No. 23-50669

In the United States Court of Appeals for the Fifth Circuit

JOSEPH VAN LOON; TYLER ALMEIDA; ALEXANDER FISHER; PRESTON VAN LOON; KEVIN VITALE; NATE WELCH,
PLAINTIFFS-APPELLANTS

v.

DEPARTMENT OF THE TREASURY; OFFICE OF FOREIGN ASSETS CONTROL; JANET YELLEN, SECRETARY, U.S. DEPARTMENT OF TREASURY, IN HER OFFICIAL CAPACITY; ANDREA M. GACKI, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF FOREIGN ASSETS CONTROL,
DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS (CIV. NO. 23-312) (THE HONORABLE ROBERT L. PITMAN, J.)

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No. 23-50669

JOSEPH VAN LOON; TYLER ALMEIDA; ALEXANDER FISHER; PRESTON VAN LOON; KEVIN VITALE; AND NATE WELCH, PLAINTIFFS-APPELLANTS

v.

DEPARTMENT OF THE TREASURY; OFFICE OF FOREIGN ASSETS CONTROL; JANET YELLEN, SECRETARY, U.S. DEPARTMENT OF TREASURY, IN HER OFFICIAL CAPACITY; ANDREA M. GACKI, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF FOREIGN ASSETS CONTROL, DEFENDANTS-APPELLEES

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Appellants:

Joseph Van Loon; Tyler Almeida; Alexander Fisher; Preston Van Loon; Kevin Vitale; and Nate Welch.

Appellees:

Department of the Treasury; Office of Foreign Assets Control; Janet Yellen, Secretary, U.S. Department of Treasury, in her official capacity; and Andrea M. Gacki, Director of the Office of Foreign Assets Control, in her official capacity.

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NOVEMBER 13, 2023

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully submit that oral argument would be useful to the disposition of this appeal because the appeal presents complex and exceptionally important issues regarding the interpretation and application of federal statutes.

TABLE OF CONTENTS

Page

Statement of jurisdiction....1

Statement of the issues....1

Statutes and regulations involved....2

Introduction....2

Statement of the case....5

A. Statutory and regulatory background....5

B. Factual background....9

C. Procedural history....16

Summary of argument....21

Standard of review....26

Argument....26

I. The designation is unlawful because the Department failed to designate a foreign 'national' or 'person'....26

A. The Department was required to identify a group that has demonstrated an agreement to pursue a common purpose....26

B. The purported Tornado Cash 'entity' has not demonstrated an agreement to pursue a common purpose....30

II. The designation is unlawful because the immutable smart contracts are not 'property'....34

A. 'Property' must be capable of being owned....35

B. The immutable smart contracts are not capable of being owned....42

III. The designation is unlawful because the purported Tornado Cash entity has no 'interest' in the immutable smart contracts....48

Page

Table of contents—continued:

A. An 'interest' in property is a legal, equitable, or beneficial interest....48

B. The purported Tornado Cash entity has no legal, equitable, or beneficial 'interest' in the immutable smart contracts....50

Conclusion....57

Certificate of compliance

Statutory addendum

TABLE OF AUTHORITIES

CASES

Altman v. *City of High Point*, 330 F.3d 194 (4th Cir. 2003)....46

Auer v. *Robbins*, 519 U.S. 452 (1997)....29

Benjamin v. *Town of Islip*, Civ. No. 20-56, 2021 WL 8344132 (E.D.N.Y. Aug. 12, 2021)....46

Bibox Group Holdings Limited Securities Litigation, *In re*, 534 F. Supp. 3d 326 (S.D.N.Y. 2021)....45

Boyle v. *United States*, 556 U.S. 938 (2009)....27

Cargill v. *Garland*, 57 F.4th 447 (5th Cir.) (en banc), *cert. granted*, 2023 WL 7266996 (Nov. 3, 2023)....38

Chaffin v. *Atlanta Coca Cola Bottling Co.*, 194 S.E. 2d 513 (Ga. Ct. App. 1972)....44

Chevron, U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)....37, 50

Page

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Coin Center v. *Yellen*,
Civ. No. 22-20375, 2023 WL 7121095 (N.D. Fla. Oct. 30, 2023),
appeal filed, No. 23-13698 (11th Cir. Nov. 7, 2023).....53

Commissioner v. *Covington*, 120 F.2d 768 (5th Cir. 1941).....36

Connecticut Bank of Commerce v. *Republic of Congo*,
309 F.3d 240 (5th Cir. 2002).....26, 35

Consarc Corp. v. *United States Department of Treasury*,
71 F.3d 909 (D.C. Cir. 1995).....41

Dames & Moore v. *Regan*, 453 U.S. 654 (1981).....54

Doe v. *Landry*, 909 F.3d 99 (5th Cir. 2018).....38

Dolan v. *City of Tigard*, 512 U.S. 374 (1994).....42, 43

Esquivel-Quintana v. *Lynch*, 820 F.3d 1019 (6th Cir. 2016),
rev'd on other grounds, 581 U.S. 385 (2017).....38

FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009).....38

Global Relief Foundation, Inc. v. *O'Neill*,
315 F.3d 748 (7th Cir. 2002), *cert. denied*, 540 U.S. 1003 (2003).....48, 53

Gonzales v. *Oregon*, 546 U.S. 243 (2006).....40

Heinold Hedge Hog Market, Inc. v. *McCoy*,
700 F.2d 611 (10th Cir. 1983).....28

Holy Land Foundation for Relief and Development v. *Ashcroft*,
333 F.3d 156 (D.C. Cir. 2003),
cert. denied, 540 U.S. 1218 (2004).....48, 53

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Kisor v. *Wilkie*, 139 S. Ct. 2400 (2019).....40, 41

Page

Cases—continued:

Lynch v. *United States*, 292 U.S. 571 (1934) 36

Meyer v. *United States*, 364 U.S. 410 (1960) 36

Morgan v. *Plano Independent School District*,
589 F.3d 740 (5th Cir. 2009).....26

Paradissiotis v. *Rubin*, 171 F.3d 983 (5th Cir. 1999).....41

Regan v. *Wald*, 468 U.S. 222 (1984).....49, 50

Rensel v. *Centra Tech, Inc.*,
Civ. No. 17-24500, 2018 WL 4410110 (S.D. Fla. June 14, 2018) 45

Seals v. *McBee*, 898 F.3d 587 (5th Cir. 2018).....39

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 34

Snyder v. *STX Technologies, Ltd.*,
Civ. No. 19-6132, 2020 WL 5106721 (W.D. Wash. Aug. 31, 2020) 45

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762 F.3d 921 (9th Cir. 2014).....28

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United States v. *Koutsostamatis*, 956 F.3d 301 (5th Cir. 2020) 36

Whole Woman's Health v. *Smith*, 896 F.3d 362 (5th Cir. 2018).....40

Williams v. *Block One*,
Civ. No. 20-2809, 2022 WL 5294189 (S.D.N.Y. Aug. 15, 2022) 45

CONSTITUTION, STATUTES, AND RULES

U.S. Const. Amend. I.....*passim*

U.S. Const. Amend. V.....17, 19

Page

Statutes and rules—continued:

Administrative Procedure Act,
5 U.S.C. §§ 551 *et seq.*, 5 U.S.C. §§ 701 *et seq.* 3, 17

Trading with the Enemy Act,
12 U.S.C. § 95, 50 U.S.C. § 4301-4341.....50

North Korea Sanctions and Policy Enhancement Act of 2016,
22 U.S.C. §§ 9201-9255:

22 U.S.C. § 9214(a).....6, 48

22 U.S.C. § 9214(b) 48

22 U.S.C. § 9214(c).....6, 26, 35, 48

22 U.S.C. § 9214(f) 7

International Emergency Economic Powers Act,
50 U.S.C. §§ 1701-1706:

50 U.S.C. § 1702(a).....6, 26, 35, 48

50 U.S.C. § 1705 7

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

31 C.F.R. § 510.201 6

31 C.F.R. § 510.305 .....7, 28

31 C.F.R. § 510.313 .....7, 49

31 C.F.R. § 510.322 .....7, 28

31 C.F.R. § 510.323 .....7, 8, 36, 38, 41

31 C.F.R. § 578.201 6

Page

Rules—continued:

31 C.F.R. § 578.305 7

31 C.F.R. § 578.309 7

31 C.F.R. § 578.313 7

31 C.F.R. § 578.314 ..... 7, 8, 36, 38, 41

66 Fed. Reg. 49,079 (Sept. 25, 2001) 28

87 Fed. Reg. 54,373 (Sept. 6, 2022) 6

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Fed. R. Civ. P. 17(b) 27

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Page

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Page

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on August 17, 2023. ROA.23. Appellants filed a timely notice of appeal on September 18, 2023. ROA.1519. The jurisdiction of this Court rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Department of the Treasury's addition of Tornado Cash to the Specially Designated Nationals and Blocked Persons (SDN) List is contrary to law and in excess of statutory authority because the Tornado Cash "entity" defined by the Department is not a foreign "national" or "person" under the International Emergency Economic Powers Act (IEEPA) and the North Korea Sanctions and Policy Enhancement Act (North Korea Act).

2. Whether the Department's inclusion of immutable smart contracts on the SDN List is contrary to law and in excess of statutory authority because immutable smart contracts are not "property" under IEEPA and the North Korea Act.

3. Whether the Department's inclusion of immutable smart contracts on the SDN List is contrary to law and in excess of statutory authority because the purported Tornado Cash entity does not have an "interest" in the immutable smart contracts under IEEPA and the North Korea Act.

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in an addendum to this brief.

INTRODUCTION

This case involves an unprecedented exercise of authority by the Department of the Treasury under the International Emergency Economic Powers Act (IEEPA) and the North Korea Sanctions and Policy Enhancement Act (North Korea Act). Those statutes give the Department authority to prohibit transactions involving certain "property" in which a foreign "national" or sanctioned "person" has an "interest." Acting through its Office of Foreign Assets Control (OFAC), the Department has stretched that authority beyond recognition to prohibit transactions involving ownerless, immutable software code.

In 2022, the Department added an open-source software project known as Tornado Cash to the Specially Designated Nationals and Blocked Persons (SDN) List. At its core, the Tornado Cash software consists of applications known as "smart contracts," which are stored on a public network called the Ethereum blockchain. The only smart contracts at issue in this case are a subset of the designated smart contracts that are immutable—meaning that no person can delete them, edit them, or control them in any way. Although some bad actors have used the Tornado Cash software in the past (for example, to benefit the North Korean government), the vast majority of the software's users are ordinary people like plaintiffs who seek online privacy for entirely

legitimate transactions. As a result of the Department's designation, those law-abiding Americans cannot use the software to safeguard their privacy without threat of criminal sanctions.

The district court erred by concluding that the Department satisfied three of the requirements for a designation under IEEPA and the North Korea Act. *First*, the purported Tornado Cash "entity" as defined by the Department is not a "national" or "person," because it is neither a natural person nor a group of individuals who have demonstrated an agreement to further a common purpose. *Second*, the immutable smart contracts identified in the designation are not "property," because they are incapable of being owned. *Third*, the purported Tornado Cash entity has no legal, equitable, or beneficial "interest" in those immutable smart contracts; at most, it is well-positioned to profit from use of the immutable, open-source code. For each of those reasons, the Department's action is contrary to law and in excess of statutory authority under the Administrative Procedure Act (APA).

As to the existence of a foreign "national" or "person": the district court correctly recognized that the designation could stand only if the Tornado Cash "entity" defined by the Department is an unincorporated association—a body of people who have demonstrated an agreement to execute a common purpose. But the Department chose to define the Tornado Cash "entity" broadly, to include anyone who holds a digital token called TORN. Because the record does

not show that all holders of the 1.5 million TORN tokens in circulation have a common purpose, the Department's purported "entity" does not satisfy the requirements for an unincorporated association. Whether a narrower group could satisfy the definition of an unincorporated association is irrelevant, because that is not the entity that the Department designated.

As to the existence of "property": the administrative record clearly indicates that at least twenty of the smart contracts in the designation are now immutable and ownerless. Those smart contracts are permanently incapable of being altered, removed, or controlled by anyone. The plain meaning of "property" is something that can be owned, and no one can "own" those immutable smart contracts. In holding otherwise, the district court skipped straight to deference to the Department's interpretation of its regulatory definition of "property," even purporting to apply extraordinary deference. But the district court was first required to determine whether the statutory term "property" is ambiguous, which it is not.

As to the existence of an "interest" in the immutable smart contracts as property: all agree that an interest in property is some form of legal, equitable, or beneficial claim to the property. But the administrative record contains no evidence that the purported Tornado Cash "entity" has a legal, equitable, or beneficial interest in the immutable smart contracts. To hold otherwise, the district court concluded that TORN holders have a beneficial interest in a

different smart contract—the mutable smart contract that maintains a registry of so-called "relayer" smart contracts, which provide an optional, privacy-enhancing service to users. But even if TORN holders had an interest in the mutable registry, that would not give them an interest in the wholly separate immutable smart contracts at issue in this case.

If the decision below were allowed to stand, the Department's authority would be nearly limitless. It would deprive the statutory terms of all meaning to deem every person who holds a particular digital token an "entity"; to call immutable, open-source software incapable of ownership "property"; and to treat the indirect potential for profit as an "interest" in property. For all of those reasons, this Court should reverse the judgment below as to the claim that the designation is contrary to law and in excess of statutory authority.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. In the designation at issue here, the Department invoked two statutes: IEEPA and the North Korea Act. Both statutes vest the President with the power to regulate "property" in which a foreign "national" or sanctioned "person" has an "interest."

IEEPA authorizes the President to "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal,

transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving" certain "property." 50 U.S.C. § 1702(a)(1)(B). Specifically, the President may act with respect to "transactions involving[] any *property* in which any foreign country or a *national* thereof has any *interest*." *Id.* (emphasis added).

The North Korea Act authorizes the President to "designate . . . any *person* that [he] determines" is engaged in certain prohibited activities with respect to North Korea. 22 U.S.C. § 9214(a), (b) (emphasis added). After a "person" is so designated, the President may "exercise all of the powers granted to [him] under [IEEPA] to the extent necessary to block and prohibit all transactions in *property* and *interests in property* of [that] person." 22 U.S.C. § 9214(c)(1) (emphasis added); *see also* 22 U.S.C. § 9214(c)(2).

American citizens and financial institutions are generally prohibited from engaging in business with designated persons or transactions involving property in which a designated person has a property interest. ROA.166. They must also report any such blocked property in their possession or control. *See* 31 C.F.R. § 578.201(a), (b); 31 C.F.R. § 510.201; *see also* 87 Fed. Reg. 54,373 (Sept. 6, 2022) (amending OFAC's cyber-related sanctions regulations). Violations of IEEPA and the North Korea Act are punishable by a civil penalty of $356,579 or an amount equal to twice the amount of the transaction that is the basis of the violation; willful violations are criminally punishable by up to

twenty years in prison and a $1 million fine. 50 U.S.C. § 1705; *see* 22 U.S.C. § 9214(f); 88 Fed. Reg. 2229, 2230 (Jan. 13, 2023).

2. Exercising authority designated by the President, the Department has promulgated regulations relating to several of those statutory terms. *First*, the Department has defined a "person" as "an individual or entity," 31 C.F.R. §§ 510.322, 578.313, and an "entity" as "a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization," 31 C.F.R. §§ 510.305, 578.305. *Second*, the Department has defined "property" and "property interest" to include various enumerated forms of property "and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent." 31 C.F.R. §§ 510.323, 578.314.[1] *Third*, the Department has defined "interest" to mean "an interest of any nature whatsoever, direct or indirect." 31 C.F.R. §§ 510.313, 578.309.

[1] The enumerated examples are "money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, guarantees, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership, or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services

3. Historically, the Department has exercised its delegated authority under IEEPA and the North Korea Act to target individuals, legal persons, or the property they own. ROA.158. For instance, the Department has added North Korean dictator Kim Jong Un to the SDN List. *See* OFAC, *Treasury Sanctions North Korean Senior Officials and Entities Associated With Human Rights Abuses* (July 6, 2016) <home.treasury.gov/news/press-releases/jl0506>. The Department has also designated the St. Vitamin, a yacht registered to a corporation controlled by the late Russian warlord Yevgeniy Prigozhin, who was also individually designated by OFAC. *See* OFAC, *Treasury Targets Assets of Russian Financier Who Attempted to Influence 2018 U.S. Elections* (Sept. 30, 2019) <home.treasury.gov/news/press-releases/sm-787>. And following Russia's invasion of Ukraine, the Department designated United Shipbuilding Corporation, which builds ships for Russia. *See* OFAC, *United States Sanctions Major Russian State-Owned Enterprises* (Apr. 7, 2022) <home.treasury.gov/news/press-releases/jy0707>.

The Department has also designated unincorporated groups of individuals, but only when the group is organized to further a common purpose. For example, the Department has designated Association For Free Research And International Cooperation, which "served as a front company for Prigozhin's

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of any nature whatsoever, contracts of any nature whatsoever." 31 C.F.R. §§ 510.323, 578.314.

influence operations in Africa, including by sponsoring phony election monitoring missions." *See* OFAC, *Treasury Escalates Sanctions Against the Russian Government's Attempts to Influence U.S. Elections* (Apr. 15, 2021) <home.treasury.gov/news/press-releases/jy0126>. Moreover, the Department has designated Chatex, a virtual currency exchange with a physical presence in multiple countries. *See* OFAC, *Treasury Continues to Counter Ransomware as Part of Whole-of-Government Effort; Sanctions Ransomware Operators and Virtual Currency Exchange* (Nov. 8, 2021) <home.treasury.gov/news/press-releases/jy0471>. And the Department has designated Blender.io, a virtual currency mixer that is operated by a group of individuals. *See* OFAC, *Cyber-Related Designation; North Korea Designation Update* (May 6, 2022) <home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20220506>.

B. Factual Background

1. Ethereum is a publicly accessible "blockchain"—a peer-to-peer network through which users can send and receive crypto assets. ROA.146. Users of Ethereum can download a "wallet," which is a software application that allows them to generate an individual address and a key that functions as a password. ROA.146. Through that individual address, users can send and receive crypto assets, including the cryptocurrency Ether (ETH), without the involvement of any intermediary. ROA.146. As with any other blockchain, one

of the hallmarks of Ethereum is its transparency: each transaction is publicly and irreversibly recorded and tied to the digital wallets of the users involved. ROA.146.

Ethereum users can interact with so-called "smart contracts" on the blockchain. ROA.146. Smart contracts are open-source software programs that may be coded to perform a specific task when predetermined conditions are met. ROA.146. For example, a smart contract could be used to collect interest on a loan or to make insurance payments when a triggering event happens. *Cf.* ROA.146. Once a smart contract is deployed on the blockchain, it is assigned a public address with which any user can interact. ROA.146. Smart contracts can be designed to be either mutable or immutable. ROA.1081. A mutable smart contract includes an "update" feature, which can be used to modify or control the contract after it is deployed to the blockchain. An immutable smart contract is one that lacks that update feature, so that it cannot be altered or controlled by anyone after it is deployed to the blockchain. ROA.1080-1081. Importantly, a mutable smart contract may be modified at a later time to become immutable, such that no one is authorized to make changes in the future. ROA.1081. That is an irreversible step; once a smart contract becomes immutable, no one can reclaim control over it. ROA.1081.

2. Tornado Cash is a decentralized, open-source software project developed by a large group of independent contributors who uploaded a series of

smart contracts to the Ethereum blockchain in 2019. ROA.146. By the time of the Department's action in 2022, the Tornado Cash software included a combination of mutable and immutable smart contracts, all of which are open-source and stored on the Ethereum blockchain. ROA.1090.

The key functions of the Tornado Cash software are performed by a set of smart contracts called "pools," along with other core smart contracts. ROA.147, 1083. This appeal concerns only those smart contracts that provide core services; as discussed below, those smart contracts are now immutable. ROA.1083-1085, 1096-1100.

Ethereum users can deposit certain amounts of crypto assets from their wallet into an immutable "pool" smart contract—for example, a pool for deposits of exactly 1 ETH—and then withdraw the same amount to a different wallet. ROA.147. The crypto assets are "pooled" in the sense that multiple users place their assets in a single smart contract, but at no point does any individual or entity other than the user gain ownership or possession of the assets. ROA.1085. Users hold the only password (in technical terms, a set of keys) that permits withdrawal of the same amount of assets. ROA.147. The code that forms the immutable pool smart contract will trigger a withdrawal only after it verifies that password. ROA.1088-1089. The entire process unfolds automatically, without any human intervention. ROA.146.

Thanks to the number of users that deposit and withdraw identical amounts of crypto assets from each immutable pool smart contract, users of the Tornado Cash software are able to regain some level of privacy. ROA.1084. The Ethereum ledger does not reflect that the deposit and the withdrawal are linked to one another, let alone that they are linked to the same user. ROA.1084-1085. The severing of that link means that a user can make a withdrawal—and spend the resulting assets—without exposing the user's financial history to third parties.

That feature has a substantial real-world impact for the thousands of law-abiding users. When a user exposes his transaction history, he risks unwittingly surrendering a wide range of sensitive and private information such as his net worth, spending habits, or preferred political causes. ROA.149-154. Criminals may use that information to identify potential victims or set up phishing schemes. ROA.149-154. By using the Tornado Cash software, individuals can protect their privacy while participating in political causes or conducting business on the internet.

3. The creation of the Tornado Cash software was spearheaded by a handful of developers. ROA.1082-1083. Those developers initially retained the ability to update the smart-contract code, including the pool smart contracts. ROA.1089-1090. But in 2020, they announced that they would hold a "trusted setup ceremony" and eliminate their control over the pool smart

contracts. ROA.310. After that ceremony, which involved the participation of over 1,100 users, at least twenty smart contracts—including the pools—became irreversibly ownerless and immutable. ROA.1090. Those immutable smart contracts are self-executing and cannot be altered, removed, or controlled. ROA.1090. Immutability provides users with confidence that their assets are secure while they are in the pools. ROA.1090.

In 2021, the original developers of Tornado Cash announced the creation of a decentralized autonomous organization (DAO) and a new crypto token called TORN, which can be transferred and sold on the blockchain like any other crypto asset. ROA.939, 1117. Early users of Tornado Cash received vouchers for TORN through unsolicited electronic transfers known as "airdrops." ROA.1063-1065. There are now 1.5 million TORN tokens in circulation, and owning TORN permits, but does not require, individuals to vote on a limited range of DAO governance issues. ROA.1019, 1063-1065, 1070-1071. Indeed, holding TORN is not enough to be eligible to vote: owners must take additional, affirmative steps to "register" their tokens to vote, including locking their TORN into a mutable "governance" smart contract. ROA.1070. It is undisputed that most TORN holders have never taken those additional steps to vote: as few as twelve voters have been sufficient to pass previous governance proposals. ROA.941, 1483.

Crucially, the DAO cannot vote on changes to the immutable smart contracts. ROA.1081. All the DAO can do is vote to implement new projects and change certain optional Tornado Cash features. *Cf.* ROA.1051-1054, 1226. Even if coding glitches were discovered in the immutable smart contracts, neither the DAO nor anyone else could fix them because the authorization to update those smart contracts has been permanently removed. ROA.1081.

4. Besides the immutable pool smart contracts, several optional features of the Tornado Cash software are provided through *mutable* smart contracts. One such mutable smart contract contains a registry of third-party "relayers." ROA.1092. Relayers provide an additional layer of privacy. To engage in any Ethereum transaction, a user must pay a "gas" fee to the Ethereum network. ROA.924. Tornado Cash users thus must have funds in their recipient wallets to ensure they can pay the gas fee to Ethereum for the withdrawal. ROA.1092-1093. Relayers are third-party services that interact with the immutable pool smart contract on the user's behalf and pay the gas fee to the Ethereum network. ROA. 1092-1093, 1113.

For users' convenience, the developers of Tornado Cash created a separate, mutable smart contract that maintains a registry of relayers. ROA.933, 1093. For most (though not all) transactions processed by a third-party relayer listed on the registry, the mutable registry smart contract collects a fee from the relayer and pays it to those TORN holders who locked their TORN

into the mutable "governance" smart contract. ROA.933, 938, 960, 1093. That fee is separate from the gas fee paid to the Ethereum network. ROA.933, 1093.

The use of relayers is optional. ROA.1091-1092. Although many individuals choose to use relayers, numerous transactions occur without any relayer involvement. ROA.958. Relayers, which are mutable smart contracts, and the mutable relayer registry itself are fully distinct from the immutable pool smart contracts. The relayers and relayer registry cannot modify or control the immutable pool smart contracts, and the immutable pool smart contracts cannot modify or control the relayers and relayer registry.

5. It is undisputed that plaintiffs and thousands of other law-abiding Americans have used the Tornado Cash software to protect their privacy while conducting legitimate blockchain transactions. ROA.149-154. Plaintiff Joseph Van Loon sought to use the Tornado Cash software to run a blockchain service without falling prey to malicious cyber attacks. ROA.149-150, 153-154. Plaintiff Tyler Almeida used the Tornado Cash software to donate anonymously to Ukraine's government and avoid reprisals from pro-Russia hackers. ROA.150-151. Plaintiff Kevin Vitale turned to the Tornado Cash software after learning that someone had linked his crypto activities to his family's home address. ROA.152-153. Plaintiff Preston Van Loon used the Tornado Cash software to prevent hackers from tracking transactions, including his investments in new ventures. ROA.152. And plaintiff Alexander Fisher used the

Tornado Cash software to develop code that improved the uses of the Ethereum network. ROA.151-152.

Plaintiffs have been prohibited from using the Tornado Cash software for those entirely lawful purposes since August 8, 2022, when the Department of Treasury took the unprecedented step of adding "Tornado Cash" to the SDN List. ROA.911-912. In its designation action, the Department listed the website tornado.cash, 37 Tornado Cash smart contracts (including at least twenty immutable smart contracts), and an address that was used to accept donations. ROA.26.

As the basis of its designation, the Department cited the use of the Tornado Cash software by agents of the North Korean government. ROA.911-912. The Department does not claim that the Tornado Cash software is itself a project of the North Korean government or in any way owned or controlled by North Korea. Rather, the Department claims that a fraction of transactions through the Tornado Cash software involved the Lazarus Group, a collection of North Korean-backed hackers. ROA.969-973. Well before the designation involving the Tornado Cash software, the Department had already added the Lazarus Group to the SDN List. ROA.912.

C. Procedural History

1. On September 8, 2022, plaintiffs filed a complaint in the United States District Court for the Western District of Texas, challenging the

Department's addition of "Tornado Cash" to the SDN List. ROA.24-43. Plaintiffs alleged that the designation exceeded the Department's authority under IEEPA; violated the Free Speech Clause of the First Amendment to the United States Constitution; and violated the Due Process Clause of the Fifth Amendment to the United States Constitution. ROA.40-42. Plaintiffs sought injunctive and declaratory relief under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq*., 5 U.S.C. §§ 701 *et seq*. ROA.42-43.

On September 13, 2022, the Department published a series of Frequently Asked Questions (FAQs) addressing the designation. *See* OFAC, *Frequently Asked Questions* (Sept. 13, 2022) <tinyurl.com/09-13-22-FAQs>. The FAQs described the action taken by the Department as "designat[ing] the entity Tornado Cash." *Id.* The FAQs went on to state that, "[a]s part of the SDN List entry for Tornado Cash, OFAC included as identifiers certain virtual currency wallet addresses associated with Tornado Cash." *Id.* The FAQs further explained that "engaging in any transaction with Tornado Cash or its blocked property or interests in property is prohibited for U.S. persons." *Id.*; *see* ROA.913 (citing FAQs).

On November 8, 2022, less than a week before the deadline for a responsive pleading, the Department withdrew its August 8 action and issued a new designation. ROA.910. In addition to removing obsolete or duplicate smart-contract addresses that were mistakenly included in the original designation,

the new designation added 53 Ethereum addresses associated with the Tornado Cash software. ROA.902-905.

That same day, the Department also published revised FAQs. ROA.39. Once again, the FAQs stated that the Department was "designat[ing] the entity Tornado Cash." OFAC, *Frequently Asked Questions* (Nov. 8, 2022) <ofac.treasury.gov/faqs/1095>. The FAQs also claimed that Tornado Cash is a "person" because it is an "entity." *Id.* The Department provided the following description of Tornado Cash:

> Tornado Cash's organizational structure consists of: (1) its founders and other associated developers, who together launched the Tornado Cash mixing service, developed new Tornado Cash mixing service features, created the Tornado Cash Decentralized Autonomous Organization (DAO), and actively promoted the platform's popularity in an attempt to increase its user base; and (2) the Tornado Cash DAO, which is responsible for voting on and implementing new features created by the developers.

Id.; *see* ROA.913 (citing FAQs). Critically, the Department further defined the "members" of the Tornado Cash DAO as anyone holding the digital token TORN. ROA.936. At the same time, the Department expressly disclaimed that it was designating "Tornado Cash's individual founders, developers, members of the DAO, or users, or other persons involved in supporting Tornado Cash." ROA.936. Nevertheless, the Department purported to block "all Tornado Cash property and interests in property." OFAC, *Frequently Asked Questions* (Nov. 8, 2022).

On November 22, 2022, in response to the superseding designation, plaintiffs amended their complaint. ROA.145-171. The first count of the amended complaint alleged that the new designation exceeded the Department's authority under IEEPA and the North Korea Act. ROA.167-168. The second and third counts, which are not at issue in this appeal, alleged that the Department's actions violated the Free Speech Clause of the First Amendment to the United States Constitution and the Due Process Clause of the Fifth Amendment to the United States Constitution. ROA.169-170.

2. The district court granted the Department's motion for summary judgment and denied plaintiffs' motion. ROA.1515-1516.

First, the district court concluded that Tornado Cash is a "national" and a "person" within the meaning of IEEPA and the North Korea Act. The district court agreed with plaintiffs that, to designate Tornado Cash as an unincorporated association, the Department was required to identify a "body of persons" who have "demonstrated an agreement to a common purpose." ROA.1507. On the facts, however, the court concluded that Tornado Cash met that standard because its founders and developers research and publish code and the DAO oversees governance of certain optional features. ROA.1506. The court also compared the Tornado Cash DAO to a corporation, ROA.1507, although the Department has not suggested that any Tornado Cash entity is formally incorporated.

Second, the district court concluded that even the immutable smart contracts are "property" within the meaning of the Department's regulations. The court did not analyze whether the statutory term "property" was ambiguous. It instead turned directly to the Department's regulations, which define "property" and "interest in property" to include "contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent." ROA.1508-1509 (quoting 31 C.F.R. §§ 510.323, 578.314). The court applied "an even greater degree of deference than the *Chevron* standard" to those regulations. ROA.1505 (citation omitted). And it concluded that "OFAC's determination that the smart contracts constitute property . . . is not plainly inconsistent with the regulatory definition of the term." ROA.1509. The court reasoned that the immutable smart contracts "are merely a code-enabled species of unilateral contracts" and observed that "Tornado Cash promoted and advertised the contracts and its abilities and published the code with the intention of people using it—hallmarks of a unilateral offer to provide services." ROA.1509.

Third, the district court concluded that the purported Tornado Cash entity has an "interest" in property in the immutable smart contracts. To reach that conclusion, the court determined that Tornado Cash holds a "beneficial interest" in the mutable smart contract registry of third-party relayers,

because it "generat[es] fees in the form of TORN tokens for the DAO when users execute a relayer-facilitated transaction." ROA.1510. But the court did not consider whether the purported Tornado Cash entity has an "interest" in the immutable smart contracts themselves.

Fourth, the district court concluded that the designation does not violate the Free Speech Clause. ROA.1513. The court recognized that the First Amendment protects the right to donate to particular social causes but held that there is no right to "do so through any particular bank or service of [one's] choosing." ROA.1513, 1515. The court also rejected the argument that the designation chilled the right to publish source code because "[d]evelopers may . . . lawfully analyze the code and use it to teach cryptocurrency concepts." ROA.1514. Plaintiffs do not appeal the judgment as to this claim.

Fifth, the district court concluded that the designation does not violate the Due Process Clause. ROA.1515. Plaintiffs did not move for summary judgment on that claim.

SUMMARY OF ARGUMENT

The district court erred by granting the Department's motion for summary judgment and denying plaintiffs' motion. The designation of "Tornado Cash" is contrary to law and exceeds the Department's statutory authority for three independent reasons: (1) the Tornado Cash entity defined by the Department is not a foreign "national" or a sanctioned "person"; (2) the

immutable smart contracts listed in the Department's designation are not "property"; and (3) the purported Tornado Cash entity has no "interest" in the immutable smart contracts.

I. The district court erred by concluding that the Tornado Cash "entity" defined by the Department is a foreign "national" or a sanctionable "person."

A. The terms "national" and "person" should be interpreted according to their plain meaning because they are unambiguous. Those terms plainly include natural persons, corporate entities, and unincorporated associations. The Department's regulatory definition of "person" is consistent with that ordinary meaning.

The Department has argued only that the purported Tornado Cash "entity" is an unincorporated association. Plaintiffs, the Department, and the district court all agree that the Department needs to identify a body of individuals who have combined to further a common purpose. Indeed, the Department has never before designated an unincorporated entity without that essential characteristic, consistent with the limits on its delegated authority to designate a "national" or "person."

B. The Department has failed to identify such a group here. It has chosen to define the Tornado Cash "entity" to include the Tornado Cash DAO, and to define DAO membership broadly to include anyone who possesses one

of the 1.5 million outstanding TORN tokens in circulation. But that disparate group of individuals has not demonstrated any common purpose. It is undisputed that people may hold TORN for any number of reasons, including as a passive financial investment, without contributing to the development of the Tornado Cash software project or even using the Tornado Cash software. People can thus be members of the DAO without sharing a common purpose—the essential requirement of an unincorporated association.

The district court upheld the Department's sweeping definition by identifying a different, narrower group of people with a supposed common purpose—those who posted job advertisements, raised funds, or voted on the governance of certain optional features provided through mutable smart contracts. Although there may well be a smaller group of individuals that the Department could have designated on that basis, the Department did not designate an "entity" defined as only the small minority of TORN holders who engaged in those activities. The designation cannot be upheld based on the common purpose of a different group that is much narrower than the one the Department designated.

II. Even if the Department had identified a foreign "national" or a sanctioned "person," the designation would still be unlawful because it included immutable smart contracts that are not "property."

A. As a matter of ordinary usage, "property" is something that is capable of being owned. The district court completely failed to analyze whether the statutory term "property" was ambiguous and instead deferred to the Department's interpretation of its regulatory definition of property. If the court had started with the plain language of IEEPA, there would have been no occasion to defer to the Department's interpretation of its own regulations, because the statutory term "property" is unambiguous.

B. Under the plain language of the statute, the immutable smart contracts are not "property" because they are incapable of being owned. Ownership entails the right to exclude, and no one—not even the United States government—can alter, delete, or exclude others from using the immutable smart contracts. The district court ignored the undisputed record, and instead concluded that the immutable smart contracts are akin to unilateral contracts. But any type of contract requires an agreement between at least two parties. And a smart contract that is ownerless and immutable cannot accept or make an offer on behalf of anyone because no one controls it. There is no basis in the statutes, regulations, or precedents for treating ownerless, immutable software code as "property."

III. Finally, the designation exceeded the Department's authority for a third reason: the purported Tornado Cash entity does not have an "interest" in the immutable smart contracts.

A. When "interest" is used in conjunction with "property," its ordinary meaning is a legal, equitable, or beneficial interest. The district court appeared to agree with that definition.

B. The district court concluded that the purported Tornado Cash entity has a beneficial interest in the immutable smart contracts by erroneously relying on a different set of smart contracts, which are mutable. To reach that conclusion, the court relied on the fact that some TORN holders receive a fee from the mutable relayer-registry smart contract when someone uses the optional services of a relayer listed on the registry to complete a transaction. That was error. The relayer registry is a mutable smart contract, distinct from the immutable pool smart contracts, and the use of relayers is entirely optional. Indeed, the district court recognized that a substantial percentage of pool transactions do not pass through relayers. It is undisputed that the immutable smart contracts at issue in this case, which are not controlled by anyone, do not pass along fees to anyone. The administrative record does not contain any evidence that the purported Tornado Cash entity has any legal, equitable, or beneficial interest in the immutable smart contracts. In that regard, as in others, the Department exceeded its authority under IEEPA and the North Korea Act.

STANDARD OF REVIEW

This Court reviews a district court's decision on cross-motions for summary judgment *de novo*. *See*, *e.g.*, *Morgan* v. *Plano Independent School District*, 589 F.3d 740, 745 (5th Cir. 2009).

ARGUMENT

I. THE DESIGNATION IS UNLAWFUL BECAUSE THE DEPARTMENT FAILED TO DESIGNATE A FOREIGN 'NATIONAL' OR 'PERSON'

Under IEEPA and the North Korea Act, the Department may take action only if it identifies a foreign "national" (IEEPA) or sanctioned "person" (the North Korea Act). *See* 22 U.S.C. § 9214(c); 50 U.S.C. § 1702(a). The purported Tornado Cash "entity" is neither, because it refers to an amorphous category of strangers who happen to hold the same type of token. For that reason, this Court should reverse the district court's judgment as to the first count of the amended complaint.

A. The Department Was Required To Identify A Group That Has Demonstrated An Agreement To Pursue A Common Purpose

1. The words "national" in IEEPA and "person" in the North Korea Act should be "interpret[ed] . . . according to their plain meanings" and "ordinary usage." *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 260 (5th Cir. 2002). A "national" is a person who resides in a particular country. *See*, *e.g.*, *American Heritage Dictionary* 874 (1st ed. 1969). A "person" is a "human being or organization with legal rights and duties," *id.*

at 978, such as a "corporation, organization, partnership, association," or natural person, *American Heritage Dictionary* 1317 (5th ed. 2016). The Department has argued only that the purported Tornado Cash "entity" is an unincorporated entity, not an incorporated entity or a natural person.

The plain meaning of an association is a "body of persons who have combined to execute [a] common purpose." *Oxford English Dictionary* (online ed.) (last updated July 2023); *see also American Heritage Dictionary* 80 (1st ed. 1969) (defining an "association" as "[a]n organized body of people who have some interest, activity, or purpose in common"). Dictionary definitions of related concepts are to the same effect. *See, e.g.*, *American Heritage Dictionary* 582 (1st ed. 1969) (defining a "group" as "[a] number of individuals or things considered together because of certain similarities"); *id.* at 926 (defining an "organization" as "[a] number of persons or groups having specific responsibilities and united for some purpose or work").

Courts have taken similar views in analogous contexts. Under the Racketeer Influenced and Corrupt Organizations Act, for example, an association-in-fact is "a group of persons associated together for a common purpose of engaging in a course of conduct." *Boyle* v. *United States*, 556 U.S. 938, 944 (2009) (citation omitted). And under Federal Rule of Civil Procedure 17(b), an unincorporated association is "a voluntary group of persons . . . formed by mutual consent for the purpose of promoting a common objective." *Southern*

California Darts Association v. *Zaffina*, 762 F.3d 921, 927 (9th Cir. 2014) (internal quotation marks and citation omitted); *see also Karl Rove & Co.* v. *Thornburgh*, 39 F.3d 1273, 1289 (5th Cir. 1994); *Heinold Hedge Hog Market, Inc.* v. *McCoy*, 700 F.2d 611, 615 (10th Cir. 1983).

The Department's regulations are consistent with the plain meaning of those terms. The Department has defined a "person" for purposes of the North Korea Act as an "individual or entity," 31 C.F.R. § 510.322, and an "entity" as "a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization," 31 C.F.R. § 510.305.

The Executive Branch's longstanding practice also reflects that limitation. While the Executive Branch typically designates natural persons or legal persons, on the occasions it has designated unincorporated entities in the past, those entities have clearly been groups organized to further a common purpose. For example, the President has designated terrorist groups that were organized to further attacks on American interests. *See*, *e.g.*, Executive Order 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001). The Department has also designated a number of drug cartels, which are networks of individuals and entities acting in concert to traffic narcotics. *See*, *e.g.*, The White House, *Fact Sheet: Overview of the Foreign Narcotics Kingpin Designation Act* (Apr. 15, 2009) <tinyurl.com/SanctionSinaloaCartel>. In the cybersecurity context, the Department has sanctioned a cryptocurrency mixer that, unlike Tornado Cash,

is operated under the supervision of a defined group of individuals. *See* OFAC, *U.S. Treasury Issues First-Ever Sanctions on a Virtual Currency Mixer, Targets DPRK Cyber Threats* (May 6, 2022) <home.treasury.gov/news/press-releases/jy0768>.

2. The district court ultimately appeared to accept, albeit with some contradictory language, that an unincorporated entity is a "body of persons" who "have combined to execute [a] common purpose" or have "demonstrated an agreement to a common purpose." ROA.1505-1507. The court observed that "an express agreement" on the part of the entity's members "is not necessary." ROA.1507. But plaintiffs have never contended that there must be a formal agreement. They have instead argued only that members of the group must have come together to execute a common goal and somehow manifest—or, as the district court put it, "demonstrate[]"—their consent to pursue that common purpose. *See* ROA.1507. And the district court did not dispute that, if a common purpose exists, it has to be manifested or demonstrated in some way.

The district court appeared to invoke deference to the agency's interpretation of its own definition of "person." ROA.1505; *see Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). But the court never identified any ambiguity in the statutory terms "national" or "person" that would warrant recourse to the agency's regulatory definition, let alone deference to the agency's inter-

pretation of that regulation. As discussed above, *see* pp. 26-29, the unambiguous meanings of "national" and "person" do not include an unincorporated group of individuals lacking any common purpose.

B. The Purported Tornado Cash 'Entity' Has Not Demonstrated An Agreement To Pursue A Common Purpose

1. The district court failed to identify a group that has demonstrated an agreement to pursue a common purpose. Instead of a common purpose, the Department would deem it sufficient to have a common characteristic. That is contrary to any accepted definition of unincorporated association.

The Department's definition of the designated entity, which the district court adopted, suffered from a fundamental flaw. The Department stated that the purported organizational structure of the Tornado Cash "entity" was not limited to "founders . . . and other associated developers, who together launched the Tornado Cash mixing service, developed new Tornado Cash mixing service features, created the Tornado Cash Decentralized Autonomous Organization (DAO), and actively promote the platform's popularity in an attempt to increase [its] user base." ROA.933. The Department's definition included "the Tornado Cash DAO, which is responsible for voting on and implementing those new features created by the developers." ROA.933. The Department defined the Tornado Cash DAO to include anyone who owns one of the 1.5 million outstanding TORN tokens in circulation—whether or not the

TORN holder has "vote[d] on" or "implement[ed] new features" of the Tornado Cash software. ROA.924, 1019.

That definition sweeps in individuals who hold TORN as an investment without ever agreeing to a common purpose with other members of the DAO. *See* ROA.933. As the Department itself concedes, people hold TORN for any number of reasons, including as a purely passive investment. *See* ROA.726, 740. TORN tokens are freely transferrable on the Ethereum blockchain, and a person can hold TORN without contributing to the software project's development or even using the software. *See* ROA.1051. The fact that someone holds TORN proves nothing about whether they have combined with a body of people to execute a common purpose.

2. Rather than asking whether the Tornado Cash "entity," as broadly defined by the Department, was an unincorporated association, the district court erroneously identified a different group and concluded that it satisfies the definition of an unincorporated association. The district court considered the DAO to be "an entity unto itself that, *through its voting members*, has demonstrated an agreement to a common purpose." ROA.1506-1507 (emphasis added). But that conclusion fundamentally mischaracterizes the Department's action. The Department defined the Tornado Cash "entity" to include all TORN holders, not merely TORN holders who actually vote or intend to vote.

TORN holders who vote are a small minority of the purported Tornado Cash entity as a whole. And TORN holders are not automatically eligible to vote; they must take additional, affirmative steps, including locking their TORN into a mutable governance smart contract. ROA.1070. It is undisputed that most TORN holders do not participate in Tornado Cash governance and never took those steps: as few as twelve participants, representing 25,000 out of 1.5 million TORN tokens, have approved previous governance proposals. ROA.941, 1483.

In any event, the evidence that the district court cited for its conclusion that the DAO is an entity proves no such thing. To be sure, voting members of the DAO control "deployments" and "protocol changes." ROA.1506. And someone acting in the name of "Tornado Cash" did things such as "plac[ing] job advertisements, maintain[ing] a fund to compensate key contributors, and adopt[ing] a compensation structure for relayers, among other things." ROA.1506. But the Department did not define the Tornado Cash entity to include only individuals who contributed to the software project in those ways. And there is no evidence that TORN holders—or, indeed, more than a small fraction of them—ever acted jointly to do anything or share a common purpose. That someone posted advertisements, maintained a fund, or created mutable smart contracts says nothing about whether *all* holders of TORN share a common purpose to do any of those things.

At most, those actions suggest that there might be a smaller group that the Department could have designated in their individual capacities or as a smaller unincorporated association based on their shared common purpose. For example, the Department might have been able to designate an unincorporated association composed of holders of TORN who took the affirmative steps necessary to vote or contributed to the development of the Tornado Cash software project. But that possibility does not prove the existence of an unincorporated association as the Department broadly defined it here—one consisting of the founders, developers, and *anyone* who owns one of the 1.5 million TORN tokens in circulation.

3. Comparing the Tornado Cash "entity" to a corporation with stockholders who may decline to vote does nothing to bridge the gap between the entity that the Department defined and the entity that the district court described. *See* ROA.1507. It is true that a corporation exists regardless of whether all shareholders vote. But a corporation is an "entity" because it has satisfied the formalities required to register as a corporation—which the Department concedes have not been met here. ROA.679-682. There is no need to ask whether corporate shareholders have manifested a common purpose; the fact that the entity is legally incorporated is the end of the analysis. Corporate law has nothing to say about people who have not complied with the formalities of incorporation, other than that they are not corporations. Even

if an entity casually resembles a corporation in its structure, that is not enough—the entity must have a common purpose, shared by a defined group of individuals, to qualify as an unincorporated association.

* * * * *

The district court's sweeping reasoning eliminates any limit on the meaning of an unincorporated association. There is nothing in the administrative record to suggest that the holders of the 1.5 million TORN tokens in circulation have combined to execute any common purpose, much less the alleged purpose of "manag[ing], promot[ing], and profit[ing]" from the Tornado Cash software. ROA.681. And the Department must defend the designation it made, not some alternative designation it could have made. *See*, *e.g.*, *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943). Because the Tornado Cash "entity" as defined by the Department is not an unincorporated association under the plain meaning of that phrase, the district court's judgment as to the first count should be reversed and the Department's action set aside.

II. THE DESIGNATION IS UNLAWFUL BECAUSE THE IMMUTABLE SMART CONTRACTS ARE NOT 'PROPERTY'

The Department's action is also contrary to law and in excess of statutory authority for the independent reason that the immutable smart contracts identified in the designation are not "property." Under IEEPA, which is incorporated by reference in the North Korea Act, the Department's authority is limited to the regulation of transactions involving "property." 50 U.S.C.

§ 1702(a)(1)(B). The unambiguous meaning of "property" is something that is capable of being owned. Because immutable smart contracts are incapable of being owned, this Court should reverse the district court's judgment as to the first count.

A. 'Property' Must Be Capable Of Being Owned

1. IEEPA authorizes the Department to designate "any property in which any foreign country or a national thereof has any interest." 50 U.S.C. § 1702(a)(1). The North Korea Act incorporates IEEPA, authorizing the Executive Branch to "exercise all of the powers granted to the President under [IEEPA] to the extent necessary to block and prohibit all transactions in property and interests in property of a person designated" under the North Korea Act. 22 U.S.C. § 9214(c)(1). Under either statute, the question is whether the Department has identified "property."

The term "property" is not defined in either IEEPA or the North Korea Act, but that term has a well-established "plain meaning[]" and "ordinary usage." *Connecticut Bank*, 309 F.3d at 260. Dictionaries define property to include "everything which is or may be the subject of ownership, whether a legal ownership, or whether beneficial, or a private ownership." *Black's Law Dictionary* 1095 (5th ed. 1979). The Supreme Court has likewise explained that "property" refers to "all objects or rights which are susceptible of ownership." *Meyer* v. *United States*, 364 U.S. 410, 413 n.3 (1960).

The Department's regulatory definition of "property" is not to the contrary. It defines property to include "any . . . property," and every listed example is something that is capable of being owned or that confers the powers of ownership. *See* 31 C.F.R. §§ 510.323, 578.314. For example, no one can doubt that money, checks, bonds, stocks, liens, warehouse receipts, and chattels are capable of being owned. *See id.*

The same is true of "contracts of any nature whatsoever," the enumerated example of "property" on which the district court relied. *See* ROA.1509-1510. It is plainly possible to own the rights conferred under a contract. *See*, *e.g.*, *Lynch* v. *United States*, 292 U.S. 571, 577 (1934); *Commissioner* v. *Covington*, 120 F.2d 768, 771 (5th Cir. 1941) (Holmes, J., concurring). And even if there were ambiguity about whether "contracts" are capable of being owned, it would be eliminated by the canon *noscitur a sociis*. Under that rule, "particular words or phrases" should be understood "in relation to the words or phrases surrounding them." *United States* v. *Koutsostamatis*, 956 F.3d 301, 307 n.2 (5th Cir. 2020).

In short, on this point, dictionaries, the Supreme Court, and the regulation are in agreement: property is something that can be owned.

2. Despite unambiguous statutory text, the district court looked immediately to the definition of "property" provided by regulation and applied "heightened deference" to the Department's interpretation of its regulation.

There is no reason to consider the agency's regulations in the first place, because the *statutory* term "property" is unambiguous. And any ambiguity in the meaning of the statutory term "property" is resolved once the term is read to avoid serious constitutional doubts under the First Amendment. There is also no reason to defer to the Department's interpretation of its regulation, because that regulation is unambiguous; the Department's interpretation of the regulation raises serious constitutional questions; and the regulation simply parrots the statutory text. And even if deference were appropriate, the district court erred by applying a heightened form of deference.

a. In deferring to the Department's interpretation of its regulatory definition of "property," the district court improperly skipped the threshold question whether the term "property" in IEEPA is ambiguous. *See* ROA.1508-1509. There is no occasion to defer to an agency's interpretation of its own regulation where "Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). And for the reasons discussed above, *see* pp. 35-36, the term "property" in IEEPA unambiguously refers to something that is capable of being owned.

The district court erred to the extent it treated the term "property" as a "term[] of art that ha[s] been defined by regulation." ROA.1507. As this Court has explained, a term of art has a well-defined, specialized meaning.

See, *e.g.*, *Streber* v. *Hunter*, 221 F.3d 701, 722 (2000). The district court failed to explain what that well-defined, specialized meaning is in the context of IEEPA. Indeed, the regulations at issue here affirmatively disclaim any "specialized" meaning by explaining that the statutory term "property" means "any . . . property." 31 C.F.R. §§ 510.323, 578.314. The ordinary meaning of that word should apply.[2]

b. Any ambiguity in the statutory term "property" is resolved once it is interpreted so as to avoid constitutional doubts. *See*, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). The district court's interpretation of IEEPA raises serious constitutional questions because it is not narrowly tailored. The Department's designation has a significant effect on speech, and a prohibition on "conduct with incidental effects on speech" is permissible only if "it is narrowly tailored to serve [a] substantial governmental interest[]." *Doe* v. *Landry*, 909 F.3d 99, 108 (5th Cir. 2018). It is undisputed that illicit activity accounts for only a small fraction of the uses of the Tornado Cash software. More than three-quarters of funds sent to cryptocurrency "mixers"—a category in which the Department includes the Tornado Cash

[2] In addition, *Chevron* deference is unwarranted because IEEPA "imposes criminal penalties." *Cargill* v. *Garland*, 57 F.4th 447, 466 (5th Cir.) (en banc) (plurality opinion), *cert. granted*, 2023 WL 7266996 (Nov. 3, 2023); *see also Esquivel-Quintana* v. *Lynch*, 820 F.3d 1019, 1027-1032 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), *rev'd on other grounds*, 581 U.S. 385 (2017).

software—are lawful. *See* ROA.930, 1111, 1189, 1191-1195. In fact, in the 2,000-page administrative record, the Department cited just three illicit uses of the Tornado Cash software. *See* ROA.969-978.

The district court's interpretation of IEEPA also raises significant questions because it would give rise to a "substantial number of unconstitutional applications" relative to IEEPA's "plainly legitimate sweep" and make the statute unconstitutionally overbroad. *Seals* v. *McBee*, 898 F.3d 587, 593 (5th Cir. 2018) (citation omitted). Thousands of law-abiding American citizens have been prohibited from using the Tornado Cash software to engage in socially valuable speech. For example, Mr. Almeida can no longer make donations to support important political and social causes, *see* ROA.364-367, and Mr. Fisher and Mr. Vitale can no longer develop code to facilitate improved uses of the Ethereum network, *see* ROA.368-370, 374-376.

The district court is the first court of which plaintiffs are aware to have concluded that open-source, immutable code is "property." By extension, it is also the first court to conclude that every American citizen may be prohibited from executing those lines of code to make political donations, start business ventures, or develop new software features. "[T]he dearth of guiding case law and the importance of context in any resolution of these issues counsel strongly in favor of the doctrine of constitutional avoidance." *Whole Woman's Health* v. *Smith*, 896 F.3d 362, 370 (5th Cir. 2018).

c. Having erroneously skipped to the regulatory definition in the face of a clear statute, the district court determined that the Department's interpretation of the regulatory definition was entitled to heightened deference. ROA.1508-1509. Even if recourse to the regulation were appropriate, however, there would be no basis to defer to the agency's interpretation of it for several reasons.

First and foremost, the regulatory definition of "property" is unambiguous for the same reasons that the statutory term "property" is unambiguous. Just as the term "property" in the statute refers to something that is capable of being owned, the words "any . . . property" in the regulation also refer to something that is capable of being owned. *See* pp. 35-36, *supra*.

What is more, the Department's regulatory interpretation is not entitled to deference because it raises serious First Amendment questions. Just as the canon of constitutional avoidance would resolve any ambiguity in the statute, the "serious application" of that "interpretive tool[]" should resolve any ambiguity in the regulation. *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2416 (2019); *see* pp. 38-39, *supra*.

In addition, the Department may not obtain the benefit of *Auer* deference by promulgating a regulation that merely "parrot[s]" the statute. *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006). The Supreme Court has explained that "[a]n agency does not acquire special authority to interpret its own words

when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Id.* Here, the agency has defined "property" in circular fashion as "any . . . property." 31 C.F.R. §§ 510.323, 578.314.

d. Finally on this point, even if there were some reason to defer to the Department's regulatory definition, the district court erred by applying "an even greater degree of deference than the *Chevron* standard." ROA.1505 (citation omitted). The district court quoted this Court's decision in *Paradissiotis* v. *Rubin*, 171 F.3d 983 (1999), which in turn cited the District of Columbia Circuit's decision in *Consarc Corp.* v. *United States Department of Treasury*, 71 F.3d 909 (1995). *See* ROA.1505. Both cases applied the contemporaneous understanding of *Auer* deference, under which an agency was entitled to deference unless its interpretation was "plainly inconsistent with the regulation." *See Paradissiotis*, 171 F.3d at 987 (quoting *Consarc*, 71 F.3d at 914). But since those cases were decided, the Supreme Court has repudiated the notion that "agency constructions of rules receive greater deference than agency constructions of statutes." *Kisor*, 139 S. Ct. at 2416. "Under *Auer*, as under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation.'" *Id.* In all events, this Court need not apply *Auer* deference here because the term "property" in the statute (and the regulation) plainly means something capable of being owned.

B. The Immutable Smart Contracts Are Not Capable Of Being Owned

1. Under the correct understanding of "property," the immutable smart contracts do not qualify because they are incapable of being owned. The Department has never disputed that immutable smart contracts cannot be controlled, modified, or taken down by anyone. To the extent the district court concluded that they are property, *see* ROA.1512, the uncontroverted evidence in the administrative record establishes that, by definition, the immutable smart contracts are incapable of being owned.

To be clear, only some of the smart contracts included in the Department's designation are immutable, and only those immutable smart contracts are at issue in this appeal. ROA.1090. Those immutable smart contracts, most of which are pools, perform the core functions of the Tornado Cash software. ROA.1083. The process of making those smart contracts immutable began with a "trusted setup ceremony" in which over 1,100 individuals voluntarily participated. *See* ROA.1090. It culminated in irrevocably removing the option for anyone to update, remove, or otherwise control those lines of code. *See* ROA.1090. The administrative record is undisputed on this point, and the Department has never attempted to argue otherwise.

That lack of control establishes a lack of ownership. It is black-letter law that "one of the most essential sticks in the bundle of rights that are commonly characterized as property" is "the right to exclude others." *Dolan* v.

City of Tigard, 512 U.S. 374, 384 (1994) (internal quotation marks and citation omitted). No one can exclude another person from using the immutable smart contracts. Indeed, even with the Department's sanctions in place, those immutable smart contracts remain accessible to anyone with an internet connection. What is more, no one has the ability to alter or delete those immutable smart contracts. *See* ROA.962, 1026, 1070, 1198. Accordingly, the immutable smart contracts are not "property" under IEEPA.

2. Despite the uncontested administrative record, the district court determined that the immutable smart contracts constitute "property" because they are "a code-enabled species of unilateral contracts." ROA.1509. A unilateral contract "results from an exchange of a promise for an act." 1 *Williston on Contracts* § 1:18 (4th ed. online). But any kind of contract, unilateral or not, requires "[a]n agreement between two or more parties." *Black's Law Dictionary* 318 (11th ed. 2019). The phrase "smart contract" is thus doubly misleading. First, a *mutable* smart contract could, at most, facilitate the creation of a contract between the smart contract's operator and a third party—but the smart contract is not itself a contract. Second, when interacting with an *immutable* smart contract, a user could theoretically make an offer, but there would be no one on the other side of the transaction to accept (or make an offer in return). A smart contract that has been immutably deployed to the block-

chain cannot accept or make an offer on behalf of anyone precisely because no one controls it.

The district court's analogy to a vending machine illustrates the point. *See* ROA.1509-1510. A vending machine is not itself a contract; it is a tool to offer a contract. The owner or operator of a vending machine stocks it with merchandise, with the understanding that any customer who pays a predetermined amount will be dispensed a specific product. That is why a traditional vending machine can be said to offer unilateral contracts on behalf of its owner: by interacting with a vending machine, the customer is contracting with the owner or operator of the machine. *See*, *e.g.*, *Chaffin* v. *Atlanta Coca Cola Bottling Co.*, 194 S.E. 2d 513, 515 (Ga. Ct. App. 1972). But a vending machine with no owner and no operator cannot possibly be a tool for offering or accepting unilateral contracts, because it is not operating on anyone's behalf. In a similar fashion, an immutable smart contract that cannot be controlled or altered by anyone cannot create a unilateral contract on behalf of anyone. Users interacting with an immutable Tornado Cash smart contract are not legally contracting with a party on the other side; they are simply running open-source software that anyone can use but no one can control.

The district court was incorrect that "other courts have recognized" that "smart contracts are merely a code-enabled species of unilateral contracts." ROA.1509. The quotations on which the district court relied not only come

from cases that did not involve immutable smart contracts, but are simply summaries of the parties' allegations. The district court relied on *Rensel* v. *Centra Tech, Inc.*, Civ. No. 17-24500, 2018 WL 4410110 (S.D. Fla. June 14, 2018), a magistrate judge's report that was never adopted by the district court, which summarized the plaintiff's allegations that "[s]mart contracts are self-executing contracts with the terms of the agreement between buyer and seller being directly written into lines of code." *Id.* at *10. The district court's reliance on *In re Bibox Group Holdings Limited Securities Litigation*, 534 F. Supp. 3d 326 (S.D.N.Y. 2021), is similarly misguided; that decision did no more than "take from plaintiff's amended complaint" facts that were "assumed to be true." *Id.* at 329. Substantially the same can be said of *Williams* v. *Block One*, Civ. No. 20-2809, 2022 WL 5294189, at *2 n.19 (S.D.N.Y. Aug. 15, 2022), and *Snyder* v. *STX Technologies, Ltd.*, Civ. No. 19-6132, 2020 WL 5106721, at *2, *6 (W.D. Wash. Aug. 31, 2020).

3. The Department offered several additional arguments that the district court did not address. Those arguments lack merit.

First, the Department invoked the concept of a "qualified property interest," but it never explained how that concept includes ownerless, immutable, open-source computer code. *See* ROA.746. For example, the Department noted that rights in certain animals are often described as "qualified property." ROA.746. But that does not alter the fact that the animals themselves

can be owned. *See Benjamin* v. *Town of Islip*, Civ. No. 20-56, 2021 WL 8344132, at *13 n.7 (E.D.N.Y. Aug. 12, 2021); 2 William Blackstone, *Commentaries on the Laws of England* 391 (1772) (Blackstone); *see also Altman* v. *City of High Point*, 330 F.3d 194, 200-205 (4th Cir. 2003). An interest in bailed property can also be described as "qualified property interest," but bailed property too is "very capable of absolute ownership." 2 Blackstone 395. That usage of "qualified property interest" merely underscores that the immutable smart contracts constitute property only if they are capable of being owned.

Second, the Department tried and failed to show that the immutable smart contracts are capable of being owned because immutability can be circumvented by "build[ing] a new [smart contract], and us[ing] that one instead." ROA.934, 940, 942. But the record makes clear that the immutable smart contracts were made ownerless and immutable before the DAO existed and have never been upgraded or replaced. *See*, *e.g.*, ROA.1027, 1063, 1119, 1201, 1203-1204. Even more fundamentally, the possibility that someone could create a new and different smart contract does not prove that an existing immutable smart contract can be owned.

Third, the Department cannot show that the immutable smart contracts are capable of being owned simply because some people have the ability to interfere with how others use them, such as by modifying optional user interfaces. *See* ROA.747. Although modifications to the user interface could affect

the popularity of the immutable smart contracts, it is not because anyone owns the immutable smart contracts. It is instead evidence that the *user interface* is someone's property.

Fourth, the Department observed that the purported Tornado Cash "entity" may have the ability to profit from others' use of the immutable smart contracts under "certain conditions." *See* ROA.747-748. But even if some members of the purported "entity" stood to profit, indirectly earning a profit from something is not the same as owning it. The Department has thus failed to establish that the immutable smart contracts can be owned.

* * * * *

The Department's newfound assertion of power over ownerless, immutable software code has troubling implications. With the district court's unprecedented ruling that the immutable smart contracts are property, it is hard to see why other intangible concepts could not be forbidden as well. A particular physics equation, a public-domain image, or any idea or public good would all be fair game. There is no reason to believe that Congress wanted the Department to have that immense power. As with "national" and "person," this Court should reject the Department's bid to remove all limits on the meaning of "property." Because smart contracts are incapable of being owned, they are not "property" and the judgment below should be reversed.

III. THE DESIGNATION IS UNLAWFUL BECAUSE THE PURPORTED TORNADO CASH ENTITY HAS NO 'INTEREST' IN THE IMMUTABLE SMART CONTRACTS

Finally, even if the immutable smart contracts were somehow "property" within the meaning of IEEPA, the Department was still required to articulate how the designated entity has an "interest" in them. *See* 50 U.S.C. § 1702(a)(1)(B). Because the district court also erred by concluding that the purported Tornado Cash person has an "interest" in the immutable smart contracts, this Court should reverse the judgment below as to the first count.

A. An 'Interest' In Property Is A Legal, Equitable, Or Beneficial Interest

IEEPA limits the Department's power to "property in which any foreign country or a national thereof has any *interest*," 50 U.S.C. § 1702(a)(1)(B), and the North Korea Act incorporates IEEPA's delegation of authority with respect to persons sanctioned for engaging in certain prohibited activities concerning North Korea, *see* 22 U.S.C. § 9214(a), (c). When "interest" is used in conjunction with "property," its ordinary meaning is a "legal or equitable claim to or right in property." *Black's Law Dictionary* 968 (11th ed. 2019). Courts have recognized that the term "interest" also includes a beneficial interest. *See*, *e.g.*, *Holy Land Foundation for Relief and Development* v. *Ashcroft*, 333 F.3d 156, 163 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004); *Global Relief Foundation, Inc.* v. *O'Neill*, 315 F.3d 748, 753 (7th Cir. 2002), *cert. denied*, 540 U.S. 1003 (2003). A beneficial interest is a "right or expectancy in something

(such as a trust or an estate)." *Black's Law Dictionary* 149 (11th ed. 2019). As the Department's regulations recognize, the legal, equitable, or beneficial interest may be of "any nature whatsoever, direct or indirect." 31 C.F.R. § 510.313.

The Department's practice has been consistent with that understanding. For example, after OFAC designated the Russian gun manufacturer Kalashnikov Concern, the Department published guidance for distributors and owners of existing Kalashnikov weapons. It clarified that the designation did not apply to a "product that was bought and fully paid for prior to the date of designation (i.e., no payment remains due to Kalashnikov Concern)," although it would potentially prohibit transactions involving "products in which Kalashnikov Concern has an interest (for example, the products are not fully paid for or are being sold on consignment)." OFAC, *Frequently Asked Questions* (July 16, 2014) <ofac.treasury.gov/faqs/374>.

The district court cited *Regan* v. *Wald*, 468 U.S. 222 (1984), for the proposition that "[t]he phrase 'any interest' should be construed broadly." ROA.1510. But there was no need for the Supreme Court to address the meaning of "interest" in *Wald*, let alone determine whether deference to the agency's definition of that term was warranted. The only issue in that case was whether the President could amend a regulation promulgated under the Trading with the Enemy Act and grandfathered under IEEPA without

meeting the procedural requirements of IEEPA. *See Wald*, 468 U.S. at 232-234. And even if the Supreme Court had instructed that the term "interest" must be broadly construed, a statute is not ambiguous "[i]f a court, employing traditional tools of statutory construction, [can] ascertain[] that Congress had an intention on the precise question at issue." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

In any event, the district court ultimately appears to have agreed with plaintiffs that those tools of construction establish an unambiguous meaning of "interest": a legal, equitable, or beneficial interest in property. *See* ROA.1510.

B. The Purported Tornado Cash Entity Has No Legal, Equitable, Or Beneficial 'Interest' In The Immutable Smart Contracts

As discussed above, a subset of the smart contracts included in the Department's designation are now immutable—no one can own, control, or modify them. Even if those smart contracts were somehow considered "property," there is nothing in the administrative record to suggest that the Tornado Cash "entity" has any legal, equitable, or beneficial interest in them.

1. The district court incorrectly concluded that "Tornado Cash has a beneficial interest in the deployed smart contracts because they provide Tornado Cash with a means to control and use crypto assets." ROA.1510. According to the district court, the smart contracts generate "fees in the form of TORN tokens . . . when users execute a relayer-facilitated transaction."

ROA.1510. To reach that conclusion, the court seemed to rely on the fact that those TORN holders who locked their TORN into the mutable governance smart contract receive a fee from the mutable relayer-registry smart contract. *See* ROA.1510-1511; *see also* ROA.964. The relayer registry maintains a list of other mutable smart contracts known as "relayers," which are operated by third parties and provide an optional layer of privacy. ROA.1498. The registry, which may be modified or disabled by the DAO through a governance vote, collects a separate fee for most transactions processed by a third-party relayer listed on the registry and pays it to the subset of TORN holders who have locked their TORN into the mutable governance smart contract. ROA.964, 1093, 1101.

But the relayer registry is entirely distinct from the immutable pool smart contracts. In its analysis, the district court ignored the facts that the registry is a mutable smart contract and that plaintiffs' argument is that the Tornado Cash "entity" has no interest in the separate immutable smart contracts. The court sought to sidestep that distinction by stating conclusorily that the "assumption" that the pools are "ownerless" is one that "the record does not support." ROA.1512. But the record is clear that at least twenty pool smart contracts identified in the designation are ownerless and immutable. *See* ROA.1096-1100.

The record is also clear that, unlike the relayer registry, the immutable pool smart contracts do not collect any fees from users. Moreover, as the district court recognized, a substantial percentage of transactions through the immutable pools—at least 16%—do not involve a relayer and could not possibly result in any fee to any TORN holders. ROA.1510. In fact, because the use of a relayer is entirely optional, nothing prevents 100% of users from electing to avoid the use of relayers altogether, thereby generating no fees for the purported Tornado Cash "entity."

The district court appears to have concluded that the Tornado Cash "entity" has an interest in the immutable smart contracts because TORN holders tend to benefit from increased use of those smart contracts. But that is a theory of economic causation; it does not establish the existence of a legal, equitable, or beneficial interest. Under that theory, some TORN holders likely receive fees when users transact using the immutable smart contracts, because some percentage of those users will also elect to use one of many optional third-party relayers listed on the relayer registry, potentially resulting in increased fees to those TORN holders who chose to lock their TORN into the mutable governance smart contract. ROA.938, 958 & n.113, 960-961, 964. At most, then, some TORN holders may have been well-positioned to profit from increased use of the immutable smart contracts. But it simply does not follow from the possibility that some TORN holders may have "derived value" from

the immutable smart contracts that they had a cognizable *property interest* in those contracts. ROA.961.

At most, payments by third-party relayers to the mutable registry-relayer smart contract might establish that some TORN holders have an interest in *the mutable relayer-registry smart contract*. But an interest in the registry does not amount to an interest in *the separate immutable smart contracts*. Those immutable smart contracts thus cannot be designated under IEEPA or the North Korea Act because the Department has not shown that anyone has (or can have) a legal, equitable, or beneficial interest in property in the immutable smart contracts themselves.

2. Neither this Court nor any other court of appeals has embraced such a sweeping and atextual understanding of IEEPA.[3] In *Global Relief Foundation*, all of the parties appeared to agree that foreign nationals had a beneficial interest in the assets of a domestic entity, and the Seventh Circuit simply rejected the entity's argument that a beneficial interest was insufficient. *See* 315 F.3d at 753. And in *Holy Land Foundation*, the D.C. Circuit concluded that Hamas had an interest in the assets of a domestic entity

[3] One district court has adopted a similar interpretation of IEEPA in a separate challenge to the Department's designation. *See Coin Center* v. *Yellen*, Civ. No. 22-20375, 2023 WL 7121095 (N.D. Fla. Oct. 30, 2023), *appeal filed*, No. 23-13698 (11th Cir. Nov. 7, 2023). That decision is erroneous for the same reasons discussed above.

because there was evidence that it "acted on behalf of Hamas," "operated as a fundraiser for Hamas in the United States," and received funds from Hamas officials. 333 F.3d at 161, 163; *cf.* Restatement (Second) of Agency § 14B, cmt. c (noting that, "[i]f a person receives property from another who manifests an intention that the transferee is to hold the property for the benefit of and subject to the control of the transferor, an agency is created, whether or not title is transferred"). Neither court adopted a rule that simply being well-positioned to profit is sufficient to show a beneficial interest.

If the district court's interpretation of "interest" were correct, the Department's sanctions authority would be nearly limitless. For example, the distance Americans commute for work and the speed at which they drive affect the demand for oil, and higher demand for oil creates a foreseeable and likely economic benefit for certain foreign firms. Under the district court's interpretation, that fact would be enough for the Department to designate Americans' cars as property in which the foreign firms have an interest—a bizarre result for a statute "intended to *limit* the President's emergency power in peacetime." *Dames & Moore* v. *Regan*, 453 U.S. 654, 672-673 (1981) (emphasis added).

3. The Department has also advanced several additional "interests" that the district court did not address. None of them is sufficient.

The Department argued that a "beneficial interest" means a right to "control and use" property, *see* ROA.749, but that definition does not help the Department here. The mutable relayer-registry smart contract does not give the purported Tornado Cash "entity" the right to "control" the ownerless, immutable smart contracts. And while users might avail themselves of third-party relayers listed on the relayer registry in the course of using the immutable smart contracts, the registry does not give the purported Tornado Cash entity any particular right to "use" the immutable smart contracts.

The Department also took the view that TORN holders (including the Tornado Cash "entity" itself) may profit if the immutable smart contracts are frequently used, because "the price of TORN tokens appear[s] to correlate with" the "success of the smart contracts." ROA.962. As an initial matter, that argument contradicts record evidence that the price of TORN decreased as the popularity of the immutable smart contracts increased. *See* ROA.963, 1133, 1204, 1211, 1236. But even if the price had moved in the way the Department supposes, it still would not establish a beneficial interest in the immutable smart contracts. Rather, it would just be another way in which TORN holders may be well-positioned to profit from the success of immutable smart contracts that neither they nor anyone else own. The Department has never explained how the speculative possibility that TORN holders will benefit from

increased use of the Tornado Cash software gives them a legal, equitable, or beneficial interest in the immutable smart contracts.

The Department has further contended that the Tornado Cash "entity" has an interest in the immutable smart contracts because it regarded them "as having value." ROA.961. But regarding something as having value does not give rise to a legal, equitable, or beneficial interest in that thing. The Department has emphasized that individuals created the immutable pool smart contracts and "expend[ed] time and effort" to perform the trusted setup ceremony to make them immutable. ROA. 962. But it would be perverse to say that performing steps to relinquish control of a smart contract, or creating a smart contract over which control is later relinquished, creates a legal, equitable, or beneficial interest after the smart contract has become ownerless and immutable. To the contrary, those steps sever any such interest that might have previously existed, just as a manufacturer has no "interest" in a gun that was "fully paid for prior to the date of designation." OFAC, *Frequently Asked Questions* (July 16, 2014) <ofac.treasury.gov/faqs/374>.

The district court therefore erred by concluding that the purported Tornado Cash "entity" the Department designated has a legal, equitable, or beneficial "interest" in the immutable smart contracts as property. In that regard, as in others, the Department exceeded its authority under IEEPA and the North Korea Act.

CONCLUSION

The judgment of the district court should be reversed as to the first count of the amended complaint.

Respectfully submitted,

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NOVEMBER 13, 2023

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, a member of the Bar of this Court and counsel for appellants certify that, on November 13, 2023, a copy of the attached Brief of Plaintiffs-Appellants was filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, a member of the Bar of this Court and counsel for appellants, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Fifth Circuit Rule 32.3, that the attached Brief of Plaintiffs-Appellants is proportionately spaced, has a typeface of 14 points or more, and contains 12,791 words.

/s/ Kannon K. Shanmugam
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NOVEMBER 13, 2023

STATUTORY ADDENDUM

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TABLE OF CONTENTS

Page

22 U.S.C. § 9214, Designation of Persons 1

50 U.S.C. § 1702, Presidential Authorities 8

50 U.S.C. § 1705, Penalties 10

31 C.F.R. § 578.201, Prohibited Transactions 11

31 C.F.R. § 510.305, Entity 15

31 C.F.R. § 510.313, Interest 16

31 C.F.R. § 510.322, Person 17

31 C.F.R. § 510.323, Property; Property Interest 18

31 C.F.R. § 578.305, Entity 19

31 C.F.R. § 578.309, Interest 20

31 C.F.R. § 578.313, Person 21

31 C.F.R. § 578.314, Property; Property Interest 22

22 U.S.C. § 9214, Designation of Persons

(a) Mandatory designations

Except as provided in section 9228 of this title, the President shall designate under this subsection any person that the President determines—

(1) knowingly, directly or indirectly, imports, exports, or reexports to, into, or from North Korea any goods, services, or technology controlled for export by the United States because of the use of such goods, services, or technology for weapons of mass destruction or delivery systems for such weapons and materially contributes to the use, development, production, possession, or acquisition by any person of a nuclear, radiological, chemical, or biological weapon or any device or system designed in whole or in part to deliver such a weapon;

(2) knowingly, directly or indirectly, provides training, advice, or other services or assistance, or engages in significant financial transactions, relating to the manufacture, maintenance, or use of any such weapon, device, or system to be imported, exported, or reexported to, into, or from North Korea;

(3) knowingly, directly or indirectly, imports, exports, or reexports luxury goods to or into North Korea;

(4) knowingly engages in, is responsible for, or facilitates censorship by the Government of North Korea;

(5) knowingly engages in, is responsible for, or facilitates serious human rights abuses by the Government of North Korea;

(6) knowingly, directly or indirectly, engages in money laundering, the counterfeiting of goods or currency, bulk cash smuggling, or narcotics trafficking that supports the Government of North Korea or any senior official or person acting for or on behalf of that Government;

(7) knowingly engages in significant activities undermining cybersecurity through the use of computer networks or systems against foreign persons, governments, or other entities on behalf of the Government of North Korea;

(8) knowingly, directly or indirectly, sells, supplies, or transfers to or from the Government of North Korea or any person acting for or on behalf of that Government, a significant amount of precious metal, graphite, raw or semi-finished metals or aluminum, steel, coal, or software, for use by or in industrial processes directly related to weapons of mass destruction and delivery systems for such weapons, other proliferation activities, the Korean Workers' Party, armed forces, internal security, or intelligence activities, or the operation and maintenance of political prison camps or forced labor camps, including outside of North Korea;

(9) knowingly, directly or indirectly, imports, exports, or reexports to, into, or from North Korea any arms or related materiel or any defense article or defense service (as such terms are defined in section 2794 of this title);

(10) knowingly, directly or indirectly, purchases or otherwise acquires from North Korea any significant amounts of gold, titanium ore, vanadium ore, copper, silver, nickel, zinc, or rare earth minerals;

(11) knowingly, directly or indirectly, sells or transfers to North Korea any significant amounts of rocket, aviation, or jet fuel (except for use by a civilian passenger aircraft outside North Korea, exclusively for consumption during its flight to North Korea or its return flight);

(12) knowingly, directly or indirectly, provides significant amounts of fuel or supplies, provides bunkering services, or facilitates a significant transaction or transactions to operate or maintain, a vessel or aircraft that is designated under an applicable Executive order or an applicable United Nations Security Council resolution, or that is owned or controlled by a person designated under an applicable Executive order or applicable United Nations Security Council resolution;

(13) knowingly, directly or indirectly, insures, registers, facilitates the registration of, or maintains insurance or a registration for, a vessel owned or controlled by the Government of North Korea, except as specifically approved by the United Nations Security Council;

(14) knowingly, directly or indirectly, maintains a correspondent account (as defined in section 9221a(d)(1) of this title) with any North Korean financial institution, except as specifically approved by the United Nations Security Council; or

(15) knowingly attempts to engage in any of the conduct described in paragraphs (1) through (14).

(b) Additional discretionary designations

(1) Prohibited conduct described

Except as provided in section 9228 of this title, the President may designate under this subsection any person that the President determines—

(A) knowingly engages in, contributes to, assists, sponsors, or provides financial, material or technological support for, or goods and services in support of, any person designated pursuant to—

(i) an applicable United Nations Security Council resolution;

(ii) any regulation promulgated under section 9254 of this title; or

(iii) any applicable Executive order;

(B) knowingly contributed to—

(i) the bribery of an official of the Government of North Korea or any person acting for on behalf of that official;

(ii) the misappropriation, theft, or embezzlement of public funds by, or for the benefit of, an official of the Government of North Korea or any person acting for or on behalf of that official; or

(iii) the use of any proceeds of any activity described in clause (i) or (ii);

(C) knowingly and materially assisted, sponsored, or provided significant financial, material, or technological support for, or goods or services to or in support of, the activities described in subparagraph (A) or (B);

(D) knowingly, directly or indirectly, purchased or otherwise acquired from the Government of North Korea significant quantities of coal, iron, or iron ore, in excess of the limitations provided in applicable United Nations Security Council resolutions;

(E) knowingly, directly or indirectly, purchased or otherwise acquired significant types or amounts of textiles from the Government of North Korea;

(F) knowingly facilitated a significant transfer of funds or property of the Government of North Korea that materially contributes to any violation of an applicable United National [1] Security Council resolution;

(G) knowingly, directly or indirectly, facilitated a significant transfer to or from the Government of North Korea of bulk cash, precious metals, gemstones, or other stores of value not described under subsection (a)(10);

(H) knowingly, directly or indirectly, sold, transferred, or otherwise provided significant amounts of crude oil, condensates, refined petroleum, other types of petroleum or petroleum byproducts, liquified natural gas, or other natural gas resources to the Government of North Korea (except for heavy fuel oil, gasoline, or diesel fuel for humanitarian use or as excepted under subsection (a)(11));

(I) knowingly, directly or indirectly, engaged in, facilitated, or was responsible for the online commercial activities of the Government of North Korea, including online gambling;

(J) knowingly, directly or indirectly, purchased or otherwise acquired fishing rights from the Government of North Korea;

(K) knowingly, directly or indirectly, purchased or otherwise acquired significant types or amounts of food or agricultural products from the Government of North Korea;

(L) knowingly, directly or indirectly, engaged in, facilitated, or was responsible for the exportation of workers from North Korea in a manner intended to generate significant revenue, directly or indirectly, for use by the Government of North Korea or by the Workers' Party of Korea;

(M) knowingly conducted a significant transaction or transactions in North Korea's transportation, mining, energy, or financial services industries; or

(N) except as specifically approved by the United Nations Security Council, and other than through a correspondent account as described in subsection (a)(14), knowingly facilitated the operation of any branch, subsidiary, or office of a North Korean financial institution.

(2) Effect of designation

With respect to any person designated under this subsection, the President may—

(A) apply the sanctions described in section 9224, 9225(c), or 9226 of this title to the person to the same extent and in the same manner as if the person were designated under subsection (a);

(B) apply any applicable special measures described in section 5318A of title 31;

(C) prohibit any transactions in foreign exchange—

(i) that are subject to the jurisdiction of the United States; and

(ii) in which such person has any interest; and

(D) prohibit any transfers of credit or payments between financial institutions or by, through, or to any financial institution, to the extent that such transfers or payments—

(i) are subject to the jurisdiction of the United States; and

(ii) involve any interest of such person.

(c) Asset blocking

(1) Mandatory asset blocking

The President shall exercise all of the powers granted to the President under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) to the extent necessary to block and prohibit all transactions in property and interests in property of a person designated under subsection (a) or (g), the Government of North Korea, or the Workers' Party of Korea, if such property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person.

(2) Discretionary asset blocking

The President may also exercise such powers, in the same manner and to the same extent described in paragraph (1), with respect to a person designated under subsection (b).

* * *

(f) Penalties

The penalties provided for in subsections (b) and (c) of section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705) shall apply to any person who violates, attempts to violate, conspires to violate, or causes a violation of any prohibition of this section, or an order or regulation prescribed under this section, to the same extent that such penalties apply to a person that commits an unlawful act described in section 206(a) of such Act (50 U.S.C. 1705(a)).

* * *

50 U.S.C. § 1702, Presidential Authorities

(a) In general

(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities,

by any person, or with respect to any property, subject to the jurisdiction of the United States;

(B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and

(C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in

any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.

(2) In exercising the authorities granted by paragraph (1), the President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in paragraph (1) either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of such paragraph. In any case in which a report by a person could be required under this paragraph, the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

(3) Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued under this chapter.

* * *

50 U.S.C. § 1705, Penalties

(a) Unlawful acts

It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this chapter.

(b) Civil penalty

A civil penalty may be imposed on any person who commits an unlawful act described in subsection (a) in an amount not to exceed the greater of—

(1) $250,000; or

(2) an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(c) Criminal penalty

A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of, an unlawful act described in subsection (a) shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

31 C.F.R. § 578.201, Prohibited Transactions

(a) All property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any U.S. person of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(1) Annex to E.O. 13694, as amended by E.O. 13757 ("amended E.O. 13694"). The persons listed in the Annex to amended E.O. 13694;

(2) Amended E.O. 13694. Any person determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State:

(i) To be responsible for or complicit in, or to have engaged in, directly or indirectly, cyber-enabled activities originating from, or directed by persons located, in whole or in substantial part, outside the United States that are reasonably likely to result in, or have materially contributed to, a significant threat to the national security, foreign policy, or economic health or financial stability of the United States and that have the purpose or effect of:

(A) Harming, or otherwise significantly compromising the provision of services by, a computer or network of computers that support one or more entities in a critical infrastructure sector;

(B) Significantly compromising the provision of services by one or more entities in a critical infrastructure sector;

(C) Causing a significant disruption to the availability of a computer or network of computers;

(D) Causing a significant misappropriation of funds or economic resources, trade secrets, personal identifiers, or financial information for commercial or competitive advantage or private financial gain; or

(E) Tampering with, altering, or causing a misappropriation of information with the purpose or effect of interfering with or undermining election processes or institutions;

(ii) To be responsible for or complicit in, or to have engaged in, the receipt or use for commercial or competitive advantage or private financial gain, or by a commercial entity, outside the United States of trade secrets misappropriated through cyber-enabled means, knowing they have been misappropriated, where the misappropriation of such trade secrets is reasonably likely to result in, or has materially contributed to, a significant threat to the national security, foreign policy, or economy of the United States;

(iii) To have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any activity described in paragraph (a)(2)(i) or (ii) of this section or any person whose property and interests in property are blocked pursuant to paragraph (a)(1) of this section or this paragraph (a)(2);

(iv) To be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to paragraph (a)(1) of this section or this paragraph (a)(2); or

(v) To have attempted to engage in any of the activities described in paragraphs (a)(2)(i) through (iv) of this section; and

(3) Section 224(a)(1) of the Countering America's Adversaries Through Sanctions Act (22 U.S.C. 9524) (CAATSA). Any person that the Secretary of the Treasury, in consultation with the Secretary of State, determines:

(i) Knowingly engages in significant activities undermining cybersecurity against any person, including a democratic institution, or government on behalf of the Government of the Russian Federation; or

(ii) Is owned or controlled by, or acts or purports to act for or on behalf of, directly or indirectly, a person described in paragraph (a)(3)(i) of this section.

(b) The prohibitions in paragraph (a) of this section include prohibitions on the following transactions:

(1) The making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to paragraph (a) of this section; and

(2) The receipt of any contribution or provision of funds, goods, or services from any person whose property and interests in property are blocked pursuant to paragraph (a) of this section.

(c) Unless authorized by this part or by a specific license expressly referring to this part, any dealing in securities (or evidence thereof) held within the possession or control of a U.S. person and either registered or inscribed in the name of, or known to be held for the benefit of, or issued by, any person whose property and interests in property are blocked pursuant to paragraph (a) of this section is prohibited. This prohibition includes the transfer (including the transfer on the books of any issuer or agent thereof), disposition, transportation, importation, exportation, or withdrawal of, or the endorsement or guaranty of signatures on, any securities on or after the effective date. This prohibition applies irrespective of the fact that at any time (whether prior to, on, or subsequent to the effective date) the registered or inscribed owner of any such securities may have or might appear to have assigned, transferred, or otherwise disposed of the securities.

(d) The prohibitions in paragraph (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this part, and notwithstanding any contract entered into or any license or permit granted prior to the effective date.

(e) All transactions prohibited pursuant to any Executive order issued after December 28, 2016, pursuant to the national emergency declared in E.O. 13694 of April 1, 2015, are prohibited pursuant to this part.

31 C.F.R. § 510.305, Entity

The term *entity* means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.

31 C.F.R. § 510.313, Interest

Except as otherwise provided in this part, the term *interest*, when used with respect to property (*e.g.*, "an interest in property"), means an interest of any nature whatsoever, direct or indirect.

31 C.F.R. § 510.322, Person

The term *person* means an individual or entity.

31 C.F.R. § 510.323, Property; Property Interest

The terms *property* and *property interest* include money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, guarantees, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership, or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent.

31 C.F.R. § 578.305, Entity

The term *entity* means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.

31 C.F.R. § 578.309, Interest

Except as otherwise provided in this part, the term *interest*, when used with respect to property (*e.g.*, "an interest in property"), means an interest of any nature whatsoever, direct or indirect.

31 C.F.R. § 578.313, Person

The term *person* means an individual or entity.

31 C.F.R. § 578.314, Property; Property Interest

The terms *property* and *property interest* include money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, guarantees, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership, or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent.