No. 26-____

IN THE UNITED STATES COURT OF APPEALS

FOR THE [________] CIRCUIT

[NAME OF PETITIONER],

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of a Final Rule of the Securities and Exchange Commission

Regulation Crypto Assets, Release Nos. 33-[____]; 34-[____]; File No. S7-2026-27

OPENING BRIEF FOR PETITIONER

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to [Fifth Circuit Rule 28.2.1 / the applicable local rule], the undersigned counsel of record certifies that the following listed persons and entities as described therein have an interest in the outcome of this case: (1) [Name of Petitioner], a [nonprofit membership organization]; (2) the members of Petitioner identified in the declarations accompanying this brief; (3) the Securities and Exchange Commission, Respondent; and (4) counsel for the parties, [___________] and the Office of the General Counsel of the Commission. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully requests oral argument. This petition challenges the most consequential deregulatory rulemaking in the Commission's ninety-two-year history. The Commission spent a decade pressing, in more than two hundred enforcement actions, the position that crypto assets sold as investments demand the registration protections of the securities laws, and every court to reach the question agreed. The Final Rule now strips those protections from that same multi-trillion-dollar asset class without confronting a single judgment the Commission itself won. The petition presents significant questions concerning the limits of the Commission's general exemptive authority, the major questions doctrine, and the change-in-position doctrine. Argument would materially assist the Court.

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INTRODUCTION

For more than a decade, the Securities and Exchange Commission told every federal court that would listen that unregistered offerings of crypto assets are securities transactions whose promoters gravely harm investors. It pressed that position in more than two hundred enforcement actions[1], and every court to decide the question agreed, across every iteration of crypto assets, in every district in which the Commission sued, before judges appointed by six Presidents, all applying the framework of SEC v. W.J. Howey Co. The Commission did not lose a single one of those judgments on the merits. The rule under review is the Commission's attempt

[1] The count, repeated throughout this brief, is conservative and is confirmed by two independent sources. Cornerstone Research, which maintains a Cryptocurrency Enforcement Database tracking every Commission crypto-asset enforcement action since the first in July 2013, reports that the Commission brought 207 cryptocurrency-related enforcement actions from 2013 through 2024, comprising 135 litigations in federal court and 72 administrative proceedings, and 13 additional actions in 2025, for a cumulative total of 220. Cornerstone Research, SEC Cryptocurrency Enforcement: 2024 Update (Jan. 2025), https://www.cornerstone.com/insights/research/sec-cryptocurrency-enforcement-2024-update/; Cornerstone Research, SEC Cryptocurrency Enforcement: 2025 Update (Jan. 2026), https://www.cornerstone.com/insights/research/sec-cryptocurrency-enforcement-2025-update/. The Commission's Division of Enforcement maintains a public catalog of its crypto-asset enforcement actions from which the count may be independently verified. SEC, Cyber, Crypto Assets and Emerging Technology: Enforcement Actions, https://www.sec.gov/about/divisions-offices/division-enforcement/cyber-crypto-assets-emerging-technology/enforcement-actions (last visited Aug. 24, 2026). The figure includes litigations and administrative proceedings only; it excludes the Commission's crypto-related trading-suspension and delinquent-filing orders, which would raise the count further. Unless otherwise noted, references in this brief to the Commission's "more than two hundred enforcement actions" rest on these sources.

to set that record aside by administrative decree rather than by litigation, appeal, or legislation.[2]

The power the Commission claims is breathtaking: the authority to withdraw an entire asset class from statutes Congress wrote, judgments courts entered, and protections investors hold, by nothing more than its own signature. It claims to derive that power from Section 28 of the Securities Act of 1933 and Section 36 of the Securities Exchange Act of 1934, general exemptive backstops enacted in 1996 to let the Commission smooth friction within the registration framework. Those provisions are not, and have never been understood to be, a standing license to construct a parallel offering regime for a multi-trillion-dollar asset class. Broad is not boundless: a reading of "any person, security, or transaction" sweeping enough to support the Final Rule would equally permit the Commission to "exempt" hedge funds from the insider-trading laws, or high-frequency trading firms from the

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[2] SEC v. W.J. Howey Co., 328 U.S. 293, 298–99 (1946). The final rule is Regulation Crypto Assets, Release Nos. 33-[____]; 34-[____] ([DATE], 2026), [__] Fed. Reg. [_____] ([DATE], 2026) ("Final Rule" or "Release"), proposed at Release Nos. 33-11434; 34-106150 (RIN 3235-AN38). For the collected judicial record, see Prepared Written Testimony of John Reed Stark Before the U.S. Senate Permanent Subcommittee on Investigations (July 27, 2026) ("Stark Senate Testimony"), Finding Five, https://www.johnreedstark.com/wp-content/uploads/sites/180/2026/07/Third-Amended-Stark-Testimony-7-27-2026.pdf.

market-manipulation rules. Nothing in the 1996 Act suggests Congress intended that result.[3]

The Final Rule cannot be sustained under any of the doctrines that govern it. The statutory findings on which it depends (that exemption be "necessary or appropriate in the public interest" and "consistent with the protection of investors") are unmakeable on an administrative record the Commission itself wrote, under oath, in the opposite direction. The Release nowhere confronts the Commission's contrary factual findings or the serious reliance interests its decade of enforcement created, as the change-in-position doctrine requires. Its economic analysis does not attempt to quantify the worst year of crypto crime on record. And Congress has actively considered, and pointedly declined to enact, the very regime the Commission now decrees, which under the major questions doctrine is proof that the decision belongs to the legislature.[4]

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[3] 15 U.S.C. § 77z-3 (Securities Act § 28); id. § 78mm (Exchange Act § 36). Both provisions were added by the National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 105, 110 Stat. 3416.

[4] See FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009); Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221–22 (2016); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 30–33 (2020); FDA v. Wages & White Lion Invs., L.L.C., 604 U.S. 129 (2025); West Virginia v. EPA, 597 U.S. 697, 723–24 (2022).

Five independent grounds require vacatur. First, the Final Rule exceeds the Commission's statutory authority under Sections 28 and 36, and the self-certification safe harbor exceeds it further. Second, the Rule is arbitrary and capricious: the required findings contradict the record the Commission itself built, the reversal is unacknowledged and unexplained, the foundational premises are false, and the public-interest finding was rendered by an agency promoting the asset class it deregulates. Third, the economic analysis fails Sections 2(b) and 3(f). Fourth, the process by which the Rule issued was defective. Fifth, under settled remedial principles, the only available disposition is vacatur of the Rule in its entirety.

The petition for review should be granted and the Final Rule vacated in its entirety.

JURISDICTIONAL STATEMENT

The Commission adopted the Final Rule on [DATE], 2026, and the Final Rule was published in the Federal Register on [DATE], 2026. Petitioner filed its petition for review on [DATE], 2026, within sixty days of each date, and filed a protective second petition following Federal Register publication. This Court has jurisdiction under Section 9(a) of the Securities Act, 15 U.S.C. § 77i(a), and Section 25 of the

Exchange Act, 15 U.S.C. § 78y(a)(1), (b)(1), which vest review of final Commission rules exclusively in the courts of appeals. Venue lies in this Circuit because Petitioner resides and maintains its principal place of business within it; venue would in any event be proper in the United States Court of Appeals for the District of Columbia Circuit, in which any person aggrieved by a final Commission rule may proceed.[5]

Petitioner has standing, and vacatur requires only one petitioner with one injury. Petitioner is a [membership organization] whose members include (i) investors who will be solicited in exempt crypto-asset offerings stripped of the registration protections on which they are entitled to rely; (ii) [state securities regulators] whose investor-protection programs the Final Rule displaces in practical effect; and (iii) registered market participants that built compliant businesses in reliance on the framework the Final Rule dismantles and that must now compete against exempt offerings bearing none of their costs. Each injury is concrete, fairly traceable to the Final Rule, and redressable by vacatur. States appearing in their sovereign and quasi-sovereign capacities have maintained precisely this posture

[5] 15 U.S.C. § 77i(a); id. § 78y(a)(1) (venue lies in the circuit in which the petitioner resides or has its principal place of business, or in the D.C. Circuit). See Horsehead Res. Dev. Co. v. EPA, 130 F.3d 1090, 1095 (D.C. Cir. 1997) (protective-petition practice where the operative date of agency action is disputed).

without their standing being questioned; competitor standing has been recognized since FCC v. Sanders Brothers Radio Station; and investors whose claims the Rule would extinguish satisfy Article III without difficulty. Declarations establishing these injuries accompany this brief.[6]

STATEMENT OF THE ISSUES

1. Whether Section 28 of the Securities Act and Section 36 of the Exchange Act, both general exemptive backstops enacted in 1996, authorize the Commission to erect a parallel, registration-free offering regime for a fraud-saturated, manipulation-prone, and catastrophically volatile multi-trillion-dollar asset class (intangible ledger entries conjured by computation, backed by no cash flows, no assets, and no issuer obligation of any kind).

2. Whether the "investment contract safe harbor," which permits issuers to certify their own instruments out of the federal securities laws, exceeds the Commission's exemptive authority and unlawfully converts that authority into a definitional eraser that sweeps across both the Securities Act and the Exchange Act.

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[6] See Chamber of Commerce v. SEC, 412 F.3d 133, 138 (D.C. Cir. 2005) (associational standing established by member declarations); Decl. of [_______] ¶¶ __–__; Decl. of [_______] ¶¶ __–__. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476–77 (1940) (competitor standing).

3. Whether the Final Rule is arbitrary and capricious where the required public-interest and investor-protection findings are contradicted by the sworn pleadings of the Commission's more than two hundred enforcement actions and by the judicial decisions sustaining them; where the Commission failed to acknowledge its change of position or the reliance interests its enforcement program created; and where the Release rests on foundational premises refuted by the record.

4. Whether the Commission's economic analysis satisfies Section 2(b) of the Securities Act and Section 3(f) of the Exchange Act when it quantifies none of the documented illicit-finance, national-security, elder-fraud, or systemic-risk costs of the deregulation it adopts.

5. Whether the process by which the Final Rule issued, including the cancellation of the noticed open meeting and a comment period inadequate to a 326-page release, independently requires vacatur.

STATEMENT OF THE CASE

A. The Statutory Framework

Registration is the cornerstone of the federal securities laws. Congress determined in 1933 and 1934 that investors are protected not by government merit review but by mandatory, standardized, liability-backed disclosure, and the Supreme Court has instructed for eighty years that the reach of that regime turns on economic substance, not labels. Where Congress has relaxed registration (Regulation A, Regulation Crowdfunding, Regulation D), it has done so through specific bargains with compensating protections Congress itself specified. Sections 28 and 36, added in 1996, are general exemptive backstops that permit the Commission to smooth friction within that framework where it makes specified findings, not to demolish the load-bearing wall of the federal securities laws. Registration is not one protection among many; it is the mechanism on which every other protection depends, the source of the disclosures that give the antifraud remedies, the private rights of action, and the market's own pricing something to work with.[7]

Two features of those provisions control this case. First, both are conditioned grants: the Commission may act only "to the extent that such exemption is necessary or appropriate in the public interest, **AND** is consistent with the protection of investors." (Emphasis added.)

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[7] Howey, 328 U.S. at 298–99; 15 U.S.C. § 77z-3; id. § 78mm, each added by the National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 105, 110 Stat. 3416. *See also* SEC v. Ralston Purina Co., 346 U.S. 119 (1953); JOBS Act, Pub. L. No. 112-106, tits. III–IV, 126 Stat. 306 (2012).

The findings are not ornamental; they are the predicate for the exercise of the power. Second, both provisions presuppose the continued operation of the framework from which they exempt. An authority to relieve identified persons, securities, or transactions from identified requirements is not an authority to withdraw the framework itself from an asset class, for the exemption would then have nothing to operate upon. The structure of the 1996 Act confirms the point: Congress paired the exemptive authority with provisions preserving antifraud jurisdiction and state authority, a pairing inconsistent with any understanding that a backstop could be used to dismantle the registration regime wholesale.[8]

B. The Commission's Enforcement Record

Beginning in 2013, the Commission brought, and won, enforcement actions against unregistered crypto-asset offerings in every district in which it sued. In more than two hundred enforcement actions, the Commission alleged under oath that unregistered crypto offerings gravely harm investors, and every court that reached the question, applying Howey, sustained the Commission's position. That record

[8] National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416; 15 U.S.C. § 77z-3; id. § 78mm(a)(1). The Proposing Release invokes Section 28 for the fundraising exemption. Release Nos. 33-11434; 34-106150, at n.222 & accompanying text.

spans every iteration of crypto assets. It is the administrative record's starting point, and it is written against the Final Rule.[9]

The most corrosive feature of the reversal the Final Rule codifies is not its policy substance; it is its posture toward the federal judiciary. Between 2018 and 2024, Article III judges appointed by Presidents Reagan, Clinton, Bush, Obama, Trump, and Biden built a deep, consistent, and emphatic body of law holding that crypto assets sold as investments are securities subject to the federal securities laws. That body of law survived every constitutional and administrative-law attack the best-funded defense bar in America could mount. The Final Rule treats it as a clerical error.[10]

The classic initial coin offering. In SEC v. Kik *Interactive Inc.*, the court granted summary judgment that Kik's $100 million "Kin" token offering was an unregistered securities offering and dispatched the fair-notice defense, observing that Howey and its progeny gave any person of ordinary intelligence all the notice

[9] Howey, 328 U.S. at 298–99. Stark Senate Testimony, Findings One, Two & Five; Complaint, SEC v. Binance Holdings Ltd., No. 1:23-cv-01599 (D.D.C. June 5, 2023); Complaint, SEC v. Coinbase, Inc., No. 1:23-cv-04738 (S.D.N.Y. June 6, 2023).
[10] Stark Senate Testimony, Finding Five ("The Rule of Law Cannot Be Repealed by Press Release").

the Constitution requires.[11] In SEC v. Telegram Group Inc., the court enjoined a $1.7 billion offering of "Grams" (one of the largest capital raises in crypto history), and the matter concluded with $1.224 billion returned to investors and an $18.5 million penalty.[12] In SEC v. Grybniak (Opporty), the court granted summary judgment that the "OPP Token" offering was an unregistered securities offering and rejected the issuer's fair-notice and reliance-on-counsel defenses.[13] In SEC v. Rivetz Corp., summary judgment again: a token marketed as a "software product" was a security because its value depended on the issuer's entrepreneurial efforts.[14]

The SAFT. When direct coin offerings drew fire, industry counsel engineered the "Simple Agreement for Future Tokens": sell contracts to accredited investors first, deliver tokens later, and characterize the public distribution as something other than an offering. Telegram was the SAFT's Waterloo: the court looked through the

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[11] SEC v. Kik Interactive Inc., 492 F. Supp. 3d 169 (S.D.N.Y. 2020) (granting summary judgment).
[12] Press Release, SEC, Telegram to Return $1.2 Billion to Investors and Pay $18.5 Million Penalty to Settle SEC Charges, No. 2020-146 (June 26, 2020).
[13] SEC v. Grybniak, No. 1:20-cv-327 (EK), 2024 WL 4287222 (E.D.N.Y. Sept. 24, 2024) (partial summary judgment holding the OPP Token ICO an unregistered securities offering and rejecting fair-notice and reliance-on-counsel defenses); SEC Litigation Release No. 26257 (Feb. 26, 2025) (final judgment).
[14] SEC v. Rivetz Corp., No. 3:21-cv-30092 (D. Mass. Sept. 30, 2024) (granting summary judgment).

two-step structure to the economic reality of the scheme (a capital raise engineered to flood tokens into the public secondary market) and preliminarily enjoined it.[15]

The token with no offering at all. In SEC v. LBRY, Inc., the issuer distributed its token without any coin offering, emphasized "consumptive utility," and called it a currency for a content platform. The court granted summary judgment for the Commission anyway, holding that "nothing in the case law suggests that a token with both consumptive and speculative uses cannot be sold as an investment contract," and rejecting the fair-notice defense as resting on "a straightforward application of a venerable Supreme Court precedent that has been applied by hundreds of federal courts across the country over more than 70 years."[16]

Crypto lending. The industry rebranded the interest-bearing account, minus the banking charter, minus the deposit insurance, minus everything. The Commission's first-of-its-kind BlockFi action produced a $100 million resolution and the shutdown of the unregistered lending product. Then came Genesis and Gemini Earn: 340,000 retail investors and roughly $900 million frozen. The

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[15] Telegram, 448 F. Supp. 3d 352 (looking through the two-step SAFT structure to the economic reality of the scheme).
[16] SEC v. LBRY, Inc., 639 F. Supp. 3d 211 (D.N.H. 2022).

Commission charged the program as an unregistered securities offering, the district court sustained the theory at the pleading stage, and Genesis took a $21 million penalty and a permanent injunction on its way through bankruptcy.[17]

Crypto staking. Kraken paid $30 million and shuttered its U.S. staking-as-a-service program. When Binance litigated the identical product, the court held the Commission plausibly alleged that the staking program was an investment in a common enterprise whose fortunes rise and fall with the operator's efforts. The court in Coinbase sustained the same theory at the pleading stage. The Commission then sued Consensys over MetaMask Staking on the same architecture. Four platforms; every court to reach the question gave the same answer.[18]

Mining-investment schemes. In SEC v. Green United, LLC, the court held the Commission adequately alleged that "Green Boxes" and "Green Nodes" sold as mining hardware for a token that was never actually mined were investment

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[17] SEC Press Release 2022-26, BlockFi Agrees to Pay $100 Million in Penalties and Pursue Registration of its Crypto Lending Product (Feb. 14, 2022); SEC Press Release 2023-7, SEC Charges Genesis and Gemini for the Unregistered Offer and Sale of Crypto Asset Securities Through the Gemini Earn Lending Program (Jan. 12, 2023); SEC Press Release 2024-37 (Mar. 19, 2024) (Genesis $21 million penalty). The court sustained the unregistered-offering theory. SEC v. Gemini Trust Co., LLC, No. 1:23-cv-00368 (S.D.N.Y. Mar. 13, 2024) (denying motions to dismiss).

[18] In re Payward Ventures, Inc. (Kraken), SEC Press Release 2023-25 (Feb. 9, 2023) ($30 million penalty; staking-as-a-service shutdown); Binance, 2024 WL 3225974; Coinbase, 726 F. Supp. 3d 260; SEC v. Consensys Software Inc., No. 24-cv-4578 (E.D.N.Y. filed June 28, 2024).

contracts, and in denying dismissal added a sentence that should be engraved above the Commission's door: this action "does not present any novel attempt at regulation by the SEC. Rather, the SEC, by this action, pursues the regulatory goals Congress set for it ninety years ago."[19]

The exchanges, brokers, and clearing agencies. In SEC v. Coinbase, Inc., the motion to dismiss was denied in 84 meticulous pages: the challenged transactions "fall comfortably within the framework that courts have used to identify securities for nearly eighty years." In SEC v. Binance Holdings Ltd., most of the Commission's thirteen claims survived dismissal. In SEC v. Payward, Inc. (Kraken), the motion to dismiss was denied. Bittrex paid $24 million to resolve charges of operating an unregistered exchange, broker, and clearing agency. Every major trading venue that stood and fought lost the threshold fight.[20]

Secondary-market transactions. The industry's fallback, that resales on a platform are beyond Howey, died twice in 2024. The Payward court held that Howey "said nothing about an investment of money requiring privity between the issuer and

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[19] SEC v. Green United, LLC, No. 2:23-cv-00159 (D. Utah Sept. 23, 2024) (McIff Allen, J.).
[20] SEC v. Coinbase, Inc., No. 1:23-cv-04738 (S.D.N.Y. Mar. 27, 2024) (Failla, J.); SEC v. Binance Holdings Ltd., No. 1:23-cv-01599 (D.D.C. June 28, 2024) (Jackson, J.); SEC v. Payward, Inc., No. 3:23-cv-06003 (N.D. Cal. Aug. 23, 2024) (Orrick, J.); In re Bittrex, Inc. (settlement resolving unregistered exchange, broker, and clearing agency charges).

the investor" and that the test "applies wherever a court seeks to determine whether a transaction involves an investment contract, regardless of whether that transaction is on a primary or secondary market." The Binance court agreed: it is the economic reality of the particular transaction that controls, and the issuer's promotional representations follow the token into the resale market.[21]

Algorithmic stablecoins and yield ecosystems. In SEC v. Terraform Labs Pte. Ltd., the court rejected the major-questions and fair-notice defenses in a single opinion and later granted summary judgment that the tokens at issue were securities; the case (arising from the UST/LUNA collapse that vaporized some $40 billion in nominal value) concluded with a $4.5 billion resolution.[22]

The rest of the bestiary. In Friel v. Dapper Labs, Inc., even NBA Top Shot "Moments" were plausibly alleged to be securities on the facts pled. In SEC v. Shavers, the first case in the line, a bitcoin-denominated Ponzi scheme taught the founding lesson: an investment of bitcoin is an investment of money. NovaTech: a

[21] SEC v. Payward, Inc., No. 3:23-cv-06003-WHO, 2024 WL 4511499 (N.D. Cal. Aug. 23, 2024); SEC v. Binance Holdings Ltd., No. 1:23-cv-01599, 2024 WL 3225974 (D.D.C. June 28, 2024).
[22] SEC v. Terraform Labs Pte. Ltd., 684 F. Supp. 3d 170 (S.D.N.Y. 2023) (Rakoff, J.) (rejecting major-questions and fair-notice defenses); SEC v. Terraform Labs Pte. Ltd., No. 1:23-cv-01346 (S.D.N.Y. 2024) (summary judgment; final judgment approving $4.5 billion resolution).

$650 million fraud spanning 200,000 investors. GTV Media: $539 million to resolve unregistered offerings. Name the iteration; there is a docket number waiting for it.[23]

The Ripple Myth. The industry's sole meaningful bright spot deserves extended treatment, because the Release will be read to lean on it. The Commission sued Ripple Labs on December 22, 2020, in the closing days of a Republican-appointed Chairman's tenure, alleging that Ripple raised more than $1.39 billion through an unregistered, ongoing offering of XRP in violation of Section 5 of the Securities Act. In July 2023, Judge Torres analyzed three categories of sales: Institutional Sales to sophisticated buyers under written contracts, for which Ripple received $728 million; Programmatic Sales to public buyers on digital asset exchanges, for which it received $757 million; and Other Distributions to employees and third parties, for which it recorded $609 million in consideration other than cash. The court held that the Institutional Sales were unregistered offers and sales of investment contracts satisfying every prong of Howey, and it rejected Ripple's fair-notice and vagueness defenses as to those sales because "the caselaw that defines an

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[23] Friel v. Dapper Labs, Inc., 657 F. Supp. 3d 422 (S.D.N.Y. 2023); SEC v. Shavers, No. 4:13-cv-416, 2013 WL 4028182 (E.D. Tex. Aug. 6, 2013); SEC Litigation Release No. 26072 (Aug. 12, 2024) (NovaTech); SEC Press Release 2021-175 (Sept. 13, 2021) (GTV Media, $539 million).

investment contract provides a person of ordinary intelligence a reasonable opportunity to understand what conduct it covers." In August 2024, the court entered final judgment, imposing a $125 million civil penalty and an injunction. Only the Programmatic Sales ruling went the industry's way, on the theory that exchange buyers did not know they were buying from Ripple.[24]

Even that bright spot is far narrower than the Release's architecture assumes. Footnote 16 of the ruling expressly declined to address secondary-market sales at all: "Whether a secondary market sale constitutes an offer or sale of an investment contract would depend on the totality of circumstances and the economic reality of that specific contract, transaction, or scheme." And on October 3, 2023, in denying certification of an interlocutory appeal, Judge Torres marked the limits of her own ruling: "The Court's findings come from a direct application of Howey to the unique facts and circumstances of this case," and the Court "did not hold that offers and sales on a digital asset exchange cannot create a reasonable expectation of profits based on the efforts of others." A decision that its own author has confined to its

[24] SEC v. Ripple Labs, Inc., 682 F. Supp. 3d 308 (S.D.N.Y. 2023) (Torres, J.) (summary judgment); final judgment and remedies order entered August 7, 2024 ($125 million civil penalty and injunction). For Mr. Stark's contemporaneous analysis of the decision and the ensuing judicial response, see John Reed Stark, post on X (Dec. 2024), https://x.com/JohnReedStark/status/1867739591559586070.

unique facts cannot anchor a rulemaking that would generalize it to every token on every platform. Counsel who cite the ruling for the general proposition that a token is not a security risk their duty of candor to the tribunal.[25]

Every judge to confront the reasoning since has rejected it. Eighteen days after the ruling, Judge Rakoff declined to follow it in Terraform: “Howey makes no such distinction between purchasers,” because “secondary-market purchasers had every bit as good a reason to believe that the defendants would take their capital contributions and use it to generate profits on their behalf.” Judge Orrick, in Payward, held that “the court in Howey said nothing about an investment of money requiring privity between the issuer and the investor,” and that “[i]t defies common sense to suggest that when someone purchases crypto assets from a reseller or another investor, that person or entity does not understand themselves to be investing money in the asset.” And Judge Failla, in Coinbase, found “little logic to the distinction defendants attempt to draw between the reasonable expectations of

[25] SEC v. Ripple Labs, Inc., 682 F. Supp. 3d 308 n.16 (S.D.N.Y. 2023); Order Denying Certification of Interlocutory Appeal, SEC v. Ripple Labs, Inc., No. 1:20-cv-10832 (S.D.N.Y. Oct. 3, 2023) (“The Court’s findings come from a direct application of Howey to the unique facts and circumstances of this case.”).

investors who buy directly from an issuer and those who buy on the secondary market." The privity theory has no other adherents on the federal bench.[26]

The reasoning is also backwards as a matter of securities policy, and commentators across the spectrum said so immediately. The decision grants the full protection of the federal securities laws to sophisticated institutions, hedge funds and venture capital firms, while stripping that protection from the retail buyers the statutes were enacted to protect; as one corporate-law scholar wrote, that result "subverts the purpose of the securities laws." The theory cannot survive contact with ordinary market mechanics. No one who buys a share of stock on an exchange knows who is selling it, and the share does not lose its character as a security for that reason. Howey turns on the economic reality of the transaction, the expectation of profits from the efforts of others, not on whether the buyer can name the counterparty. XRP buyers bet on the efforts of Ripple and its hundreds of employees to raise the token's

[26] SEC v. Terraform Labs Pte. Ltd., 684 F. Supp. 3d 170 (S.D.N.Y. 2023) (Rakoff, J.) (denying motion to dismiss and declining to follow Ripple); SEC v. Payward, Inc., No. 3:23-cv-06003-WHO, 2024 WL 4511499 (N.D. Cal. Aug. 23, 2024) (Orrick, J.); SEC v. Coinbase, Inc., 726 F. Supp. 3d 260 (S.D.N.Y. 2024) (Failla, J.).

price; that is the quintessential issuer-investor relationship the securities laws exist to police.[27]

The ruling was on appeal, by both parties, when the Commission abandoned its appeal in 2025. Even then, the retreat failed in the one forum this Commission no longer controlled. When the Commission and Ripple jointly asked the district court to dissolve Ripple's injunction and slash the final judgment as part of the settlement retreat, Judge Torres refused, twice, reminding the parties that final judgments are not bargaining chips and that the public interest does not evaporate because an agency changes administrations. The one place the retreat failed was a courtroom.[28]

The Unanimous Bench. The library's authors deserve naming, because the Final Rule would erase their work without answering it. Judge Castel preliminarily enjoined Telegram's $1.7 billion offering. Judge Failla sustained the Coinbase complaint against dismissal in a comprehensive 84-page opinion. Judge Rakoff

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[27] Ann M. Lipton, Business Law Prof Blog (July 2023) ("Let's just get out of the way that it's perverse that sales to institutions are treated as securities because institutions are sophisticated. That's backwards; it subverts the purpose of the securities laws . . . .") Matt Levine, Money Stuff, Bloomberg Opinion (July 2023); see also John Reed Stark, post on X (Dec. 2024), https://x.com/JohnReedStark/status/1867739591559586070 (collecting the commentary).

[28] SEC v. Ripple Labs, Inc., 682 F. Supp. 3d 308 (S.D.N.Y. 2023) (Torres, J.); SEC v. Terraform Labs Pte. Ltd., 684 F. Supp. 3d 170 (S.D.N.Y. 2023) (Rakoff, J.) (declining to follow Ripple's programmatic-sales reasoning); orders of the district court denying the parties' joint requests to dissolve the injunction and reduce the final judgment (S.D.N.Y. 2025); Stark Senate Testimony, Finding Five.

rejected Terraform's major-questions and fair-notice defenses and later granted summary judgment that its tokens were securities. Judge Jackson sustained the bulk of the complaint against Binance at the pleading stage. Judge Orrick denied Kraken's motion to dismiss, rejecting its major-questions and fair-notice defenses. Judge Barbadoro granted summary judgment in LBRY and disposed of the fair-notice defense "with little difficulty." Judge Komitee rejected Opporty's vagueness defense as "untenable" in a 69-page opinion. Judge Mastroianni granted summary judgment in Rivetz. Judge McIff Allen rejected "regulation by enforcement" by name in Green United. Judge Marrero held that even NBA Top Shot "Moments" were plausibly alleged to be securities. Appointees of six Presidents; district courts from New York to Washington, D.C., to Utah to California; one conclusion. The Final Rule neither distinguishes nor even cites a single one of these rulings.[29]

One acknowledgment is owed, and it strengthens the record rather than weakens it. These rulings arrived in different postures: preliminary injunction

[29] Telegram, 448 F. Supp. 3d 352 (Castel, J.); Coinbase, 726 F. Supp. 3d 260 (Failla, J.); Terraform, 684 F. Supp. 3d 170 (Rakoff, J.), summary judgment granted in part, 2023 WL 8944860 (S.D.N.Y. Dec. 28, 2023); Binance, 2024 WL 3225974 (Jackson, J.); Payward, 2024 WL 4511499 (Orrick, J.); LBRY, 639 F. Supp. 3d 211 (Barbadoro, J.); Grybniak, 2024 WL 4287222 (Komitee, J.); Rivetz, No. 3:21-cv-30092 (Mastroianni, J.); Green United, No. 2:23-cv-00159 (McIff Allen, J.); Friel v. Dapper Labs, Inc., 657 F. Supp. 3d 422 (S.D.N.Y. 2023) (Marrero, J.).

(Telegram); summary judgment (Kik, LBRY, Rivetz, Grybniak, and Terraform); denials of motions to dismiss (Coinbase, Binance, Payward, Green United, Genesis, and Dapper Labs). A pleading-stage ruling finds no facts and enters no final judgment. But the defenses those courts rejected (fair notice, vagueness, major questions, the no-privity theory) are questions of law, and a court that rejects them on a motion to dismiss resolves the legal question as squarely as a court that rejects them after trial. What the record lacks is final merits judgments against the major platforms, and it lacks them for one reason: the Commission dismissed its own cases, with prejudice, before any court could enter one.[30] Having abandoned winning positions mid-litigation, the Commission cannot treat the absence of final judgments as proof that the positions were wrong.

And the record catalogs the defenses, because the industry's champions ran every play in the administrative-law playbook, and every play failed, seriatim: fair notice (rejected in Kik, LBRY, Terraform, and Ripple);[31] reliance on counsel and fair

[30] Joint Stipulation of Dismissal with Prejudice, SEC v. Coinbase, Inc., No. 1:23-cv-04738 (S.D.N.Y. Feb. 27, 2025); Joint Stipulation of Dismissal with Prejudice, SEC v. Payward, Inc., No. 3:23-cv-06003 (N.D. Cal. Mar. 27, 2025); Joint Stipulation of Dismissal with Prejudice, SEC v. Binance Holdings Ltd., No. 1:23-cv-01599 (D.D.C. May 29, 2025).
[31] Kik, 492 F. Supp. 3d 169; LBRY, 639 F. Supp. 3d 211; Terraform, 684 F. Supp. 3d 170; Ripple, 682 F. Supp. 3d 308 (rejecting the fair-notice and vagueness defenses as to the institutional sales).

notice (rejected again in Grybniak);[32] due process (rejected in Green United);[33] "regulation by enforcement" (rejected by name in Green United and Binance);[34] the major questions doctrine (rejected in Payward, Binance, Terraform, and Coinbase);[35] and the no-contract, no-privity theory (rejected in Payward and Binance, where the court delivered the epitaph: "indignation alone cannot open that door")[36]. Unanimity of that breadth, from districts in New York, California, Massachusetts, New Hampshire, Utah, Texas, Washington, Florida, and the District of Columbia, is not binding precedent, but it is a judicial consensus an agency must confront with reasons, not erase by definition.

Hold that record against the Final Rule and ask the dispositive question: what, exactly, is left to "clarify"? The industry spent a decade and a fortune generating precisely the legal certainty it claimed to crave; it simply hates the answer. ICOs: securities offerings. SAFTs: securities offerings. So-called utility tokens: securities offerings. Lending programs: securities offerings. Staking services: securities

[32] Grybniak, 2024 WL 4287222.
[33] Green United, No. 2:23-cv-00159.
[34] Green United, No. 2:23-cv-00159. Binance, 2024 WL 3225974.
[35] Payward, 2024 WL 4511499; Binance, 2024 WL 3225974; Terraform, 684 F. Supp. 3d 170; Coinbase, 726 F. Supp. 3d 260.
[36] Binance, 2024 WL 3225974; Payward, 2024 WL 4511499; see also Ripple, 682 F. Supp. 3d 308 (rejecting fair-notice defense as to institutional sales).

offerings. Exchange intermediation: registrable activity. Secondary sales: the same Howey analysis. The industry ran out of concoctions before the Commission ran out of victories. A "tailored offering regime" is not an answer to legal uncertainty, because there is no legal uncertainty; it is an attempt to vacate, administratively, the most unanimous judicial record in modern securities law, and to disappear the judges who wrote it.[37]

Nor were the merits judgments consent decrees extracted from defaulting shell entities. They were judgments entered on summary judgment on records the Commission assembled, and no appellant ever managed to disturb them: the industry's appeals were abandoned or settled away.[38] In each, the Commission alleged, and Article III courts found, that the economic realities of crypto-asset offerings satisfied Howey: investments of money, in common enterprises, with

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[37] See cases cited supra Statement of the Case Part B.

[38] Ripple: after final judgment, both sides appealed and both voluntarily dismissed their appeals, leaving the judgment, the $125 million penalty, and the injunction intact. SEC v. Ripple Labs, Inc., Nos. 24-2648(L), 24-2705(XAP) (2d Cir. appeals dismissed Aug. 22, 2025). LBRY: appeal voluntarily withdrawn following the company's dissolution. SEC v. LBRY, Inc., No. [__-____] (1st Cir. 2023). Telegram: settled after the preliminary injunction, with $1.224 billion returned to investors. SEC Press Release 2020-146 (June 26, 2020). Kik: resolved by consent judgment after summary judgment. SEC Press Release 2020-262 (Oct. 21, 2020). Terraform: resolved by final judgment approving the $4.5 billion resolution after the jury verdict. SEC Press Release 2024-73 (June 13, 2024). Cf. SEC v. Barry (9th Cir. Aug. 11, 2025) (affirming, outside the crypto context, a judgment applying Howey to unregistered investment contracts).

profits expected from the entrepreneurial efforts of identifiable promoters. A voluntary dismissal ends a case, but it does not vacate a published opinion. Every one of these decisions remains good law.[39]

The Release identifies no intervening change in those economic realities. The instruments and the promoters are the same today. The only intervening change is the Commission's position.[40]

C. The March 17, 2026 Joint Interpretation

On March 17, 2026, the Commission issued a joint interpretation declaring that most crypto assets are not securities. The document neither cites nor distinguishes the body of judicial decisions, built across more than two hundred enforcement actions, that it purports to displace. It is the interpretive foundation on which the Final Rule expressly rests.[41]

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[39] Ripple, 682 F. Supp. 3d 308; LBRY, 639 F. Supp. 3d 211; Telegram, 448 F. Supp. 3d 352 (each judgment or published opinion left undisturbed following settlement or voluntary dismissal of the appeal).

[40] SEC Press Release 2020-146, Telegram to Return $1.2 Billion to Investors and Pay $18.5 Million Penalty to Settle SEC Charges (June 26, 2020); SEC v. Terraform Labs Pte. Ltd., No. 1:23-cv-01346 (S.D.N.Y. 2024) (final judgment approving $4.5 billion resolution); SEC Litigation Release No. 26257 (Feb. 26, 2025) (Grybniak final judgment); Stark Senate Testimony, Finding Five.

[41] [Joint Interpretation citation]; Release Nos. 33-11434; 34-106150 (describing the framework as "consistent with the Commission's recent interpretation").

D. The Proposal

The Commission noticed an open meeting to consider the proposal, cancelled it overnight with a one-word notice citing a "scheduling conflict," and issued the 326-page release days later without any public deliberation. The proposal comprised broad offering exemptions and an "investment contract safe harbor" permitting issuer self-certification, a concept circulated since 2020 that never attracted a Commission majority. Chairman Atkins's statement accompanying the proposal conceded that "legislation remains indispensable."[42]

E. The Comment Record

Commenters, including former Commission enforcement officials and financial-regulation scholars, documented that the statutory findings could not be made: that the exemptive provisions will not bear the Proposal's weight; that the Release's foundational premises are false; that calendar 2025 was the worst year for crypto crime on record, with $17 billion lost to hacks, scams, and fraud; and that the

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[42] Release Nos. 33-11434; 34-106150; Paul S. Atkins, Chairman, Statement on Regulation Crypto Assets: Fit-for-purpose Exemptions for Crypto Market Innovation (Aug. 18, 2026) ("Atkins Statement"), https://www.sec.gov/newsroom/speeches-statements/atkins-statement-regulation-crypto-assets-081826; Reuters, US Securities Regulator Cancels Meeting on Crypto Rules (Aug. 13, 2026).

economic analysis quantified none of it. Those comments are in the administrative record, and under this Court's precedent the Commission was obligated to respond to them.[43]

F. The Final Rule and This Petition

The Commission adopted the Final Rule on [DATE], 2026, by a vote of [_] to [_], substantially as proposed. This petition followed within the statutory period.

SUMMARY OF ARGUMENT

I. The Final Rule exceeds the Commission's statutory authority. Sections 28 and 36 are backstop provisions that let the Commission smooth friction within the registration framework upon specified findings; they are not a license to construct a parallel offering regime for an entire phantom asset class, one that yields nothing, discloses nothing, and exists only as entries on a ledger. The "investment contract safe harbor" compounds the excess: it permits issuers to certify themselves out of the federal securities laws and converts exemptive authority into a definitional eraser

[43] Chamber of Commerce v. SEC, 85 F.4th 760, 774–77 (5th Cir. 2023) (failure to respond to comments renders a rule arbitrary and capricious). See also Stark Senate Testimony, Findings One–Three, Seven–Nine & Eleven–Fourteen; Chainalysis, 2026 Crypto Crime Report, https://www.chainalysis.com/reports; Bank for International Settlements, Crypto Shocks and Retail Losses, BIS Bulletin No. 69 (Feb. 20, 2023), https://www.bis.org/publ/bisbull69.htm.

wielded against both Acts. And the major questions doctrine independently condemns the Rule: Congress passed the CLARITY Act through one chamber, has taken it up repeatedly in the other, and has not enacted it. The Chairman's own concession that "legislation remains indispensable" is fatal.

II. The Final Rule is arbitrary and capricious five times over. The required findings of public interest and consistency with investor protection are unmakeable on a record the Commission wrote, under oath, in the opposite direction. The Commission never acknowledged its change of position or the reliance interests a decade of enforcement created. The Release's foundational premises (transformative technology, financial inclusion, decentralization) are refuted by the record, much of it the industry's own. The Commission's contemporaneous dismantling of its enforcement machinery deprives its safety findings of any evidentiary basis: an agency cannot disable its own alarm system and then cite the silence as proof of safety. And the public-interest finding was made by an agency that is itself promoting the asset class it deregulates, without ever accounting for the market impact of its own advocacy.

III. The economic analysis fails Section 2(b) and Section 3(f). It quantifies none of the $17 billion in 2025 crypto-crime losses, none of the illicit-finance and national-security externalities, and none of the systemic risk created by removing the securities-law perimeter at the moment crypto is being wired into banks, payments, and retirement savings. It rests instead on a traceability assurance the government's own record refutes. Business Roundtable v. SEC teaches what follows.[44]

IV. The process compounds the defects: the noticed open meeting was cancelled overnight, the 326-page release issued without public deliberation, and the comment period was inadequate to the Release's breadth.

V. The remedy is vacatur. Under APA § 706, the Court "shall," not may, "hold unlawful and set aside" unlawful agency action, the defects here pervade every part of the Rule, and vacatur requires only one petitioner with one injury.[45]

STANDARD OF REVIEW

[44] Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–54 (D.C. Cir. 2011).
[45] Nat'l Ass'n of Priv. Fund Managers v. SEC, 103 F.4th 1097, 1114 (5th Cir. 2024) (quoting 5 U.S.C. § 706(2)).

The Court reviews the Commission's interpretation of its organic statutes de novo, affording the agency no deference. Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 412–13 (2024). Under the APA, the Court shall hold unlawful and set aside agency action "in excess of statutory jurisdiction, authority, or limitations" or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (C). Agency action is arbitrary and capricious where the agency has failed to examine the relevant data, failed to articulate a rational connection between the facts found and the choice made, or entirely failed to consider an important aspect of the problem. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

The Commission bears a further, securities-specific obligation: whenever it engages in rulemaking and is required to consider whether an action is necessary or appropriate in the public interest, it must consider the effect on efficiency, competition, and capital formation. 15 U.S.C. § 77b(b); id. § 78c(f). A Commission rule adopted on a defective economic analysis, one that fails to apprise the agency of the economic consequences of its action or to respond to significant comments, is arbitrary and capricious.[46]

ARGUMENT

I. THE FINAL RULE EXCEEDS THE COMMISSION'S STATUTORY AUTHORITY.

A. Sections 28 and 36 Are Backstop Provisions, Not Authority for a Parallel Offering Regime.

Congress added Section 28 to the Securities Act and Section 36 to the Exchange Act in 1996 as backstops: authority to exempt persons, securities, or transactions where the registration framework generates friction Congress did not intend, upon findings that exemption is necessary or appropriate in the public interest and consistent with the protection of investors. Nothing in text, structure, or thirty years of practice suggests that Congress thereby delegated authority to withdraw the registration regime from an entire multi-trillion-dollar asset class and replace it with a Commission-drafted substitute. "Any" is broad, but broad is not boundless: on the Commission's reading, the same words would permit it to "exempt" hedge funds

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[46] Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011); Chamber of Commerce v. SEC, 85 F.4th 760, 766, 774–77 (5th Cir. 2023); Chamber of Commerce v. SEC, 412 F.3d 133, 144 (D.C. Cir. 2005).

from the insider-trading laws, or high-frequency trading firms from the market-manipulation rules. When an agency discovers in a long-extant statute an unheralded power of vast economic significance, courts greet the discovery with skepticism, and this Court and the D.C. Circuit have repeatedly vacated Commission rules built on just such definitional bootstrapping.[47]

The Commission's own senior staff have conceded the limits. The Chairman's Senior Advisor acknowledged, in a 2020 analysis published before his appointment, that the exemptive power is "broad, but it is not unbounded," that "[a]n exemption must be in the public interest and consistent with investor protection," and that "it has other natural boundaries." The Final Rule observes none of them.[48]

MCI Telecommunications Corp. v. AT&T Co. supplies the controlling principle: an agency's authority to adjust a statutory requirement does not include the power to make "basic and fundamental changes in the scheme" Congress

[47] Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014); Goldstein v. SEC, 451 F.3d 873, 881–84 (D.C. Cir. 2006) (vacating rule stretching "client" beyond statutory meaning); Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010); Nat'l Ass'n of Priv. Fund Managers, 103 F.4th at 1109–14 (vacating rule where "the Commission has exceeded its statutory authority").

[48] Andrew N. Vollmer & Brian Knight, Does the SEC Have Legal Authority to Exceed Statutory Dollar Limitations?, Mercatus Center Public Interest Comment (2020), https://www.mercatus.org/research/public-interest-comments/does-sec-have-legal-authority-exceed-statutory-dollar-limitations. Mr. Vollmer wrote the comment in 2020 and currently serves as adviser to the Chairman of the Commission.

designed. The power to exempt is a power to make adjustments at the margin of a regime whose continued operation is assumed. The Final Rule makes exactly such a fundamental change: it withdraws registration, and with it the liability-backed disclosure regime, from the category of instruments that has generated more registration-provision enforcement than any other in the Commission's modern history. If Sections 28 and 36 reached that far, every substantive command of the securities laws would exist at the Commission's sufferance, a delegation without intelligible limit. Congress does not hide fundamental revisions of its regulatory schemes in general-purpose backstops.[49]

The Rule's interpretive foundation is independently unlawful. An agency dissatisfied with a body of adverse precedent may litigate, appeal, seek legislation, or conduct rulemaking on a proper record; it may not un-decide federal-court rulings by staff statement.

[49] MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 225, 231 (1994); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes").

The March 17, 2026 joint interpretation neither cites nor distinguishes Telegram, Kik, LBRY, Terraform, Coinbase, or Binance, and the Commission cannot bootstrap an unlawful interpretation into a lawful exemption.[50]

The exemptions the Rule adopts also invert the logic of every legitimate exemption in the federal securities framework. Regulation A, Regulation Crowdfunding, and Regulation D implement bargains Congress struck, with compensating protections Congress specified: offering caps, investor qualifications, disclosure conditions. The Final Rule relaxes registration not because the offerings are small or the investors sophisticated, but because the industry is large, politically powerful, and unwilling to comply.[51] That is not a permissible basis for exemptive action under any provision of the securities laws.[52]

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[50] Telegram, 448 F. Supp. 3d 352; Kik, 492 F. Supp. 3d 169; LBRY, 639 F. Supp. 3d 211; Terraform, 684 F. Supp. 3d 170; Coinbase, 726 F. Supp. 3d 260; Binance, 2024 WL 3225974.

[51] See, e.g., Vicky Ge Huang, Ripple Donates Another $25 Million to Crypto Super PAC Fairshake, Wall St. J. (May 29, 2024); The New Kingmakers: Crypto, AI and Betting Firms Fuel Record Spending on the 2026 Midterms, Reuters (Aug. 20, 2026) (Fairshake super PAC began 2026 with a $193 million war chest financed almost entirely by Coinbase, Ripple, and Andreessen Horowitz); Crypto Super PAC Group Expands War Chest to More Than $190M, Politico (Jan. 28, 2026); Crypto Super PAC Fairshake Has $116 Million on Hand to Grow Industry's Influence in 2026 Election, CNBC (Jan. 30, 2025) (the industry "now holds real power" in Washington, with Ripple among the largest donors while "still battling the SEC in court"). On the unwillingness to comply, see the judgments collected supra: registration violations litigated and lost across every product iteration.

[52] Release Nos. 33-11434; 34-106150 (proposed investment contract safe harbor; notice-of-reliance and transition-report requirements); compare Securities Act § 17(a), 15 U.S.C. § 77q(a), and 17 C.F.R. § 240.10b-5.

Each of the framework's legitimate exemptions, moreover, implements a statute Congress wrote. Regulation A implements Section 3(b) of the Securities Act, and its modern expansion was ordered by Congress in Title IV of the JOBS Act, which specified the dollar ceiling, issuer eligibility, qualification review, and ongoing reporting. Regulation Crowdfunding exists because Title III of the JOBS Act mandated its offering caps, its income-scaled per-investor limits, and its intermediary-registration requirement. Regulation D codifies Section 4(a)(2) as construed in SEC v. Ralston Purina Co. The Final Rule implements no statute at all. Nor does Lindeen v. SEC assist the Commission: Regulation A+ preemption survived there because Congress had ordered the rulemaking twice over and expressly delegated the specific definitional power, and the decision issued under a deference regime that Loper Bright interred in 2024.[53]

Congress made income-scaled individual investment limits mandatory in the only retail crowdfunding exemption it has enacted, 15 U.S.C. § 77d(a)(6)(B); the Release leaves individual limits an open question. The 2016–2018 ICO era already

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[53] Ralston Purina, 346 U.S. at 124–25; Lindeen v. SEC, 825 F.3d 646 (D.C. Cir. 2016); Loper Bright, 603 U.S. at 412–13. See also Securities Act § 3(b), 15 U.S.C. § 77c(b); JOBS Act tit. IV, §§ 401–402, and tit. III, §§ 301–305; Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), Release No. 33-9741 (Mar. 25, 2015).

operated as the disclosure-optional, antifraud-only regime the Rule now codifies, and it produced the fraud wave that the Commission's more than two hundred enforcement actions spent the following half-decade addressing.

The Rule's eligibility terms compound the excess. Every legitimate exemption disqualifies bad actors: Regulation A and Regulation D bar felons and securities recidivists from relying on them. 17 C.F.R. §§ 230.262, 230.506(d). Whether the Final Rule's own bad-actor disqualification matches that baseline is a question its own text must answer; what the Release nowhere explains is why an asset class whose promoters include the very defendants the Commission has sued warrants registration relief on any terms.[54]

The contrast with Congress's actual exemptions is instructive. Regulation A caps offering size and requires an offering circular subject to Commission qualification. Regulation Crowdfunding caps both offering size and individual investment and requires intermediation through a registered funding portal. Regulation D conditions its principal exemption on accredited-investor status and restricts resale. Each bargain trades registration for a compensating protection

[54] Release Nos. 33-11434; 34-106150, Question 49.

tailored to a reduced risk Congress identified: small offerings, sophisticated investors, restricted markets. The Final Rule identifies no analogous reduced risk and supplies no analogous compensating protection: offerings of up to $75 million annually, fifteen times the crowdfunding ceiling Congress enacted, may be made to an unlimited number of retail investors, on disclosures the issuer selects and without audited financial statements below the Rule's $5 million tier, and the resulting instruments trade immediately on venues subject to none of the Exchange Act's market-integrity provisions. No exemption in the ninety-two-year history of the federal securities laws has taken that shape.[55]

B. The Self-Certification Safe Harbor Converts Exemptive Authority into a Definitional Eraser.

The "investment contract safe harbor" is unlawful and unworkable. It permits issuers to certify their own instruments out of the federal securities laws, a delegation of the Howey question to the very promoters Howey exists to police. Exemptive authority permits the Commission to relieve compliance obligations for instruments that are securities; it does not permit the Commission to redefine what a security is,

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[55] 17 C.F.R. §§ 230.251–263 (Regulation A); id. §§ 227.100–503 (Regulation Crowdfunding); id. §§ 230.500–508 (Regulation D). See also 15 U.S.C. § 77d(a)(6) (statutory crowdfunding offering and investment limits); Release Nos. 33-11434; 34-106150, Question 55.

to sub-delegate that definition to self-interested issuers, or to give the redefinition effect under both the Securities Act and the Exchange Act simultaneously.[56]

Chairman Atkins's own description confirms the design: a certified asset would "therefore, no longer [be] subject to the authority of the Commission." The consequence is a jurisdictional exit, not an exemption. An issuer can promise managerial efforts, raise funds under the Rule's exemption, certify that those efforts have ceased, and, by its own signature, walk out of the Commission's authority entirely, taking with it investors' Section 17(a) and Rule 10b-5 protections. The concept descends from a proposal first circulated in February 2020; in more than six years it never attracted a Commission majority.[57]

Three defects in the safe harbor are independently disqualifying. First, it operates as a definition, not an exemption: an instrument certified into the harbor is treated as a non-security for purposes of both the Securities Act and the Exchange

[56] cf. Goldstein, 451 F.3d at 881 (Commission may not deploy definitional interpretation to escape statutory limits). Howey, 328 U.S. at 298–99. Loper Bright, 603 U.S. at 391–92 (courts must exercise independent judgment on questions of statutory meaning).
[57] Atkins Statement (Aug. 18, 2026) (certified assets "therefore, no longer subject to the authority of the Commission"); Hester M. Peirce, Commissioner, Running on Empty: A Proposal to Fill the Gap Between Regulation and Decentralization (Feb. 6, 2020), https://www.sec.gov/newsroom/speeches-statements/peirce-remarks-blockress-2020-02-06; Release Nos. 33-11434; 34-106150 (safe harbor removing certified assets from the definition of "security" under both Acts).

Act, a result the exemptive provisions, each confined by its terms to the Act in which it appears, cannot produce. Second, the certification is self-executing: no Commission review, qualification, or finding precedes effectiveness, so the scope of two federal statutes is fixed in the first instance by the regulated party itself. Even where Congress permits reliance on private conduct, it does not permit private parties to define the jurisdiction of a federal statute. Third, the harbor is unpoliceable: the Release supplies no administrable criteria by which the Commission or a court could test a certification after the fact, and the residual antifraud remedies the Release invokes apply only if the instrument is a security, which is the very question the certification purports to answer.[58]

C. The Major Questions Doctrine Independently Condemns the Rule.

The Final Rule decides a question of vast economic and political significance: whether the federal securities laws will govern a multi-trillion-dollar asset class that the record shows to be the most fraud-ridden, most opaque, and most ruinously volatile in the history of financial markets. Congress is actively engaged on precisely

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[58] cf. Goldstein, 451 F.3d at 881–84. See also SEC v. Coinbase, Inc., 726 F. Supp. 3d 260 (S.D.N.Y. 2024), and Binance, 2024 WL 3225974 (issuer and promoter representations follow the token into secondary-market transactions).

that question: it passed the CLARITY Act through one chamber, has taken it up repeatedly in the other, and has not enacted it. Active congressional consideration is proof that the decision belongs to the legislature, and an agency may not seize by rule what Congress has declined to confer by statute. Chairman Atkins's statement accompanying the proposal concedes that "legislation remains indispensable." Petitioner agrees. That concession is fatal: an agency acknowledging that only Congress can supply the governing framework may not decree the framework itself.[59]

FIT21 passed the House in 2024 and died in the Senate. The CLARITY Act passed the House on July 17, 2025, by a vote of 294 to 134; the Senate Banking Committee advanced it on May 14, 2026; it reached the Senate calendar on June 1, 2026; leadership shelved it in late July; a cloture motion was filed in August; and the Senate recessed without voting. Days later, the Commission noticed, then abruptly

[59] West Virginia v. EPA, 597 U.S. 697, 723–24 (2022); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000) (congressional consideration and rejection of the asserted authority defeats the agency's claim); Alliance for Fair Bd. Recruitment v. SEC, No. 21-60626 (5th Cir. Dec. 11, 2024) (en banc). See also Digital Asset Market Clarity Act of 2025, H.R. 3633, 119th Cong. (passed House July 17, 2025, by a vote of 294–134; advanced by the Senate Banking Committee May 14, 2026; placed on the Senate calendar June 1, 2026); Financial Innovation and Technology for the 21st Century Act, H.R. 4763, 118th Cong. (passed House May 22, 2024).

cancelled, an open meeting, and the Proposal issued the following week.[60] The Supreme Court has set aside agency action in precisely this posture, including in Alabama Association of Realtors v. HHS and NFIB v. OSHA, where the agencies likewise acted after Congress declined to.[61]

Every Brown & Williamson factor is present. The asserted authority is located in a general provision enacted decades before the problem it is now said to solve. The agency long disclaimed the authority, not merely by inaction but by more than two hundred affirmative invocations of the opposite position in its enforcement actions. Congress has legislated actively in the area while declining to confer the claimed power, as the chronology above details. And the economic and political significance of the question is conceded on the face of the Release, which describes the affected markets in the trillions of dollars. Under West Virginia v. EPA, the

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[60] Reuters, US Securities Regulator Cancels Meeting on Crypto Rules (Aug. 13, 2026), https://www.reuters.com/world/us-securities-regulator-cancels-meeting-vote-crypto-rules-2026-08-13 (meeting noticed for August 14, 2026, cancelled the night before, with the Commission citing “a scheduling conflict”); Release Nos. 33-11434; 34-106150 (issued Aug. 18, 2026); see 5 U.S.C. § 552b (Government in the Sunshine Act); see also infra Part IV (detailing the chronology).

[61] Ala. Ass’n of Realtors v. HHS, 594 U.S. 758, 764–66 (2021) (per curiam); NFIB v. OSHA, 595 U.S. 109, 117–20 (2022) (per curiam). See also H.R. 3633, 119th Cong.; H.R. 4763, 118th Cong.; Reuters, US Securities Regulator Cancels Meeting on Crypto Rules (Aug. 13, 2026), https://www.reuters.com/world/us-securities-regulator-cancels-meeting-vote-crypto-rules-2026-08-13.

Commission was required to identify clear congressional authorization for a decision of this magnitude. It identified two backstop provisions and an interpretation of its own creation. Neither comes within sight of what West Virginia demands.[62]

The Rule also betrays the administration's own administrative-law principles. An administration that celebrated the end of Chevron deference as the liberation of citizens from rule by unelected bureaucrats[63], and that, in Executive Order 14219 and the April 2025 presidential memorandum, each invoking Loper Bright and West Virginia as the measure of lawfulness, ordered every agency to rescind regulations exceeding statutory authority, cannot deploy three unelected commissioners to decree a regime Congress has specifically declined to enact. The administration's own executive orders will be quoted back to the Commission, paragraph by paragraph.[64]

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[62] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143–60 (2000); West Virginia v. EPA, 597 U.S. at 721–24.

[63] Presidential Memorandum, Directing the Repeal of Unlawful Regulations (Apr. 9, 2025) (invoking Supreme Court decisions that "recognize appropriate constitutional boundaries on the power of unelected bureaucrats" and "restore checks on unlawful agency actions"); see also Chevron Doctrine Overturned: Republicans, Big Business Praise Supreme Court Decision, CNBC (June 28, 2024) (quoting Senator McConnell: after forty years of Chevron deference, "our system of government leaves no room for an unelected bureaucracy to co-opt this authority for itself"); Supreme Court's Overturning of 40-Year Chevron Ruling Is a Win for the Trump Deregulatory Agenda, NBC News (June 29, 2024); Trump's Push to Deregulate Faces Challenges in Post-Chevron Era, Bloomberg Gov't (Nov. 8, 2024).

[64] Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984), overruled by Loper Bright, 603 U.S. 369; West Virginia, 597 U.S. at 723–24; Exec. Order No. 14219, Ensuring Lawful Governance and

II. THE FINAL RULE IS ARBITRARY AND CAPRICIOUS.

A. The Required Statutory Findings Are Unmakeable on This Record.

Both statutory conditions (that exemption be "necessary or appropriate in the public interest" and "consistent with the protection of investors") must be supported by the administrative record. Here the record was written before the rulemaking began, by the Commission itself, under oath, in more than two hundred enforcement actions alleging that unregistered crypto offerings gravely harm investors, allegations the federal courts accepted in every case that reached decision. The Commission convinced those courts; it cannot now find the opposite without confronting what it told them. The Release does not.[65]

Nor did those courts leave any defense unaddressed: as the Statement of the Case details, every theory the industry advanced was litigated and rejected, seriatim,

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Implementing the President's "Department of Government Efficiency" Deregulatory Initiative, 90 Fed. Reg. 10583 (Feb. 25, 2025); Presidential Memorandum, Directing the Repeal of Unlawful Regulations (Apr. 9, 2025) (expressly invoking Loper Bright and West Virginia v. EPA).

[65] Complaint, SEC v. Binance Holdings Ltd., No. 1:23-cv-01599 (D.D.C. June 5, 2023); Complaint, SEC v. Coinbase, Inc., No. 1:23-cv-04738 (S.D.N.Y. June 6, 2023); Stark Senate Testimony, Findings One & Two.

by judges appointed by six Presidents. The Release engages none of these decisions.[66]

The deficiency is not that the Commission changed its mind; agencies are free to do that. It is that this record forecloses the statutory findings, and the Commission's own dispositions prove as much. Binance's affiliates pleaded guilty to federal criminal charges and paid $4.3 billion in penalties, yet the Commission dismissed its civil case against Binance with prejudice, so those claims can never be refiled. Coinbase and Kraken were likewise dismissed. The Ripple appeal was abandoned. The collapses of FTX, Celsius, Terra/Luna, and Voyager are memorialized in the congressional record, the bankruptcy courts, and the Commission's own complaints, yet the Release passes over all of it in silence.[67]

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[66] Kik, 492 F. Supp. 3d 169; LBRY, 639 F. Supp. 3d 211; Terraform, 684 F. Supp. 3d 170; Ripple, 682 F. Supp. 3d 308; SEC v. Grybniak, No. 1:20-cv-00327, 2024 WL 4287222 (E.D.N.Y. Sept. 24, 2024); Green United, No. 2:23-cv-00159; Binance, 2024 WL 3225974; Payward, 2024 WL 4511499; Coinbase, 726 F. Supp. 3d 260.

[67] Binance, 2024 WL 3225974; Ripple, 682 F. Supp. 3d 308. See also U.S. Dep't of Justice, Press Release, Binance and CEO Plead Guilty to Federal Charges in $4B Resolution (Nov. 21, 2023), https://www.justice.gov/opa/pr/binance-and-ceo-plead-guilty-federal-charges-4b-resolution; SEC Litigation Release No. 26316 (May 29, 2025) (dismissal with prejudice); In re FTX Trading Ltd., No. 22-11068 (Bankr. D. Del.); In re Celsius Network LLC, No. 22-10964 (Bankr. S.D.N.Y.); In re Voyager Digital Holdings, Inc., No. 22-10943 (Bankr. S.D.N.Y.). Coinbase: Stipulation of Dismissal with Prejudice, SEC v. Coinbase, Inc., No. 1:23-cv-04738 (S.D.N.Y. Feb. 27, 2025); Kraken: SEC v. Payward, Inc., No. 3:23-cv-06003 (N.D. Cal. dismissed with prejudice Mar. 27, 2025).

The statutory findings must rest on record evidence, and the only record evidence of investor outcomes in unregistered crypto markets is the evidence the Commission itself assembled: sworn complaints, expert declarations, and judicial findings cataloguing billions of dollars in investor losses[68]. The Release cites none of it, distinguishes none of it, and identifies no new evidence superseding it. An affirmative finding that deregulation is "consistent with the protection of investors," made on a record uniformly demonstrating the opposite, is the paradigm of a conclusion that "runs counter to the evidence before the agency."[69]

B. The Commission Never Acknowledged Its Reversal or the Reliance Interests It Created.

[68] The catalog is the Commission's own. *See, e.g., Terraform,* 684 F. Supp. 3d 170 (fraud arising from the UST/LUNA collapse, which vaporized some $40 billion in nominal value and was resolved for $4.5 billion); *Telegram,* 448 F. Supp. 3d 352 ($1.7 billion unregistered offering; $1.224 billion returned to investors); *Ripple,* 682 F. Supp. 3d 308 ($1.39 billion in unregistered sales; $125 million civil penalty); *Kik,* 492 F. Supp. 3d 169 ($100 million unregistered offering); Complaint, *SEC v. Genesis Global Capital, LLC* (S.D.N.Y. Jan. 12, 2023) (roughly $900 million belonging to 340,000 Gemini Earn retail investors frozen); Complaint, *SEC v. Bankman-Fried* (S.D.N.Y. Dec. 13, 2022) (alleging the diversion of billions of dollars of FTX customer funds); the $100 million BlockFi lending resolution; the $650 million NovaTech fraud spanning 200,000 investors; and the $539 million GTV Media resolution, each cited *supra* in the Statement of the Case. The Commission's own tallies confirm the scale: monetary penalties imposed in its crypto-asset enforcement actions reached $4.98 billion in 2024 alone, the largest annual total in the program's history. Cornerstone Research, SEC Cryptocurrency Enforcement: 2024 Update (Jan. 2025), https://www.cornerstone.com/insights/research/sec-cryptocurrency-enforcement-2024-update/. Recoveries understate losses by definition: they capture only what enforcement reached, not what investors lost in collapses the Commission never charged.

[69] State Farm, 463 U.S. at 43. See also Fox, 556 U.S. at 537 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past.").

When an agency changes position, it must display awareness that it is changing position, confront the factual findings underlying the prior position, and assess the serious reliance interests the prior position engendered. FCC v. Fox Television Stations; Encino Motorcars; DHS v. Regents; FDA v. Wages & White Lion Investments. The Final Rule does none of this. A decade of enforcement taught registered market participants to build compliant businesses, taught states to calibrate their own programs to the federal baseline, and taught investors that the Howey framework governed. The Release neither acknowledges those reliance interests nor explains why the businesses, states, and investors who took the Commission at its word must now absorb the full cost of its reversal.[70]

The reliance interests include sovereign ones. The Rule deploys its "qualified purchaser" definition to displace state blue-sky review of exempt offerings, a preemption sustained in Lindeen only on an express congressional delegation, and only under a deference regime that no longer exists, as Part I.A details. States

[70] 556 U.S. at 515–16; 579 U.S. at 221–22; 591 U.S. at 30–33; 604 U.S. 129 (2025).

calibrated their investor-protection programs to the federal baseline for a decade; the Release neither quantifies nor acknowledges what their displacement will cost.[71]

Wages & White Lion is instructive for what it does not permit: the agency prevailed there only because it had never taken a definitive prior position. No such escape is available to a Commission whose prior position fills the pleadings of more than two hundred enforcement actions. And State Farm itself was a deregulation case in which the Supreme Court vacated a rescission of protections, so the standard of review does not soften because an agency is removing safeguards rather than adding them.[72]

Regents adds an independent requirement: an agency reversing course must consider obvious alternatives within its authority short of total reversal. Obvious alternatives existed: conditional exemptive relief tied to disclosure undertakings, offering-size limits, phased pilots, or coordination with the legislation the Chairman himself declared indispensable. The Release considers none of them. And Wages & White Lion confirms that an agency may not obscure a change of position by

[71] Securities Act § 18(b)(3), 15 U.S.C. § 77r(b)(3); Lindeen, 825 F.3d at 656–58; Loper Bright, 603 U.S. at 412–13; Release Nos. 33-11434; 34-106150, Questions 135, 139 & 144.
[72] Wages & White Lion, 604 U.S. 129; State Farm, 463 U.S. at 34, 46–57.

recharacterizing its prior conduct: the Release's silence about a decade of enforcement is precisely such obscuring.[73]

C. The Release's Foundational Premises Are False.

The Release rests on three premises (transformative technology, financial inclusion, decentralization), each refuted by the record, much of it the industry's own. An agency "entirely fail[s] to consider an important aspect of the problem" when its foundational factual premises collapse on inspection. State Farm, 463 U.S. at 43.[74]

The largest technology companies are spending on the order of $700 billion this year on artificial-intelligence infrastructure and effectively nothing on blockchain; their annual reports do not mention the technology even as a risk factor.

The enterprise graveyard. This is not a case of a young technology awaiting adoption. Blockchain is roughly seventeen years old, ancient by technology standards; the iPhone conquered the planet in less time, and the world's most

[73] Regents, 591 U.S. at 30–33; Wages & White Lion, 604 U.S. 129.

[74] U.S. Dep't of the Treasury, Illicit Finance Risk Assessment of Decentralized Finance (Apr. 2023), https://home.treasury.gov/news/press-releases/jy1391; John Reed Stark, 10 Critical Considerations for the SEC Crypto Task Force (With Receipts) (Mar. 21, 2025) ("Stark Roundtable Statement"), Critical Considerations Four & Six, https://www.johnreedstark.com/wp-content/uploads/sites/180/2025/03/3-21-2025-StarkRoundtableWrittenStatement.pdf.

powerful institutions spent a decade and billions of dollars trying to make it useful.[75]

The results:

- TradeLens (IBM and Maersk's global shipping platform, with more than 300 participating organizations): shut down in 2022 because the companies could not achieve "commercial viability";[76]
- We.Trade (Deutsche Bank, HSBC, Santander, UBS, IBM): insolvent in 2022;[77]
- Marco Polo (45 global banks): insolvent in 2023;[78]
- Contour (HSBC, BNP Paribas, Citi, Standard Chartered): shut down in 2023, after processing roughly 60 to 70 transactions per month, a volume a single fax machine handled in 1985;[79]

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[75] Stark Senate Testimony, Finding Seven (enterprise failure catalogue, with primary sources).

[76] A.P. Moller-Maersk and IBM, A.P. Moller-Maersk and IBM to Discontinue TradeLens, a Blockchain-Enabled Global Trade Platform (Nov. 29, 2022), https://www.maersk.com/news/articles/2022/11/29/maersk-and-ibm-to-discontinue-tradelens (the "commercial viability" language is Maersk's own).

[77] Ledger Insights, HSBC, SocGen, IBM Backed Blockchain Company We.Trade Starts Insolvency Procedure (June 2022), https://www.ledgerinsights.com/hsbc-socgen-ibm-backed-blockchain-company-we-trade-starts-insolvency-procedure/.

[78] Global Trade Review, Marco Polo Brings in Liquidators as Funds Run Dry (Feb. 2023), https://www.gtreview.com/news/top-stories/marco-polo-brings-in-liquidators-as-funds-run-dry/.

[79] Global Trade Review, Exclusive: Contour to Shut Down as Bank Shareholders Pull Funding (Oct. 2023), https://www.gtreview.com/news/top-stories/exclusive-contour-to-shut-down-as-bank-shareholders-pull-funding/; the 60–70 transactions-per-month figure is per Ledger Insights, Blockchain Trade Finance Network Contour to Shutter (Oct. 2023), https://www.ledgerinsights.com/contour-blockchain-trade-finance-network-shutter/.

- B3i (the global insurance consortium): insolvent in 2022;[80]
- Microsoft Azure Blockchain-as-a-Service: discontinued in 2021;[81]
- The Australian Securities Exchange blockchain clearing replacement: abandoned after seven years and a write-off on the order of A$250 million, with an independent review finding the project unfit for purpose;[82]
- IBM World Wire, Meta's Diem/Libra, Everledger, and, most emblematic of the era, the Long Island Iced Tea Corporation, which renamed itself "Long Blockchain Corp.," watched its stock triple on the name change alone, never deployed any blockchain, and was delisted and charged.[83]

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[80] Insurance Journal, Industry's Blockchain Project, B3i, Ceases to Trade After Filing for Insolvency (July 29, 2022), https://www.insurancejournal.com/news/international/2022/07/29/677926.htm.
[81] Microsoft, Action Required: Migrate Your Azure Blockchain Service Data by 10 September 2021, https://azure.microsoft.com/en-us/updates/action-required-migrate-your-azure-blockchain-service-data-by-10-september-2021/; see also InfoQ, Microsoft Retires Azure Blockchain (June 2021), https://www.infoq.com/news/2021/06/microsoft-drops-azure-blockchain.
[82] Ledger Insights, ASX Pauses DLT Settlement Project, Writes Off Capital Investment (Nov. 2022), https://www.ledgerinsights.com/asx-pauses-dlt-settlement-chess/ (A$245–255 million pre-tax write-off following Accenture's independent review); see also iTnews, ASX Axes Blockchain-Based Core Replacement (Nov. 17, 2022), https://www.itnews.com.au/news/asx-axes-blockchain-based-core-replacement-587904.
[83] On Diem, see Stark Senate Testimony, Finding Seven. On Everledger, see Ledger Insights, ESG, Blockchain Traceability Startup Everledger Goes Bust (May 2023), https://www.ledgerinsights.com/everledger-bankruptcy-esg-blockchain-traceability/. On Long Blockchain Corp., see SEC Press Release No. 2021-121 (July 9, 2021) (insider-trading charges arising from the name-change announcement).

Gartner found that only about 5% of enterprise blockchain projects ever reach production, and that 90% of those require replacement within two years; industry analyses estimate that over $3 trillion of announced blockchain initiatives have been quietly retired.[84] Peer-reviewed and government technical evaluations consistently find that adding blockchain to a system increases latency dramatically while reducing throughput: a database, in other words, that is slower, costlier, and harder to fix, whose sole distinguishing feature (decentralized trustlessness) is the first thing every serious enterprise deployment removes. In 2022, more than 1,500 computer scientists and technologists, including some of the most celebrated engineers alive, wrote to Congress stating that blockchain is "poorly suited for just about every purpose currently touted as a present or potential source of public benefit."[85]

Of roughly 25 million tokens ever created, more than 13 million are dead. And in the memecoin segment, roughly two of every three investors (988,905 people)

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[84] Stark Senate Testimony, Finding Seven (collecting the Gartner production-rate analysis, the replacement-rate figure, and the retirement estimates).

[85] Letter from 1,500+ Computer Scientists, Software Engineers, and Technologists to U.S. Congressional Leadership (June 1, 2022), http://www.johnreedstark.com/wp-content/uploads/sites/180/2025/06/Concerned.Tech-Letter.pdf; Stark Senate Testimony, Finding Seven.

lost $3.81 billion in the aggregate, while promoters collected $636 million in trading fees regardless of outcome.

The Release also never engages the structural objection in the record: in an asset class that generates no cash flows, returns to early holders are necessarily funded by later entrants: the structure the securities laws were written to police, and the reason the Bank for International Settlements has described the crypto ecosystem as "largely self-referential." The first case in the modern enforcement line, SEC v. Shavers, was a Bitcoin Ponzi scheme.[86]

These premises are not contested policy judgments; they are testable factual claims, and the record answers them. Concentration data refute the decentralization premise: token ownership, validation capacity, and exchange volume are each concentrated in a handful of intermediaries. And the financial-inclusion premise inverts the record: what the Release celebrates as inclusion, the data document as predation. The industry aimed its marketing at the communities historically excluded from traditional finance, and the campaign worked: by 2021, Black adults were

[86] Shavers, 2013 WL 4028182 (investments of bitcoin are investments of money under Howey); Bank for Int'l Settlements, The Crypto Ecosystem: Key Elements and Risks (2023) (ecosystem is "largely self-referential" and "does not finance real economic activity"); BIS Bulletin No. 69 (same).

markedly more likely than white adults to hold crypto, and by 2022 one in four Black Americans owned it, against roughly one in seven white Americans.[87] The timing is the indictment. JPMorgan Chase Institute data drawn from nearly five million checking accounts show that ownership more than quadrupled during the pandemic run-up; that new buyers entered in herds at price peaks, the median buyer purchasing with bitcoin near $43,900, an asset worth less than half that by mid-2022; and that lower-income purchasers systematically bought later, and at higher prices, than higher-income purchasers.[88] The communities recruited last and sold to at the top were the communities least able to absorb the loss. Congressional testimony has a name for this pattern, familiar from the subprime era: predatory inclusion, the marketing of wealth-building promises to low-income and minority communities through products engineered to transfer their wealth away.[89] An agency may choose

[87] Pew Research Center, 16% of Americans Say They Have Ever Invested In, Traded or Used Cryptocurrency (Nov. 11, 2021) (18% of Black adults versus 13% of white adults); Ariel Investments & Charles Schwab, 2022 Black Investor Survey (2022) (25% of Black Americans versus 15% of white Americans owned crypto assets).
[88] JPMorgan Chase Institute, The Dynamics and Demographics of U.S. Household Crypto-Asset Use (Dec. 2022) (analyzing transfers from approximately five million active checking accounts; ownership rose from roughly 3% before 2020 to 13% by June 2022; the median purchase was made at a bitcoin price of approximately $43,900, against a price near $17,000 by June 2022; lower-income purchasers transacted at systematically worse prices than higher-income purchasers).
[89] Coincidence or Coordinated? The Administration's Attack on the Digital Asset Ecosystem: Hearing Before the H. Comm. on Financial Services, 118th Cong. (2023) (testimony describing

between reasonable views of ambiguous evidence; it may not adopt premises the evidence forecloses.

The scholarship reached the same verdict before the Commission acted. Examining the inclusion narrative claim by claim for the Brookings Institution, Tonantzin Carmona concluded that "crypto's current capabilities do not match the needs of the groups it purports to serve," that the product "carries a host of risks and drawbacks that undermine its benefits," and that its marketing to marginalized communities belongs to the tradition of payday lending and subprime mortgages: access extended on terms that reproduce the very insecurity it promises to cure.90 Michelle Singletary, the Washington Post's Loeb Award-winning personal-finance columnist, reached the same conclusion from the household ledger: crypto is not the key to Black generational wealth, because its champions were "creating wealth for themselves by selling to less sophisticated investors who are ill-equipped to recover from major losses."91 The Release engages none of this research. It repeats the inclusion narrative as though the literature refuting it, and the documented losses confirming that literature, did not exist.92

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crypto firms' targeting of low-income and minority communities with misleading wealth-building claims as "predatory inclusion" that "is reminiscent of the 2008 financial crisis").

[90] Tonantzin Carmona, *Debunking the Narratives About Cryptocurrency and Financial Inclusion*, Brookings Institution (Oct. 2022), https://www.brookings.edu/articles/debunking-the-narratives-about-cryptocurrency-and-financial-inclusion/; *see also* Tonantzin Carmona, *Crypto Was Billed as a Vehicle to Wealth. For Many Black Investors, It's Been Anything But*, CNN Opinion (Dec. 23, 2022) (situating crypto marketing within the history of "predatory inclusion").

[91] Michelle Singletary, *Crypto Is Not the Key to Black Generational Wealth*, *Wash. Post* (Apr. 26, 2023), https://www.washingtonpost.com/business/2023/04/26/cryptocurrency-black-generational-wealth/.

[92] A.P. Moller-Maersk, A.P. Moller-Maersk and IBM to Discontinue TradeLens (Nov. 29, 2022), https://www.maersk.com/news/articles/2022/11/29/maersk-and-ibm-to-discontinue-tradelens; ASX Takes A$250m Hit After Scrapping DLT-Based CHESS Replacement Project, Finextra (Nov. 17, 2022); CoinGecko, Dead Coins: How Many Cryptocurrencies Have Failed? (2026) (13.4 million of 25.2 million listed tokens no longer trading), https://www.coingecko.com/research/publications/how-many-cryptocurrencies-failed; Nansen

D. The Commission's Contemporaneous Conduct Deprives Its Findings of Any Evidentiary Basis.

While asking the public to believe that investor protections are no longer necessary, the Commission dismantled the machinery that supplied them: the enforcement program, the pending investigations, the staff, the whistleblower pipeline. In each instance the Commission itself closed the channel through which evidence of investor harm reaches the agency. Having curtailed the collection of that evidence, it cannot treat the resulting absence of evidence as proof of safety. The absence of recent enforcement evidence is the product of the Commission's own choices and cannot support a finding that the dangers it litigated for a decade have abated.[93]

The dismantling is a matter of record: standalone enforcement actions fell to 313 in fiscal 2025, down more than a quarter year over year and pacing lower still; 1,095 pending investigations were closed; roughly 871 employees, nearly a fifth of

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analysis reported in the New York Times (July 4, 2026) (988,905 losing investors; $3.81 billion in aggregate losses; $636 million in promoter trading fees); Stark Senate Testimony, Findings Seven–Nine.

[93] Stark Senate Testimony, Findings One–Three (documenting the dismissals with prejudice in Coinbase and Binance, the abandoned Ripple appeal, the closure of 1,095 investigations, fiscal year 2025 enforcement statistics, departures of approximately 871 employees, and the collapse of whistleblower awards). On the arbitration change, see Policy Statement, Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions (Sept. 17, 2025), 90 Fed. Reg. [____] (Sept. 19, 2025).

the agency, departed; and whistleblower awards collapsed. Treasury, for its part, suspended the digital-asset cash-reporting requirement of 26 U.S.C. § 6050I sixteen days after it took effect, a requirement Congress extended to digital assets in 2021, and has never proposed the implementing regulations.

Nor can the Commission's parallel initiatives be squared with the findings the statute requires. The Commission has moved to permit mandatory arbitration provisions in registrants' governing documents and campaigned to preempt or displace the state blue-sky enforcement that has historically backstopped federal oversight, conducted by the same state regulators whose sovereign reliance interests are described above. The record documents this pattern as "the Closing of Every Door," and it is the context in which the Commission has now closed the registration door by rule. The administrative record should be read whole.[94]

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[94] Stark Senate Testimony, Findings Four & Six (documenting the September 17, 2025 mandatory-arbitration policy statement and the contemporaneous dissenting statement, curtailed Fair Fund distributions, and the displacement of state blue-sky enforcement); Policy Statement, Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions (Sept. 17, 2025), 90 Fed. Reg. [____] (Sept. 19, 2025).

The bonfire has not been confined to enforcement. For example, in a single eight-page Federal Register notice, the Commission withdrew fourteen proposed investor-protection rules:[95]

1. Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies: mandatory written cybersecurity programs and incident reporting for advisers and funds.[96]
2. Cybersecurity Risk Management Rule for Broker-Dealers, Exchanges, and Other Market Infrastructure Entities: cybersecurity policies, incident reporting, and public disclosure across the market's core infrastructure.[97]
3. Safeguarding Advisory Client Assets: the overhaul of the custody rule, extending safekeeping protections to all client assets, expressly including crypto assets.[98]
4. Outsourcing by Investment Advisers: due-diligence and monitoring duties for the third-party service providers to whom advisers hand critical functions.[99]

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[95] Withdrawal of Certain Notices of Proposed Rulemaking, 90 Fed. Reg. [____] (June 12, 2025).
[96] SEC File No. S7-04-22 (withdrawn June 12, 2025).
[97] SEC File No. S7-06-23 (withdrawn June 12, 2025).
[98] SEC File No. S7-04-23 (withdrawn June 12, 2025).
[99] SEC File No. S7-25-22 (withdrawn June 12, 2025).

5. Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers: controls on artificial-intelligence-driven conflicts that steer retail investors for the firm's benefit.[100]
6. Enhanced Disclosures About Environmental, Social, and Governance Investment Practices: standardized disclosure so that funds selling ESG strategies must actually describe them.[101]
7. Regulation Best Execution: a Commission-level best-execution standard for broker-dealers handling customer orders.[102]
8. Order Competition Rule: order-by-order auction exposure for retail orders before internalization by wholesalers.[103]
9. Volume-Based Exchange Transaction Pricing for NMS Stocks: a prohibition on volume discounts that advantage the largest trading firms over everyone else.[104]
10. Regulation Systems Compliance and Integrity: expanded resilience and compliance obligations for the technology systems on which the markets run.[105]

[100] SEC File No. S7-12-23 (withdrawn June 12, 2025).
[101] SEC File No. S7-17-22 (withdrawn June 12, 2025).
[102] SEC File No. S7-32-22 (withdrawn June 12, 2025).
[103] SEC File No. S7-31-22 (withdrawn June 12, 2025).
[104] SEC File No. S7-18-23 (withdrawn June 12, 2025).
[105] SEC File No. S7-07-23 (withdrawn June 12, 2025).

11. Position Reporting of Large Security-Based Swap Positions: public reporting of outsized swap positions of the kind that concealed the Archegos collapse.[106]
12. Amendments to the Definition of "Exchange" and Regulation ATS: the expansion that would have brought communication-protocol platforms, including crypto trading systems, within exchange regulation.[107]
13. Amendments to the Consolidated Audit Trail NMS Plan: data-security enhancements for the audit trail regulators use to reconstruct market events.[108]
14. Shareholder Proposals Under Exchange Act Rule 14a-8: amendments governing when public companies may exclude shareholder proposals from their proxies.[109]

The Commission has also floated a concept release exploring the reduction of public-company reporting from quarterly to semiannual, halving the flow of information to markets, and proposed to reclassify approximately three-quarters of registered investment advisers as "small entities," lightening their regulatory obligations. And when state regulators moved to fill the vacuum the federal retreat

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[106] SEC File No. S7-32-10 (withdrawn June 12, 2025).
[107] SEC File No. S7-02-22 (withdrawn June 12, 2025).
[108] SEC File No. S7-10-20 (withdrawn June 12, 2025).
[109] SEC File No. S7-20-22 (withdrawn June 12, 2025).

created, the answer was not deference but litigation: in April 2026, the CFTC and the Department of Justice sued Arizona, Connecticut, and Illinois over those states' efforts to police prediction-market platforms. Each item sounds individually defensible; collectively, they are the methodical dimming of every light Congress installed after every prior catastrophe. Close the enforcement door; close the examination door; close the registration door; close the courthouse door; close the state-regulator door; then dim the disclosure lights on the way out. The Final Rule is the latest door.[110]

Nor is the abdication confined to crypto, a point that matters because it forecloses any suggestion that the Final Rule reflects considered, asset-class-specific judgment rather than a general retreat. In the spring of 2026, on the eve of the largest initial public offering in history, a national exchange rewrote its listing standards to create a "fast entry" pathway and remove minimum-float protections for a single mega-capitalization issuer proposing to float roughly five percent of itself, a rewrite commentators promptly dubbed a law for one company. Upon index inclusion, on

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[110] Stark Senate Testimony, Finding Six ("The Quiet Bonfire of the Rulebook"); CFTC and DOJ complaints against Arizona, Connecticut, and Illinois (filed Apr. 2, 2026); Jason Brett, Prediction Market Regulator Sues 3 States as Kalshi Wins in New Jersey, Forbes (Apr. 9, 2026), https://www.forbes.com/sites/jasonbrett/2026/04/09/prediction-market-regulator-sues-3-states-as-kalshi-wins-in-new-jersey/.

the order of $60 billion of automatic, non-discretionary buying (schoolteachers' 403(b)s, firefighters' pensions, ordinary 401(k)s) would be conscripted into a security with a sliver of float at whatever price scarcity dictates. As one prominent investor put it, indelicately but accurately: the retirement account is the exit liquidity. A Commission absorbed in dismantling protections does not police such things, and the Final Rule codifies the posture.[111]

The timing compounds the defect. The enforcement reductions, investigation closures, staff departures, and the collapse of the whistleblower pipeline all preceded the Release, and each was a Commission choice. The Release then treats the resulting quiet as evidence of a matured, safer market. At a minimum, the Commission was obligated to disclose the change in its own measurement apparatus and explain why data generated under a dismantled enforcement regime remain probative of investor risk. It did neither.[112]

E. The Public-Interest Finding Was Made by a Promoting Regulator.

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[111] Stark Senate Testimony, Finding Fifteen ("The Abdication Is General, the Non-Crypto Proof") (documenting the 2026 listing-standards rewrite, the removal of minimum-float protections, and the approximately $60 billion in automatic index-driven buying).

[112] 26 U.S.C. § 6050I; Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 80603(b)(3) (2021); IRS Announcement 2024-4 (Jan. 16, 2024), https://www.irs.gov/pub/irs-drop/a-24-04.pdf (digital assets not counted toward the Section 6050I threshold "until regulations are issued").

The public-interest finding cannot be made by an agency that is itself promoting the asset class it proposes to deregulate. As documented in the Senate testimony, the promotion is official, sustained, and specific. The Chairman has toured industry conferences as an evangelist for the asset class. He has reorganized the agency's agenda around "Project Crypto," a program he describes as ensuring that American markets move on-chain. The Commission's 2026 Unified Regulatory Agenda lists two further crypto rulemakings alongside Regulation Crypto Assets itself: one applying the broker-dealer capital, customer-protection, and recordkeeping rules to crypto assets, and one amending the market-structure rules for crypto trading on alternative trading systems and national securities exchanges. And the agency amplifies promotional narratives from official channels, including an official Commission podcast. The evangelism reached its apex four months before the Final Rule issued. On April 27, 2026, the Chairman became the first sitting Chairman in the Commission's history to address the Bitcoin Conference, the industry's flagship promotional event, appearing before more than 40,000 attendees in Las Vegas to proclaim a new era at the agency and to assure the assembled market participants, "We want to let all these different flowers bloom." The agency charged with policing these markets went to their biggest sales event and pitched.[113]

The Release's public-interest analysis nowhere accounts for the market impact of the Commission's own advocacy, an important aspect of the problem it was obligated to consider.[114]

The point is structural, not ad hominem. Sections 28 and 36 condition exemptive relief on a disinterested judgment about the public interest and investor protection. A finding rendered by an agency that simultaneously operates a

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[113] *SEC Chair Paul Atkins Tells Bitcoin Las Vegas 2026 a New Era Starts Now at the Agency*, Bitcoin.com News (Apr. 27, 2026), https://news.bitcoin.com/sec-chair-paul-atkins-tells-bitcoin-las-vegas-2026-a-new-era-starts-now-at-the-agency/ (reporting the appearance as "the first time a sitting SEC chairman has spoken at the Bitcoin conference" and quoting the Chairman); *SEC Chairman Paul Atkins Bitcoin 2026 Fireside Chat*, The Bitcoin Conference (Apr. 27, 2026) (video), https://www.youtube.com/watch?v=oIXhrz8zpOo.

[114] Atkins Statement (Aug. 18, 2026); Sidley Austin LLP, Breaking Down "Project Crypto": SEC Chairman Atkins Outlines Next Phase of Digital Asset Oversight (Nov. 2025); Stark Senate Testimony, Finding Nine. See also Paul S. Atkins, Chairman, The SEC's Approach to Digital Assets: Inside "Project Crypto" (Nov. 12, 2025), https://www.sec.gov/newsroom/speeches-statements/atkins-111225-secs-approach-digital-assets-inside-project-crypto; Office of Info. & Regulatory Affairs, Unified Agenda of Regulatory and Deregulatory Actions (2026): RIN 3235-AN38 (Crypto Assets; offer and sale of crypto assets, "potentially to include certain exemptions and safe harbors"), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202510&RIN=3235-AN38; RIN 3235-AN48 (amendments to Rules 15c3-1, 15c3-3, 17a-3, and 17a-4 "to address the application of these rules to crypto assets"); RIN 3235-AN49 (Crypto Market Structure Amendments; crypto trading on alternative trading systems and national securities exchanges); see also SEC Adds Three Crypto Rules to 2026 Regulatory Agenda, The Defiant (July 8, 2026), https://thedefiant.io/converge/regulation/sec-adds-three-crypto-rules-to-2026-regulatory-agenda; Stark Senate Testimony, Finding Nine, https://www.johnreedstark.com/wp-content/uploads/sites/180/2026/07/Third-Amended-Stark-Testimony-7-27-2026.pdf.

promotional platform for the asset class is not the disinterested judgment the statute presumes, and the Release's failure even to acknowledge the tension, much less to analyze how the Commission's own advocacy has shaped the market conditions it cites, deprives the finding of the reasoned explanation the APA requires.[115]

III. THE ECONOMIC ANALYSIS FAILS SECTIONS 2(b) AND 3(f).

A. The Analysis Quantifies None of the Documented Costs.

Calendar 2025 was the worst year for crypto crime on record: $17 billion lost to hacks, scams, and fraud. The Release's economic analysis does not attempt to quantify any of it. A Commission economic analysis that ignores the documented costs of the conduct it deregulates does not "apprise itself — and hence the public and the Congress — of the economic consequences" of its rule. Business Roundtable, 647 F.3d at 1148. This Court's decision vacating the share-repurchase rule for a lesser failure controls the greater one here.[116]

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[115] Stark Senate Testimony, Finding Nine.

[116] Chamber of Commerce, 85 F.4th at 774–77. See also Chainalysis, 2026 Crypto Crime Report, https://www.chainalysis.com/reports; FBI, Public Service Announcement (Feb. 26, 2025) (attributing the Bybit theft to the DPRK), https://www.ic3.gov; Chainalysis, Inside Iran's Growing $7.8 Billion Crypto Ecosystem (2026); FBI Internet Crime Complaint Center, Elder Fraud Annual Report (2025); Stars and Stripes, Pentagon Names Final 2 Victims of Kuwait Drone Attack (Mar. 4, 2026).

Total illicit transaction volume in 2025 approached $154 billion, with sanctioned-entity activity up nearly 700 percent. In February 2025, approximately $1.46 billion was stolen from a single exchange, the largest financial theft in recorded history, attributed by the FBI to North Korea's Lazarus Group and accounting for 44 percent of the year's crypto thefts. North Korea has stolen approximately $6.75 billion since 2017, including $2.02 billion in 2025 alone, with proceeds linked by United Nations and United States assessments to its nuclear and ballistic-missile programs. Iranian-linked wallets received a record $7.78 billion in 2025, financing proxy forces and drone procurement conducted overwhelmingly in stablecoins. And in March 2026, an Iranian-designed drone killed six Army Reservists at a United States facility in Kuwait; the procurement networks behind such systems are financed in cryptocurrency. None of these figures appears in the Release's economic analysis.

The Commission cannot answer that the costs are unquantifiable. The figures are in the record: they were compiled by federal law-enforcement agencies, by blockchain-analytics firms the government itself retains, and by the Commission's own prior releases, and they were placed before the Commission in comments to which it was obligated to respond. Where a rule's central economic premise is challenged with record data, the Commission must engage the data or explain why it may lawfully disregard them; failure to do either requires vacatur. Nor may the Commission net asserted benefits (capital formation in exempt offerings) against costs it never measured. An analysis that measures asserted benefits while ignoring documented costs does not satisfy Sections 2(b) and 3(f).[117]

B. The Analysis Rests on a Traceability Assurance the Government's Own Record Refutes.

The deregulatory case reduces to a single assurance: that "the blockchain is transparent" and crypto is "more traceable than cash." On the government's own record, only a fraction of the crime is visible on-chain; the celebrated recoveries turned on captured private keys, not tracing; and mixers, privacy coins, and cross-chain bridges defeat tracing at industrial scale. Senior FBI officials, asked how often the Bureau recovers a ransomware payment once made, answer in one word: never. An analysis premised on a demonstrably false factual assurance is arbitrary and capricious.[118]

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[117] Chamber of Commerce, 85 F.4th at 774–77; Bus. Roundtable, 647 F.3d at 1148–54.
[118] U.S. Dep't of Justice, Press Release, Two Arrested for Alleged Conspiracy to Launder $4.5 Billion in Stolen Cryptocurrency (Feb. 8, 2022); U.S. Dep't of Justice, Press Release re Silk

The assurance misdescribes what a blockchain ledger records. The ledger logs transfers between addresses; it does not record who controls the addresses, what was promised off-chain, or where the off-chain books (the FTX-style spreadsheets) hide the fraud. The visible chain is the tip of the iceberg; the fraud lives below the waterline.[119]

Nor can the Commission answer that cash, too, serves criminals. In the dollar economy, fraud is a parasite on legitimate activity; in unregistered crypto markets, it is a documented market segment. And no cash instrument moves a multimillion-dollar ransom across borders in minutes, beyond the reach of any freeze order. The speed, scale, and irreversibility that make the traceability question decisive are unique to these markets.[120]

Government filings attribute the celebrated recoveries to seized private keys and cooperating custodians, not to on-chain tracing: the Bitfinex recovery turned on

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Road/James Zhong Seizure of More Than 50,000 Bitcoin (Nov. 7, 2022); OFAC, Designation of Tornado Cash (Aug. 8, 2022), and Delisting (Mar. 21, 2025), https://home.treasury.gov; Stark Senate Testimony, Finding Twelve ("The Traceability Myth").

[119] Stark Senate Testimony, Finding Twelve ("The Traceability Myth"); U.S. Dep't of the Treasury, Illicit Finance Risk Assessment of Decentralized Finance (Apr. 2023) (only a fraction of crypto crime is visible on-chain).

[120] See Chainalysis, 2026 Crypto Crime Report; U.S. Dep't of the Treasury, Illicit Finance Risk Assessment of Decentralized Finance (Apr. 2023); Stark Senate Testimony, Finding Twelve.

private keys stored in a cloud account reachable by subpoena[121], and the largest Silk Road recovery was consummated when agents found the keys on a device hidden in a popcorn tin in a bathroom closet.[122] The government did not trace its way to those fortunes; it stumbled into custody of the keys. Senior officials concede they cannot freeze digital-asset transactions in flight and that recovery generally requires "hands on a keyboard": custody of keys, which sophisticated criminals, unlike celebrity defendants, do not surrender.[123] A single mixing service laundered more than $7 billion before it was sanctioned in 2022; those sanctions were lifted in March 2025.[124] Mixing services and privacy protocols process illicit volume at industrial scale, and cross-chain bridges move proceeds across ledgers faster than legal process

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[121] Press Release, U.S. Dep't of Justice, Two Arrested for Alleged Conspiracy to Launder $4.5 Billion in Stolen Cryptocurrency (Feb. 8, 2022) (agents seized approximately 94,000 stolen bitcoin after decrypting a file in the defendant's online storage account containing the wallets' private keys).
[122] Press Release, U.S. Attorney's Office for the Southern District of New York, U.S. Attorney Announces Historic $3.36 Billion Cryptocurrency Seizure and Conviction in Connection with Silk Road Dark Web Fraud (Nov. 7, 2022) (50,676 bitcoin recovered from, among other places, a single-board computer submerged under blankets in a popcorn tin stored in a bathroom closet).
[123] Stark Senate Testimony, Finding Twelve (collecting the officials' statements on the inability to freeze digital-asset transactions in flight and the need for physical custody of private keys).
[124] Press Release, U.S. Dep't of the Treasury, U.S. Treasury Sanctions Notorious Virtual Currency Mixer Tornado Cash (Aug. 8, 2022) (mixer used to launder more than $7 billion in virtual currency since 2019); Press Release, U.S. Dep't of the Treasury, Tornado Cash Delisted (Mar. 21, 2025).

can follow.[125] The proportion of crypto crime visible on any public ledger is a fraction of reported losses, because the predicate frauds (investment scams, romance scams, elder fraud) occur off-chain and surface only in victim reports.[126] The Release adopts the traceability assurance without engaging any of this, though all of it was placed before the Commission in the comment record.[127]

The ransomware industry is not merely evidence against the traceability assurance; it is proof of but-for causation. Ransomware predates crypto assets by decades, and for decades it failed. The first documented attack, in 1989, demanded that victims mail a check to a post office box in Panama, and the crime remained a criminological footnote for twenty years because every payment channel then available (checks, wires, cash, prepaid cards) could be traced, frozen, reversed, or staked out.[128] What industrialized extortion was not better malware; it was a better way to get paid. Crypto assets supplied the first payment rail in history that moves

[125] U.S. Dep't of the Treasury, Illicit Finance Risk Assessment of Decentralized Finance (Apr. 2023), https://home.treasury.gov (documenting the use of mixers, privacy protocols, and cross-chain bridges to defeat tracing).
[126] Fed. Bureau of Investigation, Internet Crime Complaint Center, Cryptocurrency Fraud Report 2024 (reporting $9.3 billion in crypto-related fraud losses for 2024, drawn from victim complaints, with investment fraud the largest category).
[127] Stark Senate Testimony, Finding Twelve; see also the comment record cited therein.
[128] *See* Ronny Richardson & Max North, *Ransomware: Evolution, Mitigation and Prevention*, 13 Int'l Mgmt. Rev. 10 (2017) (recounting the 1989 "AIDS Trojan," which demanded payment by check mailed to a Panamanian post office box).

seven-figure sums across borders in minutes, irreversibly, to bearer addresses requiring no name, no bank, and no jurisdiction. The criminals themselves have settled the question: ransom notes do not demand dollars, euros, or gold; they demand crypto, overwhelmingly bitcoin, which accounted for 98% of crypto-denominated ransom payments, a fact three Senators put bluntly after the nation's largest medical-claims processor paid a $22 million bitcoin ransom while pharmacies went dark: ransomware payments "are almost exclusively made using cryptocurrency, typically Bitcoin."[129] But for bitcoin, there is no Colonial Pipeline shutdown, no Change Healthcare extortion, and no ransomware economy at all; the malware would remain, but the money would have nowhere to go. As one commentator framed the choice in 2021: "We can live in a world with cryptocurrency or a world without ransomware, but we can't have both."[130] If crypto

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[129] Coveware, Global Ransomware Marketplace Report, Q1 2019 (bitcoin constituted 98% of crypto-denominated ransom payments); Letter from Senators Elizabeth Warren, Bill Cassidy & Richard Blumenthal to the Cybersecurity and Infrastructure Security Agency (Apr. 30, 2024) (written after the $22 million bitcoin ransom paid in the Change Healthcare attack); Press Release, U.S. Dep't of Justice, Department of Justice Seizes $2.3 Million in Cryptocurrency Paid to the Ransomware Extortionists Darkside (June 7, 2021) (Colonial Pipeline ransom of 75 bitcoin, approximately $4.4 million).
[130] Lee Reiners, *Ban Cryptocurrency to Fight Ransomware*, *Wall St. J.* (May 25, 2021).

were readily traceable, the tens of thousands of ransomware operators collecting billions annually would be getting caught. They are not.

And the myth is not a harmless simplification. It is the analytical predicate for the entire deregulatory project, the assurance that lets the Release wave away the crime ledger, and it has been publicly refuted on the government's own record since 2022. An agency may not rest a public-interest finding on an assurance that is false and that the officials repeating it have every reason to know is false.[131]

C. The Rule Manufactures the Systemic Risk It Declines to Analyze.

When crypto erased $2.2 trillion in 2022, the Bank for International Settlements found "little discernible impact" on the broader financial system, because specific regulatory firewalls contained the damage.[132]

Each has since been removed, by name and by date: the Commission's accounting barrier (SAB 121) rescinded on January 23, 2025, three days into the administration; the FDIC's prior-notification requirement (FIL-16-2022) rescinded

[131] Stark Senate Testimony, Finding Twelve ("The Traceability Myth"); John Reed Stark, Crypto-Traceability: Don't Believe the Hype (Nov. 8, 2022), https://www.johnreedstark.com/publications/crypto-traceability-dont-believe-the-hype/ (dismantling the traceability claim on the public record since 2022, before the current administration).

[132] Bank for Int'l Settlements, *Crypto Shocks and Retail Losses*, BIS Bulletin No. 69 (Feb. 20, 2023), https://www.bis.org/publ/bisbull69.htm.

March 28, 2025; the OCC's written-non-objection requirement (Interpretive Letter 1179) rescinded March 7, 2025; the Federal Reserve's supervisory letters (SR 22-6 and SR 23-8) rescinded April 24, 2025; the Labor Department's 401(k) "extreme care" warning rescinded May 28, 2025, followed by an executive order opening the $8.7 trillion defined-contribution market to digital assets; and the Justice Department's National Cryptocurrency Enforcement Team disbanded. The Final Rule now removes the securities-law perimeter at the precise moment crypto is being hard-piped into banks, payments, and retirement savings. The Release considers none of this cumulative exposure, the same failure to consider related, contemporaneous deregulatory action that required remand of the Commission's securities-lending rules.[133]

D. The Analysis Ignores the Rule's Distributional Costs.

[133] Nat'l Ass'n of Priv. Fund Managers v. SEC, No. 23-60626 (5th Cir. Aug. 25, 2025) (remanding for failure to consider cumulative economic impact). See also Bank for International Settlements, Crypto Shocks and Retail Losses, BIS Bulletin No. 69 (Feb. 20, 2023) ("little discernible impact"), https://www.bis.org/publ/bisbull69.htm; SEC Staff Accounting Bulletin No. 122 (Jan. 23, 2025) (rescinding SAB No. 121); FDIC FIL-7-2025 (Mar. 28, 2025) (rescinding FIL-16-2022); OCC Interpretive Letter No. 1183 (Mar. 7, 2025) (rescinding No. 1179); Bd. of Governors of the Fed. Reserve Sys., Press Release (Apr. 24, 2025) (rescinding SR 22-6 and SR 23-8); U.S. Dep't of Labor, Compliance Assistance Release No. 2025-01 (May 28, 2025) (rescinding No. 2022-01); Exec. Order No. 14330, 90 Fed. Reg. 38921 (Aug. 12, 2025); Memorandum from the Deputy Attorney General, Ending Regulation by Prosecution (Apr. 7, 2025).

Finally, the analysis is silent about who bears the losses it declines to quantify. The record documented $2.8 billion in reported annual crypto-fraud losses among Americans over sixty (reported losses being, by the government's own account, a fraction of actual losses) and documented that unregistered crypto offerings are marketed most intensively to the households least able to absorb them. Sections 2(b) and 3(f) do not permit the Commission to treat retail losses as a rounding error in a capital-formation calculus, and the APA does not permit it to omit them entirely.[134]

IV. THE PROCESS BY WHICH THE RULE ISSUED COMPOUNDS ITS DEFECTS.

The noticed open meeting was cancelled overnight with a one-word notice claiming a "scheduling conflict," and the 326-page release issued days later without any public deliberation. The comment period afforded was inadequate to the Release's breadth, and the Commission failed to respond to significant comments documenting each defect above, the precise failure for which this Court has already vacated one Commission rule.[135]

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[134] FBI Internet Crime Complaint Center, Elder Fraud Annual Report (2025), https://www.ic3.gov; Chainalysis, 2026 Crypto Crime Report; Stark Senate Testimony, Findings Eleven & Sixteen ("The Human Ledger").

[135] Chamber of Commerce, 85 F.4th at 774–77. See also Reuters, US Securities Regulator Cancels Meeting on Crypto Rules (Aug. 13, 2026), https://www.reuters.com/world/us-securities-

The open meeting was noticed for August 14, 2026; the cancellation came late the night before; and the Release, comprising two novel exemptions, a definitional safe harbor reaching two statutes, and amendments across six parts of the Code of Federal Regulations, issued four days later. The administrative record should disclose what occurred between August 13 and August 18. Commenters requested 120 days to respond; the Commission allowed 60.

The comment period compounds the problem. The Release restructures the offering framework for an entire asset class and rests on economic premises whose refutation requires data assembly; the 120 days commenters requested comported with the Commission's historical practice for rulemakings of comparable breadth, and the 60 days allowed served no statutory deadline; the only apparent constraint was the Commission's preference for speed. These process failures are not harmless. They produced the unresponded-to comments and the unengaged record evidence that independently condemn the Rule on the merits.[136]

V. THE FINAL RULE MUST BE VACATED.

regulator-cancels-meeting-vote-crypto-rules-2026-08-13; 5 U.S.C. § 552b (Government in the Sunshine Act).

[136] Reuters, US Securities Regulator Cancels Meeting on Crypto Rules (Aug. 13, 2026) (Commission attributing the cancellation to "a scheduling conflict"); 5 U.S.C. § 552b.

Under Section 706 of the APA, when a court holds that agency action violates the APA, it "'shall'—not may—'hold unlawful and set aside' [the] agency action." Nat'l Ass'n of Priv. Fund Managers, 103 F.4th at 1114. The defects identified above are not severable: the absence of statutory authority infects every operative provision, and the unmakeable findings and defective economic analysis pervade the whole. Vacatur, not remand without vacatur, is the required remedy, and it requires only one petitioner with one injury.[137]

Remand without vacatur would be inappropriate. That disposition is reserved for cases in which there is a serious possibility the agency can substantiate its decision on remand and vacatur would be unduly disruptive. Neither condition holds. The authority defect cannot be cured by better explanation, and the findings defect cannot be cured on a record the Commission itself wrote in the opposite direction. Nor is vacatur disruptive: it restores the legal regime that governed these markets for a decade, the regime the Commission enforced in more than two hundred

[137] 5 U.S.C. § 706(2).

actions and the courts uniformly sustained, while Congress completes the legislative process the Chairman has conceded is indispensable.[138]

CONCLUSION

For the foregoing reasons, the petition for review should be granted and the Final Rule vacated in its entirety.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains [_____] words, excluding the parts exempted by Rule 32(f). This brief complies with the typeface and type-style requirements of Rules 32(a)(5) and 32(a)(6) because it has been prepared in a

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[138] Cf. Chamber of Commerce, 85 F.4th at 777, and Order of Dec. 19, 2023 (vacating rule after the Commission failed to cure).

proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ [Counsel of Record]

CERTIFICATE OF SERVICE

I hereby certify that on [DATE], 2026, I electronically filed the foregoing brief with the Clerk of Court using the appellate CM/ECF system, which will serve all counsel of record, including counsel for the Securities and Exchange Commission.

/s/ [Counsel of Record]