



Comments to the Securities Exchange Commission on Amendments Regarding the Definition of ‘Exchange’ and Alternative Trading Systems.

Secretary,
Securities and Exchange Commission,
100 F Street NE, Washington, DC
20549-1090.

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To whom it may concern:

Coin Center is an independent nonprofit research and advocacy center focused on the public policy issues facing cryptocurrency technologies such as Bitcoin. Our mission is to build a better understanding of these technologies and to promote a regulatory climate that preserves the freedom to innovate using open blockchain technologies. We do this by producing and publishing policy research from respected academics and experts, educating policymakers and the media about blockchain technology, and by engaging in advocacy for sound public policy. This comment is narrowly focused on the substantial First Amendment issues raised by the proposed definition as applied to software developers and other participants in open blockchain networks.

This rulemaking aims in part to expand the definition of “exchange” in order to encompass additional financial services organizations.¹ The way it does so, however, would create an inappropriately broad standard for registration that would impose an unconstitutional prior restraint on the protected speech activities of countless software developers and technologists.

¹ Securities and Exchange Commission, “Amendments Regarding the Definition of ‘Exchange’ and Alternative Trading Systems (ATSS) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities,” 87 FR 15496, pgs. 15496-15696, March 18, 2022, <https://www.federalregister.gov/documents/2022/03/18/2022-01975/amendments-regarding-the-definiti-on-of-exchange-and-alternative-trading-systems-atss-that-trade-us>.

As we will detail in this comment, the Supreme Court has already ruled against similar unconstitutional overreach by the Commission in the context of the Investment Advisers Act,² and is primed to do so again given recent opinions dealing with data brokers and commercial speech.³ The chilling effect inherent in imposing an overly broad standard for registration, matched with severe penalties for non-compliance, will lead many creative and inventive Americans to self-censor. Therefore, the standard proposed in this rulemaking will be immediately eligible for a pre-enforcement challenge on First Amendment grounds.⁴ The SEC has, in similar contexts past, modified proposed rules to make them less restrictive as Constitutional issues became apparent.⁵ The Commission should do so again here.

The Proposed Changes and Their Effect on Software Publishers

A plain reading of the proposed rule says that in order to publish certain types of mere speech content, the speaker must first pre-register⁶ as a securities exchange or else suffer severe penalties.⁷ Facially, therefore, the proposed rule would place an unconstitutional content-based prior restraint on speech.

The constitutionally suspect parts of the newly proposed rule are those that alter the current definition of “exchange” from:

a person who “brings together orders”⁸ and “uses established, non-discretionary methods”⁹ to effectuate a trade

to:

a person who “brings together buyers and sellers”¹⁰ and “makes available” various methods for those persons to trade including “communication protocols.”¹¹

² See *infra* pages 7-16; *Lowe v. Securities & Exchange Commission*, 472 U.S. 181, 236 (1985).

³ See *infra* pages 17-19; *Sorrell, et al. v. IMS Health Inc., et al.*, 564 U.S. 552 (2011).

⁴ See *infra* pages 22-23; *Americans for Prosperity Foundation v. Bonta*, 594 U.S. ___ (2021).

⁵ See *infra* page 24; Robert S. Karmel, “The Tension Between the First Amendment and Federal Securities Laws,” Securities and Exchange Commission, remarks to the American Friends of the Hebrew University, September 14, 1979, <https://www.sec.gov/news/speech/1979/091479karmel.pdf>.

⁶ *Supra* note 1, at 15504-05; 08-12.

⁷ Including criminal penalties under Section 32(a) of the Exchange Act and civil penalties under Section 15 (B)(4)(D).

⁸ *Id.* at 15504.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

To be clear, the two most consequential shifts in this definition are (1) a change from bringing together *things* (“orders”) to bringing together *people* (“buyers and sellers”) and (2) a change from *using* certain methods (“uses”) to merely *publishing* those methods (“making available”).

The existing definition is conduct-based. One is an exchange if one engages in certain specified conduct: One “uses” methods to bring together “orders.” The proposed definition is speech-based: One is an exchange if one publishes speech that brings other persons together and affords them a set of rules enabling them to trade, *i.e.* if one merely “makes available” a “communication protocol” such that other people come together and trade.

While the constitutionality of the existing regulatory definition has not been tested in court, the fact that it places a prior restraint on conduct (“using ... methods”) rather than on speech (“making available ... protocols”) suggests that it could survive constitutional scrutiny. Laws regulating conduct, even if it is expressive conduct (*e.g.* flag burning¹² or nude dancing¹³) and even if the law impacts some speech incidental to conduct (*e.g.* a lawyer mostly speaks but must be licensed to practice law¹⁴), are judged under an intermediate scrutiny standard and are often found constitutional despite their tendency to limit otherwise protected expression.¹⁵ By contrast, laws regulating speech *qua* speech are judged under a strict scrutiny standard and are rarely found constitutional.¹⁶

Indeed, regulations imposing registration requirements or other prior restraints on mere publication rather than conduct carry a strong presumption of unconstitutionality.¹⁷

¹² *C.f. Texas v. Johnson*, 491 U.S. 397 (1989).

¹³ *City of Erie v. Pap's A.M.*, 529 US 277 (2000).

¹⁴ *C.f. Lowe v. Securities & Exchange Commission*, 472 U.S. 181, 236 (1985).

¹⁵ *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 US 557 (1980).

¹⁶ *See, generally:* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 *U. Pennsylvania L. Rev.* 2417 (1997).

¹⁷ *See:* W. Hachen, *The Supreme Court on Freedom of the Press*, 72 (1968). (“Licensing is the least tolerated form of speech restriction. Indeed, the rule against prior restraints grew directly from governmental attempts to license the press. Emerson, *The Doctrine of Prior Restraint*, 20 *LAW & CONTEMP. PROBS.* 648, 662 (1955). In the leading case of *Lovell v. City of Griffin*, 303 U.S. 444 (1938), the Court held facially invalid an ordinance that prohibited the distribution of circulars, handbooks, advertisements, or other literature without first obtaining a permit from the city manager. *See id.* at 451. Such an ordinance, the Court admonished, “strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor.” *Id.* The Court has noted that the defect in such a licensing scheme “is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence,” and, thus, one need not prove abuse to challenge the scheme. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). In *Schneider v. State*, 308 U.S. 147 (1939), decided the year after *Lovell*, the Court held invalid as a prior restraint an ordinance that required a permit for canvassing, and that allowed the Chief of Police to refuse a permit where the applicant was “not of good character or [was] canvassing for a project not free from fraud.” *Id.*

To qualify as an exchange one must meet criteria in two clauses of the current rule.¹⁸ This rulemaking amends both clauses such that neither would be conduct-based and together the definition would describe nothing beyond mere speech. In the first clause the proposed rule alters what an exchange, as defined, is “bringing together”: “orders” vs. “buyers and sellers.” In the second clause the proposed rule alters what the exchange is doing: “using” vs. “making available.” Below we briefly analyze the plain meaning of the proposed rule in each clause to make this shift from conduct to speech as clear as possible.

In the first clause of the current definition, the exchange “brings” orders together. Orders cannot move themselves; they are messages on paper or in a computer system. Someone must bring those orders together and that person will, therefore, be engaged in conduct. Bringing *people* together may also seem like conduct, but unlike orders people can move themselves. Thus a poignant wartime news broadcast might *bring together* people in a town square, or an abandoned screaming child might *bring together* people on a beach. A provocative billboard might *bring together* passersby. The plain meaning of bringing together *things* decidedly is conduct not speech because things cannot move themselves, but the plain meaning of bringing together people is speech and not conduct because the speech or expression is an impetus for others to come together under their own volition.

Indeed it would be unusual to say that a jailer brings together inmates when he drags them from their cells to a common area, or that an ambulance driver brings together emergency room patients. We instinctively recoil at the notion of bringing together people through coercive conduct rather than through speech because it suggests that the people were treated like objects rather than given the choice to come together under their own power. Coercively rather than persuasively bringing people together suggests that the people were either no longer worthy of free movement (as in the case of inmates) or incapacitated (as in the case of patients). Describing people who are forcibly moving other people as bringing them together smacks of euphemism. The plain meaning of the phrase “brings together people” therefore is persuasion rather force; speech not conduct.

It is even more plain that the change from “using” to “making available” is a shift from a conduct-based definition to a speech-based definition. When one uses a recipe to bake a cake one is obviously doing something, baking a cake is conduct and not speech. When one makes a

at 158, 165. The Schneider Court implied that any requirement of advance permission would be viewed as an unconstitutional prior restraint. See *id.* at 160-65; Emerson, *supra*, at 663. For a more recent illustration of judicial intolerance of licensing, see *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 149-51 (1969).”

¹⁸ *Supra* note 1, at 15504; “and” in the rule.

cake recipe available to others, the only thing one is doing is communicating one's recipe; the "making available" is speech.

Nor does the proposed rule suggest that an exchange is "making available" some physical tool or object (for the conveying of such an object in physical form would itself be a kind of conduct). The proposed rule merely asks if the person is "making available . . . communication protocols."¹⁹ The Oxford English Dictionary defines "protocol" as "a set of rules governing the exchange or transmission of data between devices."²⁰ All that is being made available is a "set of rules." Despite the very odd phrasing, the proposed rule asks merely if someone is publishing rules and whether that publication brings together buyers and sellers of securities. As the proposed rule describes: "communication protocols ... prompt and guide buyers and sellers to communicate, negotiate, and agree to the terms of the trade."²¹

These "communications protocol systems"²² (as the rulemaking calls them) are repeatedly framed within the rulemaking as mere rules:

Protocols that a system offers may take many forms and could include: setting minimum criteria for what messages must contain; setting time periods under which buyers and sellers must respond to messages; restricting the number of persons a message can be sent to; limiting the types of securities about which buyers and sellers can communicate; setting minimums on the size of the trading interest to be negotiated; or organizing the presentation of trading interest, whether firm or non-firm, to participants.²³

Further, the proposed rulemaking emphasizes that a broad interpretation of the term would be used: "the Commission would take an expansive view of what would constitute 'communication protocols' under this prong of Rule 3b-16(a)."²⁴ Moreover, the publisher would need do nothing more than publish the protocol in order to qualify as an exchange:

As proposed, a Communication Protocol System can still meet the criteria of Exchange Act Rule 3b-16 even if it has no role in matching counterparties nor displays trading interest. In addition, neither the current rule nor the proposed amendments require

¹⁹ *Supra* note 1.

²⁰ *Protocol*, Oxford English Dictionary (online, 2021), <https://www.lexico.com/en/definition/protocol>.

²¹ *Supra* note 1.

²² *Id.* at 15506.

²³ *Id.* at 15507.

²⁴ *Id.* at 15507.

that, for a system to be an exchange, an execution occur on the system; rather, that the buyers and sellers agree to the terms of the trade on the system is sufficient.²⁵

While the proposed rulemaking acknowledges that some publishers of communications protocols will not qualify as exchanges, the stated differentiation is not based on whether the publisher is performing certain conduct in addition to publishing speech. It is, instead, a distinction between certain types of speech content: a distinction is made between publishing rules that make possible mere communication (what the rulemaking calls “general connectivity”) and publishing rules that make possible interaction between buyers and sellers.²⁶ The determining factor in the rulemaking is how the set of rules is “designed,”²⁷ *i.e.* what content choices the speaker made before publication of the rules and what views the speaker is expressing in those rules. Thus the rule is explicitly a content- and viewpoint-based prior restraint on the publication of speech.²⁸

This rule change would undoubtedly impact countless developers, publishers, and republishers who share protocols (rules in computer language) online that allow persons to trade “tokens” or other valuable digital assets.²⁹ To make this less abstract, take the following example. Buyers and sellers of several tokens (which may or may not fit the flexible test for status as securities³⁰) that are transferable on the decentralized Ethereum blockchain may use the following computer code to express non-firm trading interest:

```
"order":{  
  
  "maker":"0xaa40e9f4dadabef71c6864b04e4fbc4c01563601",  
  
  "taker":"0x00000000000000000000000000000000000000000000000000000000",  
  
  "makerFee":"0",
```

²⁵ *Id.* at 15507 note 116.

²⁶ *Id.* at 15507.

²⁷ *Id.* at 15507 (specifying a “structure **designed** for participants to communicate about buying or selling securities,” and elsewhere clarifying that “such providers are not specifically **designed** to bring together buyers and seller of securities.”) (emphases added). *And* at 15508 (Covered systems are “**designed** for securities and provide communication protocols.” and elsewhere asking if rules are “are **designed** to prevent fraud and manipulation, promote just and equitable principles of trade, and protect investors and the public interest.”).

²⁸ *See infra* viewpoint discussion on pages 19-20.

²⁹ Will Warren, “Decentralized Exchange,” *Coin Center*, October 10, 2018, <https://www.coincenter.org/education/key-concepts/decentralized-exchange/>.

³⁰ Peter Van Valkenburgh, “Framework for Securities Regulation of Cryptocurrencies,” *Coin Center*, August 2018, <https://www.coincenter.org/framework-for-securities-regulation-of-cryptocurrencies/>.

```
"takerFee": "0",  
"makerTokenAmount": "10000000000000000000",  
"takerTokenAmount": "10000000000000000000",  
"makerTokenAddress": "0xd0a1e359811322d97991e03f863a0c30c2cf029c",  
"takerTokenAddress": "0x6ff6c0ff1d68b964901f986d4c9fa3ac68346570",  
"expirationUnixTimestampSec": "1546329600",  
"feeRecipient": "0x0000000000000000000000000000000000000000",  
"Salt": "7919159343193651252432419554358523507388807587106119330801952180191  
5927235481",  
}
```

An exchange of tokens can be made by replacing the example data in these fields with data related to the buyer's and seller's relevant Ethereum addresses and their intentions to trade particular tokens at particular prices. If the message is filled out properly, signed with the relevant cryptographic keys, and broadcast on the peer-to-peer Ethereum network, it is likely that an exchange will occur between buyer and seller. More detailed instructions can be found on Coin Center's website.³¹ By filing this comment letter publicly, Coin Center has "made available" a "communications protocol" that can effectuate trades in securities.

While Coin Center did not, per se, bring together the buyers and sellers who might use this protocol, the Commission's public posting of our comment before interested parties who will read it, share it, and may thereby be brought together certainly does. Irrespective of that, the Commission's own rulemaking proposal suggests that Coin Center should register as an exchange even if it performs only some of "the activities that consist of the system that meets the criteria."³² We will not be registering, however.

³¹ *Supra* note 29.

³² *Supra* note 1 at page 15506; *see also* the rule footnote 107 ("The term 'makes available' is also intended to make clear that, in the event that a party other than the organization, association, or group of persons performs a function of the exchange, the function performed by that party would still be captured for purposes of determining the scope of the exchange under Exchange Act Rule 3b-16. In the Regulation ATS Adopting Release, the Commission stated that it will attribute the activities of a trading facility to a system if that facility is offered by the system directly or indirectly (such as where a system arranges for a third party or parties to offer the trading facility). The Commission has further recognized how a system may consist of various functionalities, mechanisms, or protocols that operate collectively to bring together the orders for securities of multiple buyers and sellers using non-discretionary methods under

Existing Precedent and Past Commission Overreach

The Commission has previously jeopardized the speech rights of Americans with an overbroad interpretation of its statutory authority, and a successful challenge to this rulemaking would not be the first opportunity for the Supreme Court to limit that authority on First Amendment grounds. In 1985, the Court was asked to rule on an overbroad application of the Investment Advisers Act in *Lowe v. Securities and Exchange Commission*.³³

Christopher Lowe was a registered investment adviser whose license was revoked for previous malfeasance. The case dealt with Lowe's continuing publication of a newsletter offering investment advice and an order from the Commission that he cease publication.³⁴ The Court found that Lowe's newsletter publication could not be enjoined because the statute exempted publication of "bona fide" newspapers and periodicals.³⁵ When asked whether a stock tip newsletter from a disreputable former investment advisor was, indeed, a "bona fide" publication under the meaning of the statute, the Court used the constitutional avoidance canon of statutory construction to presume that Congress had not intended for "bona fide" to trigger any content-based inquiry into the value of published speech, because such an inquiry would inherently be unconstitutional.³⁶ Instead, the Court held that any regularly published newsletter offering disinterested advice constituted a bona fide publication and that Lowe therefore did not qualify as an "investment advisor" under the statute and was not, therefore, subject to the Commission's authority.³⁷

The Court was unanimous in ruling for Lowe but Justice White offered a concurrence joined by two other justices. The concurrence found that Congress *had* intended to regulate newsletters such as Lowe's and refused to reinterpret the statute as exempting him from the registration requirements. Instead, the concurrence found that the Investment Adviser Act was

the criteria of Rule 3b-16(a), and how, in some circumstances, these various functionalities, mechanisms, or or protocols may be offered or performed by another business unit of the registered broker-dealer or government securities broker or government securities dealer that operates the ATS ("broker-dealer operator") or by a separate entity. These principles equally apply to an organization, association, or group of persons that arranges with another party to provide, for example, a trading facility or communication protocols, or parts thereof, to bring together buyers and sellers and perform a function of a system under Rule 3b-16. Using the term "makes available" will help ensure that the investor protection and fair and orderly markets provisions of the exchange regulatory framework apply to all the activities that consist of the system that meets the criteria of Rule 3b-16(a), notwithstanding whether those activities are performed by a party other than the organization that is providing the market place.").

³³ *Lowe v. Securities & Exchange Commission*, 472 U.S. 181, 236 (1985).

³⁴ *Id.*, page 181.

³⁵ *Id.*, page 182.

³⁶ *Id.*, page 211.

³⁷ *Ibid.*

unconstitutional when “applied to prevent persons who are unregistered (including persons whose registration has been denied or revoked) from offering impersonal investment advice through publications such as the newsletters published by petitioner.”³⁸ Moreover, Justice White found that the law went beyond the point where “professional regulation (with incidental effects on otherwise protected expression) becomes regulation of speech.”³⁹ This movement from mere professional regulation into speech regulation is exactly what is at stake with the present proposed rulemaking.

As described in the previous section, the existing rule defining exchanges for the purpose of registration no doubt significantly affects expressive conduct. Nonetheless, the existing regulatory structure may be constitutional because of its focus on professional conduct rather than mere speech, the regulation of which serves an important purpose, and the effects of which on expression are, in Justice White’s words, “incidental.”⁴⁰ The proposed rule, however, by moving the criteria for registration from “using” to “making available” and from “bringing together orders” to “bringing together buyers and sellers” no longer targets mere professional conduct; it targets speech itself. And as with the overbroad application of the Investment Advisor Act in *Lowe*, the proposed rulemaking creates an unconstitutional prior restraint on speech.

Justice White’s concurring opinion offers a precise test that we believe the current Court would adopt (for reasons discussed in the following section) to delineate between appropriate professional regulation and unconstitutional prohibitions on speech by the Commission.⁴¹ Quoting the principle in its entirety, Justice White found that

One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny. Where the personal nexus between professional and client does not exist, and a speaker does not

³⁸ (Concurring) *Id.*, page 236.

³⁹ (Concurring) *Id.*, page 230.

⁴⁰ *Id.*, page 230.

⁴¹ *Lowe v. Securities & Exchange Commission*, 472 U.S. 181, 231 (1985) (“It is for us, then, to find some principle by which to answer the question whether the Investment Advisers Act as applied to petitioner operates as a regulation of speech or of professional conduct.”)

purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that Congress shall make no law . . . abridging the freedom of speech, or of the press.⁴²

The majority in *Lowe* did not disagree with Justice White's constitutional analysis; instead, it simply interpreted the statute itself as being clearly limited to restraints on client-specific advice, *i.e.* professional conduct and not speech.⁴³ Both the majority and the concurrence therefore agree that prior restraints on publication of information outside the context of a personal nexus between professional and client would be unconstitutional. Justice White found that the statute called for such an unconstitutional restraint and was therefore unconstitutional, while the majority found that it did not and therefore held merely that the Commission's overbroad enforcement action was unconstitutional rather than the statute itself.

This, again, forms a neat parallel with the current matter at hand. The statutory definition of exchange is, indeed, very broad.⁴⁴ The proposed regulatory definition is also very broad.⁴⁵ However, like the majority in *Lowe*, the Court could find that the legislative intent was limited to professional regulation and did not allow for unconstitutional restraints on the mere impersonal publication of "communication protocols." In that case the current rulemaking would be unconstitutional but not the Exchange Act as applied, itself. However, as will be discussed in the following section, the current Court shares more with Justice White regarding the usage of the constitutional avoidance canon and the value of legislative history in statutory interpretation than it shares with the *Lowe* majority and may be more likely to find the Exchange Act itself unconstitutional as applied to publishers and non-professionals.⁴⁶

⁴² *Lowe v. Securities & Exchange Commission*, 472 U.S. 181, 232 (1985).

⁴³ *Lowe v. Securities & Exchange Commission*, 472 U.S. 181, 202 n.45 (1985) (" JUSTICE WHITE, however, post, at 221-223, n. 7, correctly observes that the statutory definition of an "adviser" encompasses persons who would not qualify as investment counsel because they are not primarily engaged in the business of rendering " continuous advice as to the investment of funds. . . ." 15 U.S.C. § 80b-2(a)(13) (emphasis added). But it does not follow, as JUSTICE WHITE seems to assume, that the term "investment adviser" includes persons who have no personal relationship at all with their customers. The repeated use of the term "client" in the statute, see n. 54, *infra*, contradicts the suggestion that a person who is merely a publisher of nonfraudulent information in a regularly scheduled periodical of general circulation has the kind of fiduciary relationship the Act was designed to regulate.")

⁴⁴ 15 U.S.C. § 78c(a)(1).

⁴⁵ *Supra* note 6.

⁴⁶ *See infra* pages 7-18.

Either way, Justice White's articulation stands as the most authoritative source for delineating acceptable professional regulation from unconstitutional prohibitions on speech in the context of securities regulation.⁴⁷ What does this principle suggest for the regulation of software publishers? When is there a "personal nexus between professional and client" in the context of decentralized exchange?

The answer is almost never.

⁴⁷ To the extent we should ignore Justice White's concurring opinion as dicta (even though the majority opinion agreed with his speech and conduct distinction in footnote 45), then we can look to the cases Justice White cited as a basis for his standard:

[T]he principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompass the licensing of speech per se or of the press. See *Thomas v. Collins*, 323 U.S. 516 (1945); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Schneider v. State*, 308 U.S. 147 (1939); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Jamison v. Texas*, 318 U.S. 413 (1943).

Lowe v. Securities & Exchange Commission, 472 U.S. 181, 229-30 (1985).

In particular, the Court in *Thomas v. Collins* clearly articulated how mandated registration of union organizers can only survive constitutional scrutiny if some conduct beyond speech is the trigger for the registration requirement:

Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed. In that context such solicitation would be quite different from the solicitation involved here. It would be free speech plus conduct akin to the activities which were present, and which it was said the State might regulate, in *Schneider v. State*, supra, and *Cantwell v. Connecticut*, supra. That, however, must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly.

And Justice Jackson wrote, with more illustrations of the division between speaking per se and professional conduct:

A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views. Likewise, the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak, urging persons to follow or reject any school of medical thought. So the state to an extent not necessary now to determine may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions. But I do not think it can prohibit one, even if he is a salaried labor leader, from making an address to a public meeting of workmen, telling them their rights as he sees them and urging them to unite in general or to join a specific union.

Thomas v. Collins, 323 U.S. 516, 544-45 (1945). See also, *Schneider v. State*, 308 U.S. 147, 60 S. Ct. 146 (1939) (holding that the government cannot ban handbills, speech, to vindicate its interest in preventing littering, conduct.). The Commission cannot ban the publication of communication protocol software, speech, to vindicate its interest in preventing unregistered securities issuance or trading, conduct.

The *Low* Standard and Decentralized Exchange Software Developers

First we should be clear what is meant by “decentralized exchange.” The term is best understood as a verb describing an action rather than a noun describing a place or institution. Abraham and Ulysses *make* a decentralized exchange. They do not *use* a decentralized exchange. If there is some entity that actively plays an institutional role in the trade, a person that clients know and trust with their trading orders, then the service is not properly referred to as a decentralized exchange. If it, nonetheless, refers to itself as “decentralized,” regulators should look at function rather than form, and the existing regulatory definition of exchange offers the Commission sufficient authority to demand that such a “decentralized in name only” (DINO)⁴⁸ exchange register as a national securities exchange or ATS.

The distinguishing feature between trading digital assets using a traditional centralized exchange and true decentralized exchanges is that the only parties to a decentralized exchange are the traders themselves. In a centralized context, traders go to a trusted third party and instruct that third party to match them with a counterparty and effectuate the trade. In a decentralized context, one person directly finds another person or a group of others who have committed to trading at a certain price and makes a reciprocal commitment. These commitments are not instructions offered to a third party, broker, clearing house, or any other sort of intermediary, in the hope and expectation that said third party will follow the instructions and effectuate the trade. These commitments are cryptographically signed messages that, once incorporated into a blockchain, become the trade itself. They are not merely message orders communicating trading intent to a person or institution that will effectuate the trade. They *are* the trade.

This is possible because a blockchain is an append-only list of signed transactions in one or more digital assets. Those assets have no actual physical form; their existence is entirely described by the list of verifiable past transaction messages on the blockchain, like a chain of title for a house. As each trader signs and publishes a new message, so “move” the assets being exchanged. Signed messages can be written such that the signatures are only valid if both parties commit to a described transaction. Thus, even without some trusted escrow provider, the parties can trade without fear their counterparty will run off with both assets rather than follow through with their end of the bargain.

Of course these traders would be unable to find each other and commit to their trades without software, internet access, and persons maintaining and compiling all this transaction data on a blockchain (persons variously referred to as miners or stakers depending on the specific

⁴⁸ Hester Peirce (@HesterPeirce), Twitter (Aug. 6, 2021, 8:31 AM) <https://twitter.com/hesterpeirce/status/1423637816492318722>.

technology employed by the blockchain network). There need to be sets of rules for when a digital signature is valid and should be incorporated into the blockchain; there need to be sets of rules and standards for how messages should be formed, stored, and relayed to other members of the peer-to-peer computer network before and after inclusion on the blockchain. In short, there will need to be lots of people writing these rule-sets and even more people programming their computers to follow these rules in order to participate.

The providers of these rule-sets and the providers of message through-put on the network, however, are nothing like the regulated intermediaries of the traditional financial system. If they are providing rules-sets, *e.g.* software, then all they are doing is publishing particular arrangements of 0s and 1s. If they are providing through-put, *e.g.* peer-to-peer internet connections and validation of blockchain data, then they are engaged in nothing more than the impersonal and rote maintenance of computers running those software-based rule-sets which automatically relay validly formed packets of internet data and validly signed cryptographic messages forming a blockchain.

The vast majority of those packets and messages will have nothing to do with decentralized exchange activities, they will more likely be about ordinary transfers of an asset from one address on the blockchain to another (*i.e.* a simple transfer of a digital asset). None of these infrastructure providers will have any reason to have specific knowledge of the economic realities or consequences of the data that they are processing beyond the default knowledge that because their computer relayed the message, the message must have conformed to the software's rules. Just as Sony had no reason to know what people chose to videotape with their VCRs, a Bitcoin or Ethereum miner has no reason to know what, specifically, people are buying or selling when they send validly signed transaction messages over their servers. Nor will they have any reason to know who, specifically, those people are. Just as it was wrong to impose copyright liability on Sony for infringing uses of its VCRs, it would be wrong to impose liability on miners who have neither knowledge nor intent to facilitate any specific activities. Sony's VCR division was not broadcasting a copyrighted film or projecting it onto a screen for an audience, it was just making tools available that some other people may use. Those other people might be infringing or they may simply be making home videos; it was none of Sony's concern. So too with the creators of decentralized exchange software and the miners who maintain the blockchain; they are not trading securities or even suggesting that people should use these tools to trade securities. They are merely making available tools for others. Those other people might use those tools to engage in securities trading but they also might merely be trading digital commodities like bitcoin and ethereum, or merely transferring them apart from any trade.

Our somewhat caricatured example earlier where Coin Center republishes a protocol for trading tokens on the Ethereum blockchain is, indeed, not meaningfully distinguishable from the effectively uncountable websites and other online repositories where decentralized exchange software can be found. All widely used software tools for decentralized exchange are released open source. That means that, aside from being mere tools that can be used by others to engage in potentially regulated activities, the author of the tool does not even retain exclusive rights to use, publish, or derive future works from the tools. The appropriate metaphor for this activity is not even publication of a “Secret Guide to Getting Rich by Trading Thorium” (still a constitutionally protected activity) but rather it would be more akin to standing on a public street corner and shouting “Anyone who wants to trade bearer shares of Apple stock should meet in the park at 8pm!” (*i.e.* publicly announcing a set of rules for coordination, while doing nothing more).

It is true that some publishers of decentralized exchange software may be doing more than just developing and publishing rules encoded as software. It may be argued that the proposed rulemaking is intended only to address those situations where there is publication *and* additional conduct. First, we would argue that in that case the rule should be narrowed to clearly exclude mere publication, and specifically define what type of conduct triggers a requirement to register. Otherwise the published rule will remain open to overbroad interpretation and will chill substantial amounts of protected expression. Second, we would argue that many of the additional actions that a decentralized exchange developer might take remain protected speech activities and do not fit Justice White’s test for regulatable professional conduct. Let’s briefly take a look at what additional activities might be involved in the decentralized exchange space to see if they are actually conduct or speech.

Maintaining a Website and/or User Interface

Sometimes the developers of the software may maintain a website where the software is displayed. That would involve paying a centralized web-hosting provider to store the relevant data or else running internet servers that host the data directly. This can rightly be contrasted with merely publishing the software as a so-called smart contract to the relevant blockchain where trades may take place. The website is hosted by distinct third parties; the smart contract code is redundantly stored on the computers of everyone who forms the peer-to-peer blockchain network. So unlike a developer who merely publishes code to the blockchain and could then be hit by a bus and the decentralized exchanges using that code would continue, the developer who maintains a centralized website is actively doing something post-publication.

The developer who is maintaining this website may even create and publish further digital content on that site (*e.g.* illustrations, buttons, forms, explanatory comments, and other user

interfaces) that makes it more intuitive for people to use that software to communicate with the peer-to-peer blockchain network where well-formed decentralized exchange transaction messages are eventually validated and stored. The fact that these software tools provide a better user interface (in the sense that they are written or designed to be more intuitive for an audience to use than mere computer code alone) should not discount the fact that they are still just speech, and merely publishing these things without some personal nexus between publisher and user should not give rise to regulatory obligations and prior restraint. After all, illustrations, catchy slogans, and other literary and artistic devices are no less speech simply because they have been embodied in an interactive computer program rather than a comic book or periodical.⁴⁹

The developer's additional content might also extend to advertisements or inducements to trade using their tools, yet even this will still be speech rather than conduct. However, it may be commercial speech and regulations limiting or conditioning its publication may be subject to intermediate rather than strict constitutional scrutiny. Nonetheless, to the extent this commercial speech is actually touting securities trading rather than merely the virtues of a particular tool for trading any digital asset, then it may be reasonably subject to the disclosure and anti-touting provisions of the securities laws, but it should not be subject to a registration requirement for operating an exchange.

Buying or Selling a Token

It is true that some of these tools require the purchase and use of a token for paying fees on a peer-to-peer network, but in almost all cases these tokens can be purchased from numerous willing sellers on the network who will generally not be the developers of the software. The conduct—buying a token—is something the trader does herself. It is not conduct that the developer is undertaking on behalf of the trader. It is also true that these tokens may be scarce (mathematically because of a finite number that exist on the blockchain) and that as demand for the token increases (presumably because people want to use it to make decentralized exchanges) the market price will also increase.

Developers of the tool may personally control a large number of these tokens and may, therefore, be enriched by that price appreciation. To the extent that this happens, however, and to the extent that the developer then realizes income from that appreciation by selling some

⁴⁹ *Brown, et al. v. Entertainment Merchants Assn. et al.*, 564 U.S. 786 (2011) <https://supreme.justia.com/cases/federal/us/564/786/>. (“Like protected books, plays, and movies, [video games] communicate ideas through familiar literary devices and features distinctive to the medium. And ‘the basic principles of freedom of speech ... do not vary’ with a new and different communication medium.”)

tokens, is this the kind of conduct that can reasonably be expected to trigger professional regulation? At no point did the developer “take[] the affairs of a client personally in hand and purport[] to exercise judgment on behalf of the client in the light of the client’s individual needs and circumstances.”⁵⁰ Indeed, the developer’s pecuniary benefit in this case is even more impersonal, even further removed from a typical professional-client relationship than an author’s benefitting from customers buying her book (in that case, at least, the author and reader are buyer and seller to each other). And in either case, this incentive scheme is not essential to the design of decentralized exchange software, much of which exists without any unique token-requirement for usage.

Creation and/or Use of Governance Tokens

It is true that participation in some types of decentralized exchange may reward participants who trade with new specialized tokens, often called “governance tokens.” Rather than the decentralized exchange software outputting merely a signed transaction on the blockchain that swaps the assets of the two traders, it can also output a signed message stating that a new blockchain transferable asset has been created according to previously described rules for rewarding active traders. If the traders publish that message to the blockchain, the record of the trade is now permanent alongside a record that shows how each trader now has a new token to their cryptographic name on the blockchain. As with any other blockchain token, the traders can now transfer or trade those tokens peer-to-peer as well. Even these rewards, however, are merely a product of the software as it runs on the personal computers of users. The software creates signed messages that can be sent to the peer-to-peer network, validated, added to the blockchain, and referenced in future transactions so long as other persons around the world are running the same software. The developer is not sending these messages or endeavoring to reward any specific parties, the users of the software perform those activities for themselves. The rewards are not the result of any personal or client-focused judgment or professional responsibility on the part of developers.⁵¹

It is also true that the holders of these reward tokens may be able to vote using the blockchain to enact proposals for changes to the software tools themselves (e.g. replace some old software rules on the blockchain with new ones). This is why these reward tokens are sometimes referred to as “governance tokens.” This is by no means essential to the operation of a decentralized exchange tool but some of them do include this feature in their software. Even in this case, however, the use of governance tokens to correct bugs or change features in the software on the blockchain is conducted by the users of the tool itself rather than a third party developer,

⁵⁰ *Supra* note 42.

⁵¹ *Supra* note 29.

although if they have tokens they may participate as well. Moreover, neither the developer(s) of the software nor the individual users in this governance token example, “purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted” as per the standard for professional conduct described by Justice White. Each token voter is simply exercising her own judgment about the relative merit or vulnerability of aspects of the software code itself in the hope that the tool will better suit their needs going forward.

Arguably, across all of the examples just offered, none of the people described have clients at all; they are either publishers of software or the users of software. This is the very reason why the usage of these tools is called “decentralized exchange” or “peer-to-peer” exchange; the exchange works without a professionalized middleman class and without any need for participants to know anything about each other except that a cryptographic signature is valid. The middlemen have been replaced with free and open source software running on peer-to-peer networks. This has obvious advantages, in that a trade can be accomplished without needing to trust the continued honest dealing of a third party. It also has costs, in that once a trade is confirmed on the blockchain no amount of personal persuasion or legal process can convince the non-existent middleman to pause or reverse the trade. As with a physical transfer of goods from an in-person buyer to an in-person seller, the regretful seller will need to track down the buyer in order to convince her to reverse the deal and hand the goods back.

Setting aside these more elaborate examples, it is important to remember that decentralized exchange software can be useful for peer-to-peer trading even if the developer does nothing more than publish her software once (on the internet or for that matter even if it was published in a physical book). In this simpler example, it is very clear that no professional conduct is occurring. These developers generally have no way of knowing who uses the software they publish. Just as a novelist may occasionally become personally acquainted with particularly amorous fans of her work, a decentralized exchange developer may take note of her software’s popularity with certain persons on social media, and yet she will remain as ignorant to the vast majority of users as any author is to most of her audience. None of these interactions between author and audience, neither the avid attendees of book signings badgering the creator with questions, nor the self-conscious subway reader with a clandestine book jacket hiding the actual book title, could credibly be described as a “personal nexus between professional and client.” Like *Lowe*, the software developer is a disinterested publisher of tools and advice.

But the proposed rulemaking does not ask if there is any nexus, it does not even predicate classification as an exchange on any kind of professional conduct or economic motivation. It merely asks if someone “makes available” sets of rules that “bring together” buyers and sellers

of securities. It asks if they are publishing a certain kind of speech without having the Commission's permission to do so.

Recent Developments Concerning Commercial Speech

The Supreme Court has changed significantly since *Lowe* in 1985, and yet *Lowe* remains the most relevant case law on the First Amendment limitations to registration requirements in securities regulation. This section will look briefly at how the broader commercial speech doctrine of First Amendment jurisprudence has changed since then and whether today's Court would be more or less likely to place hard constitutional limits on Commission overreach. Without exception the evolution of the Court favors a weaker—indeed potentially non-existent—commercial speech carve-out from strong First Amendment protections, as well as a now-flourishing disdain for the kind of flexible statutory interpretation that allowed the majority in *Lowe* to rule only on the isolated enforcement action at stake rather than the constitutionality of the law itself.

Rather than recite the full lineage of commercial speech cases since the 1980s we will focus here on one particularly relevant recent case, *Sorrell vs. IMS Health*.⁵²

In *Sorrell*, the Court articulated a surprisingly broad standard of what constitutes protected speech. It found that the mere “creation and dissemination of information” constitutes speech within the meaning of the First Amendment.⁵³ *Sorrell* dealt with a law that “on its face” enacted “content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information.”⁵⁴ The Court found that a Vermont law limiting sales of and access to records of which medicines doctors prescribe “disfavors marketing, that is, speech with a particular content” and “disfavors specific speakers, namely pharmaceutical manufacturers.”⁵⁵ Vermont contended that the sale, transfer, and use of prescriptions data was conduct and not speech, but the Court rejected this argument out of hand, adding that:

Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes. ... If the acts of ‘disclosing’ and ‘publishing’ information do not constitute

⁵² *Sorrell, et al. v. IMS Health Inc., et al.*, 564 U.S. 552 (2011).

⁵³ *Sorrell, et al. v. IMS Health Inc., et al.*, 2.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.⁵⁶

Decentralized exchange software is heavily laden with facts that advance human knowledge and allow us to conduct human affairs; it is—like any software—simply logic and math in a symbolic form. Because these tools need to provide fidelity of message integrity and a kind of provable record of the actions of software users through time (a list of signed and valid transactions) much of these rules deal with the science of cryptography, including digital signature algorithms, hash functions, and multi-party computing schemes. If the essential factual nature of discrete logarithms was not well understood, to give but one example of the mathematics essential to these cryptographic tools, we would struggle to engage in any secure electronic conversations.⁵⁷ Bank records, government secrets, and copyrighted content would all be up for grabs if not for pioneering advances in the science of applied cryptography. These are advances that, by and large, have always been best uncovered and expressed in computer code. To deny these publications protection from prior restraint under our constitutional system would be no different than denying protection to locomotive blueprints or rail gauge specifications in an earlier age.

As in *Sorrell*, a licensing requirement aimed at publishers of “communications protocol systems” is a content-based restriction on speech. Arguably, it is also, like *Sorrell*, facially a form of view-point discrimination. In *Sorrell*, as here, the suspect law identified certain types of speakers and subjected them to strict requirements and outright publication bans. In that case the viewpoint being discriminated against was not a political or religious one, it was a commercial one: the viewpoints of pharmaceutical companies and pharmaceutical advertisers. Nonetheless, the court found that by discriminating between these viewpoints and academic or non-profit publishers of similar information the law warranted heightened scrutiny. The Commission’s proposed rule facially discriminates between publishers of general purpose communications tools and publishers of trading-specific tools:

For example, systems that only provide general connectivity for persons to communicate without protocols, such as utilities or electronic web chat providers, would not fall within the communication protocols prong of the proposed rule because such providers are not specifically designed to bring together buyers and seller of securities or provide procedures or parameters for buyers and sellers for securities to interact. To the extent that such systems are designed for securities and provide communication protocols for buyers and sellers to interact and agree to the terms of a

⁵⁶ *Ibid.*

⁵⁷ Kevin S. McCurley, “The Discrete Logarithm Problem,” *Proceedings of Symposia in Applied Mathematics*, Vol. 42 (1990): pgs. 49-74, <http://www.mccurley.org/papers/dlog.pdf>.

trade, such systems would [require registration] within the criteria of Exchange Act Rule 3b-16(a) as proposed to be revised.

Despite the above statement, “systems that only provide general connectivity... such as utilities or electronic web chat providers” do, as a matter of fact, involve the publication of “communication protocols.” Indeed, any plain interpretation of “communication protocol” would be absurd if it did not encompass the “internet protocol,” or the “simple mail transfer protocol.” The practical effect of this part of the proposed rule is not to regulate people based on whether they publish a communication protocol or not (content-based discrimination) but rather whether the protocol that is published allows for communication of securities trading information or not (viewpoint discrimination). Publishers of open communications protocols for securities trading have a very distinct viewpoint: that software should be researched, invented, and published that allows persons to trade securities directly, safely, openly, peer-to-peer, and without necessary reliance on a potentially monopolistic, exploitative, or corrupt intermediary.⁵⁸ The Commission or the Court may disagree with this viewpoint, its merits, or may fear the attendant consequences for investors if said viewpoint was to become more widely held, but it cannot attempt to suffocate this viewpoint in the cradle by banning or licensing all publications that express this view.

As in *Sorrell*, the proposed rule facially favors some viewpoints (that the internet should be used for peer-to-peer general purpose communication only and that tools should be freely developed and published to build the internet accordingly), over other viewpoints (that the internet should also be used for peer-to-peer securities trading and that tools should be freely developed and published to accomplish those communications as well). As in *Sorrell*, these may not be religious or political views (although they likely have serious political ramifications when it comes to who should and should not be able to access financial markets) but they are, nonetheless, valid commercial views.

As explained above, the pecuniary interest of developers, while it may indeed exist, is far more attenuated than in the context of buyers and sellers of prescriber information in *Sorrell*. These developers *may* earn no return for publishing their software, as in the case of someone merely

⁵⁸ While bearer bonds and shares are no longer common because of tax treatment, inconvenience, counterfeiting, and common practice, there is no law or regulation that prohibits the person-to-person trading of bearer bonds or shares. A significant motivation of persons passionate about crypto technologies is the need to disintermediate transactions so that economic actors do not become wholly dependent on the honesty or incorruptibility of a corporate or government intermediary. This is as much true of mere payment transactions as it is of debt or equity transactions and numerous efforts are underway to digitize all of these transactions such that they can happen peer-to-peer without intermediaries. See e.g. Jerry Brito, "The Case for Electronic Cash 1.0," February 2019. <https://www.coincenter.org/the-case-for-electronic-cash/>

making decentralized exchange code available in open source software repositories. Other developers *may* hope or expect to profit in an indirect manner by being able to personally use their tools for material benefit or by the price appreciation of some digital asset that is related to the use of their tools by others. In neither case, however, is the publisher of the information actually being paid specifically for that information, as in *Sorrell*. And yet the speech in *Sorrell* still enjoyed full protection from prior restraint. It is hard to imagine why the speech affected by this rulemaking would be less deserving of protection, and easy to see why it may, especially in the cases of developers publishing without pecuniary benefit, be more deserving.

The Court has also shifted its view of statutory construction since *Lowe* and may be less likely to use the constitutional avoidance canon of construction to save this proposed rule, or even the Exchange Act itself from unconstitutionality.

This shift is best exemplified by the theories of statutory interpretation advanced by Justice Kavanaugh. In “Fixing Statutory Interpretation,” then-judge Kavanaugh argued that public suspicion of an impartial judiciary is warranted given that statutory interpretation often hinges on a finding that this or that legislative text is “ambiguous” and can therefore be interpreted in a way that suits the biases of the judge. After explaining why several recent high-profile cases hinged on an arbitrary determination that the relevant text was ambiguous, Kavanaugh writes,

All of these cases came down to what turns out to be an entirely personal question, one subject to a certain sort of *ipse dixit*: is the language clear, or is it ambiguous? No wonder people suspect that judges’ personal views are infecting these kinds of cases. We have set up a system where that suspicion is almost inevitable because the reality is almost inevitable.

Of course, in characterizing some of these decisions as examples of the problem, I am not in any way suggesting that the judges who authored them acted in an improper or political manner. To the contrary: most judges apply the doctrine as faithfully as possible. But too much of current statutory interpretation revolves around personally instinctive assessments of clarity versus ambiguity, as these cases amply show. It is difficult to make these assessments in a neutral, evenhanded way, or for different judges to reach the same assessments consistently. And even if judges could make threshold findings of ambiguity in a neutral way, they still would have trouble convincing the public that they were acting impartially. It is all but impossible to communicate clarity versus ambiguity determinations in a reasoned and accountable way — especially when those determinations lead directly to the results in controversial cases. Perhaps

unsurprisingly, then, over time a number of Supreme Court Justices have expressed frustration with the difficulty — and arbitrariness — of the threshold inquiry.⁵⁹

In the remainder of “Fixing Statutory Interpretation,” Kavanaugh advocates abandoning modes of statutory interpretation that rely on this threshold inquiry, is the text ambiguous? As Kavanaugh puts it,

A number of canons of statutory interpretation depend on an initial evaluation of whether the statutory text is clear or ambiguous. But because it is so difficult to make those clarity versus ambiguity determinations in a coherent, evenhanded way, courts should reduce the number of canons of construction that depend on an initial finding of ambiguity.⁶⁰

Among the three “ambiguity-dependent canons” ripe for removal as part of his project to fix statutory interpretation, Kavanaugh highlights constitutional avoidance.

In its original formulation, the constitutional avoidance canon directs courts as follows: “as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court’s] plain duty is to adopt that which will save the Act.”⁶¹

Assuming, as we do, that the Commission cannot constitutionally place a prior restraint on the mere publication of software, a court using the the constitutional avoidance canon may interpret the proposed rule as somehow more limited, perhaps allowing the Commission to keep this rule and judiciously use its discretion to apply it only in cases where the software developer also engaged in at least some de minimis professional conduct, e.g. emailing with someone about how their tool would be a good way to trade synthetic Tesla stock outside of a regulated exchange and offering personal technical support. Kavanaugh and his fellow textualist justices who now form a strong majority of the Court would likely eschew this mode of interpretation and rule directly on the question of constitutionality like Justice White in *Lowe*. As Kavanaugh described,

If the constitutional avoidance canon were jettisoned, judges could instead determine the best reading of the statute based on the words of the statute, the context, and the agreed-upon canons of interpretation. If that reading turned out to be unconstitutional,

⁵⁹ Brett M. Kavanaugh, “Fixing Statutory Interpretation,: A Review of *Judging Statutes* by Robert A. Katzmann,” *Harvard Law Review*, Vol. 129 (2016): pgs. 2118-2163, <http://cdn.harvardlawreview.org/wp-content/uploads/2016/06/2118-2163-Online.pdf>.

⁶⁰ *Id.*

⁶¹ *Id.*

then judges could say as much and determine the appropriate remedy by applying proper severability principles.

A best reading of the proposed rule, in the sense outlined by Kavanaugh, is clearly unconstitutional. It would demand that persons register with the Commission before they “make available” “communications protocols” that “bring[] together buyers and sellers” of securities. One could argue that, using the avoidance canon, we should interpret the rule as requiring some actual conduct, actively bringing together the buyers and sellers for example, but that interpretation is not reconcilable with the plain meaning of the phrase “bring together” in the context of people, which is persuasion (speech) rather than some physical action (conduct). It is also not reconcilable with the stated intent of the Commission in this rulemaking: to include within the registration requirements persons who merely make communications protocol systems available even in cases where other parties do the actual bringing together.⁶²

If the rule was in doubt the Court might also look to the statute to see if the proposed rule is merely regulatory overreach or if the Constitutional defect lies within the text of the Exchange Act itself. That definition is also unquestionably broad:

The term “exchange” means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market

⁶² *Supra* note 1 at page 15506; *see also* the rule footnote 107 (“The term ‘makes available’ is also intended to make clear that, in the event that a party other than the organization, association, or group of persons performs a function of the exchange, the function performed by that party would still be captured for purposes of determining the scope of the exchange under Exchange Act Rule 3b-16. In the Regulation ATS Adopting Release, the Commission stated that it will attribute the activities of a trading facility to a system if that facility is offered by the system directly or indirectly (such as where a system arranges for a third party or parties to offer the trading facility). The Commission has further recognized how a system may consist of various functionalities, mechanisms, or protocols that operate collectively to bring together the orders for securities of multiple buyers and sellers using non-discretionary methods under the criteria of Rule 3b-16(a), and how, in some circumstances, these various functionalities, mechanisms, or or protocols may be offered or performed by another business unit of the registered broker-dealer or government securities broker or government securities dealer that operates the ATS (“broker-dealer operator”) or by a separate entity. These principles equally apply to an organization, association, or group of persons that arranges with another party to provide, for example, a trading facility or communication protocols, or parts thereof, to bring together buyers and sellers and perform a function of a system under Rule 3b-16. Using the term “makes available” will help ensure that the investor protection and fair and orderly markets provisions of the exchange regulatory framework apply to all the activities that consist of the system that meets the criteria of Rule 3b-16(a), notwithstanding whether those activities are performed by a party other than the organization that is providing the market place.”).

place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.⁶³

Here again, we could imagine the Commission defending its proposed rule on statutory authority grounds by arguing that a person who “makes available” a “communications protocol” is “provid[ing]” “facilities.” That does appear to be a perfectly reasonable interpretation of the statute. That also means, however, that the statute itself is likely unconstitutional with respect to its application to mere publication of software or other rule-sets for trading securities.

Given *Lowe*, *Sorrel*, and the Court’s current composition and stated opinions on the avoidance canon, it is not unlikely that, if a case came to this point, the Court would find the Exchange Act itself unconstitutional as applied to mere publishers of information. As Justice Kavanaugh described, “judges could say as much and determine the appropriate remedy by applying proper severability principles.”⁶⁴ It is difficult, however, to predict what parts of the statutory exchange definition could be severed so as to leave the remaining whole free of unconstitutional prohibitions on speech. Both “market place” and “facilities” are amenable to interpretation as a metaphysical place made of abstract rules rather than a real place like a trading floor and any law demanding prior registration before one “constitutes, maintains, or provides” abstract rules in the form of software would be constitutionally fraught.

Pre-enforcement Challenges

Another recently evolving area of First Amendment case law deals with pre-enforcement challenges to unconstitutional laws or regulations. Typically, a facial challenge to a rule that is brought in advance of any actual enforcement of that rule must meet a high bar: the plaintiff must “establish that no set of circumstances exists under which the [law] would be valid,”⁶⁵ or she must show that the law lacks “a plainly legitimate sweep.”⁶⁶ As the Court ruled in *United States v. Stevens* and as it very recently reaffirmed in *Americans for Prosperity Foundation v. Bonta*, “[i]n the First Amendment context, however, we have recognized a second type of facial

⁶³ *Supra* note 44.

⁶⁴ *Supra* note 59.

⁶⁵ *United States v. Salerno*, 481 U.S. 739, 745 (1987)

⁶⁶ *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (internal quotation marks omitted).

challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.”⁶⁷

The Commission's own economic analysis estimates that the total number of “communications protocols systems” covered by the rule is 22.⁶⁸ We take this estimate as indicative of the type of institution the Commission primarily wishes to target for investor protection regulations. As we described above, however, a plain reading of the proposed definition will unavoidably encompass the independent publishers and republishers of decentralized exchange software. This category of persons is difficult to quantify, extending as it does from the hundreds of open source developers who contribute code to the software repositories where decentralized exchange software is first published, to the thousands of persons who republish and share this software on personal websites or in other publications (including Coin Center’s website) to the hundreds of thousands of persons who connect to the peer-to-peer networks on which decentralized exchange takes place and who, as an essential part of that connection, relay decentralized exchange transaction messages and smart contract code.

We do not intend to do a full accounting of the scale of this rule’s potential effects if it was interpreted as plainly written to encompass all of these persons. It is simple enough to say that the drafting is sufficiently overbroad that a significant number of its applications would be prior restraints on software publishing as compared with the statute’s plainly legitimate sweep, e.g. the 22-odd “communications protocol systems” within the Commission’s regulatory perimeter. If the Commission truly anticipates only 22 covered entities under the rule change, it should find a way to more carefully define that category. Otherwise, under the standard in *Stevens* and *Bonta*, a pre-enforcement facial challenge to the rule would be likely to succeed.

Past SEC Sensitivity to First Amendment Concerns During Rulemakings

To that end, the Commission has previously narrowed rules in order to avoid First Amendment issues. In 1979, Commissioner Roberta Karmel offered a stirring speech on the tension between the First Amendment and the Securities laws.⁶⁹ In it she described how a proposed rule modifying requirements for investment company advertising was modified before its

⁶⁷ *Americans for Prosperity Foundation v. Bonta*, No. 19-251, at *18 (July 1, 2021) (internal quotation marks omitted).

⁶⁸ *Supra* note 1 at 15586, (“The Commission estimates the total number of Communication Protocol Systems to be 22”).

⁶⁹ Roberta S. Karmel, “The Tension Between the First Amendment and Federal Securities Laws,” Securities and Exchange Commission, remarks to the American Friends of the Hebrew University, September 14, 1979, <https://www.sec.gov/news/speech/1979/091479karmel.pdf>.

finalization to eliminate “restrictions against broadcast media advertising and length.”⁷⁰ She recounted that “the First Amendment was an important influence on the Commission's determination to adopt this rule in a less restrictive form.”⁷¹

The final word over the Constitutionality of this proposed definition of exchange, as with any law subject to judicial review, can only ever come only from a court. However, we urge the Commission to follow the counsel of former Commissioner Karmel as well as current Commissioner Peirce,⁷² and to narrow the scope of the definition and avoid chilling the speech rights of Americans. That narrowing would be best accomplished by focusing on the regulation of professional conduct, as understood by Justice White in *Lowe*,⁷³ rather than the mere publication of software or other communications protocols.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Hester Peirce, “Dissenting Statement on the Proposal to Amend Regulation ATS,” Securities and Exchange Commission, January 26, 2022, <https://www.sec.gov/news/statement/peirce-ats-20220126>.

⁷³ *Supra* pages 7-18.