

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

_____)
NOVEDADES Y SERVICIOS, INC.,)
et al.,)
Plaintiff,) Case No. 25-CV-00886-JLS
v.) Thursday, May 15, 2025
FINANCIAL CRIMES ENFORCEMENT) Motion Hearing
NETWORK, et al.,)
Defendant.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PAGES 1 THROUGH 66

BEFORE THE HONORABLE JANIS L. SAMMARTINO

UNITED STATES DISTRICT JUDGE

Reported by: Stephanie Whitehead, RDR, CRR, CRC, CSR, CVR
District Court Clerk's Office
333 West Broadway, Suite 420
San Diego, California 92101
(Reported stenographically; transcribed via computer)

1 APPEARANCES:

2
3 For Plaintiff: INSTITUTE FOR JUSTICE
4 16781 Chagrin Boulevard, Suite 256
5 Shaker Heights, Ohio 44120
6 BY: ROBERT JOHNSON, ESQ.
7 BY: ELIZABETH SANZ, ESQ.

8 THE VORA LAW FIRM, P.C.
9 201 Santa Monica Boulevard, Suite 300
10 Santa Monica, California 90401
11 BY: NILAY U. VORA, ESQ.

12
13 For Defendant: U.S. ATTORNEY'S OFFICE
14 880 Front Street, Suite 6293
15 San Diego, California 92101
16 BY: KATHERINE L. PARKER, AUSA

17
18 Amicus Curiae: BUCHALTER APC
19 655 West Broadway, Suite 1600
20 San Diego, California 92101
21 BY: DANIEL C. SILVA, ESQ.
22
23
24
25

1 THURSDAY, MAY 15, 2025; 9:00 A.M.

2 * * *

3 *THE CLERK:* Matter number one, 25-CV-0886,
4 Novedades Services, Inc., et al., v. Financial Crimes
5 Enforcement Network et al., et al., for motion hearing.

6 *THE COURT:* Good morning. Appearances, please.
7 We'll start with plaintiffs.

8 *MR. VORA:* Good morning, your Honor. Nilay Vora
9 from the Vora Law Firm on behalf of plaintiffs.

10 *THE COURT:* Thank you.

11 *MS. SANZ:* Good morning. Elizabeth Sanz from
12 the Institute for Justice on behalf of plaintiffs.

13 *THE COURT:* Thank you.

14 *MR. JOHNSON:* Good morning, your Honor. Robert
15 Johnson from the Institute for Justice for plaintiff.

16 *THE COURT:* Thank you very much.

17 Good morning.

18 *MS. PARKER:* Good morning, your Honor. AUSA
19 Katherine Parker for the defendants.

20 *THE COURT:* Thank you, Ms. Parker.

21 And is Mr. Silva here today?

22 *MR. SILVA:* Yes, your Honor. Good morning.

23 *THE COURT:* Good morning, sir.

24 *MR. SILVA:* Daniel Silva on behalf of Amicus
25 Curiae, Money Services Businesses Association.

1 *THE COURT:* Okay. Thank you very much. Have a
2 seat wherever you're comfortable, sir, but you did make
3 the calendar so we should enter the appearance.

4 We're here today for oral argument on plaintiff's
5 motion for a preliminary injunction. I have not prepared
6 a tentative ruling in advance of the hearing. So, as
7 always, we would not be here if I couldn't be persuaded
8 one way or the other.

9 Over the last few days I've reviewed all of the
10 relevant submissions: Plaintiff's motions; defendant's
11 oppo; plaintiff's reply; the administrative record; the
12 brief of amicus, Money Services Businesses Association
13 Incorporated. And I also know that a few days ago,
14 Judge Biery entered a preliminary injunction as to the
15 named plaintiffs in the Texas case, but let me assure you,
16 this is not that case and I'm eager to listen to what you
17 have to say this morning.

18 As we discussed the prospect at one time of
19 presenting live testimony at the end of our TRO hearing, I
20 believe both sides agreed that this could be decided on
21 the papers and declarations, and I just want to confirm
22 that that is correct.

23 *MR. JOHNSON:* Yes, your Honor.

24 *MS. PARKER:* Yes, your Honor.

25 *THE COURT:* Okay. Thank you.

1 There's also been a late-filed request for
2 judicial notice of the transcript in the proceedings of
3 Judge Biery in Texas. I do know that he has ruled and
4 basically what he stated. So is there any objection to
5 the Court's accepting that on judicial notice? It was
6 done by plaintiffs, so they don't object.

7 Do you object?

8 *MS. PARKER:* I'm not sure if the purpose -- if
9 the request was to inform the Court of what action had
10 been taken. That was my impression from the filing. If
11 the request is broader, that the Court consider the
12 testimony that was given in that hearing, we would object
13 to that as not being live testimony here in this
14 proceeding.

15 *THE COURT:* Okay. I took it as the narrower
16 request, but let me hear from counsel.

17 *MR. JOHNSON:* Well, your Honor, I do think if
18 the Court -- if there was something in the transcript
19 that was different than what's in the declarations, that
20 the Court could consider that. You know, a preliminary
21 injunction can be granted on the basis of a wide range of
22 materials. But I think, to be frank, your Honor, most of
23 the witnesses who testified at that hearing also
24 submitted declarations.

25 *THE COURT:* Right.

1 MR. JOHNSON: And so I don't really see any
2 reason why the Court would even need to consider the
3 transcript.

4 THE COURT: Okay. So I'll accept the transcript
5 and accept the request for judicial notice, but it's
6 primarily for the purposes of what the judge did in that
7 hearing and not anything factually, Ms. Parker.

8 MS. PARKER: Understood.

9 THE COURT: So I'd like to begin by offering
10 both sides the opportunity to present any opening
11 remarks, and I'm sure I'll have some questions as we go
12 through this.

13 So we'll start with you, sir.

14 MR. JOHNSON: Thank you, your Honor. I want to
15 sort of pick up with where we left off at the TRO hearing
16 and focus, at least for right now, on the things that I
17 think are different and that have changed. I think for
18 the most part, you know, perhaps the biggest difference
19 is that the evidence of irreparable harm in this record
20 is now, if anything, even more compelling than it was at
21 the TRO stage. And that's because at this point, you
22 know, there has been a TRO in place in California, but
23 there has not been a TRO in place for many businesses in
24 Texas. And so we have now a month of experience with the
25 GTO being applied to businesses in Texas, and what we see

1 is exactly what people were afraid that they would see.
2 The first is a loss of customers. So, for instance, the
3 Payan declaration reports a 35 percent drop in customer
4 volume as a result of the GTO being in place for his gas
5 station, rents a money services business where they cash
6 checks. And actually one of -- there's a declaration
7 from a gentleman named Anuar Contreras, who's an employee
8 at the Payan service station, who used to cash his checks
9 there. Now he does not because he doesn't want that
10 information to be reported to the government. So we
11 actually have a declaration in the record from one
12 specific customer explaining, hey, this is why I'm no
13 longer contracting with this money service business.

14 We also still have in the record Esperanza's
15 declaration, Ms. Gomez's declaration where she says that
16 while this was in effect for a week, the first week, she
17 was seeing a drop of 50 to 60 percent in customer volume.

18 And we also have a declaration from Mariceli
19 Castro, who also runs a business here in San Diego who
20 similarly reports a drop of about 50 to 60 percent during
21 the time that the GTO was in place in her business.

22 We also have in the record now reports from
23 businesses that they have had to suspend their operations,
24 at least in part, because of the GTO. So for instance,
25 there's the declaration of Clarissa Light, who reports

1 that she had to stop processing money orders and money
2 transfers over \$200 because of the GTO, and that that's a
3 loss for her business of \$2,000 to \$4,000 in revenue per
4 month; that she's just had to completely stop because she
5 was so behind on these filings.

6 Similarly, the Payan declaration reports that his
7 service station ultimately got so far behind on cash -- on
8 doing reports for checks that they had to stop doing
9 checks over \$200.

10 And there's also the Carpio declaration which
11 reports that Western Union has just stopped doing
12 transactions over \$200 which is, you know, obviously
13 affecting Western Union, I'm sure, but it's also affecting
14 his small business because they partner with Western Union
15 and can no longer offer those services.

16 All of that is irreparable harm. The loss of
17 customers is irreparable harm, as the Court found at the
18 TRO stage. But also the loss of business, the loss of
19 revenue is irreparable harm in this context because those
20 monetary losses cannot be recovered because of sovereign
21 immunity. So when you're dealing with the Government in
22 this type of context, those monetary losses count as
23 irreparable harm.

24 And then, of course, beyond that there's the
25 reputational harm, there's the privacy harms, the loss of

1 privacy that can't be repaired, and there's also the fact
2 that this constitutional violation is automatically
3 irreparable harm.

4 On the likelihood of success on the merits, I
5 think the law is the same. There has not been a
6 significant change since the TRO hearing. The one case
7 that we've discovered that I would think is particularly
8 worth noting is in the Fourth Amendment context the
9 decision in *Airbnb* from the Southern District of New York.
10 And this was a decision -- it was at the preliminary
11 injunction stage, and the City of New York was requiring
12 two short-term rental platforms, Airbnb and HomeAway, to
13 file monthly reports where they had to provide in those
14 reports information on all of their customers, you know,
15 what they were renting, what they were paying to rent
16 those apartments, and then also I think the term of the
17 rental. So just basic information on what transactions
18 the company was doing. And they had to file these every
19 month.

20 And what the -- *Airbnb* challenged that is a
21 violation of the Fourth Amendment, and the Southern
22 District of New York granted a preliminary injunction on
23 that Fourth Amendment claim. And the reasoning of the
24 court was that this was essentially like a series of
25 overbroad subpoenas demanding all of the records of all of

1 the transactions that those businesses were doing in the
2 city of New York, and that to subpoena all of those
3 records on an ongoing basis was incompatible with the
4 Fourth Amendment.

5 *THE COURT:* Let me ask you a couple of questions
6 here since you brought up the Fourth Amendment. If I
7 were -- underscore if -- to find in your favor on just
8 one of your claims, do I really need to go on and reach
9 other claims?

10 Now there's a recent Ninth Circuit decision, very
11 recent, where the judge was affirmed on the APA and not so
12 on the constitutional basis for the reasons that you well
13 know, sir. And I'm wondering what your comment would be
14 on that sort of rubric. So if I found something in the
15 APA, I don't really need to get -- or shouldn't get to the
16 constitutional issue, and that was the ruling of the Ninth
17 Circuit. I believe it came out yesterday.

18 *MR. JOHNSON:* So I actually have not seen that
19 decision, so I apologize for that.

20 *THE COURT:* It's out of this court; that's how I
21 saw it. Not me personally, but one of my colleagues. So
22 it comes to our attention more quickly.

23 *MR. JOHNSON:* Okay. Well, I know there are
24 multiple cases -- I don't know that one, but I know there
25 have been in the past --

1 *THE COURT:* Right.

2 *MR. JOHNSON:* -- multiple cases where district
3 courts have reached multiple claims. And I would -- you
4 know, I have not read that Ninth Circuit case. It seems
5 to me that it would be appropriate to reach multiple
6 claims because --

7 *THE COURT:* Why?

8 *MR. JOHNSON:* Well, because --

9 *THE COURT:* I mean, what's the difference in
10 relief to your clients?

11 *MR. JOHNSON:* So I think the difference is that,
12 you know, that it sets up for appeal multiple bases that
13 the Court of Appeal can consider.

14 *THE COURT:* Okay. Okay.

15 *MR. JOHNSON:* And so, you know, the Court of
16 Appeal might say, you know, we're only going to reach one
17 of the claims, but if this Court doesn't reach a claim,
18 then I think that would raise the question of whether
19 that claim -- you know, I suppose there could be -- there
20 might have to be a cross appeal or I just don't know
21 procedurally how that's going to work. But certainly
22 there might be a way to put it in front of the Court of
23 Appeal, but it becomes a much trickier proposition. And
24 then the Court of Appeal may not want to rule on a claim
25 or address a claim if it hasn't been addressed in the

1 first instance.

2 THE COURT: Okay. Fair enough.

3 Let me ask you this: The Government is basically
4 suggesting to the Court that the *Schultz* case establishes
5 the proper Fourth Amendment rubric applicable to the GTO.
6 Do you agree with that?

7 MR. JOHNSON: So yes and no.

8 THE COURT: Okay.

9 MR. JOHNSON: So I think in the briefing here we
10 were, I think, hopefully, a little clearer about this
11 than we were at the TRO stage where we broke our briefing
12 into two parts. And the first part is about the interest
13 of the company, and then the second part is the interest
14 of the customers. And I think when it comes to the
15 interest of the company that *Schultz*, *Airbnb*, that these
16 cases do set out what, at least under current Supreme
17 Court doctrine, is the right way to think about this
18 which is, you know, this kind of reasonableness question.

19 And I would submit that this is not reasonable.
20 Now, when I think it comes to the interest of the
21 customers, then there's a different rubric under *Carpenter*
22 and cases like that.

23 THE COURT: Okay. No, I appreciate that.

24 Go ahead.

25 MR. JOHNSON: I'm happy to address, you know, if

1 there are other questions about the Fourth Amendment,
2 but, you know, I would say that I think that we discussed
3 the Fourth Amendment at the past hearing, and I do think
4 that this sort of same analysis that we discussed there
5 is -- you know, still holds here that this is not
6 reasonable given both the amount of the information
7 that's being requested, but the size of the transactions
8 being so low greatly increases the privacy harms, and
9 also the burden on these companies is simply
10 unreasonable.

11 You know, in terms of what's changed from the
12 last hearing, I think that, you know, the biggest change
13 on the merits is that we now have a 400-page
14 administrative record that, to my mind, just confirms the
15 arbitrary and capricious nature of the agency's action
16 here. And, you know, looking through that administrative
17 record, I don't see any data or, you know, analysis that
18 would actually support the choice of the \$200 threshold,
19 the choice of these particular jurisdictions.

20 There's a lot of general information about money
21 laundering, but it discusses all kinds of money laundering
22 schemes that have nothing to do with \$200 transactions,
23 things like use of shell companies in China; things like
24 use of funnel accounts, where money is being deposited
25 into bank accounts, and banks are not included here; use

1 of people they call money mules, who are doing things like
2 opening bank accounts, opening shell companies. There's
3 just not much discussion, if any -- I didn't really find
4 anything in the record that would support the choice of
5 the \$200 threshold.

6 And to the extent that there's information about
7 money service businesses, there are a few accounts of
8 money service businesses that were essentially in league
9 with the cartels, but one of them is in Utah, one of them
10 is in Georgia, and then another is in Sacramento.

11 *THE COURT:* Sacramento, yeah.

12 *MR. JOHNSON:* So, you know, the record doesn't
13 have, that I can tell, anything that would support
14 focusing on these particular ZIP Codes. And so we're
15 left with the explanation that's provided in the
16 memorandum, the undated memorandum. And --

17 *THE COURT:* To underscore -- you said that very
18 quickly -- it's an undated memorandum. We have no idea
19 when it was issued.

20 *MR. JOHNSON:* Correct. Correct. And to my
21 mind, the explanation is not really an explanation at
22 all. It sort of asserts that, well, \$200 will capture
23 all the relevant transactions, but it doesn't say that it
24 will -- that a higher threshold would not. It doesn't
25 really say why \$200, not \$500 or \$1,000 or \$100.

1 And I think the case I would point to, and we
2 cite this in our briefs, is *Greater Yellowstone Coalition*
3 *v. Servheen*. In that case there was a question about the
4 grizzly bear had been delisted from the endangered species
5 list, and the problem was that the delisting decision
6 didn't explain why the loss of a particular type of pine
7 bark would not threaten the grizzly bears. And the reason
8 it's relevant is because the agency did say in its
9 decision, well, we don't think it's going to be a problem,
10 but they didn't explain it. And I think it's the same
11 thing here, that the agency saying well, we don't think
12 that something is a problem, or we think \$200 is right, as
13 sort of a bare assertion, that's not enough to make this
14 not arbitrary and capricious.

15 The other thing I just want to highlight because
16 I think it is sort of another added factor since the TRO
17 hearing, that we do now have three declarations from --
18 that were submitted by amicus, the Money Service
19 Businesses Association, from people who have worked in law
20 enforcement who look at this and say this doesn't make
21 sense to us. And, you know, I don't think that that's
22 dispositive, right? The Court is not going to overturn an
23 agency rule just because, you know, someone in law
24 enforcement or who worked in law enforcement disagrees
25 with it. But I think it's helpful because these three

1 declarations point to the sorts of things, first off, that
2 people would have said in comments if comments had been
3 requested and allowed; and also because they point to the
4 types of issues that the agency didn't consider and didn't
5 address.

6 And I think the biggest one is that all three of
7 those declarations point out that FinCEN is just inundated
8 with CTRs, even at the \$10,000 transaction level; that a
9 very small percentage of CTRs are ever accessed. And the
10 Government is able to track this because they have a
11 database of CTRs. They know how many entries in the
12 database have been looked at, and it's, you know, just a
13 few percentage points of CTRs are even accessed in a year.

14 So, you know, having many, many more CTRs that
15 are just going to consume law enforcement resources is not
16 going to be useful. It's not going to actually achieve
17 anything. And, actually, those declarations make the
18 point that this is counterproductive because businesses
19 are going to have to spend, you know, compliance resources
20 generating CTRs when they could, instead, be actually,
21 like, monitoring for suspicious activity or fulfilling
22 their other compliance obligations.

23 So I don't want to sort of drone on, but I think
24 very briefly I do want to say, you know, one thing that
25 was in Texas that was -- there was a motion to supplement

1 the record in Texas.

2 *THE COURT:* Oh, okay.

3 *MR. JOHNSON:* And Judge Biery did -- the
4 administrative record. Judge Biery did grant that
5 motion. We haven't formally filed such a motion here. I
6 would like to offer to do that, if the Court would find
7 it useful. I also just --

8 *THE COURT:* What are you going to supplement
9 with, sir?

10 *MR. JOHNSON:* So even the record we have, the
11 declarations, they are already in the record. So I
12 think, you know, as I understand the Government's
13 position, it's that the Court, as to the merits at least,
14 can only consider the administrative record. And I think
15 we do disagree with that position.

16 *THE COURT:* Okay. Your client can't show
17 irreparable harm from the administrative record submitted
18 by the Government. So of course we're going to take that
19 into account, sir.

20 *MR. JOHNSON:* No, of course. But I think the
21 question is to take the declarations into account for
22 what purpose. So they can be considered for irreparable
23 harm, certainly, but I think the question is can they be
24 considered as to the merits and, you know, sort of the
25 likelihood of success on the merits. And I would point

1 to a case *Western Watersheds Project v. Schneider*,
2 417 F.Supp 3d 1319, and it's from the District of Idaho
3 in 2019. And in that case the District Court explained
4 that extra-record materials can be considered under the
5 APA when those extra-record materials point to the types
6 of issues that an agency failed to consider when adopting
7 a rule. So, you know, I think the declarations that have
8 been submitted, particularly by the amicus, could be
9 considered for that purpose under the APA.

10 *THE COURT:* Okay.

11 *MR. JOHNSON:* I also -- and just on the same
12 issue of supplementing the administrative record, there's
13 also a case out of Texas. It's called *National*
14 *Association for Gun Rights v. Garland*, and the cite on
15 that one is 741 F.Supp 3d 568, and it's the Northern
16 District of Texas, and it's 2024. And what the court
17 there says is that when you have an administrative record
18 that's put together without the opportunity for the
19 public to comment and to input, you know, what should be
20 in the record, to put things in the record, that it's
21 particularly appropriate to consider extra-record
22 materials. And I think that would also apply here where
23 we have a record that was generated without any kind of
24 adjudication, without any kind of -- but also -- and
25 also, even more importantly, without any

1 notice-and-comment. So I think it's absolutely
2 appropriate to consider the declarations not just for the
3 issue of irreparable harm but also for the issue of the
4 merits.

5 *THE COURT:* Because nothing ever went out for
6 notice-and-comment and review?

7 *MR. JOHNSON:* Exactly, your Honor.

8 *THE COURT:* Okay.

9 *MR. JOHNSON:* I also do want to address the
10 scope of the injunction.

11 *THE COURT:* Oh, good.

12 *MR. JOHNSON:* I could do that now.

13 *THE COURT:* I'm glad you want to. As we speak,
14 I believe the Supreme Court's discussing this very issue.

15 *MR. JOHNSON:* Yes, that is true.

16 *THE COURT:* So we'll try to do something
17 appropriate and take that into account.

18 *MR. JOHNSON:* I hope so, your Honor. I hope so.

19 *THE COURT:* Go ahead.

20 *MR. JOHNSON:* And so, yes, that's exactly right.
21 The Supreme Court is discussing it right now. It's
22 obviously sort of -- the issue of nationwide injunctions
23 is a hotly debated issue, but I think one thing that I
24 want to emphasize is that the Government -- the Supreme
25 Court has recognized, both the Government and Solicitor

1 General this morning, I think, as I understand it, agreed
2 with this, that the APA -- cases under the APA are
3 different.

4 And so the case that's at the Supreme Court right
5 now involves an executive order. And the decisions --
6 presidential executive orders are not subject to the APA.
7 So in the stay application that the Government filed in
8 that case, that was actually a point that they expressly
9 made, that that case would be a particularly good case for
10 the Supreme Court to consider nationwide injunctions and
11 their propriety precisely because it didn't arise under
12 the APA. And the APA doesn't -- and so the Court could
13 consider the issue outside of the APA context.

14 So I think this case obviously does arise under
15 the APA. You know, I think all of our claims arise under
16 the APA, not just -- not just our APA claims, you know,
17 for arbitrary and capricious ruling and a lack of
18 notice-and-comment but also our constitutional claims.

19 Jurisdictionally, the cause of action is under
20 the APA under 706 which says that a court shall hold
21 unlawful and set aside agency action for a number of
22 reasons, including procedural defects, arbitrary and
23 capriciousness, but also that it's contrary to the
24 Constitution. And so because we're proceeding under the
25 APA, the appropriate remedy is to hold unlawful and set

1 aside an agency action.

2 And there's decisions from the Ninth Circuit,
3 multiple ones, that we cite in our briefs, including
4 *Regents of the University of California v. Department of*
5 *Homeland Security*, and also *East Bay Sanctuary v. Garland*.
6 And these are both decisions of the Ninth Circuit that
7 say, I think quite clearly, that when a -- when a case is
8 brought -- and they're both preliminary injunction
9 decisions. And I think they're quite express, that when a
10 case is brought under the APA, the proper scope of an
11 injunction is to enjoin the agency action that's being
12 challenged.

13 *THE COURT:* Initially, the Texas case was only
14 covering the named people in the association. Has
15 anything changed in that regard?

16 *MR. JOHNSON:* No.

17 *THE COURT:* With regard to the latest ruling?

18 *MR. JOHNSON:* No, your Honor.

19 *THE COURT:* No? Okay. Okay. I was just
20 curious.

21 *MR. JOHNSON:* Yeah, and so I think the case that
22 I would particularly point to is *Regents of the*
23 *University of California v. DHS*. And in that case the
24 Ninth Circuit held that it involved the rescission of the
25 Deferred -- childhood arrivals, the DACA program. And

1 the Ninth Circuit held that the injunction was properly
2 nationwide because it was under the APA and, you know,
3 the rescission of DACA was the agency action, and the
4 proper remedy was to hold unlawful and set aside that
5 agency action, the rescission of the program. Similarly
6 here, the agency action is the order, the order that was
7 published in the Federal Register. It's a single
8 document, and the appropriate scope of the remedy is to
9 hold unlawful and set aside the order.

10 And I would point out the Supreme Court -- the
11 *Regents of the University of California* case went up to
12 the Supreme Court on the merits, and the Supreme Court did
13 affirm in part. It affirmed the part of the decision
14 finding an APA violation. It didn't affirm a separate
15 part addressing equal protection. And the Supreme Court
16 in that decision, which is it's 140 S. Ct. 1891, held that
17 as a result the agency action, quote, must be vacated.
18 So, you know, that case didn't address expressly whether
19 it's nationwide or not, but I think that does -- you know,
20 to me, it seems implicit in the decision and, to some
21 extent, express in the decision. It says it must be
22 vacated, and it affirmed the order that was a nationwide
23 order.

24 I also would think -- to the extent there's any
25 doubt about this, I would point to Justice Kavanaugh's

1 separate opinion in *Corner Post*, which -- where he goes
2 through at great length and discusses how for, you know,
3 50 years it has been understood, especially in the DC
4 circuit, but all across the country that the appropriate
5 relief under the APA is to vacate and set aside the agency
6 action, and that that's just how the APA has always been
7 understood to operate.

8 So I don't think anything that the Court is
9 discussing today is going to change that, and I think
10 it's, in a sense, it's the only way to confirm that given
11 what's in the briefing, but also what I understand has
12 been discussed this morning at oral argument where I
13 understand there was a colloquy between Justice Kavanaugh
14 and the Solicitor General, and the Solicitor General
15 confirmed the APA is not at issue.

16 So that's all I've got unless you have any
17 questions.

18 *THE COURT:* That's all you've got. I have a
19 curious point that doesn't make a whole lot of difference
20 to us, but both sides have provided more context with
21 regard to prior GTOs that had been issued by the agency.
22 And did they go through any notice-and-comment, to your
23 knowledge, and do they shed any light on where we are in
24 this case?

25 *MR. JOHNSON:* Yeah, so to my knowledge they did

1 not go through notice-and-comment. I think that those
2 past --

3 *THE COURT:* You think at different levels, much
4 higher levels, even the lowest one was significantly
5 higher than where we are in this case?

6 *MR. JOHNSON:* Yes, that's right. And they
7 also -- many of them are much narrower.

8 *THE COURT:* They were more focused, if you will.
9 I thought more focused.

10 *MR. JOHNSON:* Yeah. Yeah. Exactly.

11 And so I think that, you know, for the -- sort of
12 the keyword, as we discussed at the TRO hearing, I think
13 is order. And I think it's the keyword both for the
14 notice-and-comment claim, but I think it's also the
15 keyword for the *ultra vires* claim. Because, you know, if
16 it -- the Government's response on the notice-and-comment
17 is essentially, well, we don't have to do
18 notice-and-comment because the statute says we can act via
19 order.

20 And I think our response to that is, well, the
21 statute says that you act via order. So if you're not
22 acting by order, it's not proper under the statute. And,
23 you know, I think past GTOs -- I think what you see is
24 they've gotten broader and broader and broader. You know,
25 you sort of start with the New York GTO that's initially

1 targeted at, I understand, 12 different companies. And
2 then there's the Miami and the LA Fashion District GTOs
3 that are targeted at particular neighborhoods, focused on
4 particular neighborhoods.

5 And then, you know, the real estate GTO that gets
6 broader, it's real estate deals in particular states.
7 Although it's still -- it's targeted at all-cash real
8 estate transactions, which I think are comparatively rare.
9 So it's still more targeted than what we see today. And
10 then what we see today is sort of the -- it just explodes
11 the category, and now we're talking about all -- you know,
12 vast numbers of transactions over \$200 in 30 ZIP Codes in
13 two different states.

14 And so, you know, I think -- I don't know where
15 the line between an order and adjudication falls on that
16 spectrum. Like, I think it's possible that the real
17 estate GTOs, for instance, were -- were also not an order,
18 you know, but they were never challenged.

19 *THE COURT:* Nothing was ever challenged until we
20 got to today's cases.

21 *MR. JOHNSON:* Exactly.

22 *THE COURT:* Texas and here.

23 *MR. JOHNSON:* Yeah. And those were never
24 challenged.

25 *THE COURT:* Right.

1 MR. JOHNSON: And I think, you know, whether the
2 real estate GTOs were unlawful or not is, at this point,
3 a moot question, but they're certainly not a precedent
4 because they were never challenged.

5 THE COURT: Okay. Has your client ever
6 attempted to get the software to batch any of these
7 orders or reports that would have to go, should that --
8 should the order go back into place?

9 MR. JOHNSON: So it's a great question. My
10 understanding from the declaration is that -- and I could
11 get more information on this, but my understanding is
12 that she looked into it a bit, but it did not -- we
13 weren't able to find anything that was sort of helpful to
14 her business. And then, obviously, it's been enjoined.
15 I don't know that she's looked into it more.

16 THE COURT: Okay.

17 MR. JOHNSON: There is, though, more information
18 about that type of software in other declarations. I
19 would point the Court to the Fenchel declaration.

20 THE COURT: Okay.

21 MR. JOHNSON: Ms. Fenchel was the deputy
22 director of operations at FinCEN. And in paragraph 47
23 she says that that software is typically not designed for
24 small businesses. Also in the Payan declaration at
25 paragraph 32, he says that he has looked into it for his

1 store, but that he found the same, that that software is
2 not designed for his type of businesses.

3 *THE COURT:* Okay.

4 *MR. JOHNSON:* Also the declaration of Clarissa
5 Light at paragraph 28 discusses her attempts to use this
6 sort of bulk -- you know, FinCEN has a way that you can
7 do bulk submissions through their software. There's
8 100-page IT manual that FinCEN puts out explaining how
9 this works that she attached to her declaration. It's
10 just been completely overwhelming for her.

11 And then also I think the point that Esperanza
12 does make, Ms. Gomez makes in her declaration, at
13 paragraph 57, is that, you know, even if you had some sort
14 of software that streamlined the process of submitting the
15 information, you still have to ask for it. And asking for
16 the information is a huge burden. You know, I think the
17 numbers that we're talking about in terms of the burdens
18 here are just so huge that it almost becomes academic.

19 So in Ms. Gomez's case, you know, if you do the
20 math -- so it takes her 20 minutes or more per filing. So
21 if you do the math it comes out to over 30 hours a day.
22 If you were to imagine, right, she was able to get it down
23 to four minutes per report of extra burden -- which I
24 don't think is realistic, but let's just, like, imagine
25 that she could -- by my math you're still talking almost

1 five hours per day of added paperwork burdens which, for a
2 one-person shop, is still a huge burden.

3 So, you know, I just don't -- I don't know that
4 the software is -- then of course there's also the expense
5 of the software. So, for instance, one of the shops in
6 the declaration says their profit margin is \$6 per
7 transaction. And so, you know, just on that kind of a
8 profit margin you're not going to be able to afford
9 software and employees and all the rest of it to -- to
10 comply with these burdens.

11 *THE COURT:* Okay. Thank you. I think that's
12 all I have at this time, Counsel.

13 *MR. JOHNSON:* Thank you.

14 *THE COURT:* Ms. Parker.

15 *MS. PARKER:* Thank you, your Honor. Good
16 morning.

17 *THE COURT:* Good morning.

18 *MS. PARKER:* I would agree that there hasn't
19 been any substantial changes in the law. We do have some
20 new cases that have been discussed in the briefing, and
21 the briefing is thorough. I'm not here -- I'm sure your
22 Honor doesn't want me to rehash what's in the briefing.
23 There's actually something that your Honor and counsel
24 touched on was the primary point that I wanted to address
25 this morning.

1 *THE COURT:* Sure.

2 *MS. PARKER:* Which was the Amicus briefing that
3 was filed later in the same day that we filed our
4 opposition brief.

5 *THE COURT:* And we'll get to him after you
6 finish. The Court was going to ask if he wanted to say
7 anything.

8 Go ahead. Sure.

9 *MS. PARKER:* And Mr. Silva was kind enough to
10 reach out before that filing to inquire as to whether we
11 had opposition to an appearance. And the United States'
12 general practice in District Court litigation is not to
13 oppose any amicus appearances.

14 *THE COURT:* That's appreciated.

15 *MS. PARKER:* And we don't oppose the appearance,
16 but after seeing the content of the filing, we do object
17 to the substance of what's been filed and the way that it
18 was used in the later filed reply brief, and then at
19 the -- during argument this morning by counsel. And the
20 amicus has included nearly 200 pages of declarations from
21 individuals, certainly not currently employed by FinCEN,
22 and some of them never employed by FinCEN. And the
23 overall thrust of the declarations and the arguments that
24 are made about those declarations, are requests to this
25 Court to consider material outside of the administrative

1 record when deciding the merits of plaintiff's claims
2 here.

3 And we have the citations in the opposition brief
4 about that not being proper. I believe that -- I believe
5 that's in footnote 5 of our opposition brief, some of that
6 authority. And we don't -- we didn't have a motion put
7 before us like there was in Texas, a motion to formally
8 supplement the record. Had there been, we would have
9 opposed that motion. And this morning I do object to all
10 the declaratory evidence. I haven't read the *Western*
11 *Watersheds* case --

12 *THE COURT:* Nobody's asked me to supplement the
13 record with all of his --

14 *MS. PARKER:* Counsel -- my understanding was
15 that Counsel did.

16 *THE COURT:* Well, Counsel asked me to supplement
17 with the transcript from Judge Biery's hearing, but I
18 don't believe anybody's offered the other.

19 Maybe you did, sir, and I missed you. Did you?
20 Go ahead.

21 *MR. JOHNSON:* I think what I said is I didn't
22 know if it was necessary, given the state of the record,
23 to make a formal motion to supplement or not. But we
24 would -- we have one prepared that we would be happy --

25 *THE COURT:* Oh, okay.

1 MR. JOHNSON: We didn't want to file it
2 yesterday because I worried that --

3 THE COURT: Okay.

4 MS. PARKER: That I would need to stay up all
5 night opposing it?

6 THE COURT: You were worried this would happen,
7 and here it is. Okay. Understood.

8 Then we are at that point, Ms. Parker. Go ahead.

9 MS. PARKER: All right. So we do oppose that.
10 If it's filed as a written motion, I would file an
11 opposition. I'm prepared with what I know about the law
12 so far to oppose it. My understanding based on Counsel's
13 representation of the *Western Watersheds* case -- which I
14 haven't read -- is that it involves a standard related to
15 pointing out to the Court here are factors that the
16 agency could have or normally considers but didn't in
17 this case.

18 These declarations go far beyond that. This
19 is -- you have, for example, an individual who was
20 previously employed by FinCEN, retired I believe in 2002,
21 opining as to the efficacy of the GTO, testi- -- declaring
22 that it isn't going to work, declaring that it's not
23 well-reasoned, really providing opinions that go right to
24 the heart of what this Court needs to decide. So improper
25 on APA review as not part of the administrative record,

1 but also improper as bordering on improper expert
2 testimony that invades the province of the Court in a case
3 like this one. So we definitely oppose including those
4 declarations as part of the administrative record that the
5 Court considers for purposes of the merits of plaintiff's
6 claims.

7 One of the declarations does go to harm which is
8 not inappropriate. The evidence of harm in a case like
9 this comes from outside the agency, like the declaration
10 of the plaintiff herself. So a different issue there, and
11 I don't have an objection to that.

12 *THE COURT:* So not the entirety of what's
13 attached to amicus, but some of it?

14 *MS. PARKER:* Right.

15 *THE COURT:* That which goes to the merits --

16 *MS. PARKER:* There was --

17 *THE COURT:* -- but not to irreparable harm and
18 whatnot.

19 *MS. PARKER:* Exactly.

20 *THE COURT:* To the actions of your -- of the
21 agency, if you will.

22 *MS. PARKER:* Exactly. The declarations that go
23 to the propriety, the effectiveness, whether this was a
24 good decision by FinCEN, we object to all of that being
25 considered as part of the record in the Court's

1 consideration of plaintiff's -- the merits of plaintiff's
2 claims, yes.

3 *THE COURT:* Okay. Okay.

4 *MS. PARKER:* I do need to point out something
5 else out that my counterpart pointed out on the record in
6 the hearing on Monday in Texas. There is an error in the
7 administrative record. It's at --

8 *THE COURT:* In the Texas case, or in our case?

9 *MS. PARKER:* It's the same administrative record
10 in both cases.

11 *THE COURT:* Oh, in both cases. Okay.

12 *MS. PARKER:* And my counterpart there discovered
13 an error and put it on the record there. We're expecting
14 a correction that we would file in both cases.

15 *THE COURT:* Okay.

16 *MS. PARKER:* Bates page 10, there's a
17 footnote 27.

18 *THE COURT:* Bates page 10, footnote 27.

19 *MS. PARKER:* There's a case name and case number
20 that are just wrong. The case name should be *United*
21 *States v. Mora*, M-o-r-a, and it's an ED Cal case. The
22 case number should be 22-cr-0361 from that same district.

23 *THE COURT:* Not whatever it says?

24 *MS. PARKER:* Right. So that's just an error
25 that we expect to file something to clarify that.

1 As Counsel pointed out, there is at least one
2 case that plaintiffs have included in their briefing on
3 the Fourth Amendment issue, the *Airbnb* District Court
4 case. We've addressed it in our briefing. It's -- it's
5 close, but it's not the same case. And the Court there
6 was very careful to point out two factors that led to the
7 issuance of a preliminary injunction there, that the order
8 impacting vacation rental booking businesses had no
9 temporal sunset and no tailoring.

10 Here we have a temporal sunset. The GTO lasts
11 180 days, and it is tailored. And a lot of the briefing
12 and a lot of the argument we seem to be arguing back and
13 forth about what does it mean to tailor. This is tailored
14 by ZIP Codes. FinCEN selected 30 ZIP Codes and selected
15 them based on their proximity to both the border and to a
16 port of entry, and being ZIP Codes where there was a high
17 volume of -- of financial activity and, therefore, being
18 selected for increased reporting.

19 *THE COURT:* Do I even need to get to the
20 constitutional issue, Ms. Parker?

21 *MS. PARKER:* I also --

22 *THE COURT:* Couldn't we just focus on the APA,
23 deal with that? I know what Counsel says because he
24 thinks it's subsumed, it would be good, it would be nice
25 for the Court of Appeal, it would be nice for the Supreme

1 Court. Somebody other than us it might be nice, but for
2 my purposes here today, what are your thoughts, ma'am?

3 MS. PARKER: Well, my thoughts are that the
4 Court should deny the motion on all of the grounds that
5 are put forth.

6 THE COURT: Right. No, I understand. But go
7 with me --

8 MS. PARKER: If the Court -- and I also have not
9 read yesterday's Ninth Circuit decision and don't know
10 it, so I can't give a reasoned analysis of what it means
11 for the Court.

12 THE COURT: It may not add anything, but it's
13 the most recent example. It's out of this district.

14 MS. PARKER: And I have a vague recollection of
15 a principle that courts avoid constitutional issues if
16 they can. And I don't have any knowledge of whether
17 yesterday's case involved that, but I think it might
18 apply here.

19 THE COURT: Okay. Okay. Thank you.

20 MS. PARKER: I don't have anything additional.
21 The record is thorough and the briefing is thorough, so
22 unless the Court has questions

23 THE COURT: Let me see if I have any questions
24 for you.

25 My recollection, and I haven't read the

1 transcript, Ms. Parker, of our TRO hearing, but my
2 recollection was that you conceded, to some extent, the
3 irreparable harm, and so that now you're not. Am I
4 correct? You smiled like I sort of am a little correct on
5 that.

6 *MS. PARKER:* Correct that I'm not conceding it?

7 *THE COURT:* No, that there was a concession to
8 some extent about irreparable harm.

9 *MS. PARKER:* There is harm here, your Honor.
10 There is harm here. Has it been exaggerated, yes. Could
11 there be more efforts to reduce it, yes. But, really,
12 the Government is here because this statute -- this order
13 is legitimate and legal, and that's the reason that the
14 preliminary injunction should be denied. There is
15 evidence of harm in the record, your Honor, yes.

16 *THE COURT:* Okay. It seems to me, in going
17 through the administrative record, that there really is
18 not a specific discussion of \$200 versus any other
19 amount. Now, I know the other GTOs went to 750, went to
20 1,000, went to something else, and I appreciate that was
21 a considerable drop from the \$10,000. But I'm curious --
22 and we know that no GTO has been challenged, and it's
23 kind of interesting.

24 *MS. PARKER:* True. The question for the Court
25 becomes what does it mean to articulate the basis for

1 \$200, because the \$200 was discussed. Does the agency
2 have --

3 *THE COURT:* Because the \$200 --

4 *MS. PARKER:* Was discussed in the record as to
5 why it was chosen. At page 10 of our opposition, I've
6 cited numerous places in the record where that discussion
7 happens. In order to be reasoned, does the agency have
8 to explicitly in writing rule out every other potential
9 amount? And I would argue no. They've articulated why
10 they chose 2,000 [sic] and they did so in order to sweep
11 in almost everything except for the most de minimus for a
12 very limited time period in ZIP Codes that were chosen
13 based on their proximity to the border and the port and
14 the higher number -- the higher volume of transactions
15 happening in those ZIP Codes.

16 *THE COURT:* Well, it's a little bit like taking
17 into account the burden placed on plaintiffs, because
18 there there's somewhere in the record -- and I'm not
19 going to have a specific cite to you -- where they talk
20 about well, you know, this isn't that big a burden
21 because rates won't have to go up and the cost of doing
22 business won't go up, but it didn't take into account the
23 reporting requirement and the time and the personnel in
24 accomplishing what needs to be accomplished to do the
25 currency transaction report. And so in looking at the

1 burden, they're looking at it in a more limited fashion
2 than maybe plaintiffs would -- would argue is the impact
3 on them.

4 And maybe the same with regard to the harm here,
5 and with regard to the \$200 limit. Because saying
6 something doesn't make it so. I love to tell lawyers who
7 object "prejudicial," I say would you elaborate on why is
8 this prejudicial, and oftentimes people can't tell me. So
9 I appreciate there are many mentions of \$200, but there's
10 no mention of why 200 and not 500. Why not 1,000? Does
11 this really -- and we're not here to second-guess the
12 decision; I appreciate that completely, but I'm just
13 trying to see where that is. I know it's referenced and
14 it's meant to sweep basically everything.

15 MS. PARKER: It is. And I would argue, your
16 Honor, that in articulating why they chose \$200, the APA
17 and the case law articulated in the APA doesn't require
18 that the agency address every other option. And there's
19 no standard that requires this to be the least
20 restrictive option.

21 THE COURT: Okay.

22 MS. PARKER: And that's what plaintiffs are
23 arguing for.

24 THE COURT: Okay. No GTO has ever had
25 notice-and-comment.

1 *MS. PARKER:* I believe that's true.

2 *THE COURT:* You would concede, wouldn't you,
3 that there's a difference between an order and a rule?

4 *MS. PARKER:* Those concept -- those are
5 different concepts in the law analyzing the
6 notice-and-comment requirements of the APA. This is a
7 unique scenario where Congress used the word "order" in
8 both the APA and in the GTO statute. There's case law
9 analyzing what is an order, but we don't need to get to
10 that case law because Congress used the same word in both
11 contexts. We're not saying it's an order because we say
12 it is. We're saying it's an order because Congress said
13 it is.

14 *THE COURT:* Well, Congress also says in this
15 legislation that this should be basically kept
16 confidential between the agency and the institutions
17 involved, and that certainly isn't the case here. So
18 anybody who's having an issue or could potentially have
19 an issue with doing something inappropriate with the
20 transfer of funds is long gone from any -- any ZIP Code
21 that's impacted, probably either in this jurisdiction or
22 in Texas. I don't know enough about the Texas situation,
23 but from here they've gone elsewhere. So that's --
24 that's a concern.

25 But saying something doesn't make it so. Saying

1 I'm within the GTO section, I am an order, doesn't make it
2 so because we know from -- from many cases that a rule is
3 something going prospectively forward. The order is
4 different and rises out of the adjudication of something.
5 And there was more of a factual predicate, if you will,
6 for what was done on prior GTOs as I read them,
7 Ms. Parker, than what we have here.

8 MS. PARKER: I think the distinction comes in
9 those cases distinguishing a rule versus an order didn't
10 have a label from Congress as to what something was. The
11 cases parsing is this a rule and order, they do so
12 because no one has labeled it and they needed to create a
13 test, and that isn't needed here.

14 THE COURT: Okay. Okay. Go ahead. I didn't
15 mean to --

16 MS. PARKER: I didn't have anything further,
17 your Honor.

18 THE COURT: Let me see if I've asked you
19 everything I wanted to ask you.

20 Why didn't they go down to nothing? Why didn't
21 they go down to zero or \$50 if they wanted to sweep
22 everything? \$100?

23 MS. PARKER: I don't know, your Honor.

24 THE COURT: Okay. I think that's all I have
25 right now. Thank you.

1 *MS. PARKER:* Thank you.

2 *THE COURT:* Do you want to be heard? Do you
3 want to speak with your colleague -- I don't know if
4 he's -- he is your colleague. We're all colleagues
5 here -- with hearing from amicus, or what would you like
6 to do now? Do you want to respond?

7 *MR. JOHNSON:* I do just briefly, your Honor.

8 *THE COURT:* He needs to respond because they're
9 objecting to everything he does. You come first, sir,
10 then we'll hear his at the end. So, basically, the big
11 point is not to consider anything in the documents that
12 he's presented and filed that go to the merits.

13 *MR. JOHNSON:* Yes, your Honor. I want to --

14 *THE COURT:* Somebody's going have to sort
15 through that.

16 *MR. JOHNSON:* And I want to make sure that it's
17 appropriately presented.

18 *THE COURT:* Sure.

19 *MR. JOHNSON:* So I just want to be very clear
20 for the sake of the record: We are making a motion, and
21 I'm making it orally right now. We're making a motion
22 that we want to supplement the administrative record.

23 *THE COURT:* With?

24 *MR. JOHNSON:* With the declarations that have
25 been filed in this case, including plaintiff's

1 declarations from, you know, Ms. Gomez, but also other
2 MSB owners and customers, as well as the declarations
3 that were filed by amicus, the Money Services Businesses
4 Association.

5 *THE COURT:* And I don't think the Government has
6 any, objection, except going to amicus, correct?

7 *MS. PARKER:* Correct.

8 *THE COURT:* So everything's accepted except
9 going to amicus. And I think their objection with the
10 amicus only goes to those matters that go to not
11 irreparable harm but other issues. And easily said and
12 maybe harder to delineate, so you can respond to that.
13 And I may end up asking you to meet and confer on that
14 one and tell me what you don't want included and what is
15 included. The irreparable harm will certainly be
16 considered, but I don't have them all in front of me
17 to -- to go through them with you.

18 *MR. JOHNSON:* And so plaintiff's position, your
19 Honor, is that the declarations certainly can be
20 considered as to irreparable harm. They can certainly be
21 considered in the balance of the equities, all of the
22 public interests, all of those factors. But we also
23 believe that it can be considered as relevant to the
24 claims on the merits, and that would be both the
25 constitutional claims and the --

1 *THE COURT:* What about the former employee of
2 some 20-plus years ago opining about the merits of what
3 the Court has in front of it? I mean, that's a pretty
4 good example. Ms. Parker's saying that's tantamount to
5 expert testimony coming in.

6 *MR. JOHNSON:* So the reason I think it's
7 relevant is that it goes to the question of what it is
8 that the agency failed to consider. So we're not asking
9 the Court to read that declaration and say, oh, yes, you
10 know, Ms. Fenchel is correct. This is bad policy. I
11 disagree with FinCEN. We're not asking the Court to do
12 that, nor is that something the APA would allow the Court
13 to do.

14 But what we are suggesting is that the Court can
15 read that declaration. And so, for instance, the
16 declaration says FinCEN is inundated with CTRs, and having
17 more CTRs is just going to inundate them further. And
18 they're not going to open these; they're not going to use
19 them. And I think that sort of information, it shows
20 first off --

21 *THE COURT:* I think -- and I don't have it in
22 front of me, again. I think, though, that individual is
23 opining on the ultimate issue that the Court needs to.
24 And I don't know because I'm not going to be able to
25 discuss the evidentiary differences between you and

1 resolve it probably this morning, but I think that's the
2 issue.

3 MR. JOHNSON: So and I --

4 THE COURT: We know they have a lot of those
5 reports. We know most of them aren't reviewed. We know
6 that now that number's going to skyrocket. It's going to
7 skyrocket, most of which may or may not, depending on
8 which side you're looking at, be useful to them or to
9 anybody else. Burdensome, admittedly, to your clients.

10 MR. JOHNSON: So I think we do know those
11 things. And perhaps, you know, the Court could also just
12 take judicial notice of things that are already in the
13 public record that say there are a lot of these reports.
14 On the other hand, I think it is helpful to have it in
15 the record. But to be clear, I think what it goes to is
16 not the question of is this good policy. What it goes to
17 is the question of are there issues that FinCEN should
18 have considered and did not consider. And I think one of
19 the issues that FinCEN should have considered and did not
20 consider is the fact that they already get so many CTRs
21 and they don't even look at most of them. I think that's
22 an issue that FinCEN should have considered, and I think
23 the declarations are appropriately admitted for that
24 purpose, to show that these are -- that that issue --
25 other issues raised in the declaration similarly are

1 things that the agency should have considered and did not
2 consider in the process of promulgating the GTO.

3 And that's -- that's what the *Western Watersheds*
4 case stands for. And, you know, I understand -- we didn't
5 file a written motion because we were concerned that we
6 would be burdening the Government on the eve of the
7 hearing. I hope -- I think she may appreciate that.

8 *THE COURT:* I appreciate the collegiality.
9 That's great.

10 *MR. JOHNSON:* But, you know, I think that case
11 does stand for the proposition that these types of
12 extra-record materials can be used to show the sorts of
13 things that the agency didn't consider. I also think
14 it's useful here where there was no opportunity for
15 notice-and-comment, just to show there are significant
16 issues. These are the types of things that people would
17 have said in comments if they had had an opportunity to
18 comment, which they did not have.

19 *THE COURT:* Do you think that's something that
20 if you and Ms. Parker sat down and looked through these
21 things you could tell me, like, we agree to everything
22 except these couple of paragraphs, or do you think it's
23 beyond that and I just need to go back and take another
24 look at all of this and decide?

25 *MR. JOHNSON:* I welcome to try, your Honor. I'm

1 not sure, to be honest.

2 *THE COURT:* Okay. Okay. So go ahead. Tell me
3 whatever else you want to tell me.

4 *MR. JOHNSON:* Well, the other two points I
5 wanted to make, your Honor, one is I heard my friend from
6 the Government say that the reasoning here is they want
7 to sweep in everything in this area. And I think that
8 just goes to the Fourth Amendment issue. And it just
9 shows this is the equivalent of a general warrant and is
10 unconstitutional under the Fourth Amendment; that, you
11 know, when the Government says we want to sweep in
12 everything, that's when I think this sort of Fourth
13 Amendment Spidey-sense should start to go off and, you
14 know, we should worry that this is a general warrant.

15 And I think the *Airbnb* case -- you know, I heard
16 the Government say it's very close. It is very close.

17 *THE COURT:* It is close.

18 *MR. JOHNSON:* It's extremely close. And I think
19 it should -- it should give the Court a lot of comfort on
20 the Fourth Amendment issues.

21 I also just briefly want to address again the
22 issue of whether the Court needs to reach the Fourth
23 Amendment. One point I would make is that it's -- the
24 inquiry here is likelihood of success on the merits. It's
25 not -- and so often what courts say is, you know, there

1 are multiple claims. I think all of these claims have
2 weight, and so I think given the fact that all of these
3 claims have weight, the plaintiff is likely to prevail on
4 at least one of them. And so I think that's another
5 reason why courts often do reach multiple claims.

6 *THE COURT:* Sure.

7 *MR. JOHNSON:* It's not like in the final -- it's
8 not like a final adjudication where a court really does
9 need to avoid reaching decisions on constitutional
10 claims. You know, it's not a final decision on the
11 constitutional claim and so the avoidance concerns aren't
12 quite the same.

13 And I do have a number of cites from recent
14 decisions where courts did reach both. I'll just give you
15 two: One is the *City and County of San Francisco*
16 *v. Trump*, and that's the 2025 Westlaw 1186310, and it's
17 the Northern District of California from 2025.

18 And then also *State v. Su*, and it's 121 F.4th 1,
19 and it's the Ninth Circuit 2024.

20 *THE COURT:* Anything else?

21 *MR. JOHNSON:* No, your Honor.

22 *THE COURT:* Let me ask you this. Ms. Parker --
23 and maybe I get focused in on this too much. The order
24 versus rule issue, I'm concerned that saying something is
25 an order doesn't make it an order and doesn't sweep it

1 into this provision. And I'd just like to hear final
2 comments on that before I ask Mr. Silva.

3 MR. JOHNSON: Absolutely, your Honor. So my
4 view would be that if this is not an order, that that
5 just raises two problems. So Congress, I think the
6 Government's point is Congress said you can issue an
7 order. You know, if this is not an order but a rule, I
8 think that that means it's unlawful because it doesn't
9 fit within the statute; it's *ultra vires*. And it also
10 means it's unlawful under the APA because
11 notice-and-comment rulemaking was required.

12 So I don't read the statute as saying if you want
13 to promulgate a rule and you just call it an order, that
14 that's now permissible. I read the statute as saying it's
15 envisioning narrow, targeted orders. And precisely
16 because the statute is -- the GTO is not an order, that
17 just makes it *ultra vires* in addition to not passing the
18 APA.

19 I also -- I mean, I also think that may just --
20 it may just, perhaps on both sides, be reading too much
21 into the word "order." Perhaps Congress just didn't mean
22 to say by order anything at all, in which case then we
23 just look to the APA and sort of background principles
24 that, you know, if it's narrow it's an order and it has
25 to -- it has to -- it does not require notice-and-comment

1 but there has to be an adjudication. If it's broader,
2 it's more generally applicable. If it's a rule,
3 notice-and-comment is required.

4 Maybe the fact that Congress said order doesn't
5 mean anything, but to the extent that it means anything, I
6 think it means that if this is not an order, then it's
7 *ultra vires*. And that's how I would read the statute.

8 *THE COURT:* Well, we presume that our
9 legislators give meaning to each and every word, and when
10 they said order they meant order and not rule. But you
11 have some merit to what you're saying, sir. I
12 understand.

13 Okay. Thank you.

14 *MR. JOHNSON:* Thank you.

15 *THE COURT:* Mr. Silva, would you like to address
16 the Court, sir?

17 *MR. SILVA:* Yes, please, your Honor.

18 *THE COURT:* Okay. And maybe you should start
19 with Ms. Parker's objection to some of the documents that
20 you have there and your position on that. And I guess
21 you'd be part of the meeting also to go over things as to
22 whether or not certain paragraphs could be redacted or
23 whatever, or if I'll do that. It make no difference to
24 the Court. I was always curious if people could work
25 that out.

1 MR. SILVA: Well, as a friend of the Court here
2 we really are trying to help everyone. So initially I
3 would like to say on behalf of the MSB Association thank
4 you to the Court and both parties for allowing us to add
5 this context.

6 And I think there's a really couple important
7 points before I address the Court's question. The MSBs
8 and the three declarants that filed declarations in
9 support of the amicus brief, they all support the Bank
10 Secrecy Act. They all support anti-money laundering
11 compliance.

12 THE COURT: Sure. Sure.

13 MR. SILVA: But I think the big issue, your
14 Honor, at least from the amicus' perspective, there was a
15 little bit of limited explanation of what FinCEN is. How
16 do these reports get filed? How do they get used? And
17 so the purpose, the thrust of the declarations and the
18 brief really was to inform the Court that in
19 international complex money laundering investigations,
20 these are how the BSA reports are accessed, used, and I
21 think very, very critically how they are not used.

22 And so the majority of the declarations do talk
23 about really two things, your Honor: First the United
24 States Government's prior positions, whether it's FinCEN
25 itself, the Government Accountability Office, U.S.

1 Attorneys offices, law enforcement, who have all
2 universally said historically small threshold CTRs are not
3 even looked at. Not only are they not looked at, to the
4 extent they come up in an investigation, no one tracks how
5 useful they are.

6 And so the declaration by Nona Rangel, that the
7 amicus put before the Court talks about large scale,
8 international, transnational criminal organization money
9 laundering investigations and the value of small,
10 miniscule CTRs like this in the big scheme of the Bank
11 Secrecy Act reporting regime, how to access them, what you
12 look at, how investigations begin. And the reason why I
13 think that's so important for the Court to consider and to
14 overrule the objection, is because the point of the GTO,
15 the conclusion that it made was that these \$250, \$300 CTRs
16 would be highly useful in money laundering investigations
17 along the Southwest border.

18 The three main declarations show, one, that the
19 Government has already concluded that no, they wouldn't.
20 So I think that's very important for the Court to
21 understand, that if FinCEN is going to issue this GTO in
22 these ZIP Codes for just MSBs, it has to wrestle with what
23 it said in the past. It has to analyze why that for 10,
24 20, 30 years is no longer true. And there is a complete
25 absence in the administrative record of that. So to the

1 extent the Court does sustain the United States'
2 objection, I would encourage the Court, or maybe the
3 plaintiffs if I can be so bold -- if that's still
4 friendly -- to request judicial notice of the extensive
5 statistical and analytical reports that the government
6 puts out consistently.

7 In the declarations, your Honor, and also in the
8 brief, one of the main items that was referenced was a
9 Government Accountability Office report that was published
10 in January of 2025. It's dated December of 2024, but it
11 actually was put out there less than five months ago. And
12 it says everyone who was polled -- again, U.S. Attorneys
13 offices, law enforcement, FinCEN, whomever it was --
14 industry, it is nearly universal that CTRs in this realm
15 would not be worth much.

16 The other thing I would add there, your Honor, is
17 there is a -- and plaintiff's counsel really hit on this,
18 and this is why I think the declarations were so helpful
19 to the Court, is it shows the analysis that FinCEN could
20 have done but didn't. So, for instance, why MSBs alone?
21 There's nothing in the record that says it has to be MSBs.
22 To that point, your Honor, I think the Court knows this,
23 but I want to be very clear. An MSB can take on a variety
24 of forms. So an MSB can be both a check casher. It can
25 be a seller of Travelers checks. It can be a dealer in

1 foreign exchange. It can be an issuer or seller of money
2 orders, it can be an issue of traveler's checks. It can
3 be a money transmitter, like Western Union. It can be a
4 provider or seller of prepaid access, which I will not
5 bore the Court with it, but it's basically like prepaid
6 cards. It goes everything from coinbase to cryptocurrency
7 exchanges, all the way to the single-branch peso/dollar
8 exchange operations down by the border.

9 Again, why did FinCEN or did FinCEN consider
10 applying this GTO to a specific type of MSB? And I want
11 to make sure -- this is also important, your Honor. When
12 and MSB registers with FinCEN it files something. As we
13 put in our brief, it's called an RMSB, just a Registration
14 of a Money Services Business. Those seven, eight, dozen
15 categories, every MSB must actually select one of those.
16 So if you're a money transmitter, you're an MSB who does
17 money transmitting. You are not an MSB that also does a
18 dealer in foreign exchange. You also do not issue money
19 orders. Now, you can do all three, but you've got to
20 check all three boxes.

21 *THE COURT:* Right. Right.

22 *MR. SILVA:* Again, that, I think, helps the
23 Court understand what this legal regime does and what it
24 can do. And when you contrast that with what FinCEN
25 failed to analyze, they failed to determine that there is

1 a specific issue with all MSBs in these ZIP Codes. The
2 Court has nothing before it.

3 In addition, there's another sort of subtext here
4 that CTRs might be the most valuable BSA report. Whereas
5 in the declarations that were submitted to the Court on
6 behalf of the amicus, clearly the suspicious activity
7 reports were the real, real fruit of a potential
8 investigation, along with various other sources. But why
9 not drop the SAR reporting requirements? Why not drop the
10 reporting requirements for when people actually cross the
11 border? Right? These are called CMIRs, Currency and
12 Monetary Instrument Reports. Again, the Court has none of
13 that before it.

14 Plaintiff's counsel also touched on that the
15 analysis just doesn't align, right? Those MSBs that I
16 mentioned, if you are a dealer in foreign exchange, you're
17 a branch or two and you're down in San Ysidro, no one has
18 a bank account with you. No one can do funnel accounts
19 with your business, and yet the funnel accounts and the
20 funnel account typology in terms of money laundering is
21 one of the most prominent discussion points throughout the
22 administrative record, and it just doesn't have any
23 applicability here.

24 If a person who is going to have a CTR filed
25 against them for a \$300 dollar-to-peso currency exchange

1 doesn't have an account and can't get funneled any money
2 from anyone, then why would that be relevant in any
3 context whatsoever for this GTO? And so I can add a lot
4 more, your Honor, but I don't want to monopolize what is
5 really not our motion.

6 The final thing I would just say is that in the
7 case law cited by Government's counsel in support of their
8 objection -- this was on page 7 of their opposition -- is
9 that courts must refrain from substituting their judgment
10 for the agency's and should limit their review to
11 determining whether the agency, quote, considered the
12 relevant factors and articulated a rational connection
13 between the facts found and the choices made.

14 And I think that's why what is put forth not only
15 in the amicus brief but in all of the declarations in
16 support of it is that it was offered for the Court to
17 consider the relevant factors and also the missing
18 relevant factors in this GTO and in the administrative
19 record and whether or not the agency here, FinCEN,
20 articulated a rational connection between the facts found
21 and the choices made.

22 The fact found is that these CTRs would prove
23 highly useful in money laundering investigations.
24 Respectfully, your Honor, the amicus disagrees, and the
25 evidence put forward, we believe, will assist the Court

1 and the parties agreeing with their position. So if there
2 are no other conditions, I'll sit down.

3 *THE COURT:* Okay. Not right now. Thank you.

4 *MR. SILVA:* Thank you, your Honor.

5 *THE COURT:* Thank you.

6 Ms. Parker, I did have a question, and you can
7 respond to Mr. Silva if you like, but I had a question
8 that's bothered me throughout this entire case. Is there
9 any evidence in the administrative record that predates
10 the issuance of the GTO? It bothered me in the beginning,
11 and it continues to bother me that there's an internal
12 memo dated March xx. And it never looks like it went out.
13 It never -- I mean, what's the date of any of this?

14 And it's troublesome to me. It's a small point,
15 but in a way it's a huge point because you can't, after
16 the fact, justify what's been done, ma'am. And why isn't
17 there a date on that May memo, which is what you're
18 relying on? And in the administrative record basically
19 was everything that that document references. So what was
20 the date that that was issued, and why don't I have that?

21 You know the memo I'm talking about, I'm sure.
22 It's the March 2025. It's got March xx, 2025. And I
23 think I came out here without a copy of it up here, but
24 I'll find it.

25 *MS. PARKER:* I have it, your Honor, the Bates

1 number in the administrative record is 4.

2 THE COURT: Okay. So that's troublesome. That
3 doesn't look good.

4 MS. PARKER: The --

5 THE COURT: You're a litigator, ma'am, and you
6 know it doesn't look good, right?

7 MS. PARKER: I don't know what that xx means,
8 your Honor. I don't. We don't.

9 THE COURT: So we have no idea when that was
10 issued? It could be an after-the-fact rationalization
11 and quick job to justify what was done? I mean, I hate
12 to be that blunt, Ms. Parker. You know the Court. You
13 know the Court. I try to be kind and whatnot, but that's
14 just the harsh reality of how I feel about that document.

15 MS. PARKER: I had --

16 THE COURT: Because I question its date of
17 creation.

18 MS. PARKER: I don't have any information about
19 that xx, your Honor.

20 THE COURT: Okay.

21 MS. PARKER: So I -- I mean, there is the
22 presumption of regularity, and I don't have any evidence
23 that it was created after the fact, but I don't know. I
24 don't have any factual information about the reason for
25 the xx.

1 *THE COURT:* Maybe it doesn't bother everybody.
2 Maybe it doesn't bother plaintiff. It really bothers the
3 Court. But, okay, so having asked that, tell me whatever
4 you want to tell me in response to his comments, ma'am.

5 *MS. PARKER:* Defendants would request an
6 opportunity to brief these issues because there's a lot
7 in those declarations, and much of Mr. Silva's argument
8 underscores the effort to substitute judgment of
9 individuals outside of FinCEN for the individuals who
10 made the decisions. And there are statements in the
11 declarations about whether it's going to be effective or
12 not, which it goes far beyond -- and there's a fine line
13 between here are factors that the agency should have
14 considered but didn't consider, and here's the judgment
15 the agency should have come to, and here's what we all
16 would have done if this was our decision to make. That's
17 a fine line, and that's going to be hard to parse, but
18 these declarations certainly cross that line, and I'd
19 like an opportunity to brief it.

20 *THE COURT:* Well, it would be nice to --

21 *MS. PARKER:* And, of course --

22 *THE COURT:* -- have time to brief, but we're
23 here on a preliminary injunction and a TRO that expires
24 next Tuesday, and I need to make a ruling. And I know I
25 can have some time to do the written order, but I don't

1 think there's time to do briefing, and that's the nature
2 of the beast we have before us.

3 But the case will continue probably. I don't
4 know what everybody's going to do. I don't know how we do
5 more briefing, ma'am. I guess that's my problem.

6 *MS. PARKER:* The motions were put on the record
7 here at the hearing, and had there been a motion
8 yesterday, I would have responded to it last night. The
9 motions have been made, and we oppose the motions in
10 their entirety.

11 *THE COURT:* Okay.

12 *MS. PARKER:* Both the motion for judicial notice
13 of those declarations and the motion to supplement the
14 administrative record with all of those declarations with
15 the exception of evidence that goes to the issue of
16 irreparable harm.

17 *THE COURT:* Okay. So everything that's in the
18 record -- such as it is without dates and without
19 knowledge as to when these documents were created --
20 because I have to keep underscoring that because it's
21 very troublesome to me. But all the declarations that
22 the plaintiffs have put in, we have no problem with
23 those. We have no problem with what amicus has put in,
24 except to the extent to which it goes -- if it goes
25 beyond irreparable harm?

1 MS. PARKER: Yes.

2 THE COURT: Okay. I mean, I don't know if you
3 want to say anything, but I don't know how we go into
4 another briefing round, ma'am. I just don't know how we
5 do that and abide by all the timelines that we have to
6 abide by.

7 MS. PARKER: Understood.

8 THE COURT: Because I'm assuming people would
9 not like to agree to a rather open-ended continuance of
10 the Court's TRO. And I don't even need to ask that
11 because I know the Government's not going to do that
12 right now. So that's kind of my comment.

13 MS. PARKER: Understood. And the time -- I
14 understand the timeline and therefore place on the record
15 our objection to all of it.

16 There's one declaration by an individual who's
17 from an MSB association that really focuses on harm. The
18 rest of it focuses on -- focuses on whether the GTO was a
19 good idea, whether it will be effective, whether it was
20 done correctly, and invades the province of the Court and
21 attempts to substitute outside judgment for the agency's
22 judgment. So we object to all of it.

23 THE COURT: Okay. Okay. Anything else?

24 MS. PARKER: No.

25 THE COURT: Okay. Thank you. I think you might

1 want to respond.

2 MR. JOHNSON: Thank you, your Honor. I just
3 want to say a couple of things. I just want to be clear
4 for the sake of the record. The date absolutely does
5 bother --

6 THE COURT: Oh, it's troubled me from the get-go
7 because it looks so much to the Court -- and apologies to
8 the Government, but it just looks so much like an
9 after-the-fact document to me. Once a document is
10 issued, you put a date on it. Once it goes forward, you
11 put a date on it.

12 MR. JOHNSON: And we can't tell. As the Court
13 pointed out, you know, it's March -- sometime in March,
14 but the GTO itself came out March 14th. So, you know,
15 the memo could have been before; it could have been
16 after, and there's just no way to know. The index to the
17 administrative record also doesn't specify.

18 THE COURT: It could have been June. I don't
19 know. I don't know the timeline of the Texas case and
20 everything. Who knows.

21 MR. JOHNSON: Right. It's not clear from the
22 face of the record which, I agree, is troubling. And
23 plaintiffs certainly object to that. And I think that
24 goes to why it's appropriate here to supplement the
25 administrative record as well, because -- and I mentioned

1 the National Gun Rights -- the National Gun Rights
2 Association case from Texas where the court there said
3 when you have an administrative record that is put
4 together without any input from the public where the
5 agency is saying things and the -- the court can't just
6 be limited to the four corners of that record; it's just
7 not appropriate.

8 And the court there actually analogized it to
9 *Chevron* deference and telling the court, you know, you
10 have to only look at these particular factual materials
11 that the Government has put together is not all that
12 different from telling the court in the *Chevron* context
13 you have to defer to our interpretation of the statute.
14 And I think that especially in this context that that's
15 very much true where you have a factual record that was
16 put together. The administrative record basically
17 consists of that memo and then everything that is cited in
18 that memo.

19 *THE COURT:* Right. Right.

20 *MR. JOHNSON:* And so, you know, it's just a --
21 it's a record that was put together by the Government to
22 attempt to support its position. I don't -- I think
23 it's -- you know, after *Chevron* having been overruled, I
24 think it's particularly inappropriate for a court to have
25 to confine itself to the four corners of that kind of

1 a -- for lack of a better word, a jerrymandered record.

2 So the other thing I just wanted to briefly say,
3 I think my friend, Mr. Silva, pointed out that, you know,
4 plaintiffs may not have expressly moved for the Court to
5 take judicial notice of the documents that are included
6 with those declarations, for instance the GTO report. And
7 I think absolutely those are public documents. I'm sure
8 that report can be found on the Internet.

9 So we absolutely would -- in addition to moving
10 to include the declarations in the record, we would
11 expressly move the Court to take judicial notice of the
12 public documents that are attached to the declarations. I
13 think there's really no question that the Court could do
14 that.

15 *THE COURT:* Okay.

16 *MR. JOHNSON:* Thank you.

17 *THE COURT:* Thank you. I'd like to take a
18 break, see if I have any other questions for all of you.
19 You don't feel like you need to respond, or do you,
20 Mr. Silva? Do you need a final 30 seconds at the mic?

21 *MR. SILVA:* Ten seconds.

22 *THE COURT:* Ten seconds.

23 *MR. SILVA:* Thank you, your Honor, again.

24 *THE COURT:* Of course.

25 *MR. SILVA:* I would just note that the

1 attachments to the declarations that referenced the
2 public reports, those reports are hundreds and hundreds
3 of pages long. To spare the Court more paper and
4 reading, we just selected the pages that we cited to,
5 just to be clear. So if there's judicial notice, it
6 should be for the whole document.

7 *THE COURT:* Okay. Wonderful.

8 *MR. SILVA:* Thank you.

9 *THE COURT:* Thank you very much. Let's take a
10 15-minute break. I'll come back and tell you where we
11 are. Thank you.

12 (Recess taken from 10:20 a.m. until
13 10:38 a.m.)

14 *THE COURT:* I don't have any other questions for
15 the parties. Plaintiff has made a motion to augment the
16 record with basically everything. I'm going to grant in
17 part, deny in part. I'm going to grant it with regard to
18 all the declarations that have been presented by both
19 sides but not with regard to what's included with the
20 amicus.

21 Now, I'm going to deny that without prejudice,
22 knowing that maybe at a different point in this case that
23 can be the subject of briefing and a more thoughtful
24 process than we're able to give it right now because there
25 were a lot of cases cited. So that's the Court's ruling

1 on that.

2 Having said that, I certainly have a sufficient
3 basis to make the following ruling with regard to the
4 preliminary injunction today, and I'm finding that the
5 plaintiffs are likely to succeed the merits of several of
6 their claims under the Administrative Procedures Act. I'm
7 finding that the plaintiffs have demonstrated that they
8 will suffer irreparable harm absent emergency injunctive
9 relief, and that the balance of equities tips in their
10 favor and that the public interest will be served by the
11 issuance of a preliminary injunction.

12 So I'm enjoining enforcement of the Southwest
13 Border Geographic Targeting Order throughout the Southern
14 District of California pending the conclusion of this
15 litigation. And I will prepare a detailed, reasoned order
16 in due course, but -- quicker than normal due course.
17 I'll get it out as quickly as I can, but I wanted to rule
18 today because our deadline was coming up on Tuesday.

19 So that's the Court's ruling. I want to thank
20 both sides.

21 *MR. JOHNSON:* Thank you, your Honor.

22 *MS. PARKER:* Thank you, your Honor.

23 *MR. VORA:* Thank you, your Honor.

24 *THE COURT:* We'll be in recess. There's nothing
25 else we need to deal with, I don't believe.

1 MR. JOHNSON: No, your Honor.

2 MS. PARKER: No, your Honor.

3 THE COURT: Okay. Thank you. Thank you.

4
5 (Proceedings concluded at 10:41 a.m.)
6
7
8
9

10 C E R T I F I C A T E

11 I, Stephanie Whitehead, certify that I am a
12 duly qualified and acting Official Court Reporter for
13 the United States District Court; that the foregoing is
14 a true and accurate transcript of the proceedings as
15 taken by me in the above-entitled matter on May 15,
16 2025; and that the format used complies with the rules
17 and requirements of the United States Judicial
18 Conference.
19

20 Dated: May 19, 2025
21

22 s/ STEPHANIE WHITEHEAD
23

24 Stephanie Whitehead, CSR 10093
25 U.S. Official Court Reporter