

Notes

REINING IN THE WILD WEST: THE ELEVENTH CIRCUIT PUSHES THE CRYPTOCURRENCY INDUSTRY TOWARDS RESPONSIBLE GOVERNANCE IN *WILDES* v. *BITCONNECT*

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I. OUTLAWS AND SHERIFFS: CRYPTO'S EMERGING THREAT AND THE SECURITIES LAWS' ATTEMPT TO CONTROL IT

FTX was a leader within the cryptocurrency industry with a \$32 billion valuation.¹ It took one week for the company to entirely unravel, resulting in the loss of billions of dollars in investor funds and the criminal prosecution of its founder.² FTX is the story of one company's dysfunction, greed, mismanagement, and fraudulent behavior.³ However, its

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1. See Andrew R. Chow, *Where Did FTX's Missing \$8 Billion Go? Crypto Investigators Offer New Clues*, TIME (Dec. 21, 2022, 4:39 PM), <https://time.com/6243086/ftx-where-did-money-go/> [<https://perma.cc/9S73-ZQU8>] (stating that FTX was "one of the most respected and trusted parts of the crypto industry" prior to its collapse); Ryan Browne, *Cryptocurrency Exchange FTX Hits \$32 Billion Valuation Despite Bear Market Fears*, CNBC (Jan. 31, 2022, 8:00 AM), <https://www.cnbc.com/2022/01/31/crypto-exchange-ftx-valued-at-32-billion-amid-bitcoin-price-plunge.html> [<https://perma.cc/QX2Z-XD42>] (noting FTX reached a \$32 billion valuation in January 2022).

2. See Max Zahn, *A Timeline of Cryptocurrency Exchange FTX's Historic Collapse*, ABC NEWS (Mar. 28, 2024, 12:08 PM), <https://abcnews.go.com/Business/timeline-cryptocurrency-exchange-ftxs-historic-collapse/story?id=93337035> [<https://perma.cc/3FDP-NBYQ>] (discussing the timing of FTX's collapse). On November 2, 2022, CoinDesk, a cryptocurrency-focused news outlet, published an article raising concerns over the strength of FTX's assets. *Id.* Within the same week, FTX halted investor withdrawals, and on November 11, 2022, the company filed for Chapter 11 bankruptcy protections. *Id.* One month later, cofounder Sam Bankman-Fried was charged in a multi-count federal fraud indictment. *Id.* The collapse of FTX resulted in \$8 billion in investor losses, and interim CEO, John Ray III, estimates that the company owes money to "more than one million people and businesses." See Chow, *supra* note 1.

3. See David Yaffe-Bellany, *New Chief Calls FTX's Corporate Control a 'Complete Failure'*, N.Y. TIMES (Nov. 17, 2022), <https://www.nytimes.com/2022/11/17/business/ftx-bankruptcy.html> [perma link unavailable] (discussing comments made by FTX's interim CEO, John Ray III, who previously served as interim CEO of Enron). Ray

collapse was not an isolated occurrence; rather, it is emblematic of an industry lacking adequate external and internal controls.⁴

“Cryptocurrency” refers to a broad group of encrypted, decentralized digital assets that utilize a blockchain.⁵ Cryptocurrencies can be created by anyone with sufficient technical skills and are made available to the public through an Initial Coin Offering (ICO) before being sold on secondary markets.⁶ Rather than relying on a central authority, cryptocurrencies function through the use of a public ledger known as a blockchain.⁷ While cryptocurrencies were intended to revolutionize

stated that he had never seen “such a complete failure of corporate control.” *Id.* FTX concentrated power among a small group of inexperienced individuals, misappropriated investor funds, used software systems to conceal the misappropriation, lacked independent governance, and failed to keep adequate financial and corporate records. *Id.*

4. See Emily Nicolle, *Crypto’s Most Influential Companies Often Follow Their Own Rules — Even After FTX’s Collapse*, BLOOMBERG (May 16, 2023, 3:29 PM), <https://www.bloomberg.com/news/features/2023-05-15/some-popular-crypto-companies-lack-boards-audits-despite-ftx-s-fall?embedded-checkout=true> [perma link unavailable] (noting that many of the sixty most influential cryptocurrency firms “lack basic guardrails”). FTX was merely one example of a firm whose lack of controls contributed to significant investor losses. See Dietrich Knauth, *Crypto Companies Crash into Bankruptcy*, REUTERS (Dec. 1, 2022, 2:30 PM), <https://www.reuters.com/technology/crypto-companies-crash-into-bankruptcy-2022-12-01/> [perma link unavailable] (discussing the collapse of Three Arrows Capital, Luna, and TerraUSD, which collectively resulted in approximately \$42 billion in investor losses).

5. See Kate Ashford & Benjamin Curry, *What Is Cryptocurrency?*, FORBES (Feb. 16, 2023, 10:52 AM), <https://www.forbes.com/advisor/investing/cryptocurrency/what-is-cryptocurrency/> [https://perma.cc/3ET4-RCSR] (“A cryptocurrency is a digital, encrypted, and decentralized medium of exchange.”); Dennis Chu, Note, *Broker-Dealers for Virtual Currency: Regulating Cryptocurrency Wallets And Exchanges*, 118 COLUM. L. REV. 2323, 2326 (2018) (“Cryptocurrencies are digital assets recorded on decentralized, public ledgers.”); Paul Vigna, *What Is Cryptocurrency, and How Does It Work?*, WALL ST. J. (Dec. 2, 2021, 5:30 AM), <https://www.wsj.com/articles/what-is-cryptocurrency-how-does-it-work-11638386626> [perma link unavailable] (“‘Cryptocurrency’ is a name given to a broad group of digital assets that started in 2009 with Bitcoin.”).

6. See Kristin N. Johnson, *Decentralized Finance: Regulating Cryptocurrency Exchanges*, 62 WM. & MARY L. REV. 1911, 1946 (2021) (noting new cryptocurrencies are constantly emerging and that original issuers include individual entrepreneurs, multinational businesses, central banks, governments, and non-profit entities); *Initial Coin Offering (ICO): Coin Launch Defined, with Examples*, INVESTOPEDIA (Apr. 30, 2024), <https://www.investopedia.com/terms/i/initial-coin-offering-ico.asp> [https://perma.cc/3XEU-D9DS] (explaining the process of an ICO and equating it to an initial public offering (IPO)); Alice Ivey, *Primary vs. Secondary Markets: Key Differences*, COIN TELEGRAPH (Mar. 15, 2023), <https://cointelegraph.com/news/primary-vs-secondary-markets-key-differences> [https://perma.cc/PH7B-P4ZB] (explaining the primary and secondary markets for cryptocurrencies). Similar to the market for other securities, for cryptocurrencies, there exists a primary market where the specific cryptocurrency is first offered to investors by the issuer, and a secondary market where the cryptocurrency is exchanged between investors, typically through the use of an exchange. *Id.* For a further discussion of exchanges and the secondary market, see *infra* note 10 and accompanying text.

7. See Chu, *supra* note 5, at 2326 (noting that ownership and transfers of cryptocurrencies are recorded on a public ledger, referred to as a blockchain); Thomas Lee Hazen, *Tulips, Oranges, Worms, and Coins—Virtual, Digital, or Crypto Currency and*

the way in which goods and services are bought and sold, their inability to sustain value has rendered them unsuitable for this original purpose.⁸ Instead, cryptocurrencies have increasingly emerged as a popular speculative investment.⁹ The exponential growth experienced within the industry can be attributed to the proliferation of cryptocurrency wallets, exchanges, and systems that make purchasing and owning cryptocurrency

the Securities Laws, 20 N.C. J.L. & TECH. 493, 496–98 (2019) (explaining that each computer can access and update the public ledger, and no single computer has ultimate control over the ledger). A blockchain links individual transactions (blocks) with previous transactions to form a chronologically ordered chain that provides record of ownership. *Id.* at 496–97; Chu, *supra* note 5, at 2326 (analogizing a blockchain to a land registry because it similarly records ownership and transfers in a chronologically ordered and publicly accessible format). The system removes the need for any third-party oversight because verifying and completing the transaction is completed by the technology itself. *Id.*; *see also* Ashford & Curry, *supra* note 5 (noting that fraud is prevented from an internal validation technique which verifies each transaction before it is recorded on a blockchain).

8. *See* Joshua Davis, *The Crypto-Currency*, NEW YORKER (Oct. 3, 2011), <https://www.newyorker.com/magazine/2011/10/10/the-crypto-currency> [perma link unavailable] (explaining that cryptocurrencies allow individuals to transfer money “directly to each other, without an intermediary,” which could eliminate the need for central banks and radically transform the ways that goods and services are purchased). *But see* NICHOLAS WEAVER, YALE L. SCH., *THE DEATH OF CRYPTOCURRENCY: THE CASE FOR REGULATION* 7 (2022), https://law.yale.edu/sites/default/files/area/center/isp/documents/weaver_death_of_cryptocurrency_final.pdf [https://perma.cc/MPS2-ULZC] (“The irreversible design and volatile nature of most cryptocurrencies makes them unsuitable for use as a payment channel.”); Fabio Panetta, Member, Exec. Bd. Eur. Cent. Bank, *Paradise Lost? How Crypto Failed to Deliver on Its Promises and What to Do About It*, Speech Before the 22nd Bank of Int’l Settlements Ann. Conf. (June 23, 2023) (explaining that the lack of “intrinsic value . . . or price stabilisation mechanisms . . . makes [unbacked cryptocurrencies] inherently highly volatile and unsuitable as a means of payment” (footnote omitted)).

9. *See* Hazen, *supra* note 7, at 494 (noting that cryptocurrency is a recent example of society’s long-held fascination with nontraditional speculative investments); *Exercise Caution with Crypto Asset Securities: Investor Alert*, SEC. & EXCH. COMM’N (Mar. 23, 2023), <https://www.sec.gov/oiea/investor-alerts-and-bulletins/exercise-caution-crypto-asset-securities-investor-alert> [https://perma.cc/58BL-ES5E] (“Investments in crypto asset securities can be exceptionally volatile and speculative The risk of loss for individual investors who participate in transactions involving crypto assets, including crypto asset securities, remains significant.”); Eswar Prasad, Opinion, *The Brutal Truth About Bitcoin*, BROOKINGS INST. (July 20, 2021), <https://www.brookings.edu/articles/the-brutal-truth-about-bitcoin/> [https://perma.cc/3NU8-CNV7] (“While Bitcoin has failed in its stated objectives, it has become a speculative investment.”). Today, the total market value of all cryptocurrencies in circulation globally stands at over \$1 trillion with approximately 41 million U.S. adults having invested in, traded, or used a cryptocurrency. *See Today’s Cryptocurrency Prices by Market Cap*, COINMARKETCAP, <https://coinmarketcap.com/> [https://perma.cc/M4BF-ZNFV] (last visited May 9, 2024) (providing real-time data on the total cryptocurrency market cap); Michelle Faverio & Navid Massarat, *46% of Americans Who Have Invested in Cryptocurrency Say It’s Done Worse Than Expected*, PEW RSCH. CTR. (Aug. 23, 2022), <https://www.pewresearch.org/short-reads/2022/08/23/46-of-americans-who-have-invested-in-cryptocurrency-say-its-done-worse-than-expected/> [https://perma.cc/EF8X-46GT] (discussing a survey showing the percentage of Americans using cryptocurrencies and the popularity of the investment among users).

comparable to the purchase and ownership of other types of securities from online broker-dealers.¹⁰

The United States has struggled to develop a cohesive and effective regulatory regime—partly because of a lack of clarity as to whether cryptocurrencies should be treated as securities, commodities, or currency.¹¹ This regulatory gap has failed to encourage responsible governance, created an environment conducive to fraud, and contributed to the collapses of various cryptocurrency issuers and exchanges.¹² These collapses have left investors facing substantial losses and searching for a private remedy.¹³ Some defrauded investors have turned to the Securities Act

10. See *Global Live Cryptocurrency Charts & Market Data*, COINMARKETCAP, <https://coinmarketcap.com/charts/> [<https://perma.cc/U5FB-5DK7>] (last visited May 9, 2024) (noting the increase in the total cryptocurrency market cap since the start of 2017); Chu, *supra* note 5, at 2327–29 (explaining cryptocurrency wallets and exchanges and their roles in expanding the cryptocurrency investor base). Cryptocurrency wallets hold an investor’s cryptocurrency—acting as the investor’s custodian. *Id.* at 2327–28. Cryptocurrency exchanges play a major role in the secondary market—not only do they act as wallets—but exchanges also allow investors to trade cryptocurrencies for other types of cryptocurrencies or for government-issued currency. *Id.* at 2328–29. Cryptocurrency exchanges, which serve the same purpose as traditional broker-dealers, have increased the ease of investing in cryptocurrency and opened up the industry to new potential investors. *Id.* at 2329.

11. See EVA SUE, CONG. RSCH. SERV., IN1205, SEC JURISDICTION AND PERCEIVED CRYPTO-ASSET REGULATORY GAP: AN FTX CASE STUDY 2 (2022), <https://crsreports.congress.gov/product/pdf/IN/IN12052> [perma link unavailable] (explaining that regulatory authority is currently fragmented between the SEC and the Commodity Futures Trading Commission (CFTC)); Frank Emmert, *Cryptocurrencies: The Impossible Domestic Law Regime?*, 70 AM. J. COMP. L. 185, 191–200 (2022) (explaining the concurrent jurisdiction held by the SEC and the CFTC). *But see* Andrew R. Chow, *The U.S. Crypto Crackdown Could Reshape the Industry*, TIME (Mar. 2, 2023, 2:14 PM), <https://time.com/6259465/sec-crypto-crackdown/> [<https://perma.cc/CC9L-TZF9>] (emphasizing that the SEC has exerted increased control over cryptocurrency under Chairman Gary Gensler).

12. See *Blockchain in Finance: Legislative and Regulatory Actions Are Needed to Ensure Comprehensive Oversight of Crypto Assets*, U.S. GOV’T ACCOUNTABILITY OFF. (June 22, 2023), <https://www.gao.gov/products/gao-23-105346> [<https://perma.cc/5MWV-H3A6>] (“Recent price crashes, bankruptcies, and fraud involving blockchain-related products and services, such as crypto assets, raised concerns about how much regulation exists now and the risks consumers face.”); TIMOTHY G. MASSAD, BROOKINGS INST., IT’S TIME TO STRENGTHEN THE REGULATION OF CRYPTO-ASSETS 2 (2019), <https://www.brookings.edu/wp-content/uploads/2019/03/Timothy-Massad-Its-Time-to-Strengthen-the-Regulation-of-Crypto-Assets-2.pdf> [<https://perma.cc/L7NX-RADE>] (“There is a gap in the regulation of crypto-assets that Congress needs to fix. The gap is contributing to fraud and weak investor protection in the distribution and trading of crypto-assets.”); Annie Lowrey, *Is Crypto Dead?*, ATLANTIC (June 17, 2023), <https://www.theatlantic.com/ideas/archive/2023/06/crypto-down-or-it-dead/674442/> [<https://perma.cc/N7DF-LM6D>] (“In the world of crypto, big firms are scams. Little firms are scams. Stable coins are scams; exchanges are scams”); Johnson, *supra* note 6, at 1915–16 (“Beyond . . . firm-specific risk-management concerns . . . the entire industry grapples with operational and systemic risks: fake bank accounts, mismanagement of customer funds, blatant theft, garden-variety fraud, and exploitative and abusive trading strategies.”).

13. See Chris Arnold, *FTX Investors Fear They Lost Everything, and Wonder if There’s Anything They Can Do*, NPR (Nov. 18, 2022, 2:13 PM), <https://www.npr.org/2022/11/18/1137492483/ftx-investors-worry-they-lost-everything-and-wonder->

of 1933 (the Securities Act)—specifically, Section 12—which allows purchasers to recover from sellers of unregistered securities or from sellers who make misrepresentations in the offer or sale of the security.¹⁴ To proceed, a plaintiff must show that the defendant meets the statutory definition of a seller under Section 12.¹⁵

Over the first five decades of the Securities Act, the circuit courts adopted differing definitions of the statutory seller.¹⁶ In *Pinter v. Dahl*,¹⁷ the Supreme Court attempted to reconcile these differences and develop a clear definition.¹⁸ The Court, however, did not accomplish its goal—it merely shifted the point of contention and created a new source of ambiguity by holding that sellers include those who engage in solicitation, while failing to define solicitation.¹⁹ Post-*Pinter*, rather than struggling

if-theres-anything-they-can [<https://perma.cc/H5ZF-6UY5>] (discussing the legal consequences of FTX’s collapse); Rachel Rosenbaum, Taylor Dunn, Karen Ye, Jaclyn Skurie & Ivan Pereira, *The Year Crypto Broke: How Customers, Investors Lost Millions and What’s Being Done*, ABC News (Jan. 26, 2023, 11:47 AM), <https://abcnews.go.com/US/year-crypto-broke-customers-investors-lost-millions/story?id=96662010> [<https://perma.cc/2S4P-GRMF>] (“[T]he major crash of the crypto market last year has brought headaches, fear and anger among the millions of people around the world who invested their savings and are left wondering whether they’ll ever see their money again.”); MASSAD, *supra* note 12, at 19 (noting that the current federal regulatory scheme makes recovery of losses more difficult because it lacks certain key investor protections, such as the requirement that investor funds be segregated).

14. See 15 U.S.C. § 771(a) (1) (2024) (imposing liability on any person who sells an unregistered security); *id.* § 771(a) (2) (imposing liability on any person who sells a security via a communication including an untrue statement). To avoid confusion, note that Section 12 refers to Section 12 of the Securities Act, formally 15 U.S.C. § 771. For an analysis of the statutory sections, see *infra* notes 32–37 and accompanying text. See, e.g., *Wildes v. BitConnect Int’l PLC*, 25 F.4th 1341, 1343 (11th Cir. 2022) (providing an example of a Section 12 case brought by cryptocurrency investors), *cert. denied sub nom. Arcaro v. Parks*, 143 S. Ct. 427 (2022).

15. See, e.g., *Pino v. Cardone Cap., LLC*, 55 F.4th 1253, 1257 (9th Cir. 2022) (“To state a claim under § 12(a) (2), a plaintiff must allege that . . . the defendant qualifies as a statutory seller or offeror” (citing *In re Daou Sys., Inc.*, 411 F.3d 1006, 1028–29 (9th Cir. 2005))), *cert. denied*, 144 S. Ct. 75 (2023) (mem.).

16. See, e.g., Robert A. Prentice, *Section 12 of the 1933 Act: Establishing the Statutory Seller*, 40 ALA. L. REV. 417, 427–37 (1989) (noting that courts struggled to define seller for purposes of Section 12(a) and discussing the differing approaches that existed among the circuits). For a discussion of the ambiguity created by the statute and the divergent approaches, see *infra* notes 46–49 and accompanying text.

17. 486 U.S. 622 (1988).

18. See *id.* at 642–54 (discussing the differing approaches among the circuits); see also Barbara Snapp Danberg, Comment, *Craftmatic Securities Litigation: Third Circuit Abandons Privity Requirement in Section 12(2) Liability*, 17 DEL. J. CORP. L. 159, 163, 174 (1992) (asserting the Supreme Court granted certiorari to resolve the circuit split regarding the scope of seller liability under Section 12).

19. See *Pinter*, 486 U.S. at 647 (defining seller as including those who engage in solicitation); Joseph E. Reece, *Would Someone Please Tell Me the Definition of the Term “Seller”: The Confusion Surrounding Section 12(2) of the Securities Act of 1933*, 14 DEL. J. CORP. L. 35, 97 (1989) (“[*Pinter*] did not clearly define ‘solicitation,’ the key word upon which the test was based.” (footnote omitted)); Allen Kent Davis, *Pinter v. Dahl: The Supreme Court’s Attempt to Redefine the “Statutory Seller” Under Section 12 of the Securities Act of 1933*, 4 BYU J. PUB. L. 97, 114 (1990) (“[T]he resulting interpretation of [*Pinter*] by the lower courts . . . may lead to even more confusion and conflict.”).

to define seller, courts must now grapple with how to define an essential component-part of the definition—but the outcome is unchanged, as confusion remains regarding the scope of Section 12 seller liability.²⁰ The ambiguity *Pinter* created caused another circuit split with regard to whether individualized communication is necessary to solicit and thus potentially be liable as a seller under Section 12.²¹ In *Wildes v. BitConnect International PLC*,²² the Eleventh Circuit became the first circuit to explicitly hold that nonindividualized mass communication, such as social media posts, are sufficient to constitute solicitation under Section 12.²³ Soon after, relying on *Wildes*, the Ninth Circuit in *Pino v. Cardone Capital*²⁴ also held that nonindividualized mass communication alone can be sufficient.²⁵

This Note argues that the Eleventh Circuit's holding will encourage responsible corporate governance and is consistent with the statutory language, the original legislative intent, and judicial interpretations of Section 12 seller liability.²⁶ Part II of this Note discusses the historical

20. See Davis, *supra* note 19, at 105 (“[T]he lower courts will struggle with this new word, and, as they did with the word *seller*, try to create some manageable test to determine whether a person is a *solicitor*.”).

21. Compare *Wildes v. BitConnect Int'l PLC*, 25 F.4th 1341, 1346 (11th Cir. 2022) (“[A] solicitation need not be ‘personal’ to trigger liability.”), *cert. denied sub nom. Arcaro v. Parks*, 143 S. Ct. 427 (2022), and *Pino v. Cardone Cap., LLC*, 55 F.4th 1253, 1259 (9th Cir. 2022) (“[Section] 12 contains no requirement that a solicitation be directed or targeted to a particular plaintiff.”), *cert. denied*, 144 S. Ct. 75 (2023) (mem.), with *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871 (5th Cir. 2003) (“To count as ‘solicitation,’ the seller must, at a minimum, *directly communicate* with the buyer.” (emphasis added)), and *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 636 (3d Cir. 1989) (“[The Plaintiff] must demonstrate *direct and active participation* in the solicitation of the immediate sale” (emphasis added)), *as amended* (Jan. 30, 1990).

22. 25 F.4th 1341 (11th Cir. 2022), *cert. denied sub nom. Arcaro v. Parks*, 143 S. Ct. 427 (2022).

23. See *id.* at 1347 (holding that a person who successfully solicits the purchase of a security is liable under Section 12 regardless of whether the solicitation was individualized); Virginia Milstead, Michael Hines & Camille Brown, *Circuits Split over Whether Social Media Posts May Give Rise to Section 12 Seller Liability*, REUTERS (Mar. 6, 2023, 10:16 AM), <https://www.reuters.com/legal/legalindustry/circuits-split-over-whether-social-media-posts-may-give-rise-section-12-seller-2023-03-06/> [perma link unavailable] (noting that prior to *Wildes*, no other circuit had “addressed whether use of social media can make a defendant a statutory seller” under Section 12).

24. 55 F.4th 1253 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 75 (2023) (mem.).

25. See *id.* at 1258, 1260 (discussing *Wildes* and similarly concluding that Section 12 does not require that the solicitation be individualized).

26. See Ephrat Livni, *Crypto Needs More Rules and Better Enforcement*, *Regulators Warn*, N.Y. TIMES (Oct. 3, 2022), <https://www.nytimes.com/2022/10/03/business/cryptocurrency-regulation-stablecoin.html> [perma link unavailable] (explaining that investor losses stemming from price volatility and firm collapses emphasize the need for stronger enforcement mechanisms); Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 GEO. L.J. 967, 1013 (2019) (noting that firm behavior is influenced by the “potency of public and private enforcement threats together with the perceived proprietary and reputational costs and benefits of either law-abidingness or defection”); 77 CONG. REC. 2918 (1933) (explaining the Securities Act was intended to protect investors

development of the Securities Act and Section 12 liability, as well as the applicability of Section 12 to cryptocurrencies. Part III provides a summary of the facts and procedural history of *Wildes*. Part IV explains the Eleventh Circuit's reasoning. Part V provides a critical analysis of the holding in *Wildes* and asserts that the strengthened, private enforcement regime will create positive social benefits and advance Congress's remedial goals without running afoul of the statute. Lastly, Part VI discusses the impact of *Wildes*, particularly in light of recent investor-initiated securities litigation involving cryptocurrency firms.

II. MINERS, SWINDLERS, AND THE SECURITIES LAWS: THE HISTORY OF SECTION 12 SELLER LIABILITY AND ITS APPLICATION TO CRYPTOCURRENCIES

The substantial losses stemming from cryptocurrency—particularly those arising out of firm-level fraud—have triggered a debate about how the legal system can address the perils of this largely unregulated and speculative investment.²⁷ Over 100 years ago, in response to rampant, unchecked speculation in the securities market, Congress enacted the Securities Act of 1933, and one year later, the Securities Exchange Act of 1934 (the Exchange Act).²⁸ Today, the federal securities laws, and particularly Section 12 of the Securities Act, provide the mechanism to rein in this new era of speculation.²⁹ However, the influence of Section 12 ultimately depends on the scope of seller liability established by the courts, which have long struggled to develop a consistent approach that comports with the Securities Act's remedial goals while avoiding an overly broad imposition of liability.³⁰

from being “swindled” by “fraudulent promoter[s]”); *Pino*, 55 F.4th at 1258–59 (asserting that *Wildes* was consistent with the statutory language and judicial precedent).

27. See Sheelah Kolhatkar, *Will the FTX Collapse Lead to Better Cryptocurrency Regulation?*, NEW YORKER (Nov. 23, 2022), <https://www.newyorker.com/business/currency/will-the-ftx-collapse-lead-to-better-cryptocurrency-regulation> [https://perma.cc/8J4T-QVCQ] (discussing how the collapse of FTX has resulted in an increased push for regulation); D. Towne Morton, *The Future of Cryptocurrency: An Unregulated Instrument in an Increasingly Regulated Global Economy*, 16 LOY. U. CHI. INT'L L. REV. 129, 132 (2020) (noting the current lack of regulation of cryptocurrencies in the United States).

28. See Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified at 15 U.S.C. § 77a–mm (2024)); Securities Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified at 15 U.S.C. § 78a–jj (2024)); see also Laylin K. James, *The Securities Act of 1933*, 32 MICH. L. REV. 624, 625 (1934) (noting that significant investor losses during the Stock Market Crash of 1929 placed public pressure on Congress to pass comprehensive reforms to increase investor protections); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1223 (1999) (“The Great Depression, which followed the ‘Roaring 20s’ bull market, shaped the Securities Exchange Act.”).

29. For a discussion of how Section 12 liability can have a deterring effect that encourages cryptocurrency firms to engage in responsible governance, see *infra* notes 133–143 and accompanying text.

30. See *Wildes v. BitConnect Int'l PLC*, 25 F.4th 1341, 1346 (11th Cir. 2022) (explaining that the remedial impact of Section 12 depends upon how a particular

Section A below discusses congressional intent behind the Securities Act and the role of Section 12 and other private enforcement mechanisms in effectuating Congress's aims. Section B analyzes how the application of Section 12 has been historically hampered by inconsistent approaches to the scope of seller liability and how the Supreme Court attempted to resolve these inconsistencies. Section C explains the differing approaches presently existing among the circuits. Lastly, Section D connects Section 12 and the questions surrounding its proper scope to cryptocurrencies.

A. *The Rush for Investor Protections: Congress Curtails Fraud and Encourages Ethical Behavior in the Securities Markets*

In passing the Securities Act, Congress had three aims: (1) to provide investors with full information, (2) to discourage fraud, and (3) to encourage ethical business practices.³¹ To accomplish these objectives, Congress relied on a combination of mandatory public reporting and the imposition of both civil and criminal liability.³² Under the Securities Act,

court approaches seller liability), *cert. denied sub nom.* *Arcaro v. Parks*, 143 S. Ct. 427 (2022); Prentice, *supra* note 16, at 429–37, 441–43 (discussing the various approaches to seller liability and courts' desires to avoid an interpretation that extends beyond Congress's intent).

31. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976) (“The Securities Act of 1933 (1933 Act) was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing.” (citation omitted)). See generally James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959) (providing a thorough analysis of the legislative history of the Securities Act); 77 CONG. REC. 2918 (transcribing the debate within the House of Representatives regarding the Securities Act). Representative Sam Rayburn, a cosponsor of the Securities Act, stated, in part:

Millions of citizens have been swindled into exchanging their savings for worthless stocks. The fraudulent promoter has taken an incredible toll from confiding people.

....

... Today we are forced to recognize that the hired managers of great corporations are not as wise, not as conservative, and sometimes are not as trustworthy as millions of American investors have been persuaded to believe. . . . This catastrophe so colossal as to stagger the imagination did not come upon our people through the machinations of the common fraud. . . . It came through the leadership that the average investor had a right to believe that he could trust.

Id. (discussing the legislative intent behind the Securities Act); Williams, *supra* note 28, at 1227–35 (providing additional details on the legislative history of the Securities Act). Williams asserts that Rep. Rayburn's statements are among the “most authoritative sources of the legislative history on the House side.” *Id.* at 1228. Additionally, Williams notes that, while the Congressional Record captures over five hours of “debate,” virtually all representatives spoke in favor of the bill, and those who spoke against it did so because they felt as though it did not go far enough to protect investors. See *id.* at 1231–32.

32. See *Ernst & Ernst*, 425 U.S. at 195 (explaining that Congress sought to accomplish its remedial purposes by requiring full disclosure of material information and

civil liability arises from either public or private enforcement.³³ In terms of private enforcement, Section 11 provides a remedy for false registration statements while Section 12 governs prospectuses and communications.³⁴ Further, Sections 9(e), 10(b), 16(b), and 18 of the Exchange Act provide investors with additional remedies.³⁵ While the system of private enforcement is extensive, this Note focuses on Section 12 of the Securities Act because of its increasingly widespread use and its uniquely strong ability to influence the behavior of cryptocurrency firms.³⁶

Section 12 advances the remedial purposes of the Securities Act by providing purchasers with two distinct private causes of action.³⁷ Section 12(a)(1) imposes liability upon any person who offers or sells an unregistered security.³⁸ Meanwhile, Section 12(a)(2) imposes liability

by imposing civil liability on certain actors in certain circumstances); Murray L. Simpson, *Investors' Civil Remedies Under the Federal Securities Laws*, 12 DEPAUL L. REV. 71, 71 (1962) (“[T]he federal securities laws have created substantial improvements, both in substance and procedure, over the common law remedies available to an investor in the fraudulent purchase or sale of a security.”); Wendy Gerwick Couture, *Prosecuting Securities Fraud Under Section 17(a)(2)*, 50 LOY. U. CHI. L.J. 669, 670–73 (2019) (discussing the criminal penalties arising under the Securities Act and the Exchange Act).

33. See James D. Cox & Randall S. Thomas, *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 80 NOTRE DAME L. REV. 893, 894 (2005) (noting the Securities Act is enforced publicly by the Securities and Exchange Commission (SEC) and privately by individual litigants).

34. See 15 U.S.C. § 77k (2024) (imposing civil liabilities in connection with false registration statements); *id.* § 77l (imposing civil liabilities in connection with prospectuses and communications).

35. See Simpson, *supra* note 32, at 84–93 (discussing the Exchange Act’s provisions that impose civil liability). The most comprehensive of the Exchange Act’s private causes of action is Section 10(b), as implemented by rule 10b-5. See *id.* at 86–87 & n.59 (first citing 15 U.S.C. § 78j(b); and then citing 17 C.F.R. § 240.10b-5 (1949)). Rule 10b-5 is an anti-fraud provision that is the “main legal mechanism for policing the accuracy of periodic filings and disclosures.” See James J. Park, *Rule 10b-5 and the Rise of the Unjust Enrichment Principle*, 60 DUKE L.J. 345, 347–48, 351–52 (2010).

36. See Steven Thel, *Section 12(2) of the Securities Act: Does Old Legislation Matter?*, 63 FORDHAM L. REV. 1183, 1189–91 (1995) (noting that the defrauded investor’s reliance on Section 12(a)(2) substantially increased as courts imposed stricter requirements on plaintiffs seeking to recover under Section 10(b) and rule 10b-5). Specifically, courts imposed a scienter requirement to allegations involving Section 10(b). See *id.* at 1184 (citing *Ernst & Ernst*, 425 U.S. at 193). Additionally, Section 11 does not necessarily advance the interests of plaintiffs seeking to recover from promoters of securities because it imposes liability only on those who sign a registration statement and it contains numerous statutory defenses. See *Ackerman v. Schwartz*, 947 F.2d 841, 845 (7th Cir. 1991) (discussing the intersection between Section 11 and Section 12). For a discussion of how Section 12(a)(1) potentially creates an opportunity for investors to sue nearly all issuers of cryptocurrencies, see *infra* note 91 and accompanying text.

37. See Simpson, *supra* note 32, at 76 (“Section 12 of the Securities Act creates two distinct liabilities . . .”). The two causes of action rely on both public reporting and civil liability to discourage fraud and encourage ethical practices. See *id.*

38. See 15 U.S.C. § 77l(a)(1) (“Any person who . . . offers or sells a security in violation of section 77e . . . shall be liable . . . to the person purchasing such security from him”); Prentice, *supra* note 16, at 417 n.1 (explaining that an individual can violate Section 5 in numerous ways, such as by selling unregistered securities or

upon any person who offers or sells a security through the use of a communication that contains an untrue statement or fails to include a material fact.³⁹ Section 12 lacks a scienter requirement and provides for only limited defenses, which strengthens the remedial capabilities compared to rule 10b-5—the Exchange Act’s main anti-fraud provision.⁴⁰ Furthermore, Section 12 provides plaintiffs with two remedies—under either subsection, plaintiffs can sue for rescission or damages.⁴¹ However, Section 12 fails to clearly establish whom the plaintiffs can sue, which causes courts to face a complex interpretive question—who are the statutory sellers for the purposes of Section 12 liability?⁴²

failing to meet prospectus requirements (citing 15 U.S.C. § 77e)); Simpson, *supra* note 32, at 76–77 (noting the only affirmative defense available to the defendant is that the security was exempt from Section 5, and that the plaintiff is not required to prove the defendant’s knowledge of the violation or the defendant’s intent to violate the requirements established by Section 5). Simpson notes that liability under Section 12(a)(1) is “absolute.” *Id.* at 79. To avoid confusion, note that Section 5 refers to Section 5 of the Securities Act, formally 15 U.S.C. § 77e.

39. See 15 U.S.C. § 771(a)(2) (“Any person who . . . offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact . . . shall be liable . . . to the person purchasing such security from him”); Simpson, *supra* note 32, at 78–82 (noting defendants’ only statutory defense is proving that they “did not know, and in the exercise of reasonable care could not have known, of such untruth or omission” (quoting 15 U.S.C. § 771(a)(2))). Like Section 12(a)(1), the statutory language “eliminates the element of scienter from the plaintiff’s cause of action since he does not have to prove, nor even allege, that the person making the false statement knew it was false.” *Id.* at 79 (emphasis omitted). While Section 12(a)(2) does allow for a statutory defense by requiring intentional or negligent misrepresentations, “the defendant often has a difficult time sustaining the burden of proof that in the exercise of reasonable care he could not have known of the falsity.” *Id.*

40. See Simpson, *supra* note 32, at 76–81 (explaining that Section 12(a)(1) and Section 12(a)(2) create expansive liability because of the lack of strong defenses and the lack of a scienter requirement). However, Section 12 does impose one significant limitation—the statute of limitations. *Id.* at 83. Actions under Section 12(a)(1) “must be brought within one year after the violation of Section 5, and no more than three years after the security was bona fide offered to the public.” *Id.* Meanwhile, actions under Section 12(a)(2) “must be brought within one year after the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence . . . and no more than three years after the sale.” *Id.*

41. See 15 U.S.C. § 771(a) (stating that plaintiffs “either at law or in equity in any court of competent jurisdiction, [may] recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security”); Prentice, *supra* note 16, at 417 n.1 (noting Sections 12(a)(1) and 12(a)(2) contain identical remedies).

42. See Prentice, *supra* note 16, at 427 (noting that from the beginning of Section 12 litigation, courts have struggled to define the appropriate class of defendants). Unlike Section 11, which explicitly states who can be held liable, Section 12 merely states that liability extends to “[a]ny person who . . . offers or sells,” and leaves the interpretation to the courts. *Id.* at 427 n.49 (alterations in original) (quoting 15 U.S.C. § 771(1)).

B. *Striking Gold or Striking Out? The Supreme Court Attempts to Reconcile Past Approaches and Define the Statutory Seller*

Nearly a century of scholarship and judicial input have addressed questions surrounding the appropriate definition of the statutory seller, including whether the statutory seller is analyzed the same for purposes of Section 12(a)(1) and 12(a)(2) liability.⁴³ By the 1980s, it was settled law that liability extended beyond the individual who directly passed title.⁴⁴ The issue that continued to persist was the logical follow-up to that conclusion—if liability extends beyond the direct seller, then how far does it extend?⁴⁵ Section 12 could be construed as creating a strict privity requirement, and some early courts did adhere to this restrictive standard.⁴⁶ However, applying common-law agency principles, courts began to expand liability to include agents of the immediate seller.⁴⁷

43. See generally Reece, *supra* note 19 (providing a detailed overview of the history of Section 12 jurisprudence). See Therese H. Maynard, *Liability Under Section 12(2) of the Securities Act of 1933 for Fraudulent Trading in Postdistribution Markets*, 32 WM. & MARY L. REV. 847, 855 (1991) (discussing aspects of Section 12 that have been settled after *Pinter*). Maynard asserts that the statutory seller is likely treated the same for Sections 12(a)(1) and 12(a)(2). See *id.*; see also *Pinter v. Dahl*, 486 U.S. 622, 642 n.20 (1988) (“Most courts and commentators have not defined the defendant class differently for purposes of the two provisions.”); *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 635 (3d Cir. 1989) (“[W]e see no reason to distinguish the scope of ‘seller’ for purposes of § 12(1) and § 12(2).”), *as amended* (Jan. 30, 1990). But see David L. Goode, Note, *The Reduction in Seller Liability Under the Securities Act of 1933: Good News for Securities Professionals*, 46 WASH. & LEE L. REV. 629, 651 n.171 (1989) (noting the Supreme Court in *Pinter* “declined to take a position concerning the application of the *Pinter* definition of the term seller to claims under § 12(2) of the Securities Act”).

44. See *Pinter*, 486 U.S. at 644 (“A natural reading of the statutory language would include in the statutory seller status at least some persons who urged the buyer to purchase. For example, a securities vendor’s agent who solicited the purchase would commonly be said, and would be thought by the buyer, to be among those ‘from’ whom the buyer ‘purchased,’ even though the agent himself did not pass title.” (citing *Cady v. Murphy*, 113 F.2d 988, 990 (1st Cir. 1940))); see also *Fed. Hous. Fin. Agency for Fed. Nat’l Mortg. Ass’n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 139–40 (2d Cir. 2017) (concluding liability extends to individuals who have no direct involvement in the passing of title (citing *Pinter*, 486 U.S. at 641–42)).

45. See Prentice, *supra* note 16, at 427 (“[S]ection 12 leaves the courts to struggle with the concept of ‘seller.’ And struggle they have.”).

46. See 15 U.S.C. § 771(a) (stating that the person offering or selling the security “shall be liable . . . to the person *purchasing such security from him*” (emphasis added)); *Pinter*, 486 U.S. at 642 (“At the very least, however, the language of § 12(1) contemplates a buyer-seller relationship not unlike traditional contractual privity.”); Davis, *supra* note 19, at 98–99 (noting Section 12 was “essentially adapted from the common-law right of rescission of contract,” which does impose a strict privity requirement). The statutory language shows that the drafters at least contemplated the idea that liability should only exist for the immediate seller of the security. See *id.* at 98.

47. See Prentice, *supra* note 16, at 428 (explaining that some courts turned to agency theory in order to extend liability to brokers and other defendants that did not directly pass title); see, e.g., *Murphy v. Cady*, 30 F. Supp. 466, 469 (D. Me. 1939) (“As the section expressly applies to ‘any person who . . . sells a security’ . . . [brokers] are not excepted from its provisions. It is only a question whether the brokers

As litigants sought to expand liability to other participants in the transaction, courts needed to develop approaches for determining whether these collateral actors could be considered statutory sellers.⁴⁸

Among the circuits, three tests emerged: (1) the participation test, (2) the participant position test, and (3) the substantial factor test.⁴⁹ The Supreme Court attempted to resolve the ambiguity by developing a new approach in *Pinter*.⁵⁰ Under *Pinter*, a statutory seller is defined as an individual who either passes title to the buyer or who successfully solicits the purchase if they are motivated by a desire to advance the financial interests of the individual or the owner of the security.⁵¹ The Court explained that including those who solicit purchases was both consistent with the statutory text and necessary to effectuate Congress's remedial

here (through their agent) have done a thing which under certain circumstances gives rise to the statutory liability." (first alteration in original) (quoting 15 U.S.C. § 771(a)(1)), *aff'd*, 113 F.2d 988 (1st Cir. 1940).

48. See Davis, *supra* note 19, at 98–99 (concluding that most courts sought to expand the statutory seller definition beyond the strict privity and agency approaches). Davis notes that courts looking to expand liability had to decide "the requisite relationship of collateral participants to the transaction necessary to impose primary liability status under Section 12." *Id.* at 99 (explaining the development of different approaches to the statutory seller). But see Prentice, *supra* note 16, at 429–30 (explaining that, while most courts abandoned the strict privity requirement, strict privity was the predominant approach used by the Third and Seventh Circuits up until the Supreme Court's repudiation of the requirement in *Pinter*).

49. See Davis, *supra* note 19, at 99–101 (discussing the three tests used by the circuits to determine whether an individual could be considered a statutory seller). The participation test, which was the broadest of the three, allowed a claim against any individual who participated in the transaction, including those who participated without being compensated. *Id.* at 100 (citing *Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1052–53 (2d Cir. 1969)). The participant position test imposed liability on any individual who "was in a position to ensure full disclosure of the material facts." *Id.* at 101 (citing *Wasson v. SEC*, 558 F.2d 879, 886 (8th Cir. 1977)). Lastly, the substantial factor test borrowed tort principles and asked whether the individual's participation in the sale was a substantial factor in causing the sale to occur. *Id.* at 100–01 (citing *Hill York Corp. v. Am. Int'l Franchises, Inc.*, 448 F.2d 680, 693 (5th Cir. 1971)). While Davis refers to the third test as the proximate cause test, other scholars refer to it as the substantial factor test. See Prentice, *supra* note 16, at 432 & n.32 (explaining that the proximate cause test and substantial factor test are synonymous); see also *Pinter*, 486 U.S. at 649–50 (using the substantial factor terminology). At the time *Pinter* was decided, the substantial factor test was the majority approach among the circuits. See Prentice, *supra* note 16, at 433.

50. See *Pinter*, 486 U.S. at 642, 647 (noting that "the Securities Act nowhere delineates who may be regarded as a statutory seller" and that "[t]he courts, on their part, have not defined the term uniformly"); Jaikaran Singh, *Watch Your Mouth: Section 12(a)(2) Liability for Oral Statements Made at Road Shows*, 23 J. CORP. L. 541, 554 (1998) (asserting that the Supreme Court granted certiorari in *Pinter* to resolve the "lack of uniformity" that existed among the circuits); Prentice, *supra* note 16, at 417–18 (explaining Section 12 has "never received much attention from the Supreme Court," and that the Court heard *Pinter* in order to resolve several issues, including the definition of the statutory seller).

51. See *Pinter*, 486 U.S. at 642, 647 (holding that Section 12 imposes liability on individuals who directly pass title or ownership interest in the security and those who successfully solicit the purchase, "motivated at least in part by a desire to serve his own financial interests or those of the securities owner").

purposes.⁵² Additionally, looking to avoid expanding liability beyond Congress's intent, the Court explicitly rejected the substantial factor test out of concern that it could extend to individuals whose participation was merely incidental to the eventual purchase.⁵³ *Pinter* provided hope for a uniform approach; however, this hope ultimately proved short-lived.⁵⁴

52. See *id.* at 641–47 (explaining the statutory justification for the new test). The Court noted that the key terms of Section 12 (i.e., sell and offer) are defined elsewhere in the Securities Act. *Id.* at 643. Section 2(3) defines “sell” as “every contract of sale or disposition of a security or interest in a security, for value,” and “offer” is defined as “every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.” *Id.* (quoting 15 U.S.C. § 77b(3)). Because “solicitation” is included in the Securities Act’s definition of “offer,” it is logical to conclude that one can become a statutory seller for the purposes of Section 12 liability by soliciting the sale of a security. See *id.* at 643–44. Additionally, the Court concluded that the “purchased from” language of Section 12 does not create a strict privity requirement; rather, the language merely expands upon the proposition that there cannot be liability without a purchase. *Id.* at 644. If Congress had intended to create a strict privity requirement, it could have done so by not adding the word “offer” to Section 12. *Id.* at 646. Furthermore, the Court stated that including solicitation advances the purposes of the Securities Act by promoting full and honest disclosure of all relevant information. *Id.* The Court also explained that Congress intended civil liability to be “in terrorem”—an intent which is furthered when the liability extends to those who solicit purchases. *Id.* In support of its holding, the Court noted solicitation “is perhaps the most critical stage of the selling transaction” and “is the stage at which an investor is most likely to be injured, that is, by being persuaded to purchase securities without full and fair information.” *Id.* at 646–47. While *Pinter* expressly rejects a strict privity requirement, some modern courts point to dicta from the case to support a narrower interpretation of the statutory seller. See *FDIC v. First Horizon Asset Sec. Inc.*, 291 F. Supp. 3d 364, 376 (S.D.N.Y. 2018) (“At the very least, however, the language of § 12(1) contemplates a buyer-seller relationship not unlike traditional contractual privity.” (quoting *Pinter*, 486 U.S. at 642)). But see *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 940 (7th Cir. 1989) (“The language in *Pinter v. Dahl*, coupled with prevailing federal case law in other circuits, seems to undermine the continuing viability of the strict privity concept under section 12(2).”).

53. See *Pinter*, 486 U.S. at 650 (explaining the substantial factor test is not supported by the statutory language). According to the Court, the substantial factor test substitutes tort principles of causation for the actual text of the statute. *Id.* at 649, 652. While Section 12 emphasizes the relationship between the plaintiff and the defendant, the substantial factor test “focuses on the defendant’s degree of involvement in the securities transaction and its surrounding circumstances.” *Id.* at 651. In particular, the Court was concerned that liability would extend to participants, such as securities professionals, accountants, and lawyers, who are “only remotely related to the relevant aspects of the sales transaction . . . [and] whose involvement is only the performance of their professional services.” *Id.* (explaining the need to limit liability to those who actively sell or solicit the purchase of securities); see also *Davis*, *supra* note 19, at 101 (noting *Pinter* was decided during a period in which the Supreme Court shifted away from an emphasis on the Securities Act’s “broad remedial purpose,” and towards a stricter textual analysis). Additionally, while *Pinter* explicitly rejected the substantial factor test, it implicitly rejected the participation test, which was even broader and placed even less of a focus on the connection between the plaintiff and the defendant. *Id.* at 100.

54. See *Reece*, *supra* note 19, at 98–99 (“Certainly, if everyone were working within the same parameters, judicial consistency and the predictive value desired by the *Pinter* court would be advanced. However, all the circuits were applying the same statute and managed to develop different definitions for the term seller.” (footnote omitted)). Compare *Capri v. Murphy*, 856 F.2d 473, 479 (2d Cir. 1988)

C. *Prospecting for Clarity: The Circuits Develop Varying Approaches to the Statutory Seller*

While all circuits now apply the *Pinter* test,⁵⁵ a new circuit split has emerged regarding the application of the test.⁵⁶ By failing to define solicitation—the key term around which the test is based—inconsistent application was a practical certainty.⁵⁷ Due to the ambiguity surrounding “solicitation,” it is unclear what is required for a communication to constitute a solicitation triggering potential Section 12 liability, and the circuits have adopted different approaches.⁵⁸

The Fifth Circuit adopted the narrowest interpretation, holding that individuals cannot be liable as solicitors under Section 12 when they do not directly communicate with the purchaser.⁵⁹ In *Rosenzweig v. Azurix Corp.*,⁶⁰ investors brought suit under Section 12(a)(2) alleging that the defendants’ material misrepresentations in public filings induced their purchases.⁶¹ The investors conceded that the defendants did not directly

(creating a broader interpretation by holding that direct communication was not required to solicit), *with* *Crawford v. Glenss, Inc.*, 876 F.2d 507, 512 n.16 (5th Cir. 1989) (creating a narrower interpretation by holding that direct communication was required to solicit).

55. See, e.g., *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 636 (3d Cir. 1989) (applying *Pinter* and determining that an individual is a statutory seller under Section 12 if they either pass title to a purchaser or engage in solicitation), *as amended* (Jan. 30, 1990); see also Goode, *supra* note 43, at 663 (concluding *Pinter* replaced the different approaches that had previously been used by the circuits).

56. See W. Clark Goodwin, *The Effect of Pinter v. Dahl on Participant Liability Under Section 12 of the Securities Act of 1933*, 19 CUMB. L. REV. 191, 228–38 (1989) (explaining how the circuits immediately developed inconsistent approaches to the application of *Pinter*); Milstead, Hines & Brown, *supra* note 23 (discussing the circuit split regarding seller liability under Section 12).

57. See Reece, *supra* note 19, at 105–06 (noting that *Pinter* never defined solicitation and predicting that the failure to define the “operative term of the test” would result in confusion and inconsistent application); Goodwin, *supra* note 56, at 240 (concluding that after *Pinter*, “the boundaries of solicitation are yet to be defined”).

58. See *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871 (5th Cir. 2003) (“To count as ‘solicitation,’ the seller must, at a minimum, *directly communicate* with the buyer.” (emphasis added)); *Craftmatic Sec. Litig.*, 890 F.2d at 636 (“The purchaser must demonstrate *direct and active participation* in the solicitation of the immediate sale to hold the issuer liable as a § 12(2) seller.” (emphasis added)); *Capri*, 856 F.2d at 479 (“[P]laintiffs must show that [the alleged seller] *actually solicited* their investment.” (emphasis added)); *Ryder Int’l Corp. v. First Am. Nat’l Bank*, 943 F.2d 1521, 1531 (11th Cir. 1991) (Plaintiffs must show that the alleged seller “actively solicit[ed] . . . i.e. ‘urge[d]’ or ‘persuade[d]’”).

59. See *Crawford*, 876 F.2d at 512 n.16 (applying a direct communication standard and holding that defendants did not sell or solicit the security); *Rosenzweig*, 332 F.3d at 871 (applying a direct communication standard and holding defendants did not sell or solicit the security); Amy L. Craiger, Note, *From Conceivable to Impossible: The Hurdles Plaintiffs Must Overcome When Pleading Section 11 and Section 12(a) Securities Claims*, 5 BROOK. J. CORP. FIN. & COM. L. 549, 555 (2011) (noting that courts adopting a direct communication standard are taking a “narrower view”).

60. 332 F.3d 854 (5th Cir. 2003).

61. See *id.* at 858–61 (explaining that the defendants, who were agents of Azurix Corporation, fraudulently inflated the corporation’s stock price by concealing

pass title; rather, the investors purchased the securities in the secondary market.⁶² Additionally, they conceded that the only potential act of solicitation was the defendants' signing of the public filings.⁶³ The Fifth Circuit concluded that a signature alone is not direct communication, so there was insufficient evidence to find that the defendants solicited the purchases.⁶⁴

Meanwhile, the Third and Tenth Circuits require the plaintiff to show that the defendant directly and actively participated in the solicitation.⁶⁵ In *Craftmatic Securities Litigation v. Kraftsow*,⁶⁶ the plaintiffs alleged that the defendants violated Section 12(a)(2) by making several materially false statements in the prospectus for Craftmatic's IPO.⁶⁷ The Third Circuit noted that "'solicitation' does not encompass all activities related to the purchase transaction" and clarified that issuers of securities cannot be liable under Section 12 merely because they prepared the prospectus.⁶⁸ Nonetheless, the court held that the factual allegations in the complaint showed the defendants either directly passed title or

concerns about the strength of the company's assets and making additional misrepresentations in the prospectus and registration statement).

62. See *id.* at 858 (noting the plaintiffs purchased Azurix stock on the secondary market). The Fifth Circuit explained that when an investor purchases a security from an underwriter on the secondary market rather than directly from the issuer, the issuer is generally not liable to the eventual purchaser because the issuer is merely "[the] seller's seller." *Id.* at 871 (alteration in original) (quoting *Lone Star Ladies Inv. Club v. Schlotsky's, Inc.*, 238 F.3d 363, 370 (5th Cir. 2001)). The Fifth Circuit also noted that an issuer could be held liable for a purchase occurring on the secondary market if the issuer's role "was not the usual one; that it went farther and became a vendor's agent," but the court found no evidence supporting the allegation that Azurix assumed an unusual role. *Id.* (quoting *Lone Star Ladies Inv. Club*, 238 F.3d at 370).

63. See *id.* ("[P]laintiffs argue that, with respect to the individual defendants, signing the registration statement suffices for solicitation.").

64. See *id.* (holding the plaintiffs not only failed to provide evidence of direct communication with the defendants but also failed to provide any evidence that the defendants even solicited the purchases at all).

65. See *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 636 (3d Cir. 1989) ("The purchaser must demonstrate direct and active participation in the solicitation of the immediate sale to hold the issuer liable as a § 12(2) seller."), *as amended* (Jan. 30, 1990); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1307 (10th Cir. 1998) ("An allegation of direct and active participation in the solicitation of the immediate sale is necessary for solicitation liability, i.e., where the section 12(2) defendant is not a direct seller. Such an allegation is crucial so as to ensure a direct relationship between the purchaser and the defendant, without which a defendant is simply not a statutory seller." (quoting *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 717 n.19 (3d Cir.1996))); *Craiger*, *supra* note 59, at 555 (concluding "direct and active participation" broadly interprets the term solicitation).

66. 890 F.2d 628 (3d Cir. 1989), *as amended* (Jan. 30, 1990).

67. See *id.* at 630–33 (explaining Craftmatic made representations regarding its profitability, expected expansion, and compliance with several state consumer protections laws, which when discovered to be false, caused the share price to drop from \$8.50 per share at the time of the plaintiffs' purchase to a low of \$1 per share).

68. See *id.* at 636 (concluding *Pinter* sought to avoid an interpretation of the term "seller" that could result in liability for collateral participants who played no role in the selling or solicitation of the security).

directly and actively solicited the purchase with enough specificity to survive a Rule 12(b)(6) motion.⁶⁹

The Second and Sixth Circuits apply the broadest approach, requiring plaintiffs to prove the defendants engaged in "actual solicitation."⁷⁰ In *Capri v. Murphy*,⁷¹ the plaintiffs invested in a joint venture after receiving a prospectus containing materially false information.⁷² An attorney for the defendant-company, who also owned an equity interest in the partnership, prepared and presented the prospectus to the purchasers.⁷³ The Second Circuit concluded the attorney would have been liable under Section 12(a)(2) if he had been named as a defendant because of his active role in the promotion of the security.⁷⁴ Additionally, even though the general partners never had any direct contact with the purchasers, the Second Circuit held that they were liable as sellers because they aided in the preparation of the prospectus and directed the attorney's solicitation activities.⁷⁵

69. See *id.* at 637 (holding that the plaintiffs' claim was sufficient to survive a Rule 12(b)(6) motion to dismiss despite failing to show that the defendants directly and actively participated in the solicitation); see also *Maher*, 144 F.3d at 1304, 1307 (holding that the plaintiffs failed to satisfy the direct and active participation requirement when they alleged that the defendants' misrepresentations induced the purchase but did not allege any specific acts of solicitation).

70. See *Smith v. Am. Nat'l Bank & Tr. Co.*, 982 F.2d 936, 941 (6th Cir. 1992) ("It is not enough that the putative seller stands to benefit if the sale goes through; to be liable under a solicitation theory, he must have engaged in actual solicitation."); *Capri v. Murphy*, 856 F.2d 473, 479 (2d Cir. 1988) ("[P]laintiffs must show that [the alleged seller] actually solicited their investment."); Goode, *supra* note 43, at 659 n.246 (discussing cases that apply the "actually solicited" standard and asserting that the approach "sets a low standard for the types of actions that qualify as soliciting an offer to buy").

71. 856 F.2d 473 (2d Cir. 1988).

72. See *id.* at 475–76 (explaining the relevant security and the nature of the misrepresentations). The Second Circuit explained that the defendants were general partners in a coal-mining joint venture. *Id.* at 475. In calculating the expected profitability of the venture, the defendants omitted the costs of washing, selling, and transporting the coal, which artificially inflated the expected profitability of the venture. *Id.* at 476. The inaccurate profitability projections were then included in the prospectus presented to the plaintiffs, who alleged that they invested in the venture because of the representations made in the prospectus. *Id.*

73. See *id.* at 475–76 (noting the prospectus was prepared by an attorney who also had an ownership stake in the joint venture). The Second Circuit emphasized that the attorney and the other attorneys at his firm were the only agents of the venture who directly communicated with the purchasers. *Id.* at 476.

74. See *id.* at 478 (asserting the attorney would have been liable as a seller if he had been named as a defendant because, acting as an agent of the venture, the attorney "promoted the deal and received compensation for his promotional efforts"). But see Goode, *supra* note 43, at 659 n.246 (arguing the Second Circuit's conclusion that the attorney would have been liable under Section 12(a)(2) is inconsistent with the Supreme Court's holding in *Pinter*). Goode notes that the dicta in *Pinter* excludes from liability individuals, such as attorneys, whose participation in the transaction is "merely performing services." *Id.*

75. See *Capri*, 856 F.2d at 478 (holding that an attorney's solicitation of the purchase does not preclude the general partners from also being liable as sellers of the security). The Second Circuit explained that the general partners directed

In *Smith v. American National Bank & Trust Co.*,⁷⁶ the defendant informed one of its borrowers that it would be terminating their relationship due to an overdrawn account unless the borrower could find an investor to cover the overdrawn balance.⁷⁷ The plaintiff stepped in as the investor, and after the borrower's business went bankrupt, the plaintiff alleged that the defendant violated Section 12(a)(2) by failing to disclose several material facts, such as the borrower's questionable accounting practices.⁷⁸ The Sixth Circuit, however, concluded that the defendant did not actually solicit the purchase just because it suggested the plaintiff seek an outside investor; rather, it was the borrower who actually solicited the purchase.⁷⁹

Prior to *Wildes*, within the Eleventh Circuit, plaintiffs had to prove the defendant "urged" or "persuaded" them to purchase the security—like the Second and Sixth Circuit's approach, this looks to the nature

the promotional activities of the attorney, provided the attorney with all the information contained in the prospectus and other promotional materials, and that the attorney "took no action in relation to the investors other than that which was contemplated and authorized by defendants." *Id.* (quoting *Capri v. Murphy*, No. B-80-571, slip. op. at 36–37 (D. Conn. Dec. 10, 1987)). Because of the degree of control the defendants exercised over the solicitation, the Second Circuit concluded they could "actually solicit[]" the purchase of the security, even in the absence of direct communication with the purchasers. *Id.* at 479. *But see In re Weight Watchers Int'l Inc. Sec. Litig.*, 504 F. Supp. 3d 224, 260–61 (S.D.N.Y. 2020) (applying *Capri* and concluding that defendants who only prepare and sign the prospectus but do not assert control over the agents promoting the security cannot be held liable as sellers under Section 12).

76. 982 F.2d 936 (6th Cir. 1992).

77. *See id.* at 937–40 (explaining the defendant was the lender for a distressed borrower who owned a financially unstable car dealership). After the borrower had repeatedly overdrawn his account and wrote \$500,000 worth of checks (which his account had insufficient funds to cover), the defendant suggested that the borrower get "somebody to sign a note to cover the checks" to avoid the defendant terminating the relationship. *Id.* at 939.

78. *See id.* at 938–39 (stating that, under the agreement, the borrower transferred stock in the car dealership in exchange for the plaintiff signing a note for the \$500,000 owed to the defendant). The car dealership subsequently declared bankruptcy, leaving the plaintiff with a worthless asset and responsible for the balance of the note. *Id.* at 939–40. The plaintiff alleged that the defendant was liable under Section 12(a)(2) because the defendant coordinated the transaction and failed to disclose certain facts that, if known, would have caused the defendant to not invest. *Id.* at 941. These undisclosed material facts largely centered around the borrower's accounting practices. *Id.* The year prior to the transaction, an accounting firm declined to conduct an audit after finding woefully inadequate recordkeeping and uncovering a practice that constituted check fraud. *Id.* at 938.

79. *See id.* at 941–42 (holding an entity other than the actual owner can be held liable as a seller of a security but concluding the defendant was not liable under Section 12(a)(2) because it did not actually solicit the purchase). In this case, the plaintiff had demonstrated that the borrower solicited the purchase and that the defendant bank merely suggested the borrower seek an outside investor. *Id.* at 942. The mere encouragement to seek an investor would not lead to liability as a seller unless the entity actually participated in the solicitation of the offer, which the Sixth Circuit found no evidence of. *Id.*

and effect of the solicitation.⁸⁰ In *Ryder International Corp. v. First American National Bank*,⁸¹ Ryder used First American to purchase commercial paper issued by another company.⁸² The Eleventh Circuit concluded First American was not liable as a seller because it did not hold title to the commercial paper nor did it solicit the purchase; First American merely acted as a buyer's agent.⁸³

D. *From Physical Gold to Digital Gold: The Role of Section 12 in the Cryptocurrency Gold Rush*

While determining the proper scope of Section 12 liability is pivotal, it is ultimately a moot point within the context of cryptocurrencies if cryptocurrencies are not considered securities.⁸⁴ Collapses of cryptocurrency firms and the decline in the market capitalization for crypto assets resulted in twenty-three crypto securities class action lawsuits in 2022.⁸⁵ In various cases, courts have concluded that cryptocurrencies

80. See *Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.2d 1521, 1531 (11th Cir. 1991) (finding the defendants were not liable under Section 12 because they did not "urge" or "persuade" the plaintiffs to purchase the securities). Prior to *Pinter*, the Eleventh Circuit applied the substantial factor test but still required some form of solicitation for collateral actor liability. *Id.* at 1528.

81. 943 F.2d 1521 (11th Cir. 1991).

82. See *id.* at 1522–23 (explaining Ryder was a manufacturing company that sought to purchase commercial paper issued by Integrated Resources, Inc. as a short-term investment). The Integrated commercial paper was one of approximately twelve securities offered by First National Bank to its customers. *Id.* at 1522. First National provided information about each of the securities to Ryder. *Id.* Ryder instructed First National to purchase the Integrated commercial paper on its behalf, and First National proceeded by purchasing the security from a third-party broker. *Id.*

83. See *id.* at 1530–34 (explaining First American could not be held liable as either a direct seller or a solicitor). The court found that First American never held title to the commercial paper. *Id.* at 1530. Additionally, while First American did act out of financial self-interest, the court held it did not actually engage in any solicitation. *Id.* at 1531–32. First American simply provided clients with options and executed the transactions as instructed by the clients—there was no evidence that First American attempted to urge or persuade clients to purchase any particular security. *Id.* at 1532.

84. See Eric D. Chason, *Regulating Crypto, On and Off the Chain*, 64 WM. & MARY L. REV. 1011, 1023 (2023) (noting that applying the securities laws to cryptocurrencies requires that the "underlying cryptoasset" be a security). For a cryptocurrency to be considered a security, and thus subject to federal securities laws, the cryptocurrency must satisfy the *Howey* test, which asks whether the instrument is (1) an investment of money, (2) in a common enterprise, (3) with the expectation of profit to be serviced from the efforts of others. See Gunjan D. Devnani, *Creating a Path to Regulation – Digital Assets, Howey, and the Regulatory Dilemma*, 27 N.C. BANKING INST. 399, 401–02 (2023) (explaining the test used to determine whether an investment instrument is a security (citing SEC v. W.J. Howey Co., 328 U.S. 293, 298–99 (1946))).

85. See Farshad Ghodoosi, *Crypto Litigation: An Empirical View*, 40 YALE J. ON REG. 87, 88 (2022) ("In the early part of 2022, as cryptocurrencies crashed in value, lawsuits related to crypto assets soared. It is estimated that as of May 2022, more than 200 individual and class action lawsuits have been filed—up 50% since the start of 2020."); CORNERSTONE RSCH., SECURITIES CLASS ACTION FILINGS: 2023 YEAR IN REVIEW 9 (2023), <https://www.cornerstone.com/insights/reports/securities-class-action->

can be securities, and the Securities and Exchange Commission (SEC) considers most cryptocurrencies to be securities.⁸⁶

Whether a cryptocurrency firm may be held liable under Section 12 likely depends on whether the firm operates in the primary market or exclusively in the secondary market.⁸⁷ When the cryptocurrency (1) satisfies the definition of a security and (2) is sold directly to the purchaser through an ICO, the issuer may be held liable under Section 12.⁸⁸ However, when the cryptocurrency is sold in the secondary market, the purchaser likely cannot recover under Section 12, although the purchaser may have other causes of action under the Exchange Act.⁸⁹

filings/ [https://perma.cc/7KVF-XBDV] (noting there were twenty-three crypto securities class actions in 2022, an increase from 2021 when there were just eleven). In 2023, the number of crypto securities class actions fell to fourteen. *See id.*

86. *See, e.g., Fedance v. Harris*, 1 F.4th 1278, 1288 (11th Cir. 2021) (applying *Howey* and holding fLiK Tokens were securities); *see* William Hinman, Dir., Sec. & Exch. Comm'n Div. Corp. Fin., Remarks at the Yahoo Finance All Markets Summit: Crypto (June 14, 2018), <https://www.sec.gov/news/speech/speech-hinman-061418> [https://perma.cc/S7VS-NL6H] ("The digital asset itself is simply code. But the way it is sold—as part of an investment; to non-users; by promoters to develop the enterprise—can be, and, in that context, most often is, a security—because it evidences an investment contract."); Wayne Duggan & Michael Adams, *How Does the SEC Regulate Crypto?*, FORBES (June 30, 2023, 9:41 AM), <https://www.forbes.com/advisor/investing/cryptocurrency/sec-crypto-regulation/> [https://perma.cc/9ULJ-BSEX] (explaining that SEC Chair Gary Gensler considers the "vast majority" of cryptocurrencies to be securities under the *Howey* test, with the exception of Bitcoin, which the SEC classifies as a commodity).

87. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 582 (1995) (holding liability under Section 12 is limited to only initial public offerings (IPOs) and generally does not apply to private transactions or transactions in the secondary market). The Court could not determine whether Congress intended to extend liability to all private and secondary markets because there was not a "whisper of explanation" suggesting such an interpretation in Section 12's legislative history. *Id.* While *Gustafson* remains binding precedent, its holding and reasoning have proved controversial. *See* Natasha S. Guinan, Note, *Nearly a Decade Later: Revisiting Gustafson and the Status of Section 12(a)(2) Liability in the Courts—Creative Judicial Developments and a Proposal for Reform*, 72 FORDHAM L. REV. 1053, 1053 (2004) ("The *Gustafson* decision, although popular with defendants, has been roundly criticized by academics and the securities bar alike, not only for its policy-driven result but also for its strained and illogical reading of the '33 Act.").

88. *See* 17 C.F.R. § 230.159A (2024) (stating that for purposes of Section 12(a)(2) liability, "seller shall include the issuer of the securities sold to a person as part of the initial distribution of such securities"); Chason, *supra* note 84, at 1027 (noting the application of the securities laws to issuers of cryptocurrencies).

89. *See Gustafson*, 513 U.S. at 582 (limiting the scope of Section 12 liability to IPOs). *But see* Guinan, *supra* note 87, at 1070 (explaining plaintiffs may still have the ability to recover under Section 11 of the Securities Act and Rule 10b-5 of the Exchange Act). However, the availability of these alternative remedies is currently up for debate as one recent case concluded that cryptocurrencies, when traded in the secondary market, are not securities and therefore are not subject to any of the securities laws. *See SEC v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308, 335 (S.D.N.Y. 2023) (holding Ripple Labs was liable for the sale of an unregistered security when it sold its cryptocurrency directly to institutional investors, but was not liable for selling the same cryptocurrency on secondary exchanges), *motion to certify appeal denied*, No. 20 Civ. 10832, 2023 WL 6445969 (S.D.N.Y. Oct. 3, 2023); *see also* Alison Frankel, 'Ripple' Effect from Ruling in SEC Crypto Case Could Be Game-Changer for Class Action Defendants,

Despite this limitation, Section 12 allegations continue to be among the causes of action asserted in recent crypto securities class actions.⁹⁰ This is likely connected to the fact that Section 12 provides a uniquely powerful remedy for cryptocurrency investors—as opposed to investors in other securities—because of the increased likelihood that the security will be unregistered.⁹¹ With cryptocurrencies, plaintiffs and courts are still left to determine the proper scope of seller liability, which is complicated by the characteristics of these assets.⁹² Consequently, Section 12 cryptocurrency litigation underscores the need to reexamine the scope of the statutory seller in the modern era.⁹³

III. A NEW SHERIFF IN TOWN: THE ELEVENTH CIRCUIT USES SECTION 12 TO HOLD A CRYPTOCURRENCY FIRM ACCOUNTABLE

In *Wildes*, the Eleventh Circuit had the opportunity to reexamine the scope of seller liability.⁹⁴ Investors in the cryptocurrency firm BitConnect brought suit against the firm and individual promoters alleging a violation of Section 12(a)(1).⁹⁵ The Eleventh Circuit had to decide whether

REUTERS (July 14, 2023, 5:47 PM), <https://www.reuters.com/legal/government/ripple-effect-ruling-sec-crypto-case-could-be-game-changer-class-action-2023-07-14/> [perma link unavailable] (noting *Ripple* could significantly impact plaintiffs' ability to recover from cryptocurrency exchanges).

90. See, e.g., Class Action Complaint at 91–92, *Adonis Real v. Yuga Labs, Inc.*, No. 22-cv-08909 (C.D. Cal. Dec. 8, 2022) (discussing the Section 12(a)(1) allegation against a cryptocurrency issuer).

91. See Brady Dale, *The Few Crypto Firms That Have Registered with the SEC*, AXIOS (Mar. 6, 2023), <https://www.axios.com/2023/03/06/crypto-register-sec-securities-exchange-commission> [perma link unavailable] (noting that few cryptocurrencies are properly registered with the SEC as securities). Consequently, a vast majority of cryptocurrency issuers are presently in violation of Section 12(a)(1), and any purchaser can theoretically sue for rescission at any time. See 15 U.S.C. § 771(a)(1) (2024) (stating that any person who offers or sells an unregistered security “shall be liable . . . to the person purchasing the security from him, who may sue . . . to recover the consideration paid for such security with interest thereon, less the amount of any incomes received thereon”). But see Frankel, *supra* note 89 (noting that *Ripple* makes it more difficult for plaintiffs to bring weak cases where they “simply allege, ‘I bought a token and therefore I bought an unregistered security’”).

92. See Rashi Maheshwari, *What Are Crypto Exchanges and How Do They Work*, FORBES (Jan. 10, 2024, 2:54 PM), <https://www.forbes.com/advisor/in/investing/cryptocurrency/what-is-a-crypto-exchange/#:~:text=Show%20more,Meaning%20of%20A%20Cryptocurrency%20Exchange,functions%20similarly%20like%20e%2Dbrokerages> [https://perma.cc/VW7P-SSW3] (explaining that cryptocurrencies are most often purchased by retail investors using exchanges, which operate as *digital* marketplaces). The technologization and decentralization of cryptocurrencies means that their sale inherently does not involve direct communication between an individual and the purchaser. *Id.*

93. For a discussion of how a rigid approach to statutory sellers results in the near total avoidance of liability for securities purchased solely through digital means, see *infra* notes 125–128 and accompanying text.

94. See generally *Wildes v. BitConnect Int'l PLC*, 25 F.4th 1341 (11th Cir. 2022) (considering a Section 12 claim filed against a cryptocurrency firm), *cert. denied sub nom.* *Arcaro v. Parks*, 143 S. Ct. 427 (2022).

95. See *id.* at 1344 (discussing the allegations brought by the plaintiffs).

the individual promoters, who neither passed title nor directly communicated with the plaintiff-investors, could be liable under Section 12.⁹⁶

BitConnect was involved in the primary market through the issuance of its own cryptocurrency, the BitConnect Coin, and in the secondary market through its trading platform where users could buy and sell previously issued BitConnect Coins.⁹⁷ BitConnect also maintained a “lending program” where users were promised exorbitant fixed interest payments.⁹⁸ However, behind BitConnect’s public assurances of guaranteed returns was an unsustainable and unlawful business model destined for guaranteed losses.⁹⁹ To support the fixed interest payments, BitConnect operated a Ponzi scheme where the returns for current investors were paid using the funds contributed by new investors.¹⁰⁰ BitConnect understood that sustaining the scheme required a consistent influx of new investors, which it sought to obtain through a “multi-level marketing” approach where investors served as paid promoters.¹⁰¹ The promoters

96. See *id.* at 1345 (“The only question here is whether a person can solicit a purchase, within the meaning of the Securities Act, by promoting a security in a mass communication.”).

97. See *id.* at 1343 (noting BitConnect’s creation of the BitConnect Coin); see also Complaint at 11, SEC v. BitConnect, No. 21-cv-07349 (S.D.N.Y. Sept. 1, 2021) [hereinafter SEC Complaint] (explaining that BitConnect operated in the primary market by issuing its own cryptocurrency, the BitConnect Coin, and also operated in the secondary market through its trading platform, where users could trade the BitConnect Coin). This Note supplements the facts included in *Wildes* with additional facts from the SEC’s complaint filed against BitConnect for violations of various provisions of the Securities Act.

98. See *Wildes*, 25 F.4th at 1343 (noting the existence of the BitConnect lending program and discussing the earnings associated with the program, which included fixed daily interest, possible additional daily interest, and up to forty percent interest at the end of each month); SEC Complaint, *supra* note 97, at 11–13 (providing additional details regarding the BitConnect lending program). Under the lending program, users would first transfer Bitcoin to BitConnect. *Id.* at 11. The company would then use the Bitcoin to purchase BitConnect Coin on behalf of the users. *Id.* at 12. The users would subsequently lend the BitConnect Coin back to BitConnect, which claimed that it would use a proprietary trading bot to generate large returns for investors. *Id.*

99. See *Wildes*, 25 F.4th at 1343–45 (discussing how BitConnect’s system of guaranteed returns was supported by a classic Ponzi scheme and was unsustainable over a long period).

100. See *id.* at 1343 (finding that BitConnect was operating a Ponzi scheme by using the funds contributed by new investors to support the payments to current investors, thereby creating the appearance that BitConnect’s lending program was actually generating returns); *In re United Energy Corp.*, 944 F.2d 589, 590 n.1 (9th Cir. 1991) (“A Ponzi scheme is a fraudulent arrangement in which an entity makes payments to investors from monies obtained from later investors rather than from any ‘profits’ of the underlying business venture. The fraud consists of funnelling proceeds received from new investors to previous investors in the guise of profits from the alleged business venture, thereby cultivating an illusion that a legitimate profit-making business opportunity exists and inducing further investment.”).

101. See *Wildes*, 25 F.4th at 1343 (“To keep this Ponzi scheme running, each round of investors required still more to follow.”). As the number of investors increased, the amount that the company was obligated to pay in fixed interest payments also increased and neither the growth in value of BitConnect Coins nor the success of the trading bot were sufficient to meet these growing obligations. *Id.* at

created and implemented an extensive marketing campaign, which included thousands of videos encouraging the use of BitConnect.¹⁰²

At its peak, BitConnect was generating \$10 million of new investments each week.¹⁰³ Because this was still not sufficient to cover the promised returns, BitConnect sought to raise additional capital through the launch of a new cryptocurrency—BitConnectX.¹⁰⁴ Prior to the ICO for BitConnectX, state regulators accused BitConnect of offering unregistered securities.¹⁰⁵ After this, the entire Ponzi scheme quickly collapsed—the exchange closed, the lending program stopped, and the value of the BitConnect Coin fell precipitously.¹⁰⁶

Two investors brought a class action suit against BitConnect and several of its promoters.¹⁰⁷ They alleged that BitConnect and its promot-

1344. Therefore, BitConnect needed a continuously increasing supply of investors to maintain the Ponzi scheme, which it sought through a “multi-level marketing’ structure.” *Id.* at 1343. BitConnect hired current investors to serve as promoters—paying them commissions on the investments made by new investors whom the promoters brought on to the platform. *Id.* at 1343–44 (describing the role and compensation of promoters). The Eleventh Circuit referred to this system as “a classic pyramid scheme” where new investors became promoters themselves and “[a] share of each investment would then pass on to the recruit’s promoter, her promoter’s promoter, and so on and so forth.” *Id.*; *see also* SEC Complaint, *supra* note 97, at 16–17 (describing BitConnect’s commission payout structure).

102. *See Wildes*, 25 F.4th at 1344 (discussing the marketing strategies the promoters used). The Eleventh Circuit noted that Glenn Arcaro, who served as the national promoter, played a particularly active role in the promotion of BitConnect. *Id.* Arcaro created numerous websites that encouraged investors to sign up for BitConnect and hosted online courses, which instructed attendees on the creation of a BitConnect account. *Id.* Arcaro oversaw other promoters within the United States and directed them to create videos promoting BitConnect. *Id.* The promoters created and “posted thousands of YouTube videos . . . and those videos were viewed millions of times.” *Id.*

103. *See id.* (discussing BitConnect’s rapid revenue growth); SEC Complaint, *supra* note 97, at 2, 4 (noting BitConnect earned approximately \$2 billion through the sale of unregistered securities and many promoters received substantial commission payouts). Arcaro and his wholly owned company received over \$24 million from BitConnect. *Id.* at 11.

104. *See Wildes*, 25 F.4th at 1344 (noting BitConnect attempted to launch BitConnectX because it lacked sufficient capital to sustain the Ponzi scheme).

105. *See id.* (explaining that state regulators in Texas and North Carolina issued a cease and desist order to BitConnect prior to the launch of BitConnectX).

106. *See id.* (“Within days, the scheme unraveled. BitConnect closed its trading platform, and the value of its cryptocurrency plummeted; within ‘moments’ its value fell by almost 90%. Months later, the coin was worth only 40 cents—a 99.9% drop in value from the start of the year.”); *see also* SEC Complaint, *supra* note 97, at 38 (explaining that the structure of the lending program allowed BitConnect to insulate itself from the adverse effects of the collapse of its own coin). When joining the lending program, users exchanged BitCoin for BitConnect Coin. *Id.* at 12. Therefore, when the value of BitConnect Coin dropped, the users were left with a valueless asset while BitConnect was left with a valuable asset—the company had 325,000 Bitcoin (valued at roughly \$2 billion) from the exchange program. *Id.* at 38.

107. *See Wildes*, 25 F.4th at 1344 n.2 (discussing the class action suit, which named the following parties as defendants: BitConnect International PLC, BitConnect LTD, BitConnect Trading LTC (BitConnect), and Glenn Arcaro, Trevon Brown, Craig Grant, Ryan Hildreth, Ryan Maasen, and Tanner Fox (Promoters)).

ers violated Section 12(a)(1) by selling unregistered securities through BitConnect's promotional materials.¹⁰⁸ The promoters moved to dismiss, arguing that Section 12 requires personal solicitation and that the promoters did not "directly communicate" with the potential investors through the videos.¹⁰⁹ Agreeing with the defendants' interpretation of Section 12(a)(1), the district court held that the plaintiffs failed to show the promoters "individually" persuaded them to invest through the marketing materials because the communication was only through "publicly available content."¹¹⁰ The district court allowed the plaintiffs to amend their complaint to allege a more direct connection between the plaintiffs and the defendant promoters; however, the district court also dismissed the amended complaint, concluding that it similarly failed to establish individualized solicitation.¹¹¹ The plaintiffs appealed.¹¹²

IV. A (SEEMINGLY) NEW APPROACH BRINGS LAW TO THE WILD WEST

The issue on appeal was whether an individual who promotes a security solely through mass communication can be held liable as a seller under Section 12.¹¹³ The Eleventh Circuit began its analysis by looking to the statutory text.¹¹⁴ Because Section 12 does not define "offer" or "sell," the court turned to the definitions provided by Section 2(a)(3) of the Securities Act and concluded that the definitions do not support an individualized communication requirement.¹¹⁵ The court also found

108. See *id.* at 1344 (stating plaintiffs alleged a violation of Section 12(a)(1) in addition to various other state and federal claims); *In re BitConnect Sec. Litig.*, No. 18-cv-80086, 2019 WL 9104318 (S.D. Fla. Aug. 23, 2019) (providing further details about the plaintiffs' claims). The plaintiffs sought relief under Section 12(a) and Section 15(a) of the Securities Act, as well as under state law claims, including breach of contract, unjust enrichment, fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, conversion, and civil conspiracy. *Id.* at *2.

109. See *Wildes*, 25 F.4th at 1344 & n.2 (noting two promoters moved to dismiss, asserting Section 12(a) does not apply to them because their lack of direct communication with the Plaintiffs meant that they could not have offered or sold the security).

110. See *In re BitConnect*, 2019 WL 9104318, at *10; see also *Wildes*, 25 F.4th at 1344 ("[T]he plaintiffs needed to allege that the promoters had urged or persuaded them—'individually'—to purchase BitConnect coins. Because the plaintiffs based their case on interactions with the promoters' 'publicly available content,' the district court concluded that their complaint failed to state a section 12 claim.").

111. See *Wildes*, 25 F.4th at 1345 (explaining that the plaintiffs submitted an amended complaint adding new claimants who initially invested with BitConnect through referral links shared by the defendant promoters, but that the district court found the referral links were not enough to establish individualized solicitation).

112. See *id.* (noting that, on appeal, the plaintiffs only challenged the dismissal of the Section 12 claim against the promoters).

113. See *id.* ("The only question here is whether a person can solicit a purchase, within the meaning of the Securities Act, by promoting a security in mass communication.").

114. See *id.* (conducting a textual analysis of Section 12).

115. See *id.* ("[A] person sells a security when he makes a 'contract of sale' for or disposes of a security for value. And a person offers a security 'every' time he makes an 'offer to dispose of'—or a 'solicitation of an offer to buy'—a security for

that the text of Section 12 suggests Congress intended a broader interpretation of seller liability.¹¹⁶

Recognizing that the statutory text does not impose such a restriction, the Eleventh Circuit then considered whether the term “solicitation” itself implies a need for individualization.¹¹⁷ Because *Pinter* did not define solicitation, the court constructed a definition by analyzing the term’s historical interpretation.¹¹⁸ Based on this analysis, the Eleventh Circuit found that courts have long understood solicitation as including “communications made through diffuse, publicly available means—at the time, newspaper and radio advertisements.”¹¹⁹ Consequently, the court concluded that the term “solicitation” does not carry an inherent individualization requirement.¹²⁰

The Eleventh Circuit also disputed the argument that judicial precedents require communications to be individualized in order to constitute solicitations.¹²¹ According to the court, *Pinter* was not outcome-determinative because it did not define the scope of solicitation.¹²² *Pinter* maintained only that the solicitation must be successful and motivated by a desire to advance the financial interests of the

value.” (quoting 15 U.S.C. § 77b(a)(3) (2024)); see *id.* (“Nowhere in those definitions does Congress limit solicitations to ‘personal’ or individualized ones as the district court did here.”).

116. See *id.* (emphasizing that the broadly phrased “any means” language, seems to include nonindividualized communications that contain untrue statements and lead to the sale of the specific security (emphasis added) (quoting 15 U.S.C. § 77e(a)(1))). Further, the Eleventh Circuit noted that Section 12 creates potential liability for those who offer or sell through the use of a “prospectus,” which is defined elsewhere in the Securities Act as including “communications as impersonal as radio and television advertisements.” *Id.* (first citing 15 U.S.C. § 77e(a)(1); and then citing 15 U.S.C. § 77b(a)(10)).

117. See *id.* (analyzing whether “the proposed limitation [is] somehow baked into the word ‘solicitation’”).

118. See *id.* at 1346 (“The leading case interpreting section 12, *Pinter v. Dahl*, says nothing about what solicitation entails.”). To fill this gap, the Eleventh Circuit looked to materials from the 1930s to ascertain the meaning of solicitation as the drafters of the Securities Act would have understood it. *Id.*

119. See *id.* (defining “solicitation” as “pursuit, practice, act, or an instance, of soliciting,” and defining “soliciting” as “to approach with a request or plea, as in selling” (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2393–94 (2d ed. 1938))). The Eleventh Circuit cited several cases from the 1930s, which held that an individual could solicit a purchase solely through publicly available newspaper or radio advertisements. *Id.* But see Milstead, Hines & Brown, *supra* note 23 (noting the cases cited by the Eleventh Circuit “did not arise under the Securities Act”).

120. See *Wildes*, 25 F.4th at 1346 (“Broadly disseminated communications also can convey a solicitation—indeed, they are consistent with the longstanding interpretation of the term.”).

121. See *id.* (“Securities Act precedents do not restrict solicitations under the Act to targeted ones.”).

122. See *id.* (noting *Pinter* does not resolve the issue of whether mass communications can be considered solicitations and whether promoters who rely solely on mass communications can be considered statutory sellers because *Pinter* did not define solicitation).

alleged solicitor.¹²³ Without any additional Supreme Court precedent on point, the Eleventh Circuit turned to its own cases interpreting solicitation for purposes of Section 12(a), which similarly did not limit the scope of solicitation to individualized communications.¹²⁴

Additionally, relying on a practicality-based argument, the Eleventh Circuit noted that an interpretation of solicitation whereby only certain types of broadly disseminated communications constitute solicitations would create inconsistencies in enforcement.¹²⁵ Under the district court's approach, if a promoter of an unregistered security mailed a letter to all residents within a certain geographical area, the promoter would potentially be liable under Section 12(a).¹²⁶ However, if the promoter included the same information in a video or a social media post, they would be immune from liability.¹²⁷ The court reasoned that any approach allowing individuals to avoid liability merely by choosing a certain type of communication should not be adopted.¹²⁸

The Eleventh Circuit concluded its analysis by noting that advances in technology have drastically changed the ways securities are offered and sold.¹²⁹ Because today's sellers have largely replaced individualized promotion with digital methods that allow for a global reach, the court explained that an overly narrow interpretation would substantially limit

123. *See id.* (“[*Pinter*] focuses on the result and intent necessary for section 12 liability: the solicitation must succeed, and it must be motivated by a desire to serve the solicitor's or the security owner's financial interests.” (citing *Pinter v. Dahl*, 486 U.S. 622, 647 (1988))).

124. *See id.* (noting *Pinter* is the leading case interpreting Section 12(a) and that no other Supreme Court precedent discusses whether mass communication alone is sufficient to constitute solicitation under Section 12(a)). In looking to its own precedent, the Eleventh Circuit noted that it had never before required that communications be individualized or personalized in order to constitute solicitations. *Id.* (citing *Ryder Int'l Corp v. First Am. Nat'l Bank*, 943 F.2d 1521, 1531, 1534 (11th Cir. 1991)). For a further discussion of the Eleventh Circuit precedent, see *supra* notes 80–83 and accompanying text.

125. *See Wildes*, 25 F.4th at 1346 (explaining that liability would depend on the form of the communication rather than its substance and effect).

126. *See id.* (describing the district court's ruling as a “cramped reading of the Securities Act”). The Eleventh Circuit illustrates the practical insufficiencies of an overly narrow approach by using the following example: under the district court's approach, a seller who sends a personalized letter to a prospective purchaser containing information about a security and encourages the purchase of the security would be liable whereas another seller who distributes the same information but through nonindividualized means (e.g., social media posts, online videos, podcasts, etc.) would not be held liable. *Id.* According to the court, “[a] seller cannot dodge liability through his choice of communications.” *Id.*

127. *See id.* (noting the hypothetical seller who utilized digital methods of solicitation would not be liable under the district court's approach, but the hypothetical seller who mailed the letter would be liable).

128. *See id.* (concluding that an overly narrow approach to defining solicitation “makes little sense” and rejecting “an interpretation that both contradicts the text and allows easy end-runs around the [Securities] Act”).

129. *See id.* (“Technology has opened new avenues for both investment and solicitation.”).

the remedial effectiveness of Section 12.¹³⁰ Ultimately, liability should hinge on the substance and success of the communication rather than its method of delivery.¹³¹ Therefore, when the promoters of BitConnect, through videos and other digital methods, successfully urged individuals to purchase BitConnect Coin out of their own financial self-interest, they became statutory sellers under Section 12 regardless of the form of their communication.¹³²

V. TAMING THE CRYPTO OUTLAWS: THE ELEVENTH CIRCUIT ENCOURAGES RESPONSIBLE GOVERNANCE THROUGH A STRONG AND STATUTORILY SUPPORTED PRIVATE ENFORCEMENT REGIME

Within the cryptocurrency industry, the prevalence of fraud underscores the need to incentivize responsible governance.¹³³ Fraud flourishes in environments where inadequate social controls allow for rationalization, perceived opportunity, and perceived pressure.¹³⁴ The disjointed and ineffective regulatory regime for cryptocurrencies enables firms to rationalize their conduct.¹³⁵ While the SEC has increased its oversight

130. *See id.* (“Sellers can now reach a global audience through podcasts, social media posts, or, as here, online videos and web links . . .”). Unlike many historical methods of solicitation, which are by their nature individualized, many modern methods are inherently nonindividualized. *Id.*

131. *See id.* (asserting that a seller should not be able to avoid liability based on the form of the communication and concluding, “[a] new means of solicitation is not any less of a solicitation”).

132. *See id.* (“So when the promoters urged people to buy BitConnect coins in online videos, they still solicited the purchases that followed. The plaintiffs therefore have stated a section 12 claim against Arcaro and the other promoters.”).

133. *See* Elizabeth Davidson, *A Middle-Ground for Cryptocurrency Regulation: Using Delaware’s Incentive-Driven Private-Ordering Model*, 44 J. CORP. L. 789, 803, 811 (2019) (emphasizing that government-created but privately enforced control systems can “create an incentive-based circumstance for the acting parties to act in their best interest, which is also the desired public policy interest”); Tobias Adrian, Dong He, Arif Ismail & Marina Moretti, *Crypto Needs Comprehensive Policies to Protect Economies and Investors*, IMF BLOG (July 18, 2023), <https://www.imf.org/en/Blogs/Articles/2023/07/18/crypto-needs-comprehensive-policies-to-protect-economies-and-investors> [<https://perma.cc/5TGF-W24Y>] (explaining that without adequate controls, there is an increased risk of fraud within the cryptocurrency industry).

134. Waymond Rodgers, Arne Söderbom & Andrés Guiral, *Corporate Social Responsibility Enhanced Control Systems Reducing the Likelihood of Fraud*, 131 J. BUS. ETHICS 871, 871–72 (2015) (discussing the three components of the fraud triangle: rationalization, perceived opportunity, and perceived pressure).

135. *See id.* at 872 (describing rationalization as the attempt to reduce “cognitive dissonance,” which allows individuals to justify the fraud); Arjun Kharpal, *‘Can’t Get Their Act Together’: Crypto Firms Slam SEC, Washington for Lack of Clarity on Rules*, CNBC (Mar. 24, 2023, 2:19 AM), <https://www.cnbc.com/2023/03/24/cant-get-their-act-together-crypto-firms-slam-sec-washington-for-lack-of-clarity-on-rules.html> [<https://perma.cc/UU4N-432W>] (asserting that the inconsistent regulatory regimes have left cryptocurrency firms without clarity as to whether the securities laws apply to their business activities); Kolhatkar, *supra* note 27 (“[A]nytime something isn’t clearly defined, it creates space for different actors in the market to argue that the regulations don’t apply to them.”); Paul Kiernan, *Coinbase Adds Its Defiance*

of the cryptocurrency industry,¹³⁶ public enforcement alone fails to adequately remedy the issue of perceived opportunity because of budgetary constraints, political pressures, and informational disadvantages.¹³⁷

These deficiencies emphasize the need for a robust system of private enforcement.¹³⁸ Private enforcement undoubtedly has its flaws, including market inefficiencies stemming from high transaction costs and the potential for overdeterrence.¹³⁹ However, a hybrid model of public and

of *SEC to Litany of Risks*, WALL ST. J. (Feb. 21, 2023, 7:31 PM), <https://www.wsj.com/livecoverage/stock-market-today-02-21-2023/card/coinbase-adds-its-defiance-of-sec-to-litany-of-risks-fqiytPF0oUfs6gCyJgCG> [perma link unavailable] (stating that, in the wake of regulatory uncertainty, one of the world's largest cryptocurrency exchanges has simply declared that its platform is not subject to the securities laws).

136. See Adam Hayes, *How SEC Regs Will Change Cryptocurrency Markets*, INVESTOPEDIA (Apr. 15, 2024), <https://www.investopedia.com/news/how-sec-regs-will-change-cryptocurrency-markets/#:~:text=Key%20Takeaways,agency%20as%20securities%20trading%20platforms> [<https://perma.cc/KKZ2-R2EL>] (noting the SEC has expanded the size of its cryptocurrency enforcement unit and brought twenty-four enforcement actions in the first half of 2023 in an effort to assert greater regulatory control over the cryptocurrency industry).

137. See Rodgers, Söderbom & Guiral, *supra* note 134, at 871–72 (explaining that perceived opportunity exists in the absence of appropriate controls to discourage the fraudulent conduct); Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1519 (2022) (explaining that controlling behavior via public enforcement is limited by budgetary constraints and political pressures); see also J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1153–54 (2012) (noting public enforcement agencies provide an indirect response and must overcome various issues including limited financial resources and informational disadvantages).

138. See Shannon Rose Selden, *(Self-)Policing the Market: Congress's Flawed Approach to Securities Law Reform*, 33 J. LEGIS. 57, 58 (2006) (emphasizing that reliance on disclosure and self-governance is not sufficient, and that the securities market needs strong enforcement mechanisms); Glover, *supra* note 137, at 1153 (“Private parties function as crucial regulators within various areas of law because of limitations on public bodies that circumscribe their effectiveness in achieving regulatory goals.”); Norris, *supra* note 137, at 1519 (“In such a context of slanted power and governmental unresponsiveness, traditional forms of private enforcement litigation have a potentially powerful and equalizing effect.”). Norris explains that not only can private enforcement address the financial and political limits to effective public enforcement, but it can also remedy power imbalances. *Id.* Whereas government actors may be unwilling or unable to address certain areas because of industry influence, private enforcement provides individual actors who feel they have been unlawfully harmed with the power to act on behalf of themselves. *Id.* at 1519–20. But see Joseph A. Grundfest, Opinion, *The Class-Action Market*, WALL ST. J. (Feb. 7, 2007, 12:01 AM), <https://www.wsj.com/articles/SB117082270114300590> [perma link unavailable] (“As long as the government’s enforcement activities remain sufficiently vigorous, the private class-action securities fraud lawsuit can be viewed as an expensive, wasteful and unnecessary sideshow that generates little deterrence and offers questionable levels of compensation.”).

139. See Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2200–03 (2010) (explaining that private enforcement can lead to market inefficiencies and overdeterrence); Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207, 208–10 (2009) (discussing the drawbacks of private enforcement, including the collective action problem, the free rider problem, the lost efficiencies stemming from lawyers’ fees, and the potentially insufficient monetary penalties).

private enforcement can extrapolate the benefits of both enforcement mechanisms while minimizing the flaws of each.¹⁴⁰ Defrauded cryptocurrency investors need the Securities Act—and specifically Section 12—to provide an opportunity for private enforcement.¹⁴¹ But when excessive limitations restrict the scope of Section 12 liability, private enforcement ceases to have a deterring effect.¹⁴² By broadening the scope of liability, the Eleventh Circuit maintained the power of the individual investor, and in doing so, provided the necessary incentives to encourage responsible governance.¹⁴³

The legislative history surrounding the Securities Act also clarifies Congress's goals—to control fraud and promote ethical behavior.¹⁴⁴ Congress intended for civil liability to be a primary method for effectuating

140. See Jackson & Roe, *supra* note 139, at 208 (arguing strong private enforcement can overcome the deficiencies of public enforcement and vice versa); Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 104 MINN. L. REV. 811, 822–30 (2019) (asserting hybrid enforcement models are supported by both political and economic theory rationales).

141. See James J. Park & Howard H. Park, *Regulation by Selective Enforcement: The SEC and Initial Coin Offerings*, 61 WASH. U. J.L. & POL'Y 99, 102 (2020) (noting the Securities Act provides investors with “powerful remedies when they purchase an unregistered token that turns out to be a security”); Selden, *supra* note 138, at 58 (explaining that private enforcement allows investors “to be compensated for their losses”); see also *supra* note 31 (discussing the limitations of Section 11 of the Securities Act and Section 10b).

142. See *Wildes v. BitConnect Int'l PLC*, 25 F.4th 1341, 1346 (11th Cir. 2022) (noting that an overly narrow approach to seller liability frustrates the remedial purpose of Section 12 by allowing sellers of securities to avoid liability merely by picking and choosing certain forms of communication), *cert. denied sub nom. Arcaro v. Parks*, 143 S. Ct. 427 (2022); see also Glover, *supra* note 137, at 1142 (“[R]estrictions of the mechanisms that make such litigation possible may, as a general matter, lead to undesirable consequences for the vindication of substantive rights or the deterrence of socially undesirable conduct.”).

143. See *Wildes*, 25 F.4th at 1346–47 (maintaining a wide, yet statutorily consistent, scope of seller liability by creating potential liability for any individual who offers or sells the security, regardless of whether they did so via direct or indirect communication); Rose, *supra* note 139, at 2222 (discussing the scope of liability under the securities laws). While the author generally disfavors private enforcement because of the associated market inefficiencies, she acknowledges that there are social benefits and additional research is warranted moving forward. *Id.* With respect to the social benefits, the author notes:

The reputational damage that private enforcement imposes, for example, may effectively deter officers and produce significant savings in underdeterrence costs. The threat of class action litigation may also galvanize the attention of directors on the risk of managerial fraud, prompting boards to implement better internal controls than they otherwise would. Moreover, private enforcement may have a positive effect on the SEC's own deterrence efforts, to the extent that SEC enforcement personnel fear the class action bar exposing their inadequate job performance.

Id. (discussing the benefits of private enforcement of the securities laws).

144. See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976) (stating Congress's intent in enacting the Securities Act was three-fold: “to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing”).

these legislative goals.¹⁴⁵ The holding of *Wildes* advances the legislative intent of the Securities Act.¹⁴⁶ However, any approach that expands liability is ultimately futile if it conflicts with the statute.¹⁴⁷ While *Wildes* extends liability beyond the Fifth Circuit's direct communication standard, it is still consistent with the text of Section 12.¹⁴⁸

Additionally, *Wildes* is consistent with judicial interpretations of Section 12.¹⁴⁹ While the Supreme Court expressly rejected the substantial factor test, imposing liability on those who solicit through mass communication does not require the use of the substantial factor test.¹⁵⁰ The Supreme Court rejected the test because of its potential effects on certain collateral actors (e.g., lawyers and accountants).¹⁵¹ However,

145. See *id.* (explaining Congress sought to achieve its remedial goals through public registration requirements and the imposition of civil liability); see also 77 CONG. REC. 2919 (1933) (emphasizing the importance of civil and criminal liability in encouraging sellers to adhere to the Securities Act).

146. See *Pino v. Cardone Cap., LLC*, 55 F.4th 1253, 1259 (9th Cir. 2022) ("Creating liability for those who solicit a sale for financial gain, as opposed to limiting it to those who simply pass title, is consistent with the Securities Act's remedial goal of protecting purchasers from the harm caused by promoters' material misstatements and omissions, in part due to the promoter's superior access to information concerning the securities and their valuation."), *cert. denied*, 144 S. Ct. 75 (2023) (mem.); see also *Pinter v. Dahl*, 486 U.S. 622, 642, 647 (1988) (explaining that imposing liability on all individuals who successfully solicit the purchase of a security motivated by their own financial self-interest is consistent with "Congress' overriding goal").

147. See *Prentice*, *supra* note 16, at 467 ("[T]he remedial purposes of the Act do not justify ignoring the language and history of section 12." (citing *Pinter*, 486 U.S. at 653)).

148. Compare *Wildes*, 25 F.4th at 1347 (holding an individual who promotes a security solely through mass communication can be held liable as a seller), with *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871 (5th Cir. 2003) (holding direct communication is necessary for the imposition of liability under Section 12). See *Pino*, 55 F.4th at 1257–58 (endorsing the *Wildes* approach and asserting that the statutory language "any person," implies a broad scope of liability (quoting 15 U.S.C. § 771(a) (2) (2024))). The Ninth Circuit also noted that the Securities Act originally defined prospectus as including communications over television or radio, which suggests that Congress affirmatively intended liability to extend beyond a direct communication standard. *Id.* at 1258–59 (discussing how definitions located elsewhere in the Securities Act support an expanded interpretation of seller liability); see also *Prentice*, *supra* note 16, at 471 n.286 (explaining that even some commentators "who support the strict privity approach to § 12 admit that a solicitation approach, if limited to market professionals, would be an acceptable alternative").

149. See *Wildes*, 25 F.4th at 1346 (explaining that Section 12 precedents "do not restrict solicitations under the Act to targeted ones"); *Pino*, 55 F.4th at 1259 (noting the Supreme Court has never held that individualized communication was necessary to solicit a purchase and thus trigger potential liability as a seller under Section 12).

150. See *Pinter*, 486 U.S. at 642, 650 (rejecting the substantial factor test). But see *Pino*, 55 F.4th at 1259–60 (finding that those who solicit through mass communication may be held liable without having to apply the substantial factor test).

151. See *Pinter*, 486 U.S. at 648–54 (explaining that the substantial factor test was inconsistent with Section 12 because it imposed liability on professionals, such as lawyers and accountants, whose work is only incidental to the eventual sale of the security); see also *Prentice*, *supra* note 16, at 434–35 (noting that the Supreme Court rejected the substantial factor test because it could lead to liability for ancillary

those who promote the sale of securities through mass communication are not merely facilitating the transaction—their communication is causing the transaction.¹⁵² Ultimately, *Wildes* used existing interpretations of Section 12 to reach a conclusion in an emerging area of the law.¹⁵³ The holding may be novel, as no circuit has previously held that promoters who utilize solely nonindividualized methods can be liable as sellers under Section 12, but the method of analysis—determining whether the communication, regardless of it being direct or indirect, had the effect of inducing the plaintiff's purchase—is not novel.¹⁵⁴

While the *Wildes* approach conflicts with the direct communication standard, the overly strict nature of that standard makes it inconsistent with both the legislative intent of the Securities Act and the text of Section 12.¹⁵⁵ Proponents of that approach support its narrow scope

professionals who do not constitute “true sellers” and because the test’s use of tort principles made its applicability inconsistent).

152. See *Pino*, 55 F.4th at 1260 (holding that individuals who successfully solicit the purchase of the security can be true sellers regardless of the method of solicitation they used and whether the plaintiff relied on the communication). Within the context of cryptocurrencies specifically, investors are purchasing cryptocurrencies as a result of mass communicated advertisements. See Emma Fletcher, *Reports Show Scammers Cashing in on Crypto Craze*, FED. TRADE COMM’N (June 3, 2022), <https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/06/reports-show-scammers-cashing-crypto-craze> [perma link unavailable] (noting forty-nine percent of the fraud reports filed with the Federal Trade Commission (FTC) regarding cryptocurrencies “started with an ad, post, or message on a social media platform”); Daniel Arkin, *Why Were There So Many Crypto Ads During the Super Bowl?*, NBC NEWS (Feb. 14, 2022, 3:14 PM), <https://www.nbcnews.com/tech/tech-news/many-crypto-ads-super-bowl-rcna16132> [https://perma.cc/KW9D-XHFV] (predicting that the crypto industry’s aggressive advertising push is likely to result in a “huge rise in downloads and sign-ups”).

153. See Melanie Cherdack, *Pushes, Tweets, Emojis and Fintok: Emerging Tech Meets Old School Securities Regulation*, 30 PIABA BAR J. 319, 344 (2023) (noting *Wildes* clarified that the “[o]ld school Securities Act interpretations still apply” and govern new means of solicitation). For further discussion of *Wildes*’ use of precedent in its analysis, see *supra* notes 126–129 and accompanying text.

154. See Milstead, Hines & Brown, *supra* note 23 (noting the Eleventh Circuit in *Wildes* was the first circuit to address whether promoters of securities who utilize only digital, nonindividualized communications can be liable as sellers under Section 12); *Wildes*, 25 F.4th at 1347 (“When a person solicits the purchase of securities to serve his (or the security owner’s) financial interests, he is liable to a buyer who purchases those securities—whether that solicitation was made to one known person or to a million unknown ones. Using publicly available videos, the promoters here—with Arcaro in the lead—convinced the plaintiffs to buy BitConnect through their referral programs and earned a commission on those investments.”). The Eleventh Circuit was not the first to hold that direct communication was not necessary to solicit under Section 12. See *Capri v. Murphy*, 856 F.2d 473, 479 (2d Cir. 1988) (holding an individual who directly communicated with the plaintiffs could be liable as a seller because they directed the solicitation efforts). Applying *Capri* would likely result in liability for Glenn Arcaro in *Wildes*, who, like the defendant in *Capri*, oversaw the solicitation efforts that reached the plaintiffs. See *Wildes*, 25 F.4th at 1346 (imposing liability on the leader of BitConnect’s promotional activities).

155. See sources cited *supra* notes 126–128 and accompanying text (discussing the insufficiencies of a direct communication standard); see also *Wildes*, 25 F.4th at 1345 (explaining that the holding of the trial court, which applied the Fifth Circuit’s

by emphasizing one sentence from *Pinter* where the Supreme Court conceded that, “the language of § 12(1) contemplates a buyer-seller relationship not unlike traditional contractual privity.”¹⁵⁶ However, this mischaracterizes the central holding of *Pinter* because it expressly rejected the idea that liability requires a direct buyer-seller relationship.¹⁵⁷

Furthermore, *Wildes* correctly emphasizes the practical insufficiencies of imposing liability on individuals who use antiquated methods of sales and solicitation while permitting the avoidance of liability for those who promote the same information utilizing modern methods.¹⁵⁸ The conclusion that selling requires direct communication is a relic of a pre-internet era when the sale of securities required direct, and often in-person, communication between the purchaser and the seller.¹⁵⁹ When Congress originally drafted the Securities Act, its conception of solicitation was door-to-door promotion.¹⁶⁰ Today, across all industries, firms have increasingly sought to solicit customers and sell goods and

direct communication standard, “would certainly go a long way toward eliminating liability for the promoters here, and for others who champion dicey investments through modern communication channels”).

156. See *Pino*, 55 F.4th at 1259–60 (quoting *Pinter*, 486 U.S. at 641–42) (noting Section 12 defendants point to dicta from *Pinter* to support their contention that the Supreme Court intended a narrow scope of seller liability); see, e.g., *FDIC v. First Horizon Asset Sec. Inc.*, 291 F. Supp. 3d 364, 377 (S.D.N.Y. 2018) (narrowing the scope of liability by quoting dicta from *Pinter* regarding strict privity).

157. See *Pino*, 55 F.4th at 1260 (noting the Supreme Court in *Pinter* “interpreted the meaning of ‘seller’ under § 12 to include more than mere owners to encompass those who engage in solicitation”); *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 940 (7th Cir. 1989) (concluding *Pinter* expressly rejects a strict privity requirement).

158. See *Wildes*, 25 F.4th at 1346 (explaining that practical inconsistencies would arise if sellers were held liable for some types of communications but not others); see also Davis, *supra* note 19, at 106, 112 (noting courts can consider practical, policy-based arguments regarding the Securities Act when no conclusive approach exists (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 694–95 n.7 (1985))).

159. See *Wildes*, 25 F.4th at 1346 (“A new means of solicitation is not any less of a solicitation.”); see also Brad M. Barber & Terrance Odean, *The Internet and the Investor*, 15 J. ECON. PERSP. 41, 42 (2001) (noting that as a result of technology, investment services which were once performed in-person are now generally performed through digital means and at lower costs); Cherdack, *supra* note 153, at 319 (“The methods of human communication have drastically changed since Congress crafted the securities laws almost a century ago. The basic principles have not. Existing securities laws and principles can be used or expanded to regulate advances in technology which broker-dealers employ to communicate with and engage investors. Although accomplished through a nudge or push notification to a smartphone, tweeted with emojis or posted on a TikTok or YouTube video, the messages and their legal implications are the same.”).

160. See 77 CONG. REC. 2949 (1933) (“It is through *house-to-house solicitation* that the unwary, the unworldly, and the uninformed are chiefly defrauded. We are all familiar with the high-pressure security salesman, his elaborate technique of approach and of closing, his prepared harangue to outtalk the unprepared prospect, and his faked-up enthusiasm.” (emphasis added)); see also Robert J. Shiller, *Looking Back at the First Roaring Twenties*, N.Y. TIMES (Apr. 16, 2021), <https://www.nytimes.com/2021/04/16/business/roaring-twenties-stocks.html> [perma link unavailable] (stating that around the time the Securities Act was passed, illuminated stock tickers and radio advertisements were considered new technology).

services through digital, nonindividualized methods.¹⁶¹ If courts attempt to apply a twentieth century understanding of solicitation to a twenty-first century set of facts, it will produce inconsistent results.¹⁶² The unique and additional risks posed by modern methods of solicitation emphasize the need for an approach that does not allow promoters of securities who rely solely on these modern methods to escape liability.¹⁶³

VI. BLAZING A TRAIL: THE IMPACT OF *WILDES* ON THE SCOPE OF SECTION 12 LIABILITY AND THE FUTURE OF THE CRYPTOCURRENCY INDUSTRY

After the Ninth Circuit's 2022 decision in *Pino* (which relied on *Wildes*), there is growing momentum for the *Wildes* approach.¹⁶⁴ *Pino* and *Wildes* illustrate the fact that the fraudulent promoters that the

161. See Yogesh K. Dwivedi, Elvira Ismagilova, D. Laurie Hughes, Jamie Carlson, Raffaele Filieri, Jenna Jacobson, Varsha Jain, Heikki Karjalainen, Hajer Kefi, Anjala S. Frishen, Vikram Kumar, Mohammad M. Rahman, Ramakrishnan Raman, Philipp A. Rauschnabel, Jennifer Rowley, Jari Salo, Gina A. Tran & Yichuan Wang, *Setting the Future of Digital and Social Media Marketing Research: Perspectives and Research Propositions*, 59 INT'L J. INFO. MGMT. 1, 2 (2020) [hereinafter *Setting the Future*] ("The decline of traditional communication channels and societal reliance on bricks-and-mortar operations, has necessitated that businesses seek best practices use of digital and social media marketing strategies to retain and increase market share.").

162. See *Wildes*, 25 F.4th at 1346 (emphasizing that an approach such as the direct communication standard allows for the avoidance of liability when information is transmitted through digital mass communication but imposes liability when the same information is delivered in-person or through a personal letter). The drafters of the Securities Act understood securities sales in a radically different way than how modern securities are sold. Compare 77 CONG. REC. 2949 (discussing the door-to-door salesman selling hard-copy stock certificates), with *Chu*, *supra* note 5, at 2326–29 (discussing the blockchain and the fully digital sale of cryptocurrency through online exchanges), and *Pino*, 55 F.4th at 1256 (discussing Cardone Capital's sale of approximately \$100 million worth of securities, which was almost entirely the result of digital activities).

163. See *Pino*, 55 F.4th at 1260 ("[I]f anything, the advertisements at issue in this case—Instagram posts and YouTube videos—are the types of potentially injurious solicitations that are intended to command attention and persuade potential purchasers to invest in the Funds during the 'most critical' first stage of a selling transaction, when the buyer becomes involved. *Pino* fairly alleges that the nature of social media presents dangers that investors will be persuaded to purchase securities without full and fair information." (citation omitted)). Additionally, the Ninth Circuit noted that solicitation through digital means is a cost-saving measure that allows for sellers of securities to reach more people at lower costs. *Id.* (explaining another reason for ensuring the equal treatment of digital mass communications); see also *Setting the Future*, *supra* note 161, at 2 (emphasizing that "[d]igital and social media marketing allows companies to achieve their marketing objectives at relatively low cost").

164. See *Pino*, 55 F.4th at 1258 (endorsing the approach taken by the Eleventh Circuit and stating "[t]he Eleventh Circuit correctly recognized that nothing in § 12 expressly requires that solicitation must be direct or personal to a particular purchaser to trigger liability under the statute"). The defendant in *Pino*, Cardone Capital, invested in real property by pooling money from investors. *Id.* at 1255. To reach investors, Cardone relied exclusively on social media and other forms of digital mass communication. *Id.* at 1256. Cardone's CEO, who was the individual defendant named in the suit, made repeated, misleading statements in these communications, including guaranteeing fixed returns for investors. *Id.* at 1255–56.

drafters of the Securities Act feared continue to roam the Wild West.¹⁶⁵ The fraudulent promoters of today no longer require direct communication to sell securities; rather, because of technological advances, they can materialize a new security and reach a global audience all from behind a computer screen.¹⁶⁶ Consequently, adopting an overly narrow interpretation of seller liability, such as the Fifth Circuit's direct communication standard, will effectively eliminate the investor's ability to recover losses stemming from the frauds perpetrated by the modern promoter.¹⁶⁷ The differences between the approaches of the Fifth Circuit and the Ninth and Eleventh Circuits may require the Supreme Court to once again step in to interpret Section 12.¹⁶⁸

The collapses of cryptocurrency firms such as FTX have drawn increased attention to the scope of liability for promoters of

Relying on *Wildes*, the Ninth Circuit held that the defendant was a seller under Section 12(a)(2). *Id.* at 1258–61.

165. See *id.* at 1256 (exemplifying the fact that sellers of securities continue to mislead investors); see also MASSAD, *supra* note 12, at 3 (noting insufficient regulation has enabled an environment conducive to fraud). As cryptocurrency firms continue to perpetrate frauds and operate without sufficient governance mechanisms, an increase in litigation is likely to continue. See Ghodoosi, *supra* note 85, at 88 (noting that “a cascade of lawsuits” similar to those following the collapse of financial firms during the Great Recession is likely to result).

166. See Allie Grace Garnett, *How to Make a Cryptocurrency*, INVESTOPEDIA (May 11, 2024), <https://www.investopedia.com/how-to-make-a-cryptocurrency-5215343> [<https://perma.cc/8PP8-D5VJ>] (explaining that cryptocurrencies can be created by anyone with sufficient time, money, and technical knowledge); PARMA BAINS, ARIF ISMAIL, FABIANA MELO & NOBUYASU SUGIMOTO, INT’L MONETARY FUND, REGULATING THE CRYPTO ECOSYSTEM: THE CASE OF UNBACKED CRYPTO ASSETS 16 (2022), <https://www.imf.org/-/media/Files/Publications/FTN063/2022/English/FTNEA2022007.ashx> [perma link unavailable] (noting digital assets are typically marketed through digital means).

167. See *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871 (5th Cir. 2003) (holding an individual cannot solicit the purchase of a security without directly communicating with the purchaser). Under that approach, promoters such as the defendants in *Wildes* and *Pino*, who principally engage with potential purchasers through mass communication, cannot be held liable under Section 12 because one does not directly communicate through online videos or social media posts. See *id.* (creating a narrow approach to seller liability); see also *Wildes*, 25 F.4th at 1346 (emphasizing that an overly narrow approach will allow sellers to escape liability by choosing a specific method of solicitation).

168. See Milstead, Hines & Brown, *supra* note 23 (noting that the differences between the circuits may affect business considerations and will lead to plaintiffs filing suits in jurisdictions that follow the *Wildes* approach); Matthew Bultman, *Instagram Promoters Test Limits of 90-Year-Old Securities Laws*, BLOOMBERG L. (Oct. 20, 2023, 5:00 AM), <https://news.bloomberglaw.com/securities-law/instagram-promoters-test-limits-of-90-year-old-securities-law> [<https://perma.cc/QZS5-8PQJ>] (“The uncertainty has created a murky situation for investment companies and promoters, lacking bright-line rules about the kinds of online activities that would push them into the territory of being a seller who can be hauled into court.”); Prentice, *supra* note 16, at 417 (noting Section 12 has “never received much attention from the Supreme Court”). The Supreme Court already denied certiorari in *Pino*, so it is unclear whether the Court would be willing to review this issue in the future. See *Cardone Cap., LLC v. Pino*, 144 S. Ct. 75 (2023) (mem.).

cryptocurrencies.¹⁶⁹ Through its promoters, FTX told the public that their investments would be safe.¹⁷⁰ In reality, their investments were far from safe.¹⁷¹ When FTX collapsed, investors lost billions, and on May 15, 2023, former FTX investors brought a class action suit against the founder of FTX and its celebrity promoters asserting that the defendants unlawfully sold unregistered securities.¹⁷² The plaintiffs specifically cited *Wildes* in support of their assertion that broadly disseminated communications promoting the sale of a security can constitute solicitations resulting in liability for the sellers of the security.¹⁷³ With each ensuing collapse of a cryptocurrency firm adding to the already substantial amount of investor losses, it is the time to strengthen rather than weaken the incentives for cryptocurrency firms to engage in responsible governance.¹⁷⁴

169. See Steven Zeitchik & Julian Mark, *Tom Brady Pushed Crypto to His Fans: This Lawyer Wants Him to Pay Up*, WASH. POST (Dec. 14, 2022, 7:19 PM), <https://www.washingtonpost.com/business/2022/12/14/ftx-class-action-lawsuit/> [https://perma.cc/NV43-ULZ2] (discussing the potential liability for promoters of FTX).

170. See *id.* (explaining that FTX utilized an aggressive marketing scheme through which it paid promoters to portray the exchange “as an exciting but safe place to invest money” in various television commercials and other forms of digital advertising).

171. See Rohan Goswami, *Never Seen ‘Such a Complete Failure’ of Corporate Controls, Says New FTX CEO Who Also Oversaw Enron Bankruptcy*, CNBC (Nov. 17, 2022, 8:51 AM), <https://www.cnbc.com/2022/11/17/ftx-ceo-shreds-bankman-fried-never-seen-such-a-failure-of-controls.html> [https://perma.cc/UE6W-5JCU] (noting FTX failed to implement “basic corporate standards” and that a substantial portion of the company’s assets were either missing or stolen); David Yaffe-Bellany, Matthew Goldstein & Emily Flitter, *Prosecutors Say FTX Was Engaged in a ‘Massive, Yearslong Fraud’*, N.Y. TIMES (Dec. 13, 2022), <https://www.nytimes.com/2022/12/13/business/ftx-sam-bankman-fried-fraud-charges.html> [perma link unavailable] (discussing the criminal indictment filed against Bankman-Fried wherein prosecutors alleged that FTX was misappropriating investor funds for personal benefit).

172. See Chow, *supra* note 1 (discussing the severity of investor losses); see also Amended Class Action Complaint and Demand for Jury Trial at 14, *Garrison v. Bankman-Fried*, No. 22-cv-23753 (S.D. Fla. May 15, 2023) [hereinafter Amended Class Action Complaint] (discussing the allegations against the celebrity promoters of FTX). See generally Madeline Simpson, *Consumers Caught in the Cryptocurrency Crisis: Why Celebrity Endorsers Should Not Escape Liability*, 64 B.C. L. REV. 2045 (2023) (discussing investor suits against celebrity promoters of cryptocurrencies).

173. See Amended Class Action Complaint, *supra* note 172, at 14 (asserting *Wildes* supports the plaintiffs’ legal conclusion that the promoters can be held liable as sellers of securities solely through their omissions in television ads and internet advertisements). But see Motion to Dismiss by Defendants Thomas Brady, Gisele Bündchen, Stephen Curry, Lawrence David, The Golden State Warriors, LLC, Udonis Haslem, William Trevor Lawrence, Shohei Ohtani, Kevin O’Leary, David Ortiz, and Naomi Osaka and Incorporated, Memorandum of Law and Request for Hearing at 1, 8, *Garrison*, No. 22-cv-23753 (asserting *Wildes* does not apply in this case because the plaintiffs alleged violations of state securities laws rather than a violation of Section 12).

174. See Adrian, He, Ismail & Moretti, *supra* note 133 (emphasizing how recent collapses of cryptocurrency firms highlights the need for additional investor protections).

Representative Sam Rayburn's words in support of the Securities Act in the 1930s remain unfortunately applicable today as millions of Americans continue to be "swindled into exchanging their savings for worthless stocks."¹⁷⁵ Rather than an uncontrolled stock market, the culprit is now an uncontrolled cryptocurrency market plagued by fraud and a lack of responsible governance.¹⁷⁶ While the legislative and executive branches continue to contemplate the ideal regulatory and enforcement mechanisms for cryptocurrencies,¹⁷⁷ an expanded application of the *Wildes* approach can serve as a "stopgap remedial measure[]" to protect the financial security of investors.¹⁷⁸ The expanded application may not protect the FTX investors, and it will not eliminate all fraud in the cryptocurrency industry, but it will encourage responsible governance and discourage reckless misrepresentations and omissions through the moderate deterrent effect created by a strong system of private enforcement.¹⁷⁹

175. See 77 CONG. REC. 2918 (1933) (discussing the market conditions that led Congress to pass the Securities Act); Gary Gensler, Chairman, Sec. & Exch. Comm'n, "We've Seen This Story Before": Remarks Before the Piper Sandler Global Exchange & Fintech Conference (June 8, 2023), <https://www.sec.gov/news/speech/gensler-remarks-piper-sandler-060823> [<https://perma.cc/5XGG-UN3R>] (noting the current cryptocurrency environment is "reminiscent of what we had in the 1920s before the federal securities laws were put in place. Hucksters. Fraudsters. Scam artists. Ponzi schemes. The public left in line at the bankruptcy court"); MacKenzie Sigalos, *Crypto Scammers Took a Record \$14 Billion in 2021*, CNBC (Jan. 7, 2022, 4:31 AM), <https://www.cnbc.com/2022/01/06/crypto-scammers-took-a-record-14-billion-in-2021-chainalysis.html> [<https://perma.cc/36WZ-E9BF>] (discussing the amount of investor losses stemming from crypto-related crime).

176. See Knauth, *supra* note 4 (discussing the collapses of various cryptocurrency firms, including FTX, Three Arrows Capital, Luna, and TerraUSD, each of which have led to criminal fraud charges).

177. See Financial Innovation and Technology for the 21st Century Act, H.R. 4763, 118th Cong. (2023) (codifying a regulatory framework for digital assets); Hannah Lang, *Crypto Bill Passes Congressional Committee in Victory for Industry*, REUTERS (July 26, 2023, 8:50 PM), <https://www.reuters.com/technology/us-congressional-committee-set-weigh-crypto-bills-2023-07-26/> [perma link unavailable] (stating H.R. 4763 was the "first time a crypto regulatory bill was put to a vote in Congress," but noting the bill still faces significant obstacles, including a belief among some members that it places the interests of the industry above the interests of the public); Exec. Order No. 14067, 87 Fed. Reg. 14143 (Mar. 14, 2022) (requiring relevant agencies to submit a report detailing potential regulatory and legislative action that can be taken to protect investors from fraud within the cryptocurrency industry).

178. See Glover, *supra* note 137, at 1198–99 (asserting that "ex post stopgap remedial measures" are effective in the absence of meaningful ex ante regulation); see also Gary Gensler, Chairman, Sec. & Exch. Comm'n, Prepared Remarks of Gary Gensler on Crypto Markets at the Penn Law Capital Markets Association Annual Conference (Apr. 4, 2022), <https://www.sec.gov/news/speech/gensler-remarks-crypto-markets-040422> [<https://perma.cc/DF7K-JYNK>] (discussing the benefits of applying existing laws to the cryptocurrency industry). Chairman Gensler stated: "We already have robust ways to protect investors trading on platforms We ought to apply these same protections in the crypto markets. Let's not risk undermining 90 years of securities laws and create some regulatory arbitrage or loopholes." *Id.*

179. See Alejandro E. Moreno & Tori D. Kutzner, *Ninth Circuit Holds That Social Media Posts May Give Rise to "Seller" Liability Under Section 12(a)(2) of the Securities Act of*

1933, NAT'L L. REV. (Jan. 4, 2023), <https://www.natlawreview.com/article/ninth-circuit-holds-social-media-posts-may-give-rise-to-seller-liability-under> [https://perma.cc/H2K3-GM4P] (explaining that the decisions in *Wildes* and *Pino* should cause promoters of securities to exercise increased caution when making public statements that could contain omissions or misrepresentations); Rose, *supra* note 139, at 2184 (explaining that fear of liability can affect individual decision-making and encourage responsible behavior); Norris, *supra* note 137, at 1517–22 (noting private enforcement is particularly necessary and effective in industries with growing corporate power and insufficient government influence). The type of environment that this author believes is conducive to reliance on private enforcement meets the characteristics of the cryptocurrency industry. See Molly Ball, *Crypto Goes to Washington*, TIME (Oct. 3, 2022, 7:00 AM), <https://time.com/6215042/crypto-washington-dc-regulation/> [perma link unavailable] (discussing the current government's insufficient and inconsistent control over the crypto industry and crypto's growing influence over its own regulation). But see Prentice, *supra* note 16, at 472–73 (suggesting that adjusting the scope of seller liability under Section 12 may not be the most effective way to achieve policy goals). Additionally, there is the unresolved question not addressed by this Note as to whether liability would extend to the secondary market (i.e., the cryptocurrency exchanges). See *supra* notes 87–89 and accompanying text.