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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NOVEDADES Y SERVICIOS, INC. and
ESPERANZA GOMEZ ESCOBAR,
Plaintiffs,
v.
FINANCIAL CRIMES ENFORCEMENT
NETWORK, et al.,
Defendants.

Case No.: 25-CV-886 JLS (DDL)
**ORDER GRANTING MOTION FOR
PRELIMINARY INJUNCTION**
(ECF No. 22)

Presently before the Court are Plaintiffs Novedades y Servicios, Inc. and Esperanza Gomez Escobar’s Motion for Preliminary Injunction (“Mot.,” ECF No. 22) and Memorandum of Points and Authorities in Support Thereof (“Mem.,” ECF No. 22-1), filed on April 29, 2025. Defendant United States of America (“Government”) filed an Opposition (“Opp’n,” ECF No. 40) and Plaintiffs filed a Reply (“Reply,” ECF No. 42). Also before the Court is the Brief of *Amicus Curiae* Money Services Business Association, Inc. in Support of Plaintiffs’ Motion for Preliminary Injunction (“MSBA Br.,” ECF

1 No. 41). The Court heard oral argument on May 15, 2025. ECF No. 45. Having
2 considered the Motion, the Parties’ arguments, the law, and the evidence, the Court
3 **GRANTS** Plaintiffs’ Motion.

4 Before proceeding, the Court restates, for clarity’s sake, the bench ruling made
5 during the hearing on Plaintiffs’ oral motion to augment the record with the declarations
6 attached to the Motion for Preliminary Injunction and the declarations attached to the
7 MSBA Brief. Plaintiffs’ oral motion is **GRANTED IN PART** with respect to the
8 declarations attached to the Motion (ECF No. 22) and **DENIED IN PART** with respect to
9 the declarations attached to the MSBA Brief (ECF No. 41). To the extent Plaintiffs’ oral
10 motion is denied, it is denied without prejudice. Plaintiffs are free to renew their oral
11 motion in writing, if they so desire, so the Court may reach a more reasoned and thoughtful
12 decision with the benefit of full briefing. Further, as stated on the record, Plaintiffs’
13 Request for Judicial Notice (ECF No. 44) of the transcript from the preliminary injunction
14 hearing in the parallel case being heard in the Western District of Texas is **GRANTED** to
15 the extent it enlightens the Court as to the procedural status of that case. *See Tex. Ass’n of*
16 *Money Servs. Bus. v. Bondi*, No. SA-25-CA-00344-FB (W.D. Tex. filed Apr. 1, 2025).

17 Having dispensed with that preliminary, the Court summarizes this Order as follows.
18 Plaintiffs are likely to succeed on the merits of three of their claims under the
19 Administrative Procedure Act—those being the *ultra vires* claim, the notice-and-comment
20 claim, and the arbitrary and capricious claim. Plaintiffs have demonstrated that they will
21 suffer irreparable harm absent emergency injunctive relief. And Plaintiffs have
22 demonstrated that the balance of equities tips strongly in their favor, and that the public
23 interest will be served by the issuance of a preliminary injunction. For those reasons, as
24 elaborated upon below, the Court enjoins enforcement of the Southwest Border Geographic
25 Targeting Order throughout the Southern District of California pending the conclusion of
26 this litigation.

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BACKGROUND

On March 11, 2014, the Secretary of the Treasury, acting through the Financial Crimes Enforcement Network (“FinCEN”), issued the Southwest Border Geographic Targeting Order (“SWB GTO”). *FinCEN Issues Southwest Border Geographic Targeting Order*, Fin. Crimes Enf’t Network (Mar. 11, 2025), <https://www.fincen.gov/news/news-releases/fincen-issues-southwest-border-geographic-targeting-order> (hereinafter, “GTO Press Release”). The SWB GTO, which was published in the Federal Register on March 14, 2025, and went into effect on April 14, 2025, imposes new recordkeeping and reporting requirements on money services businesses (“MSBs”) in select zip codes in Texas and California. Issuance of a Geographic Targeting Order Imposing Additional Recordkeeping and Reporting Requirements on Certain Money Services Businesses Along the Southwest Border, 90 Fed. Reg. 12106 (Mar. 14, 2025). The day after the SWB GTO went into effect, Plaintiffs filed this lawsuit, alleging that the issuance of the SWB GTO suffered from several substantive and procedural defects. ECF No. 1 (“Compl.”). Namely, they allege the GTO: (1) violates the Fourth and Fifth Amendments to the United States Constitution, (2) violates multiple provisions of the Administrative Procedures Act (“APA”), and (3) was issued without sufficient statutory authority. *Id.* Plaintiffs also allege that the GTO’s authorizing statute, 31 U.S.C. § 5326, violates the non-delegation doctrine. *Id.* Before discussing how the SWB GTO fits into this case, a broad overview of the statutory and regulatory backdrop is helpful.

I. Statutory and Regulatory Background

A. *The Bank Secrecy Act and Implementing Regulations*

Congress enacted the Bank Secrecy Act (“BSA”) in 1970 “in response to increasing use of banks and other institutions as financial intermediaries by persons engaged in criminal activity.”¹ *Ratzlaf v. United States*, 510 U.S. 135, 138 (1994);

¹ The BSA is the colloquial name for the “Currency and Foreign Transactions Reporting Act, its amendments, and the other statutes relating to the subject matter of that Act.” 31 C.F.R. § 1010.100(e).

1 Pub. L. No. 91-508, 84 Stat. 1114 (1970). The Act contains a series of recordkeeping and
2 reporting requirements intended to serve multiple purposes as expressed by statute. Some
3 of these purposes include: (1) “prevent[ing] the laundering of money and the financing of
4 terrorism;” (2) “facilitat[ing] the tracking of money that has been sourced through criminal
5 activity or is intended to promote criminal activity;” and (3) “establish[ing] appropriate
6 frameworks for information sharing . . . to identify, stop, and apprehend money launderers
7 and those who finance terrorists.” 31 U.S.C. § 5311. The Act followed “extensive
8 hearings” in Congress revealing that legislators had “two major problems” in mind related
9 to “the enforcement of the regulatory, tax, and criminal laws of the United States.” *Cal.*
10 *Bankers Ass’n v. Shultz*, 416 U.S. 21, 26 (1974). Congress first felt, with respect to affairs
11 at home, the “need to insure that domestic banks and financial institutions continue to
12 maintain adequate records of their financial transactions with their customers.” *Id.* And
13 Congress further, with respect to affairs away from home, “was concerned about a serious
14 and widespread use of foreign financial institutions, located in jurisdictions with strict laws
15 of secrecy as to bank activity, for the purpose of violating or evading domestic criminal,
16 tax, and regulatory enactments.” *Id.* at 27.

17 This case, at its core, concerns the first problem: domestic affairs. Since the BSA’s
18 inception, Congress has delegated broad authority to the Treasury Secretary to assume
19 responsibility for tackling that problem. *See Shultz*, 416 U.S. at 30 (“[T]here is no denying
20 the impressive sweep of the authority conferred upon the [Treasury] Secretary by the Bank
21 Secrecy Act of 1970.”). The Secretary’s broad authority is reflected in one of the pillars
22 of the BSA and its implementing regulations, the currency transaction report (“CTR”).

23 CTRs arose in 1972 as a requirement under 31 U.S.C. § 5313(a). Financial
24 Recordkeeping and Reporting of Currency and Foreign Transactions, 37 Fed. Reg. 6912
25 (Apr. 5, 1972) (to be codified at 31 C.F.R. pt. 103) (final rule establishing the CTR). That
26 statute provides:

27 When a domestic financial institution is involved in a transaction
28 for the payment, receipt, or transfer of United States coins or

1 currency (or other monetary instruments the Secretary of the
2 Treasury prescribes), in an amount, denomination, or amount and
3 denomination, or under circumstances the Secretary prescribes
4 by regulation, the institution and any other participant in the
5 transaction the Secretary may prescribe shall file a report on the
6 transaction at the time and in the way the Secretary prescribes.

6 31 U.S.C. § 5313(a). The Secretary, in turn, has exercised that authority to require
7 “financial institutions” to file a CTR each time they transact in cash in amounts exceeding
8 \$10,000. 31 CFR § 1010.311. The term “financial institution” is defined by regulation to
9 cover a wide berth of businesses, including, but not limited to, those organized as banks,
10 securities brokers, and, most pertinent here, money services businesses (“MSBs”). *Id.*
11 § 1010.100(t).

12 The regulations go on to define MSBs as persons conducting business, however
13 extensive, in one of a few predefined capacities. *Id.* § 1010.100(ff). Such capacities
14 include, but are not limited to, exchanging currency (i.e., dollars for foreign currency or
15 vice versa), cashing checks, and issuing traveler’s checks or money orders. *Id.* MSBs are
16 subject both to the general \$10,000 CTR reporting requirement described above as well as
17 additional recordkeeping requirements as further prescribed by the Secretary. MSBs must
18 register with FinCEN within 180 days of the date the business is established. *Id.*
19 § 1022.380.

20 With respect to the CTR requirement, a CTR is a five-page document that collects
21 certain information from a business that conducts a covered transaction. *See* ECF No. 22-9
22 at 16–20. Such information includes, for example, the customer’s name, age, gender,
23 address, phone number, email address, social security number or taxpayer identification
24 number, occupation, and driver’s license or passport number. *Id.* The CTR also asks for
25 the amount of money involved in the transaction as well as bank account numbers for
26 transmitting/receiving the money. *Id.* Software has been developed to automate the CTR
27 reporting process, but the software, according to the general manager of an El Paso, Texas
28 MSB, can cost up to \$3,700 per month. Declaration of Antonio Carpio (“Carpio Decl.”)

1 ¶ 24, ECF No. 22-4.

2 Beyond requiring MSBs (and all other financial institutions) to report CTRs, the
3 Secretary compels the collection of certain records of transactions conducted at lower
4 thresholds. For instance, MSBs must obtain and retain certain information when they
5 accept transmittal orders of \$3,000 or more. *Id.* § 1010.410. They must also maintain
6 records of certain information when they “issue or sell a bank check or draft, cashier’s
7 check, money order or traveler’s check for \$3,000 or more.” *Id.* § 1010.415. And in the
8 event an MSB “knows, suspects, or has reason to suspect that” a transaction or pattern of
9 transactions aggregating to at least \$2,000 presents indicators of illegal activity or money
10 laundering, it is required to report what is known as a Suspicious Activity Report (“SAR”).
11 *Id.* § 1022.320. All of this builds upon MSBs’ obligation to maintain a robust anti-money
12 laundering (“AML”) program consisting of the implementation of policies and procedures
13 to assure compliance with the above requirements, the designation of a compliance officer,
14 and the imposition of education and/or training of appropriate personnel. *Id.* § 1022.210.

15 Compliance with the Secretary’s directives is not optional; indeed, failure to comply
16 can carry stiff penalties. Willful violations of the Act can subject businesses to civil
17 penalties nearing \$100,000, 31 U.S.C. § 5321(a)(1), as well as criminal fines capped at
18 \$250,000 and imprisonment of up to five years, *id.* § 5322(a). Even negligent violations
19 can carry up to a \$1,430 civil penalty. *Id.* § 5321(a)(6); 31 C.F.R. § 1010.821. Under the
20 BSA framework, the Secretary receives broad latitude to administer and enforce the
21 above-discussed provisions. *See id.* § 321 (outlining the general authority of the
22 Secretary).

23 ***B. Geographic Targeting Orders and FinCEN***

24 A little over a decade after the BSA was enacted, Congress built atop the Act’s
25 foundation when it enacted the Anti-Drug Abuse Act of 1986 (“ADAA”). Pub. L. 99-570,
26 100 Stat. 3207 (1986). The ADAA passed in response “to what was perceived as a
27 dangerous spread of drugs,” *United States v. Bannister*, 786 F. Supp. 2d 617, 645
28 (E.D.N.Y. 2011), and legislators saw financial institutions as part of the problem.

1 Congress, thus, as part of a 1988 amendment to the ADAA, developed a new tool for the
2 Secretary to use to root out money laundering: the geographic targeting order. *See* 31
3 U.S.C. § 5326; Anti-Drug Abuse Act of 1988, Pub. L. 100-690, tit. VI, § 6185(c),
4 102 Stat. 4181 (1988).

5 Similar to the CTR, the geographic targeting order imbues the Secretary with broad
6 authority to impose recordkeeping and reporting requirements. Because the GTO’s
7 authorizing statute, § 5326, is central to this suit, the Court recites the statute’s main
8 provision in its entirety:

9 (a) **In general.** -- If the Secretary of the Treasury finds, upon
10 the Secretary’s own initiative or at the request of an appropriate
11 Federal or State law enforcement official, that reasonable
12 grounds exist for concluding that additional recordkeeping and
13 reporting requirements are necessary to carry out the purposes of
14 this subtitle or to prevent evasions thereof, the Secretary may
15 issue an order requiring any domestic financial institution or
16 nonfinancial trade or business or group of domestic financial
17 institutions or nonfinancial trades or businesses in a geographic
18 area—

16 i. to obtain such information as the Secretary may
17 describe in such order concerning—

17 (A) any transaction in which such financial
18 institution or nonfinancial trade or business is
19 involved for the payment, receipt, or transfer of
20 funds (as the Secretary may describe in such
21 order), the total amounts or denominations of
22 which are equal to or greater than an amount
23 which the Secretary may prescribe: and

22 (B) any other person participating in such
23 transaction;

23 ii. to maintain a record of such information for such
24 period of time as the Secretary may require; and

24 iii. to file a report with respect to any transaction
25 described in paragraph (1)(A) in the manner and to
26 the extent specified in the order.

27 31 U.S.C. § 5326(a). Section 5326 was amended several times over the ensuing years, first
28 in 1992 to add subsection (c), which prohibits the subjects of a GTO from disclosing the

1 GTO’s existence “to any person except as prescribed by the Secretary,” *id.* § 5326(c), and
2 then again in 2001 to extend the maximum effective period of a GTO from 60 to 180 days,
3 *id.* § 5326(d).

4 Other than what is described above, Title 31 of the United States Code is otherwise
5 silent as to any procedural limits placed on the Secretary’s authority to promulgate a GTO.
6 Nevertheless, through notice-and-comment rulemaking in 1989, the Secretary placed a few
7 procedural limits on himself. *See* Amendment to the Bank Secrecy Act Regulations
8 Relating to Geographic Reporting of Certain Domestic Currency Transactions,
9 54 Fed. Reg. 33675 (Aug. 16, 1989) (to be codified at 31 C.F.R. pt. 103) (final rule
10 establishing “the procedures that Treasury would follow in issuing [a GTO]”). These
11 self-policing procedures are today, after several amendments, codified at 31 C.F.R.
12 § 1010.370, and they largely mimic the terms of the GTO-enabling statute, § 5326. They
13 do, however, add a notice provision not present in the statute, which dictates that all GTOs
14 “shall be directed to the Chief Executive Officer of the financial institution or nonfinancial
15 trade or business” 31 C.F.R. § 1010.370(b).

16 The next year, in 1990, then-Secretary of the Treasury Nicholas Brady established
17 by Treasury Order the Financial Crimes Enforcement Network, a bureau within the
18 Treasury Department otherwise known as FinCEN. *Treas. Order 105-08* (Apr. 25, 1990).
19 FinCEN’s original mission was “to provide a governmentwide, multisource intelligence
20 and analytical network in support of the detection, investigation, and prosecution of
21 domestic and international money laundering and other financial crimes” *Id.* To this
22 day, the bureau remains central to “support[ing] law enforcement efforts and foster[ing]
23 interagency and global cooperation against domestic and international financial crimes,”
24 and to that end, the Secretary has delegated to FinCEN the authority to “take all necessary
25 and appropriate actions to implement and administer the provisions of the Bank Secrecy
26 Act” *Treas. Order 180-01* (Jan. 14, 2020).

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1 **II. Factual Background**

2 One of the many businesses covered by the BSA is Plaintiff Novedades y Servicios,
3 Inc. (“Novedades), “a small, independently owned business that provides money transfers,
4 money orders, and check cashing services” to members of the San Diego, California
5 community. Compl. ¶ 14. By offering those services, Novedades, which is owned and
6 managed by Plaintiff Esperanza Gomez Escobar, falls within both the broader coverage of
7 the BSA as a whole and within the narrower coverage of the regulatory scheme applicable
8 to MSBs. *Id.* ¶¶ 8, 18; 31 C.F.R. § 1010.100(ff). Escobar not only manages Novedades,
9 but she is also a customer of Novedades, as she engages the business’s services to “send[]
10 money to family members outside the United States.” Compl. ¶ 8. In Escobar’s estimation,
11 the average transaction at Novedades falls somewhere between \$300–450, but the vast
12 majority of transactions are above \$200 while in “all the years that it has been in business,
13 [Novedades] has never completed a cash transaction over \$10,000 and has therefore never
14 had to file a Currency Transaction Report.” *Id.* ¶¶ 16, 36.

15 That \$200 figure is critical. On March 11, 2025, acting pursuant to its authority
16 under § 5326, FinCEN issued the SWB GTO, requiring “all [MSBs] located in 30 ZIP
17 codes across California and Texas near the southwest border to file [CTRs] with FinCEN
18 at a \$200 threshold, in connection with cash transactions.” *GTO Press Release*. A few
19 days later, the full SWB GTO was published in the Federal Register. *See*
20 90 Fed. Reg. 12106.

21 The SWB GTO leaves all other BSA requirements in place. These include, for
22 example, the longstanding \$10,000 CTR and \$2,000 SAR requirements. *Id.* at 12107. But
23 now, with the government’s heightened focus on transnational cartels and their
24 concomitant threat to national security, *see* Exec. Order. No. 14157, 90 Fed. Reg. 8439
25 (Jan. 29, 2025), FinCEN found “that reasonable grounds exist for concluding that”
26 additional recordkeeping and reporting requirements are necessary “in furtherance of
27 Treasury’s efforts to combat illicit finance by drug cartels and other illicit actors along the
28 southwest border of United States.” SWB GTO, 90 Fed. Reg. at 12107. To that end,

1 FinCEN required all MSBs inside a select grouping of zip codes at the United
2 States-Mexico border in Texas and California to file a CTR within 15 days for every
3 “deposit, withdrawal, exchange of currency or other payment or transfer, . . . which
4 involves a transaction in currency, of more than \$200 but not more than \$10,000.” *Id.*
5 MSBs were further required to retain reports of all CTRs filed under the SWB GTO for
6 five years from the SWB GTO’s expiration (including any renewals thereof). *Id.* Such
7 terms were to be effective from April 14, 2025, through September 9, 2025. *Id.*

8 Escobar perceives the SWB GTO to impose “business-crushing burdens.” Compl.
9 ¶ 42. By FinCEN’s own estimate, CTRs result in, on average, eight minutes of additional
10 paperwork per report. *Id.* ¶ 27 (citing 89 Fed. Reg. 7767, 7768 (Feb. 5, 2024)). But that
11 average is calculated to include “large firms with automated processes to generate the
12 reports.” *Id.* (citing 85 Fed. Reg. 29022, 29029 (May 14, 2020)). In contrast, for smaller
13 businesses like Novedades that do not have automated procedures for filing CTRs, FinCEN
14 estimates that each CTR takes 23.93 minutes to process. *Id.* Based on its historical
15 business activity, Novedades, using FinCEN’s estimates (recall that Novedades had never
16 filed a single CTR before the SWB GTO), predicts it would have to spend around 30,000
17 minutes per month, or around 15–17 hours per day, filing CTRs. *Id.* ¶ 87. To satisfy this
18 regulatory burden, Novedades would need to add at least one full-time employee to its
19 payroll, a cost the business cannot absorb if it wishes to keep its doors open. *Id.* ¶ 88.

20 So, Escobar alleges that she can either take on this cost to remain in compliance or
21 risk being the subject of a civil enforcement action. *Id.* ¶ 80. Even more concerning to
22 Escobar is the risk that noncompliance may expose her to criminal prosecution. *Id.* Per a
23 Frequently Asked Questions document provided by FinCEN, each willful violation of the
24 SWB GTO may result in, on the civil side, liability up to \$71,545 (or greater for
25 transactions over that amount) and, on the criminal side, fines up to \$250,000 and/or
26 imprisonment of up to five years. *Frequently Asked Questions*, Fin. Crimes Enf’t Network
27 (Apr. 16, 2025), [https://www.fincen.gov/sites/default/files/shared/SWB-MSB-GTO-](https://www.fincen.gov/sites/default/files/shared/SWB-MSB-GTO-Order-FINAL508.pdf)
28 [Order-FINAL508.pdf](https://www.fincen.gov/sites/default/files/shared/SWB-MSB-GTO-Order-FINAL508.pdf) (hereinafter, “*GTO FAQ*”).

1 Beyond the direct regulatory burden on Novedades, Escobar alleges that the SWB
2 GTO will impose other costs on her business. Because the SWB GTO only covers select
3 zip codes, including the one in which Novedades operates, Escobar suggests that customers
4 can simply take their business to MSBs that are not covered by the geographical scope of
5 the SWB GTO. Compl. ¶ 85. At least one MSB is just a five-minute drive from Novedades
6 but is not covered by the SWB GTO, so Escobar fears her customers will conduct their
7 transactions there instead. *Id.* ¶ 83. Such a fear is justified, according to Escobar, because
8 of the reputational damage associated with customers’ perception that “Novedades is
9 prying into their personal information (either on its own initiative or at the behest of the
10 government) when other MSBs outside the targeted area are not.” *Id.* ¶ 86. And as to the
11 customers who are willing to share their information with Novedades or other covered
12 MSBs when they execute a transaction, Escobar alleges the Government’s data collection
13 will infringe upon the privacy interests both of Novedades and its customers. *Id.* ¶¶ 90,
14 103.

15 **III. Procedural Background**

16 Escobar and Novedades filed their Complaint on April 15, 2025, asserting claims
17 rooted in constitutional, statutory, and procedural defects in the SWB GTO. *See* Compl.
18 The next day, they moved for a temporary restraining order (“TRO”) seeking to enjoin the
19 Government from enforcing the SWB GTO, which had gone into effect on April 14, 2025.
20 *See* ECF No. 8. The Court set an expedited briefing schedule, and on April 22, 2025, the
21 Parties appeared before the Court for a hearing on the TRO Motion. *See* ECF No. 15. The
22 Court issued a ruling from the bench granting the TRO Motion and followed the ruling
23 with a written Order setting forth the basis for the TRO. ECF No. 16 (“TRO Order”).

24 In the TRO Order, the Court found that Plaintiffs had demonstrated a substantial
25 likelihood of success on the merits of their claims that the SWB GTO was unlawfully
26 issued without undergoing the notice-and-comment procedures prescribed by 5 U.S.C.
27 § 553 and that the SWB GTO was arbitrary and capricious under 5 U.S.C. § 706(2)(A). *Id.*
28 at 2. The Court further found that Plaintiffs had suffered and will continue to suffer

1 immediate and irreparable harm absent a TRO, including the threat of business closure and
2 the loss of customers and goodwill, and that the balance of equities and public interest
3 favored granting a TRO. *Id.* at 2–3. Finally, the Court found good cause to issue the TRO
4 for a total of 28 days in anticipation of Plaintiffs filing the instant Motion.

5 LEGAL STANDARD

6 Federal Rule of Civil Procedure 65 governs the issuance of temporary restraining
7 orders and preliminary injunctions. To obtain a preliminary injunction, the moving party
8 must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm
9 to the moving party in the absence of preliminary relief; (3) that the balance of equities tips
10 in favor of the moving party; and (4) that an injunction is in the public interest. *Winter v.*
11 *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Although a plaintiff seeking a
12 preliminary injunction must make a showing on each element, the Ninth Circuit employs
13 a “version of the sliding scale” approach where “a stronger showing of one element may
14 offset a weaker showing of another.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
15 1131–35 (9th Cir. 2011). Under this approach, a court may issue a TRO or preliminary
16 injunction where there are “serious questions going to the merits and a balance of hardships
17 that tips sharply towards the plaintiff . . . , so long as the plaintiff also shows that there is a
18 likelihood of irreparable injury and that the injunction is in the public interest.” *Id.* at 1135
19 (internal quotation marks omitted). Generally, a TRO or preliminary injunction is
20 considered “an extraordinary remedy that may only be awarded upon a clear showing that
21 the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22. The moving party has the
22 burden of persuasion. *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

23 DISCUSSION

24 I. Likelihood of Success on the Merits

25 In their Motion, Plaintiffs argue that the SWB GTO: (1) violates the Fourth
26 Amendment under the U.S. Constitution, (2) failed to undergo the notice-and-comment
27 procedures prescribed by the Administrative Procedure Act (“APA”), (3) is arbitrary and
28 capricious, (4) was issued in excess of statutory authority (i.e., *ultra vires*), and (5) was

1 promulgated under a statute that violates the non-delegation doctrine. Plaintiffs’
2 non-delegation challenge may come last in the briefing, but it is where the Court will begin.
3 Though not strictly necessary for each of Plaintiffs’ claims, it is only logical to start by
4 interpreting the GTO-enabling statute, § 5326, as many of the claims are overlapping and
5 rely heavily on a proper reading of the law. Because “a nondelegation inquiry always
6 begins . . . with statutory interpretation,” that is where the Court first turns. *Gundy v.*
7 *United States*, 588 U.S. 128, 135 (2019).

8 **A. *Non-Delegation Doctrine***

9 “The nondelegation doctrine is rooted in the principle of separation of powers that
10 underlies our tripartite system of Government.” *Mistretta v. United States*, 488 U.S. 361,
11 371 (1989). Whereas the “executive power shall be vested in a President,” U.S. Const.,
12 Art. II, § 1, and the judicial power “in one Supreme Court, and in such inferior courts as
13 the Congress may from time to time ordain and establish,” *id.*, Art. III, § 1, all “legislative
14 Powers herein granted shall be vested in a Congress of the United States,” *id.*, Art. I, § 1.
15 The question in a delegation challenge then becomes “whether the statute has delegated
16 legislative power to the agency.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472
17 (2001).

18 As the Supreme Court has long held, Congress “may not transfer to another branch
19 ‘powers which are strictly and exclusively legislative.’” *Gundy*, 588 U.S. at 135 (quoting
20 *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)). But that is not to say that
21 Congress cannot delegate at all. Indeed, “Congress has found it frequently necessary to
22 use officers of the executive branch within defined limits, to secure the exact effect
23 intended by its acts of legislation, by vesting discretion in such officers to make public
24 regulations interpreting a statute and directing the details of its execution” *J.W.*
25 *Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). The Supreme Court has
26 thus “deemed it ‘constitutionally sufficient if Congress clearly delineates the general
27 policy, the public agency which is to apply it, and the boundaries of this delegated
28 authority.’” *Mistretta*, 488 U.S. at 372–73 (quoting *Am. Power & Light Co. v. Sec. & Exch.*

1 *Comm’n*, 329 U.S. 90, 105 (1946)).

2 This standard, as is commonly understood today, asks simply “whether Congress
3 has supplied an intelligible principle to guide the delegee’s use of discretion.” *Gundy*,
4 588 U.S. at 135. To answer that question, courts first must “constru[e] the challenged
5 statute to figure out what task it delegates and what instructions it provides.” *Id.* at 136
6 (first citing *Whitman*, 531 U.S. at 473; and then citing *Am. Power & Light*, 329 U.S.
7 at 104–05). “Only after a court has determined a challenged statute’s meaning can it decide
8 whether the law sufficiently guides executive discretion to accord with Article I.” *Id.*

9 The SWB GTO, according to Plaintiffs, “runs afoul of the non-delegation doctrine
10 because the statute that FinCEN relied on to promulgate it, 31 U.S.C. § 5326, contains no
11 such intelligible principle.” Mem. at 22. Section 5326 requires as a prerequisite only that
12 FinCEN “finds . . . that reasonable grounds exist for concluding that additional
13 recordkeeping and reporting requirements are necessary to carry out the purposes of this
14 subtitle or to prevent evasions thereof,” but Plaintiffs contend that those “purposes” fail to
15 erect sufficient guardrails to rein in what is essentially limitless discretion delegated to the
16 agency. *Id.* Plaintiffs view that discretion as “absolute” because FinCEN can require
17 reports from whomever it desires on whatever transactions it deems necessary, so long as
18 those reports carry out the BSA’s purposes. *Id.*

19 Broad as FinCEN’s authority under § 5326 may be, that authority remains
20 constitutionally sound under modern precedent. “Only twice in this country’s history (and
21 that in a single year)” has the Supreme Court found a congressional delegation so lacking
22 in an intelligible principle as to be unconstitutional. *Gundy*, 588 U.S. at 146 (first citing
23 *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and then citing
24 *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935)). In those two cases, both decided in
25 1935, one “provided literally no guidance for the exercise of discretion, and the
26 other . . . conferred authority to regulate the entire economy on the basis of no more precise
27 a standard than stimulating the economy by assuring ‘fair competition.’” *Whitman*,
28 531 U.S. at 474). By contrast, the Supreme Court has “repeatedly turned down many

1 non-delegation challenges, including in cases involving very broad conferrals of
2 authority.” *United States v. Melgar-Diaz*, 2 F.4th 1263, 1267 (9th Cir. 2021). To put it
3 mildly, “[p]revailing on a non-delegation challenge is thus a tall order.” *Id.* at 1266.

4 Section 5326 is nowhere near the statutes held unconstitutional in *Schechter Poultry*
5 or *Panama Refining*. Congress allowed the agency to act here only upon a finding “that
6 reasonable grounds exist for concluding that additional recordkeeping and reporting
7 requirements are necessary to carry out the purposes of this subtitle or to prevent evasions
8 thereof” 31 U.S.C. § 5326(a). Those purposes are expressly delineated in 31 U.S.C.
9 § 5311, found just a few pages away in the U.S. Code. FinCEN thus possesses a clearly
10 defined rubric by which to act. That rubric might be broad, but the Supreme Court has
11 “upheld, again without deviation, Congress’ ability to delegate power under broad
12 standards.” *Mistretta*, 488 U.S. at 373–74 (collecting cases upholding delegations under
13 standards such as “prevent[ing] unfair or inequitable distribution of voting power among
14 security holders,” “determine[ing] just and reasonable rates,” and “regulat[ing] . . . as
15 public interest, convenience, or necessity require”).

16 Even upon a finding that reasonable grounds exist for invoking § 5326, Congress
17 has also narrowed FinCEN’s allowable response. The agency, as delegated by statute, may
18 set a dollar threshold for collecting certain information concerning the transaction and the
19 participants thereof. 31 U.S.C. § 5326(a). FinCEN is then made responsible for
20 establishing retention and reporting requirements for said information. *Id.* And
21 importantly, FinCEN was authorized to “issue an order” to accomplish as much. *Id.* This
22 direction from Congress is far from the freewheeling authorization to, as Plaintiffs see it,
23 make the code rather than prescribe it. Mem. at 23 (citing *Schechter Poultry*, 295 U.S.
24 at 541).

25 Where, as here, “Congress has placed multiple specific restrictions on the [agency’s]
26 discretion to define [culpable] conduct,” those “restrictions satisfy the constitutional
27 requirements of the nondelegation doctrine.” *Touby v. United States*, 500 U.S. 160, 167
28 (1991) (upholding a delegation to the Drug Enforcement Administration to temporarily

1 schedule a substance using expedited procedures when doing so is “necessary to avoid an
2 imminent hazard to the public safety”). Put differently, Congress has “clearly delineate[d]
3 the general policy, the public agency which is to apply it, and the boundaries of this
4 delegated authority.” *Am. Power & Light*, 329 U.S. at 105. This conclusion comports with
5 that of at least one other district court to have considered a similar, yet broader challenge
6 leveled at FinCEN. *See United States v. Langenberg*, No. 8:09CR183, 2009 WL 3157397,
7 at *4–5 (D. Neb. Sept. 28, 2009) (rejecting a non-delegation challenge to various BSA
8 provisions and regulations implemented thereunder).

9 In short, through § 5326, Congress set the general policy of authorizing additional
10 recordkeeping and reporting requirements, and it established a discernible benchmark for
11 when FinCEN was permitted to invoke that authority. FinCEN was left with “merely the
12 interstitial task of determining” when the benchmark was met and what recordkeeping and
13 reporting requirements to impose. *Melgar-Diaz*, 2 F.4th at 1267. Plaintiffs have thus
14 failed to show that they are likely to succeed on the merits of their non-delegation claim.

15 **B. Ultra Vires**

16 The Court next turns to the *ultra vires* argument. Under the APA, courts “shall hold
17 unlawful and set aside agency action, findings, and conclusions found to be in excess of
18 statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C.
19 § 706(2)(C) (cleaned up). For much of the recent past, when analyzing whether an agency
20 had properly acted within its statutory limits, courts had been instructed to “generally apply
21 *Chevron* to determine whether to defer to the agency’s interpretation of the statute.” *E.*
22 *Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 976 (9th Cir. 2020) (citing *Nw. Env’t*
23 *Advocates v. Env’t Prot. Agency*, 537 F.3d 1006, 1014 (9th Cir. 2008)). Now, however,
24 after the Supreme Court overruled *Chevron* in *Loper Bright Enterprises v. Raimondo*,
25 603 U.S. 369 (2024), courts review agency interpretations of statutes de novo, exercising
26 their own “independent judgment in deciding whether [the] agency has acted within its
27 statutory authority.” *China Unicom (Ams.) Operations Ltd. v. Fed. Commc’ns Comm’n*,
28 124 F.4th 1128, 1143 (9th Cir. 2024) (alteration in original) (quoting *Loper Bright*,

1 603 U.S. at 412). “Doing so requires using ‘all relevant interpretive tools’ to determine the
2 ‘best’ reading of a statute; a merely ‘permissible’ reading is not enough.” *Mayfield v. U.S.*
3 *Dep’t of Lab.*, 117 F.4th 611, 617 (5th Cir. 2024) (quoting *Loper Bright*, 603 U.S. at 400).

4 Plaintiffs argue that the SWB GTO was issued in excess of FinCEN’s statutory
5 authority. They reach this conclusion based on the “plain language” of § 5326, which they
6 say only authorizes the imposition of a reporting requirement much more limited than that
7 imposed by the SWB GTO. Mem. at 21. Plaintiffs’ reading of the statute is primarily
8 premised upon several textual clues, which, when placed in context, demonstrate that the
9 SWB GTO is not what Congress had in mind when it enacted § 5326. *Id.* This reading, in
10 Plaintiffs’ view, is buttressed by the major questions doctrine. Naturally, the Court will
11 first consider that doctrine’s applicability.

12 *I. Major Questions Doctrine*

13 “[I]n certain extraordinary cases, both separation of powers principles and a practical
14 understanding of legislative intent” counsel in favor of caution when reviewing the exercise
15 of administrative power. *West Virginia v. Env’t Prot. Agency*, 597 U.S. 697, 723 (2022)
16 (citing *Util. Air Regul. Grp. v. Env’t Prot. Agency*, 573 U.S. 302, 324 (2014)). In such
17 cases, the court’s analysis of an agency’s proffered interpretation of a statute differs from
18 the normal course. More than simply persuading the court that it has the best reading of
19 the statute, the agency must “‘point to clear congressional authorization’ to justify the
20 challenged program.” *Biden v. Nebraska*, 600 U.S. 477, 506 (2023) (quoting *West*
21 *Virginia*, 597 U.S. at 723). Several competing justifications for this canon of construction
22 have been suggested, but the bottom line is this: When applicable, the major questions
23 doctrine calls for enhanced scrutiny of the asserted administrative authority. *Compare*
24 *West Virginia*, 597 U.S. at 737 (Gorsuch, J., concurring) (“The major questions doctrine
25 works . . . to protect the Constitution’s separation of powers.”), *with Nebraska*, 600 U.S.
26 at 514 (Barrett, J., concurring) (“In my view, the major questions doctrine grows out
27 of . . . commonsense principles of communication.”).

28 The Ninth Circuit recently established a “two-prong framework” for dealing with

1 the major questions doctrine. *State v. Su*, 121 F.4th 1, 14 (9th Cir. 2024). Such a
2 framework has been characterized in the following way:

3 First, we ask whether the agency action is “unheralded” and
4 represents a “transformative expansion” in the agency’s
5 authority in the vague language of a long-extant, but rarely used,
6 statute. Second, we ask if the regulation is of “vast economic
7 and political significance” and “extraordinary” enough to trigger
8 the doctrine. If both prongs are met, the major questions doctrine
9 applies, and we should greet the agency’s assertion of authority
10 with “skepticism” and require the agency to identify “clear
11 congressional authorization” for its action.

12 *Id.* (internal citations omitted).

13 Here, the Court concludes that Plaintiffs’ argument falters at the first prong because
14 FinCEN is not relying on § 5326 to exert “an unheralded power to regulate ‘a significant
15 portion of the American economy’” based on a longstanding, yet seldom-used statute.
16 *Utility Air*, 573 U.S. at 324 (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco
17 Corp.*, 529 U.S. 120, 159 (2000)). Congress enacted § 5326 in 1988 and, since that time,
18 FinCEN has exercised its GTO powers under the statute on numerous occasions. *See*
19 Declaration of Andrea Gacki (“Gacki Decl.”) ¶ 7, ECF No. 40-1 (detailing the agency’s
20 various GTO use cases). For instance, as FinCEN Director Andrea Gacki explained by
21 declaration, “FinCEN has issued several GTOs in the past that required a great number of
22 businesses in certain geographic areas to report on cash transactions at dollar thresholds far
23 below existing BSA reporting thresholds.” *Id.* Where, as here, the relevant provisions at
24 issue “have been regularly invoked,” those provisions are decidedly poor candidates for
25 heightened scrutiny under the major questions doctrine. *See Su*, 121 F.4th at 14; *see also*
26 *United States v. Cal. Stem Cell Treatment Ctr., Inc.*, 117 F.4th 1213, 1220 (9th Cir. 2024)
27 (declining to find that an FDA regulation “represent[ed] a sudden assertion or
28 ‘transformative expansion’ of authority” because the regulation’s “power rest[ed] on key
provisions of the [Food, Drug, and Cosmetic Act], not a rarely used ‘gap filler’” (internal
citations omitted)). This conclusion holds true even though the SWB GTO sets a reporting
threshold at \$200, a level so low it has rarely been seen before. *See Mayfield*, 117 F.4th

1 at 617 (“That means that even though the particular salary level in question here is novel,
2 the assertion of authority to consider salary is not.”).

3 On the second prong, too, the Court concludes that Plaintiffs have not made a
4 sufficient showing that the SWB GTO “present[s] a matter of extreme ‘economic and
5 political significance.’” *Cal. Stem Cell Treatment Ctr.*, 117 F.4th at 1220 (quoting *West*
6 *Virginia*, 597 U.S. at 721). With respect to economic significance, although the “Supreme
7 Court has never set a floor on what qualifies as economically vast,” the SWB GTO does
8 not appear to resemble the magnitude of administrative actions found to fit the bill. *See*
9 *Su*, 121 F.4th at 21–22 (Nelson, J., concurring). Economically significant actions have
10 included the “Clean Power Plan’s \$1 trillion reduction in GDP, at issue in *West Virginia*,”
11 or the \$50 billion at issue in *Alabama Association of Realtors v. Department of Health &*
12 *Human Services*, 594 U.S. 758 (2021). Here, by contrast, though neither Party offers a
13 concrete estimate of the compliance costs expected to result from the SWB GTO, it appears
14 facially implausible for the costs to mirror such extravagant sums. Similarly, with respect
15 to political significance, the SWB GTO imposes a recordkeeping and reporting obligation
16 on just thirty out of the tens of thousands of zip codes around the country. SWB GTO,
17 90 Fed. Reg. at 12107. A regulatory action of that scope is not in the same ballpark as the
18 eviction moratorium covering over 80% of the nation at issue in *Alabama Association of*
19 *Realtors*, or the carbon emission standards at issue in *West Virginia* that, if implemented,
20 would have “substantially restructure[d] the American energy market.” *Cal. Stem Cell*
21 *Treatment Ctr.*, 117 F.4th at 1220–21 (internal citations omitted).

22 To be sure, the mere fact that the SWB GTO falls outside the grips of the major
23 questions doctrine does not foreclose Plaintiffs from prevailing on their *ultra vires* claim.
24 *See Su*, 121 F.4th at 14 (continuing on to conclude that an executive order did not violate
25 the major questions doctrine even after concluding that the executive order exceeded the
26 authority granted to the executive branch). It is, of course, possible for an agency action
27 that presents a mere “minor question” to still run afoul of the agency’s statutory authority.
28 But where, as here, the major questions doctrine does not apply, the nature of the inquiry

1 is relaxed to a de novo standard of review that calls upon the “court to exercise its
2 independent judgment in interpreting and expounding upon the laws.” *Perez v. Mortg.
3 Bankers Ass’n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring).

4 2. *Whether SWB GTO is Consistent with § 5326*

5 Having declined to apply the major questions doctrine, the Court’s obligation is now
6 “to independently identify and respect [congressional] delegations of authority, police the
7 outer statutory boundaries of those delegations, and ensure that agencies exercise their
8 discretion consistent with the APA.” *Loper Bright*, 603 U.S. at 404. As alluded to above,
9 Plaintiffs contend that FinCEN’s SWB GTO is inconsistent with the statutory authority
10 delegated to the agency under § 5326, and they do so on the basis of three textual clues.
11 *First*, Plaintiffs point to Congress’s decision to authorize GTOs by “order,” which they say
12 the SWB GTO is not. Mem. at 21. *Second*, Plaintiffs identify language in the statute
13 suggesting GTOs ought to be aimed at narrower classes of businesses rather than the SWB
14 GTO’s indiscriminate spray aimed at “everyone meeting certain regulatory criteria.” *Id.*
15 *Third*, because the statute, in subsection (c), prohibits the public disclosure of GTOs
16 without FinCEN’s sign-off, Plaintiffs submit that the SWB GTO—which was published
17 publicly in the Federal Register—was not a congressionally authorized action. *Id.*

18 The Court agrees. Under a plain language reading of § 5326, Congress has
19 authorized FinCEN to utilize GTOs as limited, investigatory tools directed to an
20 identifiable business or group of businesses based on particularized facts. FinCEN, here,
21 has exceeded that authority. As will be explored in more detail below, this conclusion is
22 based on the statute’s text, structure, history, and context. *See Davis v. Mich. Dep’t of*
23 *Treasury*, 489 U.S. 803, 809 (1989)

24 a. *Whether the SWB GTO is an “Order”*

25 The GTO-enabling statute expressly permits FinCEN to “issue *an order* requiring”
26 a business or group of businesses to collect and report certain information the agency
27 deems necessary to carry out the purposes of the BSA. 31 U.S.C. § 5326(a) (emphasis
28 added). Borrowing from the APA’s definition, Plaintiffs argue that the SWB GTO is not

1 an “order” at all, but instead a rule of general applicability and prospective effect. And if
2 that is the case, then FinCEN did not issue an “order” as the agency was singularly
3 authorized to do by § 5326. Fully addressing Plaintiffs’ argument entails two steps: first,
4 interpreting the statute to discern, with precision, what Congress authorized; and second,
5 interpreting the SWB GTO to determine whether it fits within the scope of that delegated
6 authority.

7 i. Interpreting § 5326

8 Courts begin with the presumption that words in a statute should be interpreted
9 “consistent with their ‘ordinary meaning . . . at the time Congress enacted the statute.’”
10 *Wis. Cent. Ltd v. United States*, 585 U.S. 274, 277 (2018) (quoting *Perrin v. United States*,
11 444 U.S. 37, 42 (1979)). But ordinary meaning takes a backseat when “context requires a
12 different result.” *Gonzales v. Carhart*, 550 U.S. 124, 152 (2007) (citing 2A N. Singer,
13 Sutherland on Statutes and Statutory Construction § 47:28 (6th ed. 2000)). Here, the Court
14 finds that context militates in favor of interpreting the word “order” in § 5326 consistent
15 with its meaning as defined by the APA. Both Parties seem to agree.

16 Central to the APA is the basic dichotomy between rules and orders, both of which
17 find meaning in the Act’s text. *See Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442
18 (9th Cir. 1994). A rule, as defined by the APA, is “the whole or a part of an agency
19 statement of general or particular applicability and future effect designed to implement,
20 interpret, or prescribe law or policy” 5 U.S.C. § 551(4). A rulemaking, by
21 straightforward inference, is the “agency process for formulating, amending, or repealing
22 a rule.” *Id.* § 551(5). By contrast, an order, as defined by the APA, is “the whole or a part
23 of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of
24 an agency in a matter other than rule making by including licensing.” *Id.* § 551(6). An
25 adjudication is the “agency process for the formulation of an order.” *Id.* § 551(7).

26 The Government itself highlights this distinction in its Opposition. Whereas the
27 BSA, the Government points out, specifically authorizes FinCEN to “prescribe[] by
28 regulation” the general CTR reporting requirement (which has been set at \$10,000) in

1 31 U.S.C. § 5313(a), the BSA, in stark contrast, authorizes FinCEN to “issue an order” to
2 implement a GTO in 31 U.S.C. § 5326(a). Plaintiffs, for their part, approve of this
3 construction. *See* Mem. at 17. And so it appears that there is no dispute in this matter as
4 to what § 5326(a) authorizes. Both Parties settle on the understanding that the clearly
5 expressed distinction between acting “by regulation” in § 5313 and acting “by order” in
6 § 5326 reflects congressional intent to limit the agency’s authority in issuing GTOs to
7 acting by order.

8 The Court agrees with this understanding. “Here, the context of these words—the
9 water in which they swim—indicates that Congress used them as terms of art.” *United*
10 *States v. Hansen*, 599 U.S. 762, 775 (2023). At the time Congress created the GTO power
11 in 1988, the BSA was already in its present form of authorizing Treasury to require CTRs
12 “by regulation.” *See* Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat 877. So when the
13 1988 ADAA amendment authorizing GTOs became law, Congress had a clear textual
14 anchor by which to judge the language it could choose from. Congress opted to deviate
15 from § 5313 when it authorized GTOs to issue by “order” in § 5326, and the Court does
16 “not presume to ascribe this difference to a simple mistake in draftmanship.” *Russello v.*
17 *United States*, 464 U.S. 16, 23 (1983). This difference “strongly suggests [Congress] acted
18 ‘intentionally and purposefully in the disparate’ decisions.” *Azar v. Allina Health Servs.*,
19 587 U.S. 566, 577 (quoting *Russello*, 464 U.S. at 23).

20 The Court, therefore, proceeds with the understanding that Congress:
21 (1) intentionally adopted the meaning of “order” from the APA in § 5326 and
22 (2) exclusively intended to allow GTOs to issue by “order” as so understood. By the
23 Court’s reading of the briefs and interpretation of the arguments at hearing, the Parties
24 agree. Accordingly, it is likely that FinCEN may only issue a GTO by order as defined by
25 the APA. The question next becomes whether the SWB GTO at issue here is, in fact, an
26 order.

27 ///

28 ///

1 ii. Applicability to SWB GTO

2 “[C]ourts have long looked to the *contents* of the agency’s action, not the agency’s
3 self-serving *label*, when deciding” on the legal significance of any given administrative
4 action. *Allina Health*, 587 U.S. at 575 (first citing *Gen. Motors Corp. v. Ruckelshaus*,
5 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc); and then citing *Guardian Fed. Sav. &*
6 *Loan Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666–67 (D.C. Cir. 1978)). The
7 contents of the SWB GTO reveal that it is not an order under the APA’s definition.

8 There are three primary considerations when drawing the line between legislation
9 and adjudication: “(1) whether the government action applies to specific individuals or to
10 unnamed and unspecified persons; (2) whether the promulgating agency considers general
11 facts or adjudicates a particular set of disputed facts; and (3) whether the action determines
12 policy issues or resolves specific disputes between particular parties.” *Gallo v. U.S. Dist.*
13 *Ct. for Dist. of Ariz.*, 349 F.3d 1169, 1182 (9th Cir. 2003), *cert. denied*, 541 U.S. 1073
14 (2004). Put differently, the line is drawn between “proceedings for the purpose of
15 promulgating policy-type rules or standards, on the one hand, and proceedings designed to
16 adjudicate disputed facts in particular cases on the other.” *United States v. Fla. E. Coast*
17 *Ry. Co.*, 410 U.S. 224, 245 (1973). Or as Justice Scalia put it, “there is really no alternative
18 except the obvious meaning, that a rule is a statement that has legal consequences only for
19 the future.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 217 (1988) (Scalia, J.,
20 concurring).

21 Under any articulation of the rule versus order divide, the SWB GTO is a rule. The
22 SWB GTO imposes new recordkeeping and reporting obligations on a class of businesses
23 with no individualized factual determinations as to whether any business in particular is
24 uniquely vulnerable to money laundering. *See Gallo*, 349 F.3d at 1182 (“The effect of the
25 law is to revoke a general class of licenses, but unlike a disbarment proceeding, the ground
26 for doing so is not individual . . . misconduct.”). The administrative record could not be
27 clearer on this point—FinCEN, though recognizing that “MSBs along the southwest border
28 are a point of vulnerability in the U.S. financial system,” made no factual finding that any

1 single one of the targeted MSBs showed any signs of being susceptible to drug trafficking
2 organizations (“DTOs”). Administrative Record (“AR”), ECF No. 18-2 at 000011. Yes,
3 FinCEN made particularized findings as to thirty specific zip codes in California and
4 Texas, concluding that those zip codes were targeted based on specific risk factors such as
5 proximity to the border and historical per capita CTR filings. *Id.* at 9–13. But the
6 particularized findings of an adjudication, which results in an order, must be made with
7 respect to the regulated parties, not regulated zip codes. *See Fla. E. Coast Ry.*, 410 U.S.
8 at 246 (“No effort was made to single out any particular railroad for special consideration
9 based on its own peculiar circumstances.”).

10 In issuing the SWB GTO, FinCEN “did not adjudicate any dispute between specific
11 parties.” *Safari Club Int’l v. Zinke*, 878 F.3d 316, 333 (D.C. Cir. 2017). Instead, the SWB
12 GTO, which imposes severe civil and criminal penalties on a broad swath of businesses if
13 they fail to comply, “create[s] rights, impose[s] obligations, [and] effect[s] a change in
14 existing law pursuant to authority delegated by Congress.” *Hemp Indus. Ass’n v. Drug*
15 *Enf’t Admin.*, 333 F.3d 1082, 1087 (9th Cir. 2003) (citing *Yesler Terrace*, 37 F.3d at 449).
16 By imposing a reporting obligation of exclusively prospective effect on “a broad category
17 of individuals not yet identified,” the SWB GTO bears “all the hallmarks of a rule.” *Yesler*
18 *Terrace*, 37 F.3d at 448–49.

19 The Government resists this conclusion on two grounds. *First*, citing *United States*
20 *v. W.H. Hodges & Co.*, 533 F.2d 276 (5th Cir. 1976), the Government contends that the
21 SWB GTO “is not exclusively legislative in nature.” Opp’n at 13. By this, the Court
22 understands the Government to suggest that the SWB GTO has investigatory features in
23 addition to legislative features, and as such, the GTO is not a rule as defined by the APA.
24 *Second*, the Government contends that the SWB GTO is not necessarily a rule simply
25 because it affects “a group of businesses.” *Id.* Neither argument holds water.²

26
27 ² At hearing, the Government clarified a third argument: that Congress authorized FinCEN to act by
28 “order,” so the SWB GTO is *ipso facto* an “order.” The circularity of this argument is facially apparent.
An administrative action does not conform with a congressional delegation by the mere act of invoking

1 As it relates to the first argument, the Fifth Circuit in *W.H. Hodges* carved a third
2 category out of the rule/order dichotomy: investigatory actions. 533 F.2d at 278. There,
3 the Secretary of Agriculture issued an order “in the course of an investigation of rates
4 charged by stockyard marketing agencies in Louisiana” that required 38 marketing
5 agencies to file a special report. *Id.* When seventeen of the marketing agencies failed to
6 comply with the order, the government brought enforcement actions against the defaulted
7 marketing agencies, seeking injunctive relief and damages. *Id.*

8 In affirming the district court’s grant of summary judgment to the government, the
9 Fifth Circuit, in a single sentence, rejected the marketing agencies’ argument that the order
10 requiring the special reports was unlawfully issued without undergoing the APA’s
11 notice-and-comment procedures. *Id.* Here is the entirety of what that court said: “The
12 order at issue here was clearly investigatory in nature, as opposed to an adjudicatory or
13 rule-making process, and hence not subject to the procedures governing rule-making
14 outlined in the APA.” *Id.* (citing *Genuine Parts Co. v. Fed. Trade Comm’n*, 445 F.2d 1382,
15 1388 (5th Cir. 1971)). Aside from that one line, the court did not expound in the slightest
16 as to when an administrative action may be exclusively investigatory as opposed to a
17 rulemaking.

18 Almost a decade later, however, that same court revisited the question. *See U.S.*
19 *Dep’t of Lab. v. Kast Metals Corp.*, 744 F.2d 1145, 1149–50 (5th Cir. 1984). Upon
20 reflection, the court recognized that rulemaking and investigation “are not mutually
21 exclusive.” *Id.* at 1150. In other words, “information-gathering can be the result of a rule,
22 and preliminary investigative activity can mold conduct in clearly identifiable ways.” *Id.*
23 (internal citations omitted). With that refined understanding, the court held that an OSHA
24 instruction “set[ting] forth the criteria and method by which OSHA selected employers for
25 routine safety and health inspections” was not categorically exempt from the APA as an
26

27
28 that delegation. Instead, the Court must ask whether or not the agency, in substance, “acted within its
statutory authority, as the APA requires.” *Loper Bright*, 603 U.S. at 412.

1 investigatory measure because the instruction established criteria that “guide[d] the agency
2 in exercise of its statutory authority to conduct inspections.” *Id.* at 1147, 1150.

3 The same can be said here. The SWB GTO molds the conduct of the targeted MSBs
4 “in clearly identifiable ways” by prescribing a precise reporting requirement for every cash
5 transaction above \$200. *Id.* at 1150. More than merely requiring the production of a report,
6 FinCEN “has outlined with considerable specificity the actions that it expects the regulated
7 industry to undertake in order to produce [a transaction report] satisfactory to the agency.”
8 *Guardian Fed. Sav. & Loan Ass’n*, 589 F.2d at 663. Further, unlike the order in *W.H.*
9 *Hodges*, the SWB GTO was not issued to a narrow set of businesses already under
10 investigation for a crisply defined purpose. *See W.H. Hodges*, 533 F.2d at 278 (issuing the
11 order *in the course of* a pre-existing investigation). For an administrative action to be
12 purely investigatory in nature, the action “must focus on specific parties and particularized
13 matters” *Genuine Parts*, 445 F.2d at 1388 (citing *United States v. Morton Salt Co.*,
14 338 U.S. 632, 642 (1950)). FinCEN’s own stated purpose of the SWB GTO is to help the
15 agency “identify cartel-related, money-laundering and to conduct targeted investigations
16 and prosecutions of suppliers and facilitators that enable the flow of deadly drugs such as
17 fentanyl into the United States.” AR at 000012. Thus, by FinCEN’s own admission, the
18 SWB GTO is a *pre-investigation* tool. So even if *W.H. Hodges* does set forth a narrow
19 investigatory carveout to the notice-and-comment requirement, the SWB GTO falls outside
20 the carveout because its stated purpose is to gather generic, innocuous information that
21 may someday lead to an investigation rather than to gather party-specific information to
22 support an investigation that is already underway.

23 The Government’s second argument fares no better. The Government contends that
24 the fact that the SWB GTO may impact a group of businesses rather than a single business
25 does not preclude categorizing the GTO as an order. Opp’n at 13 (first citing *Neustar, Inc.*
26 *v. Fed. Commc’ns Comm’n*, 857 F.3d 886, 894 (D.C. Cir. 2017); and then citing *Nat’l*
27 *Biodiesel Bd. v. Env’t Prot. Agency*, 843 F.3d 1010, 1018 (D.C. Cir. 2016)). Phrased
28 differently, the Government submits that because even an order “may affect agency policy

1 and have general prospective application,” the SWB GTO must be an order. *Neustar*,
2 857 F.3d at 894.

3 The Government is correct as a matter of black-letter administrative law that “the
4 fact than an agency action governs a ‘large number’ of similar cases ‘carries little weight’
5 in deciding whether it is a rule or order.” *ITServe All., Inc. v. U.S. Dep’t of Homeland Sec.*,
6 71 F.4th 1028, 1035 (D.C. Cir. 2023). But to say that an order *can* affect a large number
7 of interested persons is to say nothing at all about whether the SWB GTO actually is an
8 order. A does not lead to B.

9 In any event, the Government’s two cited cases, *Neustar* and *National Biodiesel*, just
10 drive home the point that the SWB GTO is not an order resulting from an adjudication.
11 Take *Neustar*, for instance, where the court stated the following:

12 In this case, the Order under review determined the rights and
13 obligations of two parties . . . that were then entitled to negotiate
14 for [a] contract. It applied existing rules and regulations [to the
15 parties] in a fact-intensive determination that occurred on a
16 case-by-case basis. . . . This individualized determination was
not intended to impact law or policy; rather, it resolved interests
in a specific bidding competition.

17 *Neustar*, 857 F.3d at 895 (internal citations omitted). That passage clearly illustrates the
18 meaning of an adjudication as contemplated by the APA and how such an act is different
19 from a rulemaking. *See Bowen*, 488 U.S. at 221 (Scalia, J., concurring) (“Adjudication
20 deals with what the law was; rulemaking deals with what the law will be.”). The SWB
21 GTO does not take existing law and apply it to the facts of a given case. Instead, it creates
22 new obligations, punishable by civil and criminal penalties, for a broad class of businesses
23 that had no such obligation before the SWB GTO issued. Such an act is a legislative rule.
24 *See Hemp Indus.*, 333 F.3d at 1088 (“[I]f there is no legislative basis for enforcement action
25 on third parties without the rule, then the rule necessarily creates new rights and imposes
26 new obligations.”); *see also Shultz*, 416 U.S. at 26 (“[W]e think it important to note that
27 the [BSA’s] civil and criminal penalties attach only upon violation of regulations
28 promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would

1 impose no penalties on anyone.”).

2 b. Additional Features of § 5326

3 On its own, the Court’s conclusion above that the SWB GTO is not an “order” as
4 defined by the APA is enough to find Plaintiffs’ *ultra vires* claim likely to succeed on the
5 merits. But other textual indicators in § 5326 reinforce the Court’s conclusion. For one,
6 the statute authorizes FinCEN to direct a GTO to “any domestic financial institution or
7 nonfinancial trade or business or group of domestic financial institutions or nonfinancial
8 trades or businesses in a geographic area.” 31 U.S.C. § 5326(a). Plaintiffs argue this
9 language, when read in context, “limits GTOs to an *identified* business or group of
10 businesses, not a *category* of businesses such as ‘MSBs’ that apply indiscriminately to
11 everyone meeting certain regulatory criteria.” Mem. at 21. The second indicator sprouts
12 out of subsection (c), which prohibits subjects of a GTO from “disclos[ing] the existence
13 of, or terms of, the order to any person except as prescribed by the Secretary.” 31 U.S.C.
14 § 5326(c). The SWB GTO flouts this instruction, Plaintiffs say, because of its publicized
15 and conspicuous nature. The Government is silent in its Opposition on these arguments,
16 ostensibly believing its job was done once it demonstrated that the major questions doctrine
17 and non-delegation doctrine did not apply. *See* Opp’n at 13 (“Plaintiffs . . . rely entirely
18 on the ‘major questions doctrine’ and the non-delegation doctrine.”).

19 As an initial matter, the major questions doctrine and non-delegation doctrine are
20 simply the beginning of the inquiry, not the end. The mere fact that the major questions
21 doctrine is held to be inapplicable to a given statutory interpretation problem does not
22 absolve the Government of the responsibility of defending its construction. There is no
23 “major questions” prerequisite for bringing an *ultra vires* claim; plenty of courts have held
24 governmental action invalid as *ultra vires* even in the absence of a major question. *See,*
25 *e.g., Nw. Env’t Advocs. v. U.S. Env’t Prot. Agency*, 537 F.3d 1006, 1019–20 (9th Cir.
26 2008) (striking down EPA regulation as *ultra vires* without discussion of major questions
27 doctrine); *Nat’l Ass’n of Postal Supervisors v. U.S. Postal Serv.*, 26 F.4th 960, 980 (D.C.
28 Cir. 2022) (finding, with no mention of the major questions doctrine, that the Postal Service

1 acted *ultra vires* in refusing to take statutorily mandated measures). Likewise, the
2 Government is misguided in tying the non-delegation analysis to the *ultra vires* analysis.
3 Opp’n at 14 (“Nor does the nondelegation doctrine somehow aid Plaintiffs’ *ultra vires*
4 claim”). One, quite simply, has little to do with the other. As explained above, the
5 non-delegation doctrine holds that “Congress generally cannot delegate its legislative
6 power to another Branch.” *Mistretta*, 488 U.S. at 372 (citing *Field v. Clark*, 143 U.S. 649,
7 692 (1892)). But even a properly delegated power can be stretched beyond congressional
8 limit when an agency acts beyond the power delegated. *See Biden*, 600 U.S. at 495
9 (discussing how a power delegated to the executive branch “has limits”).

10 Notwithstanding the Government’s muddled response to Plaintiffs’ statutory
11 arguments, the Court independently agrees with Plaintiffs that the text and structure of
12 § 5326 contemplates action more limited in scope than the SWB GTO. By authorizing the
13 targeting of “any domestic financial institution or nonfinancial trade or business or group
14 of domestic financial institutions or nonfinancial trades or businesses in a geographic area,”
15 the Court finds it likely that Congress intended for FinCEN to carefully choose its targets
16 on a more granular basis than it did here.

17 Congress’s phrasing in § 5326 authorized FinCEN to target a single business (i.e.,
18 “any domestic financial institution or nonfinancial trade or business”) or multiple
19 businesses (“i.e., “group of domestic financial institutions or nonfinancial trades or
20 businesses”). The most natural way to read this provision, in context, is that FinCEN may
21 issue an order resulting from a factual determination with respect to either a single business
22 or with respect to a group of multiple businesses. The provision does not authorize the
23 issuance of an order, as the Government did here, resulting from a factual determination
24 with respect to a zip code or geographical area. This latter, more generalized factual
25 determination is inconsistent with Congress’s instruction that FinCEN act by “order.”

26 Additional context is supplied by subsection (c). As touched on above, § 5326(c)
27 provides: “No financial institution or nonfinancial trade or business or officer, director,
28 employee or agent of a financial institution or nonfinancial trade or business subject to an

1 order under this section may disclose the existence of, or terms of, the order to any person
2 except as prescribed by the Secretary.” 31 U.S.C. § 5326(c). A confidentiality provision
3 such as this is strong evidence that Congress intended for GTOs to be issued directly to the
4 targeted businesses, not to the public at large. The provision, in turn, implies that it must
5 be feasible for FinCEN to provide individualized notice to the targeted businesses. In other
6 words, subsection (c)’s inclusion in § 5326 only makes sense in a world in which FinCEN
7 knows *ex ante* which business(es) are subject to the GTO.

8 But a sweeping GTO, like the SWB GTO, that targets an entire industry without
9 consideration of the particularized need for the given GTO with respect to the specific
10 targeted businesses is in tension with subsection (c). As elaborated upon below, Treasury’s
11 own contemporaneous understanding of subsection (c) at the time of enactment as well as
12 FinCEN’s historical use of GTOs are both consistent with the Court’s interpretation of the
13 statute as authorizing GTOs to issue by “order” on the basis of particularized findings of
14 fact.

15 The addition of subsection (c) was not insignificant to Treasury’s understanding of
16 § 5326. Indeed, it appears as though subsection (c) merely codified the agency’s wish to
17 maintain GTOs under a shroud of secrecy. The year after § 5326 was enacted, Treasury
18 set out to promulgate procedural rules for the agency to abide by in issuing GTOs. At that
19 time, there was no subsection (c). Yet in a notice of proposed rulemaking for what is now
20 codified at 31 C.F.R. § 370, Treasury took the position that GTOs “will not be published
21 in the Federal Register. They will be issued only to the affected financial institutions.”
22 Proposed Amendment to the Bank Secrecy Act Regulations Relating to Geographic
23 Reporting of Certain Domestic Currency Transactions, 54 Fed. Reg. 12238, 12239
24 (Mar. 24, 1989). The agency went on to say that it “normally would request that a financial
25 institution subject to a geographic targeting order not notify the public of the enhanced
26 reporting and recordkeeping requirement limits.” *Id.* at 12240. The reason behind that
27 intended practice was “to ensure that the purpose of the order is not circumvented.” *Id.*

28 Treasury reiterated those same points when it published the final rule five months

1 later. *See* Amendment to the Bank Secrecy Act Regulations Relating to Geographic
2 Reporting of Certain Domestic Currency Transactions, 54 Fed. Reg. 33675 (Aug. 16,
3 1989). In addition to repeating the same statements as above, the agency responded to
4 comments expressing concern that serving notice of a GTO on a targeted business might
5 be frustrated without designating a point of contact for the business. *Id.* at 33677. Finding
6 “that these suggestions have merit,” Treasury specified that a business’s CEO was best
7 situated to receive notice on behalf of the institution such that other “senior officials at the
8 targeted financial institution will be informed of the issuance of the order.” *Id.* This
9 requirement found its way into 31 C.F.R. § 1010.370(b), which establishes the internal
10 procedural requirement that a GTO “shall be directed to the Chief Executive Officer of the
11 financial institution or nonfinancial trade or business.” This feature, which shines a light
12 on the particularized nature of GTOs, is still in effect today.

13 Three years later, Congress took Treasury’s regulatory practice and enshrined it into
14 law. *See* Housing & Community Development Act of 1992, Pub. L. 102-550, Title XV,
15 § 1514, 106 Stat. 3672. Accordingly, it appears likely that Congress’s addition of
16 subsection (c) in 1992 was merely meant to ratify Treasury’s practice of maintaining
17 confidential procedures when issuing GTOs. *See Norwegian Nitrogen Prods. Co. v. United*
18 *States*, 288 U.S. 294, 315 (1933) (reasoning that an administrative practice “has peculiar
19 weight when it involves a contemporaneous construction of a statute by the men charged
20 with the responsibility of setting its machinery in motion; of making the parts work
21 efficiently and smoothly while they are yet untried and new”). That understanding of the
22 scope of delegated authority under § 5326 cannot be squared with FinCEN’s more modern
23 practice, as exemplified by the SWB GTO, of engaging in a GTO-by-press release
24 campaign directed at unnamed and unidentified businesses without regard to maintaining
25 surreptitious procedures. Thus, the 1992 amendment is “weighty evidence of
26 congressional approval of [Treasury’s] interpretation” of the BSA—especially in light of
27 the amendment’s temporal proximity to the 1989 regulation—and, as a result, suggests that
28 the SWB GTO was issued “in excess of statutory jurisdiction, authority, or limitations.”

1 5 U.S.C. § 706(2)(C).

2 FinCEN’s historical use of GTOs further illustrates the point. Courts have “long
3 extended ‘great respect’ to the ‘contemporaneous’ and consistent view of the coordinate
4 branches about the meaning of a statute’s terms,” and such respect appears warranted here.
5 *See Loper Bright*, 603 U.S. at 430 (Gorsuch, J., concurring) (quoting *Edwards’ Lessee v.*
6 *Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827)). Director Gacki, in her declaration, identifies
7 several GTOs from years past to validate the notion that the SWB GTO is not without
8 precedent. Gacki Decl. ¶ 7. A closer look, however, reveals quite the opposite.

9 Consider, for instance, the two GTOs FinCEN issued in the New York City
10 metropolitan area in the 1990s (“New York GTOs”). Based on the press releases Director
11 Gacki cites to in her declaration, FinCEN issued GTOs throughout 1996 and 1997 to New
12 York City money remitters that were themselves suspected of laundering money to
13 Colombia and Dominican Republic. *Treasury Acts Against Flow of Dirty Money to*
14 *Colombia*, Fin. Crimes Enf’t Network (Dec. 23, 1996),
15 [https://www.fincen.gov/news/news-releases/treasury-acts-against-flow-dirty-money-](https://www.fincen.gov/news/news-releases/treasury-acts-against-flow-dirty-money-colombia)
16 [colombia](https://www.fincen.gov/news/news-releases/treasury-acts-against-flow-dirty-money-colombia) (hereinafter “*Colombia GTO*”); *Treasury Cracks Down on Remittances to*
17 *Dominican Republic*, Fin. Crimes Enf’t Network (Sept. 4, 1997),
18 [https://www.fincen.gov/news/news-releases/treasury-cracks-down-remittances-](https://www.fincen.gov/news/news-releases/treasury-cracks-down-remittances-dominican-republic)
19 [dominican-republic](https://www.fincen.gov/news/news-releases/treasury-cracks-down-remittances-dominican-republic) (hereinafter “*Dominican Republic GTO*”). Strikingly, those press
20 releases tout the hefty investigations that took place *prior to issuing the GTOs*. For
21 example, the Colombia GTO was used to impose lower threshold reporting requirements
22 “on *specified* financial service providers” after laying a foundation premised upon several
23 antecedent indictments in the area. *See Colombia GTO*. The Colombia press release
24 highlights the July 24, 1996 guilty plea from Vigo Remittance Corp. and the “[n]umerous
25 other agents and their employees [who] have been successfully prosecuted for money
26 laundering over the past few years.” *Id.*

27 In contrast, here, the Government points to no investigation that took place prior to
28 the SWB GTO to justify its existence nor does the Government point to any particularized

1 suspicion with respect to any individual MSB in the targeted area. In fact, FinCEN’s
2 admitted purpose in issuing the SWB GTO is “to generate new leads and identify new and
3 related subjects in ongoing cases.” AR at 000012. Yet it sought out to accomplish that
4 task by publicly issuing a press release on March 11 of this year, over a month before the
5 effective date of the SWB GTO. This newfangled execution elucidates just how far GTOs
6 have drifted from Congress’s original intention—as expressed in the plain language of the
7 statute—for GTOs to be confidentially issued orders covering a business or narrowly
8 tailored group of businesses based on particularized findings of fact. *Cf. United States v.*
9 *Oreira*, 29 F.3d 185, 187 (5th Cir. 1994) (describing a 1991 GTO issued to a single money
10 remitter after a government informant uncovered evidence of wrongdoing and after the IRS
11 had executed a search warrant on the remitter). Thus, though not dispositive, the agency’s
12 past practice when invoking § 5326 underpins the Court’s conclusion above.

13 All said, based on the text, context, structure, and historical record, the Court
14 concludes that the SWB GTO is likely to have been issued in excess of FinCEN’s statutory
15 authority.³ Plaintiffs have, therefore, shown that they are likely to succeed on their *ultra*
16 *vires* APA claim.

17 **C. Notice-and-Comment**

18 As a background principle of administrative law, a “notice and comment period is
19 generally required for agency rulemaking, but not for adjudications.” *MacLean v. Dep’t*
20 *of Homeland Sec.*, 543 F.3d 1145, 1151 (9th Cir. 2008) (first citing 5 U.S.C. § 553; and
21 then citing *Cisneros*, 37 F.3d at 448). To promulgate a rule, the notice and comment
22 regime establishes a three-step procedure for agencies to follow: “(1) publishing notice of
23 the proposed rule-making in the *Federal Register*; (2) providing a period for interested
24 persons to comment on the proposed rule, which comments will be considered by the
25

26 ³ It should be noted that, as far as the Court is aware, none of FinCEN’s previously issued GTOs were
27 legally challenged in court on APA grounds like the SWB GTO is being challenged here. Some, if not
28 all, of those previous GTOs may very well have been lawfully issued consistent with congressional
authority. The Court, of course, takes no position on the legality of any GTOs other than the one being
challenged in the instant case.

1 agency prior to adopting the rule; and (3) publishing the adopted rule not less than thirty
2 days before its effective date” *Paulsen v. Daniels*, 413 F.3d 999, 1004 (9th Cir. 2005)
3 (internal citations omitted). This procedure reflects Congress’s “judgment that notions of
4 fairness and informed administrative decisionmaking require that agency decisions be
5 made only after affording interested persons notice and an opportunity to comment.” *Id.*
6 at 1004–05 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979)).

7 There is no dispute here that the SWB GTO did not undergo the notice-and-comment
8 procedures spelled out by the APA. The dispute is over whether those procedures were
9 required in the first place. As explained above, Plaintiffs argue that, regardless of the label,
10 the SWB GTO is substantively a rule that required notice-and-comment. The Government
11 counters by maintaining that the SWB GTO is an order and was expressly exempted from
12 notice-and-comment, most notably via § 5326(c), which prohibits targeted businesses from
13 disclosing the existence of a GTO.

14 The Court agrees with Plaintiffs. Though the structure of § 5326—which
15 specifically prohibits the targets of a GTO from disclosing the existence of that action to
16 the public—“indicates that Congress intended to abrogate the APA’s notice-and-comment
17 requirements in a ‘clear’ or ‘plain’ way in a later statute,” the Court concluded above that
18 the actual SWB GTO issued here is not an order as actually authorized by that statute.
19 *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1145 (6th Cir. 2022) (citing *Lockhart*
20 *v. United States*, 546 U.S. 142, 145–46 (2005)). The SWB GTO “create[s] rights,
21 impose[s] obligations, [and] effect[s] a change in existing law” such that it is a rule as
22 defined by the APA. *Hemp Indus.*, 333 F.3d at 1087. Because such “rules have the ‘force
23 and effect of law’ and may be promulgated only after public notice and comment,” FinCEN
24 likely violated the APA by issuing the SWB GTO without following the
25 notice-and-comment procedures of 5 U.S.C. § 553. *Nat’l Mining Ass’n v. McCarthy*,
26 758 F.3d 243, 250 (D.C. Cir. 2014) (quoting *Immigr. & Naturalization Serv. v. Chadha*,
27 462 U.S. 919, 986 n.19 (1983)). Thus, Plaintiffs are likely to succeed on their notice-and
28 comment APA claim.

1 **D. Arbitrary and Capricious**

2 Plaintiffs’ final APA argument is that the SWB GTO is arbitrary and capricious.
3 Under the APA, courts may hold agency actions to be unlawful if they are “arbitrary,
4 capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.
5 § 706(2)(A). Agency action is arbitrary and capricious if:

6 the agency has relied on factors which Congress has not intended
7 it to consider, entirely failed to consider an important aspect of
8 the problem, offered an explanation for its decision that runs
9 counter to the evidence before the agency, or is so implausible
10 that it could not be ascribed to a difference in view or the product
11 of agency expertise.

11 *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004) (quoting *Motor Vehicle*
12 *Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The
13 standard is “highly deferential, presuming agency action to be valid and affirming the
14 agency action if a reasonable basis exists for its decision.” *Nw. Ecosystem All. v. U.S. Fish*
15 *& Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (quoting *Indep. Acceptance Co. v.*
16 *California*, 204 F.3d 1247, 1251 (9th Cir. 2000)). A court must be “searching and careful”
17 in its review of an agency action but is not to substitute its judgment for that of the agency.
18 *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 556 (9th Cir. 2000) (citing *Mt.*
19 *Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993)).

20 The court’s review “is limited to ‘the grounds that the agency invoked when it took
21 the action.’” *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 20 (2020)
22 (quoting *Michigan v. Env’t Prot. Agency*, 576 U.S. 743, 758 (2015)). The agency must
23 examine the relevant data and articulate a satisfactory explanation for its action. *State*
24 *Farm*, 463 U.S. at 43. Plaintiffs bear the burden of showing that agency action was
25 arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law.
26 *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

27 Plaintiffs raise six independent reasons as to why the SWB GTO is arbitrary and
28 capricious. Those reasons are: (1) FinCEN failed to consider the scope of the problem,

1 (2) the \$200 threshold is arbitrary, (3) the 30 targeted zip codes are arbitrary, (4) FinCEN
2 failed to consider cartel countermeasures, (5) FinCEN does not have the capacity to convert
3 CTR-acquired intelligence into actionable leads and real prosecutions, and (6) FinCEN
4 failed to consider the impact on MSBs. Mem. at 18–20. The Government recasts these
5 arguments into two broad categories, responding that (1) the \$200 threshold is both
6 reasonable and properly informed and (2) the 30 targeted zip codes were chosen because
7 of specific criteria that was reasonably assessed. In support of its position that the SWB
8 GTO is not arbitrary and capricious, the Government compiled an administrative record
9 consisting of an internal memorandum submitted to FinCEN Director Gacki, AR 4–20
10 (“FinCEN Memo”), as well as attachments of the documents cited in the Memo.

11 Given the substantial overlap in several of the Parties’ competing interpretations of
12 the administrative record, the Court will proceed to analyze the two most salient reasons
13 why Plaintiffs have the better of the argument. This is not to say that Plaintiffs’ remaining
14 arguments have no merit; the Court simply finds it sufficient to resolve this case on the two
15 grounds stated below.⁴

16 *1. Failure to Consider the Burden on Targeted MSBs*

17 Having carefully reviewed the administrative record, the Court finds that FinCEN
18 failed to consider the degree to which the SWB GTO would impose a regulatory burden
19 on targeted MSBs. Failure to consider an important aspect of the problem, like the effect
20 of the regulation on the impacted community, is sufficient to conclude that the SWB GTO
21 is arbitrary and capricious. See *E. Bay Sanctuary Covenant*, 994 F.3d at 984 (citing *State*
22 *Farm*, 463 U.S. at 43). That is especially true when the agency is charged with determining
23

24
25 ⁴ The Court would be remiss not to comment on its concern over the missing date on the FinCEN Memo.
26 AR at 000004 (dated “March XX, 2025”). As the Court finds it, the administrative record contains no
27 clear indication that the agency considered *anything at all* prior to issuing the SWB GTO. This, on its
28 own, is problematic for the Government’s assertion that it considered the relevant facts *before* issuing the
SWB GTO. Despite this concern, the Court will assume, for purposes of the instant Motion, that the
FinCEN Memo does indeed pre-date the SWB GTO. That assumption, it should be said, rests on shaky
grounds.

1 whether “reasonable grounds exist for concluding that [the regulations] are necessary.”
2 31 U.S.C. § 5326(a); *Michigan v. Env’t Prot. Agency*, 576 U.S. 743, 759 (2015)
3 (concluding that an agency “must consider cost—including, most importantly, cost of
4 compliance—before deciding whether regulation is appropriate and necessary”).

5 To start, the published GTO itself in the Federal Register is silent as to expected
6 compliance costs. AR at 000001–03. The published GTO describes the various parameters
7 of what the targeted MSBs were required to report, when reports are due, how long reports
8 must be retained, and more. *Id.* But the Federal Register provides no indication that the
9 agency considered the burden on the impacted businesses. So the Court must proceed to
10 the FinCEN Memo to discover whether the agency considered this important factor.

11 That document is similarly devoid of adequate consideration of compliance costs.
12 The FinCEN Memo is a seventeen-page document that steps through the historical
13 backdrop of the SWB GTO, the justification for the SWB GTO, and the expected scope of
14 the SWB GTO. *See generally* FinCEN Memo. The Memo cites to governmental reports
15 that support the conclusion that MSBs are generally susceptible to abuse by DTOs,
16 journalistic exposes uncovering the nature of money laundering operations, and several
17 instances of federal indictments filed against corrupt MSBs that have taken complicit roles
18 in laundering money across the border. The agency, however, cites to no authority
19 whatsoever to demonstrate its appreciation for the costs of compliance. *See Michigan*,
20 576 U.S. at 759.

21 The FinCEN Memo touts the limited geographic scope of the SWB GTO to show
22 that it concerned itself with “limit[ing] burden,” AR at 000013, but there was no effort to
23 quantify the burden or to acknowledge what effect the SWB GTO might have on the MSB
24 industry in the southwest. Just once in the Memo does FinCEN recognize that “the GTO
25 would place a higher burden on Covered Businesses due to the increased volume of CTRs
26 that would result,” but the agency immediately proceeds to dismiss that burden as “merely
27 a reporting obligation” that is not expected “to materially alter typical fees charged for cash
28 services, given that the reporting period is temporary” and that continued competition from

1 banks will drive down prices. *Id.* at 17. No justification is provided in the Memo as to
2 how the agency reached that facile conclusion.

3 In its Opposition, the Government cites to internal FinCEN estimates of the time
4 burden imposed by filing a CTR, but that explanation is too little too late. Under the *post*
5 *hoc* justification doctrine, it is well-settled that “courts assess agency action based on the
6 official explanations of the agency decisionmakers, and not based on after-the-fact
7 explanations advanced by *agency lawyers during litigation*” *Regents*, 591 U.S. at 67
8 (Kavanaugh, J., concurring in part and dissenting in part) (emphasis in original) (collecting
9 cases). The Government’s insistence that it considered the eight-minute CTR time burden
10 (by FinCEN’s estimate) at the time FinCEN issued the SWB GTO is belied by the record.
11 *See* Opp’n at 10 n.7. There is, from the Court’s review, no mention of or reference to that
12 time burden in the record.

13 Even if the agency had considered industry burden at the time it issued the SWB
14 GTO, there is no evidence that it weighed that burden against the benefits. Assuming that
15 FinCEN sincerely believes the influx of CTRs to the Government’s databases will
16 somehow prove useful in deterring money laundering in the future, the Court finds nothing
17 in the FinCEN Memo or anywhere else in the record that demonstrates the agency assessed
18 that benefit to outweigh the costs. “[T]o look at only one side of the scales, whether solely
19 the costs or solely the benefits, flunks th[e] basic requirement” of considering all important
20 aspects of the problem. *State v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1122
21 (N.D. Cal. 2017) (citing *State Farm*, 463 U.S. at 43). Because the agency failed to
22 undertake the sensitive balancing act of weighing the burden on the private sector against
23 the need for increased security for international remittances, the SWB GTO is likely
24 arbitrary and capricious. *See Michigan*, 576 U.S. at 753 (“Consideration of cost reflects
25 the understanding that reasonable regulation ordinarily requires paying attention to the
26 advantages *and* the disadvantages of agency decision.” (emphasis in original)).

27 ///

28 ///

1 2. *Failure to Articulate a Rational Basis for the \$200 Threshold or to*
2 *Consider Reasonable Alternatives*

3 Potentially contributing to FinCEN’s failure to consider the industry burden of the
4 SWB GTO is the fact that the agency similarly failed to articulate a rational basis for the
5 \$200 reporting threshold. Assessing the burden of a regulation on private industry is, after
6 all, a heroic task if the agency makes no factual findings whatsoever as to what percentage
7 of transactions in the regulated industry will be covered in the first place. In the FinCEN
8 Memo, the agency states in a conclusory fashion that the \$200 threshold “would include
9 nearly all cash transactions vulnerable to abuse by drug cartels through structuring
10 payments to avoid CTRs, while excluding clearly de minimis amounts that are more likely
11 to be legitimate.” AR at 000016. But that conclusion, reached without any citation or
12 authority, does not demonstrate that “the agency considered relevant factors and articulated
13 a rational connection between the facts found and the choice made.” *Pac. Coast Fed’n of*
14 *Fishermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001).

15 As helpful context, FinCEN broadly justifies the SWB GTO—or, more specifically,
16 the reduced reporting threshold—as necessary to “help make structuring more difficult,
17 thereby increasing the cost of doing business for cartels.” AR at 000012. Structuring is,
18 as defined by regulation, “conduct[ing] or attempt[ing] to conduct one or more transactions
19 in currency, in any amount, at one or more financial institutions, on one or more days, in
20 any manner, for the purpose of evading the reporting requirements” as promulgated by
21 FinCEN. 31 C.F.R. § 1010.100(xx). Put simply, to structure a large transaction that would
22 otherwise exceed an applicable reporting threshold is to divide it into multiple, smaller
23 transactions that, individually, are below the reporting threshold. The Government
24 contends that cartels use so-called “money mules” to structure large, illegitimate
25 transactions “by dividing illicit proceeds between multiple individuals who conduct
26 transfers at one or multiple MSB locations.” AR at 000010. Thus, as FinCEN’s theory
27 goes, “the \$200 threshold is low enough both to prevent the successful structuring of
28 transactions to avoid CTR requirements and to increase the cost of doing business for drug

1 cartels.” Gacki Decl. ¶ 19.

2 This theory is not without appeal and the record contains at least some evidence that
3 structuring is a real device used by money launderers to disguise drug proceeds “to look
4 like routine remittances.” AR at 000010. As illustrations, the FinCEN Memo highlights
5 two corrupt MSBs—one located in Sacramento, California and the other located in Atlanta,
6 Georgia—that laundered money to Mexico “by breaking transactions into smaller
7 amounts” *Id.* Never mind that both of those examples cited by FinCEN took place
8 far from the United States-Mexico border; they at least provide factual evidence to support
9 FinCEN’s claim that corrupt structuring is a real problem.

10 The trouble with the record, however, is that it lacks any factual findings necessary
11 to assess just how low the agency’s reporting threshold should go. On the face of the
12 FinCEN Memo, the agency sought out to exclude de minimis amounts while sweeping in
13 all cash transactions vulnerable to abuse, but that stated objective requires first determining
14 what dollar amounts are: (1) de minimis and (2) vulnerable to abuse. FinCEN not only
15 failed to explain how it landed on \$200, but the evidence that the agency supposedly relied
16 on contradicts its conclusion.

17 The FinCEN Memo makes no mention of what the agency finds particularly notable
18 about \$200. FinCEN broadly pronounces that structuring below \$10,000 is a problem
19 worth fighting, but it provides no analytical context as to the transactional profile of MSBs.
20 The Memo says nothing about average illicit transaction amounts, average licit transaction
21 amounts, or anything in between. And the Memo similarly says nothing about what makes
22 a \$200 transaction vulnerable to abuse. True, \$200 is less than \$10,000. But by that logic,
23 any dollar amount less than \$10,000 would pass muster. The Government provides no
24 limiting principle or mechanism for understanding when a reporting threshold goes so low
25 as to be counterproductive.

26 As Plaintiffs point out, the January 2025 Center for Strategic and International
27 Studies (“CSIS”) study, relied on by the FinCEN Memo, declines to go so far as to endorse
28 a \$200 reporting requirement. That study found that the average remittance transaction is

1 around \$390, which is well below the \$10,000 CTR threshold and even quite below the
2 SAR threshold. AR at 000160. But, according to the study, laundering large amounts of
3 money in such small transactions may not prove feasible. As the study put it:

4 To succeed via this method, criminal organizations must recruit
5 a large number of vendors in the sending and receiving localities.
6 While it would take approximately 2,564 deposits of the average
7 \$390 remittance to move a million dollars across the border,
8 recent investigations into money laundering mechanisms suggest
9 that millions are laundered without a single dollar ever crossing
10 into Mexico using Chinese money launderers.

11 *Id.* This passage suggests that structuring transactions at “de minimis” levels, as
12 understood by FinCEN, may be so impracticable that DTOs have resorted to more complex
13 networks, primarily through Chinese Money Laundering Organizations (“CMLOs”), to
14 evade detection. The February 2024 National Money Laundering Risk Assessment,
15 published by the Treasury Department and similarly relied on by the FinCEN Memo, also
16 stresses the emergence of CMLOs as alternatives to low-dollar value remittances. *See* AR
17 at 00057 (“Since [2022], law enforcement has reported that CMLOs have become more
18 prevalent and are now one of the key actors laundering money professionally in the United
19 States and around the globe.”). In light of these factual findings, the CSIS study suggested
20 lowering certain reporting thresholds to align more closely with those set by Mexico at
21 \$1,000. *Id.* at 000163. The FinCEN Memo does not engage with this policy proposal from
22 CSIS.

23 With FinCEN having cited these authorities as support, the Court is unable to find
24 that the agency “considered the relevant factors and articulated a rational connection
25 between the facts found and the choice made.” *Nat’l Res. Def. Council v. U.S. Dep’t of the*
26 *Interior*, 113 F.3d 1121, 1125 (9th Cir. 1997). Instead, more accurately described, the
27 agency leaped to the supposition that \$200 is somehow a suitable dividing line between de
28 minimis transactions and transactions vulnerable to abuse, and then it left that supposition
unsupported by any concrete facts rationally leading to that conclusion. Suppositions
without a factual underpinning are not “within the bounds of reasoned decisionmaking

1 required by the APA.” *Baltimore Gas & Elec. Co. v. Nat’l Res. Def. Council, Inc.*, 462
2 U.S. 87, 104 (1983).

3 Moreover, the Court is unable to find that FinCEN considered reasonable
4 alternatives to the \$200 reporting threshold. As noted above, the FinCEN Memo
5 recognizes that the reporting requirement “would place a higher burden on Covered
6 Businesses due to the increased volume of CTRs that would result.” AR at 000017. But
7 the agency declined to consider any other reporting thresholds that might allow FinCEN to
8 collect “highly useful” reports, 31 U.S.C. § 5311(1), while still mitigating this recognized
9 burden on MSBs. Several alternatives, however—like the \$1,000 CSIS proposal noted
10 above—appear directly in the administrative record that FinCEN purports to have relied
11 on before issuing the SWB GTO. Although the Court’s responsibility is not “to ask
12 whether [the agency’s] decision was ‘the best one possible’ or even whether it was ‘better
13 than the alternatives,’” the agency still must “consider the evidence and give reasons for
14 [its] chosen course of action.” *Dep’t of Com. v. New York*, 588 U.S. 752, 777 (2019)
15 (quoting *Fed. Energy Regul. Comm’n v. Elec. Power Supply Ass’n*, 577 U.S. 260, 292
16 (2016)).

17 Beyond the CSIS proposal, and as discussed by *amicus*, the FinCEN Memo cites to
18 an October 2024 Department of Homeland Security (“DHS”) blogpost that discusses MSB
19 vulnerabilities to money laundering. MSBA Br. at 14 (citing AR at 000405). In that
20 blogpost, DHS urges investigators to utilize the Transaction Record Analysis Center
21 (“TRAC”) database as a means of identifying complicit MSB agents. AR at 000405. That
22 database, the blogpost reveals, contains over 337 million transactions representing
23 “subpoenaed financial transactions from numerous global MSBs.” *Id.* (cleaned up). These
24 records are “exclusively available to authorized federal, state and local law enforcement,”
25 yet FinCEN makes no mention of the database in its Memo that otherwise presses the need
26 to ramp up data collection without any consideration for the enhanced burden on industry.
27 Because an “agency’s recognition of [a problem], without any meaningful discussion of
28 the issue in the context of alternatives . . . points to the agency’s failure to ‘consider an

1 important aspect of the problem’ and ‘articulate a satisfactory explanation for its action,’”
2 the Court finds it likely that the SWB GTO is arbitrary and capricious.⁵ *Nat’l Cmty.*
3 *Reinvestment Coal. v. Consumer Fin. Prot. Bureau*, No. 20-2074 (BAH),
4 2022 WL 4447293, at *31 (D.D.C. Sept. 23, 2022) (quoting *Am. Bankers Ass’n v. Nat’l*
5 *Credit Union Ass’n*, 934 F.3d 649, 656, 668–71 (D.C. Cir. 2019)).

6 For the reasons discussed above, the Court finds that Plaintiffs have shown that they
7 are likely to succeed on the merits of their arbitrary and capricious claim under the APA.

8 ***E. Fourth Amendment***

9 The final argument in the Motion is a constitutional argument. In Plaintiffs’ view,
10 the SWB GTO is defective under the Fourth Amendment because the GTO operates as a
11 general warrant that violates the privacy interests of: (1) the covered MSBs and (2) the
12 covered MSBs’ customers. The Government opposes this argument on the ground that the
13 SWB GTO is a garden-variety reporting requirement that is consistent with countless other
14 reporting requirements that have been upheld as constitutionally permissible under the
15 Fourth Amendment.

16 Although the Parties ardently disagree on this issue, the Court declines to reach it.
17 Because the SWB GTO is likely unlawful for multiple non-constitutional reasons, the
18 Court defers on reaching the Fourth Amendment issue until addressing it becomes
19 necessary. *See Al Otro Lado v. Exec. Off. for Immigr. Rev.*, Nos. 22-55988, 22-56036,
20 2024 WL 5692756 (9th Cir. May 14, 2025) (observing the longstanding principle requiring
21 “courts [to] avoid reaching constitutional questions in advance of the necessity of deciding
22 them” (internal quotation marks and citation omitted)).

23 ///

24 ///

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27 ⁵ In relying on the MSBA Brief, the Court is not considering the attached declarations, which were
28 objected to on the record at hearing. The Court relies on the MSBA Brief solely for the purpose of
identifying areas in the Government’s own administrative record that affect the Court’s analysis above.

1 **II. Irreparable Harm**

2 Plaintiffs argue they will suffer irreparable harm from the SWB GTO in three ways.
3 They first claim economic harms through increased compliance costs and reduced
4 transaction volume, both as a direct result of the SWB GTO. These economic harms are
5 so severe, Plaintiffs say, that “Novedades will have to close.” Escobar Decl. ¶ 48. And
6 according to Plaintiffs, even if the economic harms were not so severe, they still constitute
7 irreparable harm due to the Government’s sovereign immunity, which would prevent
8 Plaintiffs from recovering any monetary damages. Mem. at 10 (citing *Idaho v. Coeur*
9 *d’Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015)). Second, and independent of the
10 economic harm, Plaintiffs claim they will suffer a loss of goodwill and control over their
11 business reputation. *Id.* Third, Plaintiffs claim that irreparable harm results as a matter of
12 course any time constitutional rights are violated. In support of their argument, Plaintiffs
13 attach a declaration of Plaintiff Esperanza Escobar as well as a series of declarations from
14 other individuals who either work at or utilize the services of MSBs.

15 The Government’s main rebuttal is that Plaintiffs overstate the burden of complying
16 with the SWB GTO and speculate as to the detrimental impact the GTO will have on
17 Novedades. A sizable chunk of the Government’s briefing quibbles with Plaintiffs’
18 estimates for how long it takes to complete a CTR and faults Plaintiffs for not exploring
19 automated batch-filing, which it says would reduce the burden of compliance. Opp’n
20 at 21–22. The Government also contends that the Court should limit its consideration of
21 the evidence exclusively to the declarations directly bearing on the two Plaintiffs before
22 the Court—Escobar and Novedades—and it lodges a general objection “to all of the
23 non-party evidence attached to Plaintiffs’ motion.”⁶ *Id.* at 23.

24
25
26 ⁶ The Court was left unclear after the hearing as to the Government’s position on irreparable harm. The
27 Court understood the Government to concede the existence of irreparable harm last month during the TRO
28 hearing, and counsel appeared to concede the same at the Preliminary Injunction hearing. Yet the
Opposition quite forcefully argues that Plaintiffs have not established irreparable injury. *See* Opp’n
at 21–23. In any event, the Court will assume for purposes of the instant Motion that the Government
does indeed dispute whether Plaintiffs have satisfied the irreparable harm prong.

1 As an initial matter, the Court **OVERRULES** the Government’s objection. “At this
2 preliminary stage, plaintiffs may rely on the allegations in their Complaint and whatever
3 other evidence they submitted in support of their preliminary injunction motion to meet
4 their burden.” *City and County of San Francisco v. U.S. Citizenship & Immigr. Servs.*,
5 944 F.3d 773, 787 (9th Cir. 2019) (cleaned up) (quoting *Washington v. Trump*,
6 847 F.3d 1151, 1159 (9th Cir. 2017) (per curiam)). And here, it is perfectly sensible for
7 Plaintiffs to corroborate their claims of irreparable harm with the experiences of those
8 individuals and businesses that have been most exposed to the SWB GTO. The SWB GTO
9 went into effect on April 14, 2025, but this Court issued a TRO one week later covering
10 the Southern District of California. ECF No. 16. Meanwhile, the SWB GTO remains in
11 effect along the border in Texas, where, with the exception of ten MSBs who successfully
12 obtained a similar TRO limited to the ten named plaintiffs in a parallel case, covered
13 businesses have been required to comply with the SWB GTO for over one month. *See Tex.*
14 *Ass’n of Money Servs. Bus. v. Bondi*, No. SA-25-CA-00344-FB (W.D. Tex. Apr. 11, 2025),
15 ECF No. 13. Evidence of the regulatory burden on the businesses that have remained
16 subject to the SWB GTO is, of course, highly probative of the practical effect the SWB
17 GTO would have on Novedades, considering the fact that FinCEN has been enjoined from
18 enforcing the SWB GTO against Novedades since April 22, 2025. The Court, therefore,
19 will consider the third-party declarations to the extent they validate Plaintiffs’ allegations
20 of irreparable harm, but it will not consider harm to third parties as a substitute for
21 examining the likelihood of imminent and irreparable harm to Plaintiffs themselves. *See*
22 *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

23 Even if the Court were to limit itself to the Escobar declaration as the Government
24 requests, Plaintiffs still have met their burden of demonstrating imminent irreparable harm.
25 Escobar estimates that at least 99% of Novedades transactions are over \$200 and thus
26 within the sweep of the SWB GTO. Escobar Decl. ¶ 41. With over 2,000 total transactions
27 each month, complying with the SWB GTO would add close to 1,000 hours of work per
28 month of completing and submitting CTRs, or over 30 hours per day. *Id.* ¶ 50. Escobar

1 bases that calculation on her optimistic assumption of 25 minutes per CTR, *id.*, an
2 assumption directly in line with FinCEN’s own estimate of 23.93 minutes per CTR for
3 non-automated filers, 85 Fed. Reg. 29029, and well below the 40-minute estimate that is
4 printed directly on the CTR itself, ECF No. 22-9 at 16. For a business that typically
5 maintains one person on duty at a time, the Court finds credible Plaintiffs’ avowal that the
6 regulatory burden imposed by the SWB GTO would be simply unsustainable for
7 Novedades. Because the “threat of ‘extinction’ is enough to establish irreparable harm,
8 even when damages may be available and the amount of direct financial harm is
9 ascertainable,” the Court concludes that Plaintiffs have met their burden on this prong. *hiQ*
10 *Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1188 (9th Cir. 2022) (citing *Am. Passage*
11 *Media Corp. v. Cass Commc’ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985)).

12 Beyond this risk of business closure, Escobar’s declaration also demonstrates a
13 non-speculative impact on Novedades’s reputation and goodwill in the community.
14 Escobar states that, if put back into effect, the SWB GTO “will cause customers to
15 discontinue business with Novedades.” Escobar Decl. ¶ 48. The Government counters
16 that Escobar’s contentions are merely speculative, but the Court finds that Escobar’s
17 declaration is replete with ample evidence of concrete harm. For the one week the SWB
18 GTO was in effect in California, Escobar claims that “[a]pproximately 50–60% of the
19 customers [she] explained the [reporting] requirement to left the store without completing
20 a transaction.” Escobar Decl. ¶ 43. She goes on to claim that customers told her that they
21 “planned to go to MSBs in unaffected zip codes,” and that “one customer even told [her]
22 that an MSB in an unaffected zip code had called him to convince him to go there instead.”
23 *Id.* ¶ 49. Escobar further recounts that “customers were reluctant to give [her] their
24 personal information and expressed skepticism and fear.” *Id.* ¶ 44. With the SWB GTO
25 in force, it is evident that Novedades “stood to lose its newfound customers and
26 accompanying goodwill and revenue.” *Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*,
27 240 F.3d 832, 841 (9th Cir. 2001) (citing *Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*,
28 60 F.3d 27, 37–38 (2d Cir. 1995)). This, too, supports the Court’s finding of irreparable

1 harm.

2 The Court has no doubt that the Texas MSB associates who filed declarations
3 alongside Escobar’s declaration have experienced similar harms. *See, e.g.*, Declaration of
4 Mariceli Castro (“Castro Decl.”) ¶¶ 34–36, ECF No. 22-8 (discussing an exodus of
5 customers to nearby MSBs, reducing business by 50–60%); Amended Declaration of
6 Andres Payan, Jr. (“Payan Decl.”) ¶ 29, ECF No. 22-3 (describing how he is “buried in
7 CTRs,” with “about 100 CTRs stacked up on [his] desk”); Declaration of Antonio Carpio
8 (“Carpio Decl.”) ¶ 25, ECF No. 22-4 (explaining how his MSB is “hemorrhaging money,”
9 having “lost at least 15% or more of [his] business”); Declaration of Clarissa Ashley Light
10 (“Light Decl.”) ¶ 19, ECF No. 22-7 (“We are losing up to 10 customers per day because of
11 it.”). But the Court need not consider those declarations to comfortably conclude that
12 Plaintiffs themselves will suffer irreparable harm absent a preliminary injunction. These
13 severe harms weigh in favor of issuing the requested relief.

14 **III. Balancing of the Equities and Public Interest**

15 After assessing the plaintiff’s likelihood of success on the merits and prospect of
16 facing irreparable harm, “district courts must ‘give serious consideration to the balance of
17 equities and the public interest.’” *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir.
18 2010) (quoting *Winter*, 555 U.S. at 27). “In weighing the equities, courts ‘balance the
19 competing claims of injury’ and ‘consider the effect on each party of the granting or
20 withholding of the requested relief.’” *Pacito v. Trump*, No. 2:25-cv-255-JNW,
21 2025 WL 655075, at *23 (W.D. Wash. Feb. 28, 2025) (quoting *Winter*, 555 U.S. at 24).
22 The public interest inquiry, meanwhile, “primarily addresses impact on non-parties rather
23 than parties.” *Bernhardt v. Los Angeles County*, 339 F.3d 920, 931 (9th Cir. 2003)
24 (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002)). These
25 two factors merge “[w]here the government is a party to a case in which a preliminary
26 injunction is sought.” *Padilla v. Immigr. & Customs Enf’t*, 953 F.3d 1134, 1141 (9th Cir.
27 2020) (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)).

28 The harm to Plaintiffs absent a preliminary injunction is, as evidenced by the record,

1 concrete and severe. Novedades is “a small, independent business with a small storefront”
2 that is typically “manned by one person at a time.” Escobar Decl. ¶ 6. Escobar, the
3 manager and president of Novedades, relies on her business to make a living and support
4 her family, and she has demonstrated the non-speculative possibility of a destructive impact
5 on Novedades if the business once again is required to comply with the \$200 recordkeeping
6 and reporting requirement of the SWB GTO. *Id.* ¶ 62. Because of the “great financial
7 risk” the SWB GTO imposes on Plaintiffs, *id.*, the Court finds Plaintiffs’ interest in
8 continuing the business considerable, *see hiQ Labs*, 31 F.4th at 1190.

9 On the other hand, the Court appreciates the Government’s concern with addressing
10 money laundering and the risks associated with cartel activity infecting the domestic
11 financial system. Enjoining enforcement of the SWB GTO during the pendency of this
12 litigation surely impedes, however slightly, the Government’s ability to implement a
13 widescale data collection program, the product of which could, in theory, prove useful in
14 certain national security and homeland security functions.

15 But “[t]he public interest is not served by maintaining executive actions that conflict
16 with federal law” *Pacito*, 2025 WL 655075, at *24 (citing *Valle de Sol Inc. v.*
17 *Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)); *see also League of Women Voters of U.S.*
18 *v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (“There is generally no public interest in the
19 perpetuation of unlawful agency action. To the contrary, there is a substantial public
20 interest in having governmental agencies abide by the federal laws that govern their
21 existence and operations.”). And the abstract nature of the public interest the Government
22 claims to serve here does not imply that the issuance of a preliminary injunction would in
23 any way thwart the Government’s ability to combat emergent threats through other
24 investigatory and prosecutorial tools. In the words of Director Gacki, the SWB GTO will
25 “collect data that is expected to be highly useful to law enforcement for case generation,
26 ongoing investigations, and prosecutions targeting Mexican drug cartels” Gacki Decl.
27 ¶ 11. That Director Gacki herself envisions the mere possibility that the SWB GTO will
28 someday prove useful is a testament to the want of urgency with which the GTO must be

1 implemented. The absence of any non-speculative evidence that the data collected by the
2 SWB GTO will, in fact, keep the public safer as juxtaposed with a wealth of
3 non-speculative evidence that the SWB GTO will, in fact, threaten the existence of
4 Novedades and, in turn, the livelihood of Esperanza Escobar and her family, leads the Court
5 to conclude that the balance of equities and public interest tip sharply in Plaintiffs’ favor.
6 In conjunction with serious questions going to the merits, the *Winter* factors thus weigh in
7 favor of issuing the requested preliminary injunction. *See Pacito*, 2025 WL 655075, at *24
8 (citing *CTIA—The Wireless Ass’n v. City of Berkeley, California*, 928 F.3d 832, 841
9 (9th Cir. 2019)).

10 **IV. Scope of Injunction**

11 This Court’s TRO—entered on April 22, 2025—applied to all covered businesses,
12 as defined by the SWB GTO, that are located in the Southern District of California. ECF
13 No. 16 at 3. Plaintiffs urge the Court to enter a preliminary injunction “at least as broad,”
14 citing circuit precedent that permits reviewing courts to set aside agency action on a
15 nationwide basis when the challenged action is held to be unlawful. Mem. at 24 (first citing
16 *Regents of Univ. of Cal. v. Dep’t of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018); and
17 then citing *E. Bay Sanctuary Covenant*, 994 F.3d at 987). Such universal relief, they say,
18 is the appropriate remedy when a plaintiff prevails on an APA challenge. *Id.* The
19 Government disagrees, arguing that this Court’s powers under constitutional and equitable
20 principles are inherently limited to redressing the specific injuries of the named parties
21 before the Court. Opp’n at 24. The APA, according to the Government, incorporates these
22 familiar principles. *Id.* (citing 5 U.S.C. § 705).

23 The Court will, once again, issue temporary injunctive relief to all covered
24 businesses, as defined by the SWB GTO, that are located in the Southern District of
25 California. As a general background rule, “[w]here relief can be structured on an individual
26 basis, it must be narrowly tailored to remedy the specific harm shown.” *Bresgal v. Brock*,
27 843 F.2d 1163, 1170 (9th Cir. 1987). But the APA expressly departs from this background
28 rule; indeed, the “Federal Government and the federal courts have long understood

1 § 706(2) to authorize vacatur of unlawful agency rules” *Corner Post, Inc. v. Bd. of*
2 *Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 826 (2024) (Kavanaugh, J., concurring). Thus,
3 when administrative actions are found to have violated the APA, “the ordinary result is that
4 the rules are vacated—not that their application to the individual petitioners is proscribed.”
5 *Regents*, 908 F.3d at 511 (quoting *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*,
6 145 F.3d 1399, 1409 (D.C. Cir. 1998)). And on an interim basis, § 705 of the APA
7 provides that, at a preliminary stage in the proceedings, courts may “issue all necessary
8 and appropriate process to postpone the effective date of an agency action or to preserve
9 status or rights.” Courts have generally interpreted that statute to conclude that “the scope
10 of preliminary relief under Section 705 aligns with the scope of ultimate relief under
11 Section 706, which is not party-restricted and allows a court to ‘set aside’ an unlawful
12 agency action.” *See, e.g., Career Colls. & Schs. of Tex. v. U.S. Dep’t of Educ.*,
13 98 F.4th 220, 255 (5th Cir. 2024).

14 Accordingly, though mindful of the “extraordinary” nature of injunctive relief,
15 *Winter*, 555 U.S. at 22, the Court finds it appropriate to enjoin the Government from
16 enforcing the SWB GTO throughout the entire Southern District of California. The Court
17 takes the APA at face value as authorizing vacatur of an administrative action unlawfully
18 issued under the APA, a remedy equally available on a preliminary injunction. However,
19 given the weighty questions of law implicated by the SWB GTO, the Court will limit relief
20 to within its jurisdiction as consideration of those questions “might benefit from
21 development in different factual contexts and in multiple decisions by the various courts
22 of appeals.” *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (citing
23 *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

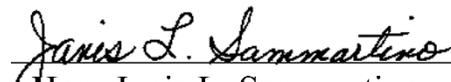
24 CONCLUSION

25 For the foregoing reasons, the Court **GRANTS** Plaintiffs’ Motion for Preliminary
26 Injunction (ECF No. 22). Pending the conclusion of the litigation in this matter, the Court
27 **ORDERS** that Defendants, and their officers, agents, servants, employees, and all persons
28 acting in concert or participation with them, are temporarily enjoined from enforcing,

1 implementing, or otherwise giving effect to the SWB GTO, as it applies to **ALL**
2 **COVERED BUSINESSES, AS DEFINED BY THE SWB GTO, THAT ARE**
3 **LOCATED IN THE SOUTHERN DISTRICT OF CALIFORNIA.** The Court further
4 **ORDERS** that no bond shall be required given the “significant public interest underlying
5 this action.” *Am. Fed’n of Gov’t Emps., AFL-CIO v. Trump*, No. 25-cv-03698-SI,
6 2025 WL 1358477, at *24 (N.D. Cal. May 9, 2025) (citing *Taylor-Failor v. Cnty. of Haw.*,
7 90 F. Supp. 3d 1095, 1102–03 (D. Haw. 2015)).

8 **IT IS SO ORDERED.**

9 Dated: May 21, 2025

10 
11 Hon. Janis L. Sammartino
12 United States District Judge
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