

No. 26-40285

**In the United States Court of Appeals
for the Fifth Circuit**

FLOWERS TITLE COMPANIES, L.L.C.,
Plaintiff-Appellee,

v.

SECRETARY, U.S. DEPARTMENT OF THE TREASURY & DIRECTOR OF THE
FINANCIAL CRIMES ENFORCEMENT NETWORK,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern
District of Texas (Hon. Jeremy D. Kernodle, No. 6:25-cv-127)

**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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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons and entities identified in the Appellee's Certificate, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 of the Rules of this Court have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate potential disqualification or recusal.

Amici Curiae

1. The Chamber of Commerce of the United States of America has no parent corporations, and no publicly held company has any ownership interest therein.
2. The National Federation of Independent Business Small Business Legal Center, Inc. has no parent corporations, and no publicly held company has any ownership interest therein.
3. The National Association of Home Builders of the United States has no parent corporations, and no publicly held company has any ownership interest therein.

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OCTOBER 23, 2026

INTEREST OF THE *AMICI CURIAE*

The Chamber is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. Many of the Chamber's members are companies subject to reporting obligations under the Bank Secrecy Act and are subject to regulation by the Financial Crimes Enforcement Network.¹

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of NFIB, which is the nation's leading small business association. NFIB's mission is to promote and protect

¹ *Amici* state that no 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 burdening law enforcement officials with a mountain of unnecessary reports on benign transactions.

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 does 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. This Court should reject it.

ARGUMENT

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

FinCEN argues that two provisions of the Bank Secrecy Act provide authority for the Residential Real Estate Rule: Section 5318(g)(1) and Section

5318(a)(2). As the district court recognized, neither one supports the agency’s newfound approach to its own powers. And if this Court accepted FinCEN’s arguments, the Bank Secrecy Act would afford the agency limitless discretion to require the reporting of lawful transactions and invite serious constitutional questions under the non-delegation doctrine.

A. The District Court Correctly Held That Section 5318(g)(1) Does Not Authorize the Residential Real Estate Rule.

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 “transaction[s]” 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.

In arguing otherwise, FinCEN does not seriously dispute the district court’s interpretation of the statute. Instead, it argues that the Rule satisfies that interpretation because non-financed real-estate transactions are unusual and ripe for criminal abuse. Gov’t Br. 21–22. The agency did not build a factual

record to support that assertion. And if FinCEN’s arguments are sufficient here, it is hard to imagine a class of transactions that could not be deemed “suspicious” going forward.

1. Section 5318(g)(1) requires transaction-specific indicia of illegality.

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 Section 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 may be “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

² FinCEN also relied on Section 5318(g)(5) as authority for the Rule. But both Section 5318(g)(1) and (g)(5) limit FinCEN’s rulemaking authority to “any suspicious transaction.”

uses “suspicious” to modify individual “transaction[s],” not categories 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. *Flowers Title Cos., LLC v. Bessent*, 826 F. Supp. 3d 813, 819–820 (E.D. Tex. 2026).

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. *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. Just like

“suspiciousness” in Fourth Amendment jurisprudence turns on the characteristics of *each suspect*, “suspiciousness” under the Bank Secrecy Act turns on the characteristics of *each transaction*.

Statutory context. Surrounding provisions of the Bank Secrecy Act demonstrate that FinCEN’s authority under Section 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 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 value 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 suspicious activity reports (SARs) confirms that Section 5318(g)(1) applies only to “transaction[s]” 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”: (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 business or apparent lawful purpose or is not the sort in which the *particular* customer would normally be expected to engage.” 31 C.F.R. § 1020.320(a)(2) (emphasis added).³ The same framework applies across other SAR regulations as well—

³ FinCEN first adopted that understanding of “suspicious transactions” three decades ago. *See* Amendment to the Bank Secrecy Act Regulations; Requirement To Report Suspicious Transactions, 61 Fed. Reg. 4,326, 4,331–4,332 (Feb. 5, 1996) (codified at 31 C.F.R. pt. 103).

all of which turn on the characteristics of individual transactions. *See, e.g., id.* § 1021.320 (casinos); *id.* § 1023.320 (brokers or dealers in securities); *id.* § 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*,” 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 an SAR filing.⁴ In other words, FinCEN

⁴ For example, FinCEN recently issued a notice related to payroll tax evasion and workers’ compensation fraud in the construction sector. *See* FinCEN, 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 eleven subject-matter-specific red

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 agency practice, 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 of transactions, it must first determine that *every* transaction in that category is actually “suspicious.” FinCEN has failed to do so here.

2. The Residential Real Estate Rule covers transactions that are not “suspicious.”

FinCEN did not stay within those statutory bounds for its Residential Real Estate Rule. 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

flags and reiterated that “[n]o single red flag is determinative of suspicious activity.” *Id.* at 5–7. Instead, “financial institutions should consider the surrounding facts and circumstances . . . before determining if a transaction” is suspicious. *Id.* at 5.

Real Estate Transfers, 89 Fed. Reg. 70,258, 70,265–70,266 (Aug. 29, 2024).⁵

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 (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 as suspicious because “approximately 42 percent of [those transactions] captured

⁵ 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.

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. *Id.* 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 fiscal year 2024 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, 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 (approximately 58%) are *not* conducted by individuals or entities connected to

a SAR. *See* 89 Fed. Reg. at 70,260. 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 id.* 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 “nearly every type of transaction imaginable.” *Flowers Title*, 826 F. Supp. 3d at 820. The Bank Secrecy Act does not allow FinCEN to impose blanket reporting requirements under those circumstances.

3. FinCEN’s counterarguments lack merit.

FinCEN does not dispute the district court’s interpretation of Section 5318(g)(1). *Compare Flowers Title*, 826 F. Supp. 3d at 820 (holding “that § 5318(g)(1) does not give FinCEN the authority to regulate *all* transactions—but only those transactions that tend to arouse the belief that something is wrong”), *with* Gov’t Br. 21 (arguing that § 5318(g)(1) “allows FinCEN to require the reporting of transactions that give rise to an ‘apprehension of something wrong or hurtful’”). Instead, FinCEN argues that the Residential

Real Estate Rule complied with that provision because it was sufficiently tailored to cover only those transactions that are associated with potential wrongdoing. None of FinCEN's arguments on appeal support that conclusion.

a. FinCEN spends much of its opening brief characterizing the transactions covered by the Rule. In its view, the Rule covers only “a defined category of transactions” that are “especially attractive to drug cartels, human traffickers, and other illicit actors”; distinct from “run-of-the-mill residential real estate transactions”; and “by their very nature . . . unusual and popular with criminals.” Gov't Br. 21, 24. And because these transactions present “the highest risk of undetected abuse,” FinCEN argues that every transaction covered by its Rule “arouses suspicion that something wrong is occurring.” *Id.* at 23, 26 (quotations and brackets omitted).

The problem for FinCEN is that none of these assertions are supported by citations to the record. And when FinCEN does engage with the actual evidence it marshaled in support of its Rule, its arguments are “vague, conclusory, and unpersuasive.” *Flowers Title*, 826 F. Supp. 3d at 820.

FinCEN notes (at 21–22) that most real estate transactions are financed, which makes non-financed transactions “unusual.” But the prevalence of a certain type of transaction does not make other types suspicious—for

example, the fact that most payments are made with credit cards says nothing about the suspiciousness of debit-card or cash transactions. And as explained above (at 14–15), FinCEN’s own data demonstrated that the majority of non-financed real-estate transactions are not suspicious in any way. Indeed, FinCEN has explicitly acknowledged that “[m]any all-cash transactions are routine and legitimate.” FinCEN, FIN-2017-A003, *Advisory to Financial Institutions and Real Estate Firms and Professionals*, at 4 (Aug. 22, 2017).

FinCEN also speculates (at 22) about the ways in which criminals *could* use non-financed real-estate transactions to facilitate money laundering or other financial crimes, including by taking advantage of so-called “secrecy jurisdictions.” But FinCEN did not limit its rule to any subset of transactions that involve “secrecy jurisdictions” or other known indicia of illegality. Instead, it required reporting for a large class of lawful transactions, simply because some transactions may be illegal. That approach would “grant FinCEN far-reaching powers no one has contemplated.” *Flowers Title*, 826 F. Supp. 3d at 820.

Finally, FinCEN argues (at 22–23) that its Rule is justified because it “exclud[ed] numerous transfers” it found to be lower risk, including “transfers as part of estate planning, tax deferral, or the dissolution of a marriage.” But

the question here is not whether FinCEN appropriately excluded from the Rule's coverage non-suspicious transactions; it is whether FinCEN built a record showing that the transactions covered by the Rule are actually suspicious. The Rule's exclusions are not relevant to that question.

b. Unable to justify its sweeping assertions about non-financed real-estate transactions on the factual record, FinCEN falls back on the legal standard, arguing that the district court was required to defer to the agency's "judgment" and should not have engaged in "speculation" about the legitimate reasons for engaging in transactions covered by the Rule. Gov't Br. 28–30. That argument is wrong on the law and misreads the district court's decision.

To start, FinCEN's arguments flip the APA's burden on its head. The APA requires administrative agencies to offer "an adequate explanation" for their own regulations and empowers courts to set aside agency action when such an explanation is lacking. *United States v. Garner*, 767 F.2d 104, 117 (5th Cir. 1985) (explaining that failure to offer such an explanation "has frequently resulted in [a] rule's invalidation"). As a result, it was not the district court's responsibility to marshal facts showing covered transactions are not suspicious; instead, FinCEN was required to offer some support for its

conclusion that they are. Given that legal standard, it was entirely appropriate for the district court to scrutinize FinCEN’s “judgment” in this case.

Moreover, the district court’s discussion of the legitimate reasons for non-financed real-estate transactions was hardly “speculation.” In asking whether FinCEN had “limit[ed] its reporting rule to ‘any suspicious transaction,’” the district court examined the declarations in the record, which demonstrated both (i) that most non-financed real-estate transactions are paid for “with money from a savings account at a bank or credit union that is required to maintain an anti-money-laundering program,” and (ii) that purchasers can save significant amounts of money by deciding not to finance a real-estate transaction. *Flowers Title*, 826 F. Supp. 3d at 821. That is the searching analysis courts are required to conduct under the APA. And despite criticizing the court for noting the legitimate reasons for non-financed real-estate transactions, Gov’t Br. 27–28, FinCEN has never disputed any specific conclusion the district court drew from the record in this case.

B. The District Court Correctly Held That Section 5318(a)(2) Does Not Authorize the Residential Real Estate Rule.

In promulgating the Residential Real Estate Rule, FinCEN relied almost entirely on the suspicious-transaction authority of Section 5318(g)(1). *See* 89 Fed. Reg. at 70,259 (discussing § 5318(g)(1) as the “particular”

authority relevant to the Rule). To defend that Rule in court, however, FinCEN has now pivoted to a separate provision, Section 5318(a)(2), which allows FinCEN to “maintain appropriate procedures” to ensure compliance with the law. Section 5318(a)(2) does not vest FinCEN with substantive authority to circumvent the limits found elsewhere in the Bank Secrecy Act. And even if FinCEN’s statutory arguments were colorable, the APA does not permit agencies to advance legal arguments for the first time in court. *See DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 24 (2020) (“An agency must defend its actions based on the reasons it gave when it acted.”); *Data Mktg. P’ship, LP v. United States Dep’t of Labor*, 45 F.4th 846, 856 (5th Cir. 2022) (“In reviewing an agency’s action, we may consider only the reasoning ‘articulated by the agency itself’; we cannot consider *post hoc* rationalizations.”) (citations omitted).

1. Section 5318(a)(2) authorizes FinCEN to “maintain appropriate procedures, *including the collection and reporting of certain information . . . to ensure compliance with this subchapter.*” 31 U.S.C. § 5318(a)(2) (emphasis added). As the district court explained, that provision permits FinCEN to “require institutions to maintain procedures, including maintaining collection and reporting procedures,” but does not “grant it independent, standalone

authority to require reports from financial institutions.” *Flowers Title*, 826 F. Supp. 3d at 822–823; *see 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).

FinCEN’s contrary reading presents numerous problems. For one, it is inconsistent with the statute’s plain meaning. Section 5318(a)(2) authorizes “procedures” to “ensure compliance” with the substantive obligations imposed by Subchapter II of the Bank Secrecy Act, including reporting requirements. The natural implication of that language is that the substantive obligations must arise from another provision; otherwise, there would be no distinction between the “procedures” authorized by Section 5318(a)(2) and the reporting obligations those procedures are meant to “ensure compliance” with.

For another, reading Section 5318(a)(2) as a grant of substantive authority would make a hash of the statute by “render[ing] the reporting requirement in § 5318(g)(1) surplusage.” *Flowers Title*, 826 F. Supp. 3d at 823. If Section 5318(a)(2) authorizes FinCEN to require the “reporting of certain information” any time it likes, without qualification, then there is no reason for the Bank Secrecy Act to specifically authorize FinCEN to require reporting for SARs and GTOs. Such a result 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 Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) (“[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.”); *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (explaining that Congress “does not . . . hide elephants in mouseholes”).

According to FinCEN (at 35–36), there is no surplusage problem here because Section 5318(a)(2) is narrower than Section 5318(g)(1). Specifically, as FinCEN’s analysis goes, Section 5318(a)(2) only authorizes procedures to ensure compliance with Subchapter II of the Bank Secrecy Act or to prevent three types of illicit activity (money laundering, terrorist financing, or other forms of illicit finance)—whereas Section 5318(g)(1) authorizes FinCEN to require reporting of “any suspicious transaction relevant to a possible violation of law or regulation.” That argument fails on basic logic: because Section 5318(g)(1) is part of Subchapter II, the authority in Section 5318(a)(2) to

prescribe procedures to ensure compliance with Subchapter II necessarily includes the full suite of procedures for compliance with Section 5318(g)(1). Accordingly, by its plain language, Section 5318(a)(2) is broader than Section 5318(g)(1). And if FinCEN is right that Section 5318(a)(2) provides an independent source of substantive authority, that authority would extend to any transaction “relevant to a possible violation of law or regulation,” rendering Section 5318(g)(1) superfluous. Notably, FinCEN has not identified a single transaction it could reach under its suspicious-transaction authority that does not fall within its newfound interpretation of Section 5318(a)(2).

For the first time on appeal, FinCEN also argues that its expansive view of Section 5318(a)(2) is supported by “statutory history.” That argument is meritless. FinCEN observes that Congress “expanded” FinCEN’s authority in Section 5318(a)(2) over time to allow the agency to impose a broader set of procedures—first to guard against money laundering, then to cover terrorist financing and other illicit finance—and also authorized FinCEN’s procedures to include “reporting.” Gov’t Br. 36–37 (citing Pub. L. No. 102-550, § 1513, 106 Stat. at 4058; Pub. L. No. 116-283, § 6102, 134 Stat. at 4553). That is true but irrelevant. No one disagrees that Congress progressively increased FinCEN’s authority to impose procedures, including

reporting procedures, that facilitate compliance with the substantive requirements of the Bank Secrecy Act. But that expansion says nothing about whether Section 5318(a)(2) is a separate source of substantive authority. As the district court concluded, it is not.

2. In any event, FinCEN’s reliance on Section 5318(a)(2) suffers from a separate and independent defect: FinCEN did not rely on that provision as a source of authority when it promulgated the Residential Real Estate Rule. That alone provides a basis for rejecting FinCEN’s newfound arguments on appeal.

Under the APA, judicial review is limited to the grounds offered by the agency at the time it acted. *See Flowers Title*, 826 F. Supp. 3d at 821 (citing *Michigan v. EPA*, 576 U.S. 743, 758 (2015)). Accordingly, “if the grounds that an agency gives to support its decision are ‘inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.’” *Doe v. HHS*, 165 F.4th 903, 905 (5th Cir. 2026) (quoting *Calcutt v. FDIC*, 598 U.S. 623, 629 (2023)). That “fundamental rule” of administrative law prevents government lawyers from offering “post hoc rationalizations for . . . agency action” that appear nowhere

in the administrative record. *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

That requirement was violated here. In its rulemaking, FinCEN relied extensively on its authority to require reports for “suspicious transactions” under Section 5318(g)(1).⁶ By contrast, it cited Section 5318(a)(2) once in a footnote, which stated only that “FinCEN believes this authority also provides an additional basis for the reporting requirement adopted in this final rule.” 89 Fed. Reg. at 70,259 n.11. That footnote provides no indication that FinCEN believed Section 5318(a)(2) was a source of substantive authority. Indeed, the text preceding that footnote relates to a procedural issue—*i.e.*, the means of “implementing” the reporting requirements set forth in Section 5318(g)(1). *Id.* at 70,259. As a result, FinCEN’s passing reference to Section 5318(a)(2) does not provide grounds on which this Court can uphold a rule that requires reporting for nearly every non-financed real-estate transaction throughout the United States.

⁶ See, e.g., 89 Fed. Reg. at 70,262 (“FinCEN is issuing this final rule pursuant to its BSA authority to require ‘financial institutions’ to report ‘suspicious transactions’ under 31 U.S.C. 5318(g)(1).”); *id.* (“FinCEN has clear statutory authority to require ‘persons involved in real estate closings and settlements’ to file reports on suspicious activity.”) (citing 31 U.S.C. § 5318(g)).

Although the district court did not decide the procedural issue because it rejected FinCEN’s arguments on the merits, *Flowers Title*, 826 F. Supp. 3d at 821 n.2, it provides an alternative ground for affirmance on appeal. *See Jaffke v. Dunham*, 352 U.S. 280, 281 (1957) (“A successful party in the District Court may sustain its judgment on any ground that finds support in the record.”).

C. FinCEN’s Overbroad Interpretation Of The Bank Secrecy Act Would Violate The Non-Delegation Doctrine.

If there were any doubt about the soundness of the district court’s holding, it is resolved by the non-delegation doctrine. Under Article I of the U.S. Constitution, “Legislative power . . . belongs to the legislative branch, and to no other.” *FCC v. Consumers’ Research*, 606 U.S. 656, 672 (2025). For that reason, Congress cannot delegate policy-making discretion to an administrative agency without clarifying “both ‘the general policy’ that the agency must pursue and ‘the boundaries of [its] delegated authority.’” *Id.* at 673 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)); *see id.* (explaining that Congress must set an “‘intelligible principle’ to guide” the agency). “Under that test, ‘the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.’” *Id.* (quoting *Whitman*, 531 U.S. at 475). Accordingly, when Congress vests an

agency with broad powers that could affect “the entire national economy,” it must provide detailed guidance to cabin that authority. *Id.*

FinCEN’s interpretations of Section 5318 would remove any meaningful limits on the agency’s authority. In FinCEN’s view, Section 5318(g)(1) allows the agency to require reports for *any* category of transactions, so long as *some* transactions in that category have previously been associated with illegal activity. Gov’t Br. 26. And FinCEN’s reading of Section 5318(a)(2) is even broader: it would allow the agency to require the reporting of any “class of transactions” whatsoever, so long as it deems the new requirement necessary to “guard against money laundering” or to combat any “other form[] of ‘illicit finance.’” *Id.* at 31–32. As the district court recognized, either path leads to a boundless grant of authority. *Flowers Title*, 826 F. Supp. 3d at 820 (explaining that “nearly every type of transaction imaginable would be ‘suspicious’” under FinCEN’s view of Section 5318(g)(1), which would grant FinCEN “far-reaching powers no one has contemplated”); *id.* at 823 (explaining that FinCEN’s interpretation of Section 5318(a)(2) would “allow [it] to circumvent the express congressional limit on its authority in § 5318(g)(1)”).

FinCEN now argues that it can require reports any time doing so would “allow FinCEN and its law enforcement partners to ferret out unlawful activity among a class of transactions ripe for abuse.” Gov’t Br. 32. Under that approach, there is no category of transactions beyond the agency’s reach. And because FinCEN’s interpretation would result in an unconstitutional delegation of power to the Executive Branch, this Court should reject it. *See Inhance Techs., L.L.C. v. EPA*, 96 F.4th 888, 893 (5th Cir. 2024) (“When statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems.”) (citation omitted).

II. The Residential Real Estate Rule 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 permit FinCEN’s categorical approach, that figure could increase by orders of magnitude, potentially leading to tens of millions of new reports. And if FinCEN can deem any category of transactions “suspicious” based on the absence of existing reporting obligations or the participation of SAR subjects in a percentage of those transactions, the agency may use its newfound authority to target entire industries—such as cryptocurrency platforms or fintech businesses. That outcome would expand FinCEN’s authority well beyond its historical limits, which require tailoring SAR obligations to transactions that are likely to involve wrongdoing.

CONCLUSION

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

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 5,969 words.

/s/ Amanda Flug Davidoff
AMANDA FLUG DAVIDOFF

OCTOBER 23, 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 October 23, 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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OCTOBER 23, 2026