

PROBLEMS WITH RULEMAKING BY DISTRICT COURT ENFORCEMENT ACTION: THE SEC'S IMPROPER CRYPTOCURRENCY REGULATION

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INTRODUCTION

Cryptocurrencies have become a vibrant part of the global economy. Unsurprisingly, the United States is the global leader in developing and advancing cryptocurrency and blockchain technology. But as with any new technology, the rise and prominence of cryptocurrencies create both opportunities and challenges. Some of those challenges are regulatory in nature. As States, the federal government, and even many in the cryptocurrency industry agree, some regulations to ensure safety and protect consumers are necessary.

Yet an increasingly important question is: Who should be regulating? States or Congress could assign roles to various actors in our federalist system to ensure safe continued use of cryptocurrencies. Instead, the SEC has decided, without Congressional authorization, that regulating cryptocurrencies is its job—and has decided to take on that new role without following the Administrative Procedure Act.

Rather than going through notice-and-comment rulemaking, the SEC has taken a new approach—rulemaking by district court enforcement action. Through that process, the SEC seeks to set judicial precedent adopting its view so that it could create new law without facing the normal adversarial testing that would come through traditional notice-and-comment rulemaking. In so doing, the SEC has saddled many tech startups with prohibitively expensive lawsuits and then forced them to bite their tongues through neither-admit-nor-deny consent decrees that make it impossible for the target of the action to defend itself after the fact.

For example, in *Securities and Exchange Commission v. SafeMoon LLC*,¹ the SEC went after SafeMoon, a cryptocurrency token not connected with any business. The SEC never alleges that SafeMoon's token was a stock by another name—it repeatedly uses the term “token,” and its only allegation for why the token satisfies *Howey* is that SafeMoon investors “shared equally in price increases[] or together suffered price decreases.”² Adopting that standard for defining an investment contract would give the SEC the right to regulate virtually any commodity that changes value.

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¹ 1:23-cv-08138 (E.D.N.Y.).

² Compl. ¶ 43, SEC v. SafeMoon LLC, 1:23-cv-08138 (E.D.N.Y. Nov. 1, 2023).

This is not a one-off for the SEC. The SEC website lists the dozens of enforcement actions the agency has brought against cryptocurrency sellers without tying the cryptocurrency tokens to shares in a business.³ Perhaps the SEC's vigor in choosing to regulate cryptocurrencies without following the APA's requirements makes sense: the SEC is acting far outside its assigned regulatory role. Any move toward rulemaking would draw scrutiny for the SEC's attempted *ultra vires* expansion. And especially with the Supreme Court's renewed skepticism of free-ranging federal agencies acting beyond their statutory authority,⁴ the SEC may realize that such rulemaking would be short-lived—assuming it survived a pre-enforcement challenge at all.

The challenges that have risen along with cryptocurrencies' surge in popularity are varied and complex. But almost every interested party—save the SEC itself—agrees that the SEC has no business treating cryptocurrencies as investment contracts under the Securities Act.⁵

Compounding its problems, the SEC's conduct—rulemaking by district court enforcement action—flouts the APA. Even the SEC has long acknowledged that cryptocurrencies are not investment contracts subject to their oversight. But rather than explain why it changed its mind, the agency has ignored the basic requirements of reasoned decision-making for its arbitrary and capricious campaign of scorched earth litigation.⁶

The SEC's actions do not adequately consider their consequences—potential preemption of State consumer protection laws leaving citizens without defense from predatory scammers. The SEC is not shy about claiming preemptive effect of its regulations—nor will those who States seek to pursue be shy in contending that States no longer have a proper role in a field occupied by the SEC.

The federal courts should stop the SEC's egregious regulatory overreach and hold that garden variety cryptocurrencies are not investment contracts under the Securities Act of 1934. In Part I, we discuss the basics of cryptocurrencies. In Part II, we make two overarching arguments. The first (in Section II.A) is that the major questions doctrine and federalism canons require a clear statement because the SEC is entering a domain it has never regulated before and because the SEC is asserting authority over a large swath of the American economy. The second (in Section II.B) is that ordinary cryptocurrencies are not investment contracts under *Howey*. Not only are ordinary cryptocurrencies not contracts (much less *investment* contracts), but they do not satisfy any of the three prongs of the traditional *Howey* test. In Part III, we provide concluding remarks.

³ SEC, *Crypto Assets and Cyber Enforcement Actions*, <https://perma.cc/5SGL-TF3Y>; see also *In re Wines*, SEC No. 3-21682 (2023) (involving cryptocurrency token that was functionally equivalent to fiat currency); SEC v. DeSalvo, 2:23-cv-08092 (D.N.J.).

⁴ See, e.g., *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2262 (2024) (holding that courts must “exercise independent judgment on questions of law”).

⁵ See, e.g., CFTC, *The CFTC's Role in Monitoring Virtual Currencies* (last accessed on July 25, 2024), available at <https://www.cftc.gov/digitalassets/index.htm>; Jacob Bogage, *House votes to make CFTC main crypto regulator, a win for the industry*, WASHINGTON POST (May 22, 2024); Eleanor Terrett, *Coinbase sues SEC, FDIC for information relating to crypto regulation*, FOXBUSINESS (June 27, 2024).

⁶ Cf. *Grayscale Investments, LLC v. SEC*, 82 F.4th 1239, 1249 (D.C. Cir. 2023) (finding arbitrary and capricious differential treatment of similar cryptocurrency products).

I. BACKGROUND

A. *A Primer on cryptocurrency*

Cryptocurrencies started to become popular “in 2008, . . . with the deployment of Bitcoin and the blockchain ledger.”⁷ “Cryptocurrency is any form of currency that only exists digitally.”⁸ Cryptocurrencies usually do not have a “central issuing system or regulating authority.”⁹ Instead, they rely on decentralized systems called “blockchains” that maintain records of the transactions and provide the code that underlies each cryptocurrency.¹⁰

“A blockchain is a digital database containing information (such as records of financial transactions) that can be simultaneously used and shared within a large decentralized, publicly accessible network.”¹¹ “A cryptocurrency coin [(or token)] is a coin built on its native blockchain.”¹² Coins can either be “fungible, meaning” the tokens are all identical and can be exchanged for each other, “or non-fungible, meaning each token is unique and carries a different value.”¹³

“Bitcoin was created to eliminate the need for a central monetary authority to monitor, verify and approve transactions”; it does this by using a network on which people can mine Bitcoin “using software to solve mathematical puzzles.”¹⁴ Cryptocurrencies are popular with scammers and other criminals because they can be difficult to track.¹⁵ And the recent FTX scandal should teach observers that the SEC oversight may not prevent certain fraudulent cryptocurrencies from defrauding less informed investors.

B. *The Major Questions Doctrine*

When an agency asserts newly found authority to regulate areas of broad “economic and political significance,” courts should “hesitate before concluding that Congress meant to confer such authority.”¹⁶ The major questions doctrine requires Congress to “speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”¹⁷ After all, “[e]xtraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices.”¹⁸

⁷ Paul Andersen, Note and Comment, *Will the FTX Collapse Finally Force U.S. Policymakers to Wake Up?: Regulatory Solutions for Cryptocurrency Tokens Not Classified As Securities Under the Supreme Court’s Howey Analysis*, 18 J. BUS. & TECH. L. 251, 257 (2023).

⁸ *Id.* (quotation marks omitted).

⁹ *Id.* (footnotes omitted).

¹⁰ *Id.* at 257–58 (footnote omitted).

¹¹ *Id.* at 258 (quotation marks omitted).

¹² *Id.*

¹³ *Id.* (footnotes omitted).

¹⁴ Brett Hemenway Falk & Sarah Hammer, *A Comprehensive Approach to Crypto Regulation*, 25 U. PA. J. BUS. L. 415, 419 (2023).

¹⁵ See Chelsea Pieroni, *La Crypto Nostra: How Organized Crime Thrives in the Era of Cryptocurrency*, 20 N.C.J.L. & TECH. ONLINE 111, 133–34 (2018).

¹⁶ *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)) (quotation marks omitted).

¹⁷ *Ala. Ass’n of Realtors v. Dep’t Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (per curiam) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)) (quotation marks omitted).

¹⁸ *West Virginia*, 597 U.S. at 723 (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)) (cleaned up).

Major questions cases tend to have several characteristics in common. *First*, major questions cases involve agencies asserting authority over large swaths of the American population or economy.¹⁹ *Second*, major questions cases tend to involve agencies trying to assert power in areas outside their expertise and that they had never previously regulated.²⁰ *Third*, major questions cases tend to involve an agency settling a national debate through its rulemaking authority.²¹

II. CRYPTOCURRENCIES ARE NOT INVESTMENT CONTRACTS.

Courts should find that cryptocurrencies are not investment contracts subject to the SEC regulation under the Securities Act for two fundamental reasons. *First*, the SEC's attempted arrogation of authority is a major question and violates the federalism canon. The SEC does not have clear congressional authorization to treat cryptocurrencies like investment contracts. *Second*, ordinary cryptocurrencies do not satisfy *Howey's* test. Although there are some investment vehicles that satisfy *Howey* and are labeled cryptocurrencies, that is because those so-called cryptocurrencies are investment contracts by a different name. The label should not matter in determining whether a financial instrument is an investment contract under the Securities Act.

A. *The Major Questions Doctrine and federalism canon foreclose the SEC's ability to regulate cryptocurrencies.*

1. The SEC regulating cryptocurrencies raises the major questions doctrine.

The SEC's decision to regulate cryptocurrencies has all the hallmarks of a major questions case. *First*, the SEC is trying to regulate massive portions of the economy. The cryptocurrency industry is worth "more than a trillion dollars," and "its daily trading volume is in the tens of billions of dollars."²² There are more than \$450 billion in Bitcoin in circulation alone.²³ The industry has created "hundreds of thousands of new jobs," and cryptocurrencies have the potential to take the economy to places it has never been before.²⁴ *Second*, the SEC has never asserted authority over cryptocurrencies. Even though cryptocurrencies have been around for much of two decades,²⁵ the SEC did not start taking enforcement actions against cryptocurrency

¹⁹ See, e.g., *Nat'l Fed. Indep. Bus. v. OSHA*, 595 U.S. 109, 117 (2022) (per curiam) (applying the doctrine to OSHA's vaccine mandate because it covered over 84 million people); *West Virginia*, 597 U.S. at 723–24 (EPA's attempt to regulate carbon emissions was subject to major questions scrutiny because the agency tried to assert authority over almost the entire economy); *Ala. Realtors*, 594 U.S. at 764 (invoking the major questions doctrine when evaluating the CDC's eviction moratorium because it covered "[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction").

²⁰ See, e.g., *Louisiana v. Biden*, 55 F.4th 1017, 1029–30 (5th Cir. 2022) (holding unconstitutional the federal government's vaccine mandate for government contractors because the Procurement Act had never been used to regulate public health issues); *NFIB*, 595 U.S. at 117 (a workplace safety agency trying to regulate public health for the first time); *Ala. Realtors*, 594 U.S. at 764 (the CDC, a public health agency, regulating landlord-tenant relationships).

²¹ See, e.g., *Texas v. Nuclear Reg. Comm'n*, 78 F.4th 827, 844 (5th Cir. 2023) (applying the doctrine to rules governing nuclear waste disposal—a "hotly politically contested" issue "for over half a century"); *Biden v. Nebraska*, 600 U.S. 477, 504 (2023) (hundreds of billions of dollars in student debt forgiveness that was near constant Congressional debate); *West Virginia*, 597 U.S. at 701 (regulation of carbon emissions that would resolve "how much coal-based" pollution the government would tolerate "over the coming decades").

²² Compl. ¶ 29, *Lejilex v. SEC*, 4:24-cv-00168 (N.D. Tex. Feb 21, 2024).

²³ *Id.*

²⁴ *Id.* ¶ 30.

²⁵ Andersen, *supra* note 7, at 257.

exchanges until 2022.²⁶ *Third*, the SEC is trying to stop a debate that has raged in the law reviews for years over what Congress can or should do to regulate cryptocurrencies. But Congress has the responsibility to assert its authority to control the money supply in interstate commerce.²⁷ And Congress has never tasked the SEC with doing so through rulemaking by district court enforcement action.

Because this case is a quintessential major questions case, the SEC must demonstrate it has a clear congressional authorization to regulate cryptocurrencies.

2. The SEC's attempted regulation implicates the federalism canon.

The SEC's attempt to regulate cryptocurrencies "would upset the usual constitutional balance of federal and state powers," so "federal courts [must] be certain of Congress' intent before finding that federal law overrides this balance."²⁸

Consumer protection is uniquely the States' domain. Garden variety fraud is a state law cause of action.²⁹ Meanwhile, States have enacted a bevy of laws that bar unfair or unconscionable trade practices.³⁰ But federal securities law preempts state consumer protection law in many instances.³¹ Bad faith actors will almost assuredly argue that the SEC's treatment of cryptocurrency scams precludes any state-level enforcement actions against them. So, the SEC's foray into consumer protection threatens to tear down States' delicately balanced statutory schemes and common law causes of action. And it risks not only upsetting any given State's approach to regulation but also preempting those regulations.

Because the SEC is trying to intrude on an area of the law that is uniquely within the purview of the States, it must point to "unmistakably clear" language authorizing it to do so.³² And it cannot.

3. No statute clearly authorizes the SEC to regulate the sale of cryptocurrencies.

No one contests that the SEC has general authority to prosecute people for engaging in securities fraud.³³ But general language is not enough to overcome a clear statement rule. For example, the Supreme Court in *Atascadero* refused to hold California waived its sovereign immunity, even though the California Constitution gave its citizens the general right to sue the State.³⁴ And the Court in *Gregory* refused to strike down Missouri's age limits for judges, even though the law banning age discrimination applied to the States.³⁵

²⁶ See Compl. ¶ 47, *Lejilex*, *supra*, note 22; see also *Util. Air Regul. Grp. v. EPA.*, 573 U.S. 302, 324 (2014) (noting that courts should be skeptical "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy'" (quoting *Brown & Williamson*, 529 U.S. at 159)).

²⁷ See U.S. CONST. art. I, § 8, cls. 3, 5.

²⁸ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)) (quotation marks omitted).

²⁹ See, e.g., *Bowden v. Med. Ctr., Inc.*, 845 S.E.2d 555, 563 n.10 (Ga. 2020); *Koury v. Ready*, 911 So. 2d 441, 445 (Miss. 2005); *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 155 (Iowa 1984).

³⁰ See, e.g., IOWA CODE § 537.5108; MO. REV. STAT. § 407.020.1; N.J. STAT. ANN. § 56:8-2.

³¹ See 15 U.S.C. § 77r.

³² *Gregory*, 501 U.S. at 460 (quoting *Atascadero*, 473 U.S. at 242).

³³ See 15 U.S.C. § 78u.

³⁴ 473 U.S. at 241.

³⁵ 501 U.S. at 466–47.

What is more, clear statement rules like the major questions doctrine and the federalism canon prevent Congress from “hid[ing] elephants in mouseholes.”³⁶ Here, the Securities Act’s definition of a “security” is long and includes several dozen different types of investment vehicles.³⁷ The word “investment contract” is buried in the middle of that lengthy definition.³⁸ To read the Securities Act and find that Congress allowed the SEC to regulate cryptocurrencies as investment contracts would be finding a mammoth in that mousehole. And the SEC recognizes that, which is why it has proceeded on this *ad hoc* basis of *seriatim* enforcement actions rather than through rulemaking that would exceed its authority.

B. *Precedent forecloses the SEC’s position.*

Applying longstanding precedent to the Securities Act shows that cryptocurrencies are not investment contracts. The Supreme Court has explained that investment contracts must be a contract “whereby [(1)] a person invests his money in [(2)] a common enterprise” (3) through which the investor would “expect profits solely from the efforts of the promoter or a third party.”³⁹ A financial instrument meets *Howey’s* first prong only if the investor can make “a voluntary investment choice.”⁴⁰ A financial instrument meets *Howey’s* second prong only if “the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties.”⁴¹ And a financial instrument meets *Howey’s* third prong only if someone other than the investor has “managerial” control that could “affect the failure or success of the enterprise.”⁴²

If cryptocurrencies look like a strange fit for the Supreme Court’s definition of an investment contract, it is because they are. When the average person thinks of investing in an “enterprise” they think of investing in a business. That is why the Ninth Circuit held speculating in gold futures did not create an investment contract—investing in a product involves reliance on the price of the underlying product, not someone’s business acumen.⁴³ So too with cryptocurrencies; the value of a cryptocurrency has nothing to do with the success of a business and everything to do with the price of the underlying token. Since the investor is not investing in a business, it would be weird to hold that speculating in cryptocurrencies creates an investment contract within the SEC’s jurisdiction.

1. Cryptocurrency trading does not involve contracts under *Howey*.

Howey’s test is often described as having three-prongs but there is also a fourth prong that the SEC’s approach violates—that is, that the financial instrument be *a contract*.⁴⁴ As one commentator has explained, “speculat[ing] on a global market” will not involve investment contracts “without

³⁶ *Whitman*, 531 U.S. at 468.

³⁷ 15 U.S.C. § 77b.

³⁸ *See id.*

³⁹ SEC v. W.J. Howey Co., 328 U.S. 293, 298–99 (1946).

⁴⁰ *Matassarini v. Lynch*, 174 F.3d 549, 561 (5th Cir. 1999).

⁴¹ SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 478 (5th Cir. 1974) (quoting SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 482 n.7 (9th Cir. 1973)).

⁴² SEC v. Arcturus Corp., 928 F.3d 400, 409–10 (5th Cir. 2019) (quoting *Williamson v. Tucker*, 645 F.2d 404, 418 (5th Cir. 1981)).

⁴³ *See* SEC v. Belmont Reid & Co., 794 F.2d 1388, 1391 (9th Cir. 1986).

⁴⁴ *See, e.g., Howey*, 328 U.S. at 298–99.

any post-sale obligations undertaken by the seller.”⁴⁵ In other words, the “meeting of the minds” that forms the backbone of American contract law, never happens when someone speculates in cryptocurrencies.⁴⁶

And that makes sense. Calling a stock a contract (and, by extension, an investment contract) is reasonable because there is a meeting of the minds. For example, an investor could pay Apple at an IPO in return for a share of stock representing a piece of the company’s ownership. That investor understands Apple has a duty to maximize its value to its investors. But that agreement does not exist for cryptocurrencies. There is no one to call at Bitcoin Headquarters who can allow you to buy shares of Bitcoin in exchange for Bitcoin, Inc. maximizing shareholder value. Treating a Bitcoin like a share of Apple stock is a category error. Without an underlying agreement between the purchaser and the seller there is no meeting of the minds—the fundamental requirement of a contract. That alone precludes calling cryptocurrencies investment contracts.

2. Normal cryptocurrencies fail under *Howey*, even assuming they involve a contract.

The preliminary problems take cryptocurrencies outside of *Howey*’s reach. But even if they did not, cryptocurrencies do not satisfy *Howey*.

First, there is no investment under *Howey*. “[T]here are many reasons one would buy Bitcoin or Ethereum not as an investment; the common one being to transact anonymously.”⁴⁷ If the person buying the cryptocurrency does so to use it as currency, they are not investing. By way of analogy, although someone might buy Euros because they hope they will increase in value, another person might buy Euros to buy goods on a trip to Europe. That is not investing in Euros. So too here. The person buying cryptocurrency is not investing their money because the goal is to use the cryptocurrency to make purchases, not wait for it to increase in value.

Second, there is not necessarily a common enterprise when someone buys cryptocurrency. A cryptocurrency buyer’s fortunes are not interwoven with an entity seeking an investment—nobody is seeking an investment. Bitcoin is a currency that is designed to serve as a store of value and a way to make purchases. In that way Bitcoin is like other currencies, from the Swiss Franc to the British Pound Sterling. Just as those currencies are not businesses seeking an investment, many cryptocurrencies are not businesses seeking an investment, either.

That makes sense given the reasons cryptocurrencies’ value fluctuates. With most investments, the success of the business determines the value of a given security—the value will increase during the good times and decrease during the bad times.⁴⁸ But a cryptocurrency is not a business, so it does not increase or decrease in value based on whether the business is doing well or poorly. Instead, the value of a given cryptocurrency is simply whatever the next person in line is willing to pay for it. Put differently, someone investing in a business is betting on the

⁴⁵ Matt Donovan, Note, *Ripple Effect: The SEC’s Major Questions Doctrine Problem*, 91 FORDHAM L. REV. 2309, 2319 (2023).

⁴⁶ See, e.g., *Peak v. Adams*, 799 N.W.2d 535, 544 (Iowa 2011); *Chisholm v. Ultima Nashua Indus. Corp.*, 834 A.2d 221, 225 (N.H. 2003); *Milner v. Milner*, 360 S.W.3d 519 (Tex. App. 2010), *aff’d*, 361 S.W.3d 615 (Tex. 2012); see also *id.* at 2340 (noting that the average secondary buyer—that is, someone who buys cryptocurrency off an exchange—“has no legal relationship” with whoever invented that coin).

⁴⁷ Justin Henning, Note, *The Howey Test: Are Crypto-Assets Investment Contracts?*, 27 U. MIAMI BUS. L. REV. 51, 65 (2018).

⁴⁸ See generally, e.g., *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005).

company doing well. Someone “investing” in a cryptocurrency is betting on the willingness of other people to bet on the success of the cryptocurrency. As a result, the fortunes of the investor are not interwoven with or dependent upon the fortunes of the person seeking the investment.

The SEC has argued that “the promoter[]” of the cryptocurrency can serve as the person seeking the investment for *Howey*’s second prong,⁴⁹ but that proves too much. For context, celebrities and social media influencers will promote a cryptocurrency the same way they might endorse a pair of headphones. But if that were sufficient to meet *Howey*’s second prong, then any investment advisor who recommends a specific investment would be enough, too.

Congress did not want to turn a financial instrument into an investment contract simply because someone recommended that the investor buy it. What is more, it is unclear how the influencer’s success is interwoven with the investor’s success. The influencer would (ostensibly) either receive a flat fee or a commission for the endorsement deal, while the investor’s profit would fluctuate with the value of the cryptocurrency. Because the influencer’s profits do not change with the investor’s, their success is not interwoven with the investor’s success under *Howey*.

Indeed, the case the SEC mainly relies on shows why that argument must fail. In *Securities and Exchange Commission v. International Loan Network, Inc.*, a group of people was found to have illegally sold unregistered securities.⁵⁰ But the unregistered security there was shares in a business, and the promoters of that business were the owners of that business. Rather than being a third-party influencer, the people seeking the investment were the ones who stood to profit off the investment.

Third, the profits do not come solely through the acts of a third party. There is no business, so for many cryptocurrencies no one exercises managerial control over the cryptocurrency.⁵¹ In those cases, the token’s seller and buyer set the price, even if those cryptocurrencies have a management structure. After all, buying a cryptocurrency is often a bet that other people will be willing to buy that currency later. And a cryptocurrency purchaser can influence whether people are willing to buy his tokens later by changing the price at which he is willing to sell the token. But those pricing decisions are made by the cryptocurrency owners, not a business management team.

C. Cases finding cryptocurrencies to be investment contracts are unpersuasive.

The District of Connecticut found that the cryptocurrency Paycoin was an investment contract, but that is because Paycoin was a stock.⁵² The token represented shares in the defendant company.⁵³ And no one disputes that a stock is an investment contract under *Howey*. That is also why the Southern District of New York’s reasoning in *Terraform Labs* and *Kik Interactive* is

⁴⁹ See Jerry W. Markham, *Securities and Exchange Commission vs. Kim Kardashian, Cryptocurrencies and the “Major Questions Doctrine”*, 14 WM. & MARY BUS. L. REV. 515, 540 (2023) (quoting SEC guidance).

⁵⁰ 968 F.2d 1304, 1305 (D.C. Cir. 1992).

⁵¹ See *Arcturus*, 928 F.3d at 409–10.

⁵² See *Audet v. Fraser*, 605 F. Supp. 3d 372, 394 (D. Conn. 2022).

⁵³ *Id.* at 381.

unhelpful—in both cases, a company was selling stocks by a different name.⁵⁴ A company cannot avoid the SEC regulation through clever attempts at labeling.

That distinction sounds technical, but it matters. The tokens at issue in those cases were all investments in a company. The fluctuations in the tokens' values were really fluctuations in the companies' values. That differs from the ordinary cryptocurrency. In those circumstances, the SEC is not trying to regulate the purchase and sale of traditional stocks or shares in a company. Rather, the SEC is trying to regulate cryptocurrencies generally, not tokens connected to the value of the company that issued the cryptocurrencies.

To be clear, the SEC is not powerless when someone uses the words “cryptocurrency” or “blockchain” to try to launder what would otherwise be an investment contract into a cryptocurrency. *Howey* “is to be applied in light of ‘the substance—the economic realities of the transaction—rather than the names that may have been employed by the parties.’”⁵⁵ So, the SEC's authority does not extend to all “cryptocurrencies”—it only applies to tokens that also meet the traditional definition of investment contracts.

Indeed, the nuance in this discussion highlights why the SEC's position is such a gross overreach. Like the Covid pandemic, the challenges of cryptocurrencies require “a delicate exercise of” regulatory power.⁵⁶ But “rather than a delicately handled scalpel, the [the SEC's position] is a one-size-fits-all sledgehammer that makes hardly any attempt to account for differences in” the financial instruments it is trying to regulate.⁵⁷

CONCLUSION

The SEC's decision to engage in a scorched earth campaign of rulemaking by district court enforcement action on cryptocurrencies is a decision without a basis in law. And the repercussions are most likely to be felt by States—States that do not appreciate intrusions on their sovereign police powers. Even worse, many of those effects are likely both unforeseen by the SEC and quite foreseeable—had the SEC chosen the more appropriate path of explaining itself through rulemaking. Beyond the effect on States, the SEC's unexplained arrogation of authority risks stepping far beyond the bounds that Congress authorized. And so, the SEC should tread carefully. An aggressive regime of enforcement may spur the Courts to assess the SEC's actions under the many tools at their disposal to curtail instances of federal overreach.

⁵⁴ SEC v. Terraform Labs Pte. Ltd., 2023 WL 4858299, at *13 (S.D.N.Y. July 31, 2023); SEC v. Kik Interactive Inc., 492 F. Supp. 3d 169, 177–78 (S.D.N.Y. 2020).

⁵⁵ Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel, 439 U.S. 551, 558 (1979) (quoting United Hous. Found., Inc. v. Forman, 421 U.S. 837, 851–52 (1975)).

⁵⁶ BST Holdings, LLC v. OSHA, 17 F.4th 604, 612 (5th Cir. 2021) (quoting Pub. Citizen Health Rsch. Grp. v. Aucther, 702 F.2d 1150, 1155 (D.C. Cir. 1983)) (cleaned up).

⁵⁷ *Id.*