar of this Court, certify, pursuant to Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5), and 32(a)(6), that the attached Brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,012 words.

/s/ *Amanda Flug Davidoff*
AMANDA FLUG DAVIDOFF

AUGUST 7, 2026

CERTIFICATE OF SERVICE

I, Amanda Flug Davidoff, counsel for *amici curiae* the Chamber of Commerce of the United States of America, National Federation of Independent Business Small Business Legal Center, Inc., and National Association of Home Builders, and a member of the Bar of this Court, certify that, on August 7, 2026, a copy of the attached Brief was filed electronically through the CM/ECF system with the Clerk of this Court. The participants in this case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ *Amanda Flug Davidoff*
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AUGUST 7, 2026