UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FORUSALL, INC., *Plaintiff*, **v.** **UNITED STATES DEPARTMENT OF LABOR and MARTIN J. WALSH, in his official capacity as SECRETARY OF LABOR,** *Defendants*.	Case No. 22-cv-01551-CRC Hon. Christopher R. Cooper **ORAL ARGUMENT REQUESTED**

PLAINTIFF FORUSALL, INC.'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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October 6, 2022

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INTRODUCTION

Defendants' Motion to Dismiss is based on the false premise that "the Release ***merely*** repeats binding case law interpreting plan fiduciaries' duty of prudence" and "***merely*** restates well-established law." *See* Dkt. 10-1 ("Motion") at 21 (emphasis added). In reality, in addition to quoting one Supreme Court decision for a proposition not at issue in this case and regurgitating background principles of fiduciary responsibility, the Release also sets forth: (i) a new standard of care, "extreme care," applicable only to cryptocurrency; and (ii) an obligation to monitor investments in "brokerage windows" also applicable only to cryptocurrency. *See* Dkt. 10-2 ("Release") at 1, 3. Defendants fail to identify any "well-established law" to support either of these plainly wrong and biased positions. Instead, Defendants all but deny that the Department of Labor (the "Department") ever took these positions, even though they remain on the face of the Release that Defendants have refused to modify or withdraw despite significant public pressure.

Unable to defend the key portions of the Release, Defendants make a myriad of clearly erroneous procedural arguments in attempting to preclude the Court from reaching the merits, including:

- Defendants argue that Plaintiff ForUsAll, Inc. ("ForUsAll") lacks Article III standing because its injury was caused by third parties' reactions to and interpretations of the Release, not by the Release itself, even though the D.C. Circuit has condemned these arguments as "impossible to maintain" and "irrelevant." *See infra* at 8-9.

- Defendants argue that Article III standing is also lacking because the Court cannot "direct the Department to take a particular interpretation of . . . any . . . statutory provision," even though the Court can obviously interpret the law and order the Department to comply with the Court's interpretation. *See infra* at 15.

- Defendants argue that the Release is not final agency action because it cannot represent the "culmination of [the] agency's consideration" as opposed to "the ruling of a subordinate official," since it was not issued in the Secretary's name, even though it was issued in the name of the Department and – as Defendants ignore – the Secretary has publicly confirmed he considers it to be a "ruling[]" of the "Department of Labor." *See infra* at 16.

- Defendants argue that there is not final agency action because there cannot be "direct and appreciable legal consequences" from guidance that is not formally binding, even though the Supreme Court decision they cite for that proposition held exactly the opposite. *See infra* at 20-21.

Defendants' erroneous procedural arguments are the sole basis on which they move to dismiss Count II of the Complaint, which alleges that Defendants acted arbitrarily and capriciously and exceeded their authority. With respect to Count I of the Complaint, which alleges that Defendants failed to engage in notice and comment rulemaking, Defendants ignore, *inter alia*:

- That the case law they selectively cite requires notice and comment rulemaking where an agency "adopt[s] a new position inconsistent with any of [its] existing regulations," while failing to even acknowledge the existence of the regulation that the Complaint alleges is inconsistent with the Release. *See infra* at 23-25.

- The allegation in the Complaint that "DOL has publicly acknowledged that it considered using notice and comment rulemaking, but decided not to for reasons unrelated to the substantive nature of the rules prescribed in the Release, including what it deemed to be political expedience." *See infra* at 24.

Granting Defendants' Motion would invite a brave new world of agency lawlessness. Agencies could publish official statements, endorsed by the agency head, disregarding the agency's own regulations (and an executive order), advance biased positions, threaten to investigate any regulated entity that dares to reach a different conclusion than the one strongly suggested by the agency's biased position, and publicly attack, by name, any entity that announces an intent to make available a service the agency disfavors. All of this with no judicial review, even where the agency admits it chose not to go through rulemaking because it would be politically inexpedient. No case law countenances such a lack of agency accountability and no decision should incentivize any federal agency to behave in this manner. The Motion should be denied.[1]

[1] In the event that the Court does dismiss the Complaint, any dismissal should make explicit that the positions espoused by Defendants about the Release in their Motion will be binding on the Department. *See infra* at 27-28.

BACKGROUND

"Cryptocurrency is a widely accepted asset class," which "[t]ens of millions of Americans have included . . . in their portfolios, as have some of the nation's largest institutional investors, including Harvard University's endowment." Compl. ¶ 3. *See also id.* ¶¶ 27-30. On March 9, 2022, President Biden issued an executive order directing federal agencies to work together to "promote" the development and use of cryptocurrency. *See id.* ¶¶ 3, 6, 31-32; Exec. Order No. 14067, *Ensuring Responsible Development of Digital Assets*, 87 Fed. Reg. 14,143, 14,147 (Mar. 9, 2022) (the "Executive Order"). "The Executive Order was widely understood to supplant any hostility individual government officials may have previously expressed with respect to the existence of cryptocurrency and move the federal government towards a unified approach to the expanding use of cryptocurrency." Compl. ¶ 33 (collecting articles).

In stark contrast to the reactions of other federal agencies, which openly welcomed the Executive Order, the Department responded by issuing the Release at issue in this lawsuit the very next day. *See id.* ¶¶ 34-38; *see also* Release. The Release did not mention the Executive Order or any of the potential benefits of cryptocurrency, described cryptocurrency in exclusively negative terms, and stated that "the Department has serious concerns about the prudence of a fiduciary's decision to expose a 401(k) plan's participants to direct investments in cryptocurrencies or other products whose value is tied to cryptocurrencies." *See* Release. The Release's biased description of cryptocurrency and list of purported risks included the preposterous assertion that other agencies might – in direct defiance of the Executive Order – simply "shut[] off" the ability to exchange cryptocurrency. *See id.* at 3. Speaking in mandatory terms, the Release instructed that this purported regulatory risk was one that "[f]iduciaries who are considering whether to include a

cryptocurrency investment option ***will have to include in their analysis*** . . . ." *See* Release at 3 (emphasis added).[2]

In addition to describing the Department's biased and inaccurate views on cryptocurrency, the Release makes at least two new and erroneous pronouncements regarding how the duty of prudence imposed by the Employee Retirement Income Security Act ("ERISA") applies to cryptocurrency.

First, by way of background, and as correctly explained in Defendants' Motion:

> ERISA fiduciaries must uphold a duty of prudence. Specifically, the statute requires a fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." [29 U.S.C.] § 1104(a)(1)(B).

Motion at 3. Yet, contrary to the explanation in Defendants' Motion, the Release does not merely "remind fiduciaries" of this duty "as expressed in the statute . . . ." *Id*. at 1. In fact, the Release never mentions the prudence standard of care described in the statute, and instead describes the applicable standard of care as "extreme care." *See* Release at 1 ("The Department cautions plan fiduciaries to exercise extreme care before they consider adding a cryptocurrency option to a 401(k) plan's investment menu for plan participants."); Compl. ¶ 6(a) (alleging that the Release "[i]nvented a standard of care, 'extreme care' – heretofore unseen in the nearly 50-year history of ERISA and contradicted by the text of the statute – applicable only to cryptocurrency").

Second, the Release purports to impose a duty to monitor investments in "brokerage windows," at least with respect to cryptocurrency. *See* Release at 3 ("The plan fiduciaries responsible for overseeing such investment options ***or allowing such investments through***

[2] Without even acknowledging, much less addressing, these issues, Defendants' "Factual Background" section of their brief incorrectly describes the Release as "[c]onsistent with the Executive Order[] . . . ." Motion at 5.

brokerage windows should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks described above.") (emphasis added). Yet, the Department's own longstanding regulations provide that the "duty to prudently select and monitor" investments applies to "designated investment alternatives" included on the plan's menu of investment options, but does not extend to investments that are only available to participants if they opt in to the use of a brokerage window. *See* Compl. ¶¶ 20-21; 29 C.F.R §§ 2550.404a-5(f), (h)(4). In response to industry-wide criticism, *see, e.g.,* Compl. ¶ 42, Department officials publicly stated that the Department was not imposing a duty to monitor "all of the investments participants can access" in brokerage windows, but only cryptocurrency in brokerage windows. *See id*. ¶ 43 (denying that the Department had "imposed [an] obligation" "to monitor ***all of the investments*** participants can access") (emphasis added); *see also* Kellie Mejdrich, *Under Fire From Biz Groups, DOL Stands By Crypto Guidance*, Law360 (Apr. 22, 2022) ("Khawar said that plan sponsors should consider the brokerage window reference in the context of a compliance assistance release focused on cryptocurrency. . . . People shouldn't really be interpreting this as a broader statement about what your obligations are – or are not – in other contexts.").

"Neither the Release nor statements by DOL officials offer any coherent rationale for how there could be a duty to select and monitor investments in a brokerage window if those investments are cryptocurrency, but not if they are any other type of investment." Compl. ¶ 44. The Motion offers no such rationale either. Instead, in addition to completely ignoring the Department's regulations on this topic, the Motion misleadingly describes the above quotes as follows:

> Nowhere does the Release prohibit the offering of cryptocurrency investment options. And the Department has not stated anything different. Indeed, the complaint purports to quote a senior Department official as stating that the Department didn't "impos[e] th[e] obligation" that the Release's critics allege, but rather reminded fiduciaries that "[t]hey need to make sure they're looking out for

> plan participants," Compl. ¶ 43—which is exactly what the duties of loyalty and prudence require, see 29 U.S.C. § 1104(a).

Motion at 22 (alteration in original). Absent from the Motion is any acknowledgment that the obligation the Department officials were discussing was the duty to monitor investments in a brokerage window or that the denial was with respect to all investments other than cryptocurrency.

The Release was not issued by mere staff at the Department, but was approved by at least the Acting Assistant Secretary of Labor (the top official in the Department's Employee Benefits Security Administration), who, in his own name, made an accompanying blog post purporting to explain the basis for the Release. *See* Compl. ¶ 37. Moreover, the Secretary of Labor himself has publicly described the Release as a "ruling[]" of the Department of Labor. *See id.* ¶ 36; The Washington Post, *Transcript: The Technology 202: The Future Infrastructure Workforce* (May 19, 2022).[3] In drafting the Release, Defendants conspicuously ***removed*** the disclaimer that the Release would not have "the force and effect of law" and would not "bind the public in any way," which the Department had included in its prior "Compliance Assistance Release" on another topic. *See* Compl. ¶ 40.

The Acting Assistant Secretary of Labor "publicly acknowledged that [the Department] considered using notice and comment rulemaking, but decided not to for reasons unrelated to the substantive nature of the rules prescribed in the Release, including what it deemed to be political expedience." *Id.* ¶ 53. *See also id.* ¶¶ 7, 41. The Acting Assistant Secretary of Labor also publicly attacked, by name, the two leading companies that announced their intention to help plans make cryptocurrency available to their participants: ForUsAll and Fidelity. *See id.* ¶ 47.

[3] https://www.washingtonpost.com/washington-post-live/2022/05/19/transcript-technology-202-future-infrastructure-workforce/.

ForUsAll has been injured. Of the "plans which had already agreed to add cryptocurrency through ForUsAll's program prior to the Release and DOL officials' public comments following the Release . . . approximately one-third of the plans that ForUsAll has discussed the matter with have indicated that, despite their interest in including cryptocurrency, they do not intend to proceed at this time in light of Defendants' enforcement threats." *Id*. ¶ 50. These are not "unspecified enforcement threats." Motion at 12. The threats appear plainly on the face of the Release, which tells fiduciaries that they "should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of" the Department's biased and inaccurate views of cryptocurrency "described [in the Release]," and which promises, beyond "conduct[ing] an investigative program aimed at plans that offer participant investments in cryptocurrencies . . . to take appropriate action to protect the interest of plan participants with respect to these investments" under the auspices of brand new positions on the scope of the duty of prudence applicable only to cryptocurrency. *See* Release.

The Release also makes several uncontroversial statements regarding the general nature of fiduciary duties, including a quote from a recent Supreme Court decision which states the unremarkable proposition that "plan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options." *See* Release at 1 & n.2 (quoting *Hughes v. Northwestern Univ.*, 142 S.Ct. 737, 742 (2022)). The *Hughes* decision was limited to investments on the "plan's menu of options" and did not address brokerage windows. ForUsAll does not challenge these aspects of the Release.

On June 2, 2022, ForUsAll brought this lawsuit under the Administrative Procedure Act ("APA"). In Count I, the Complaint alleges that the Department's failure to engage in notice and comment rulemaking violated the APA. *See* Compl. ¶¶ 51-55. In Count II, the Complaint alleges

that the Department's "issuance of the Release was arbitrary, capricious, and otherwise not in accordance with the law, and in excess of DOL's statutory jurisdiction, authority, or limitations," also in violation of the APA. *See id.* ¶ 62. On September 12, 2022, Defendants moved to dismiss the Complaint, arguing, with respect to both counts, that ForUsAll lacks standing and the Release did not constitute final agency action. *See generally* Motion. Defendants also argue Count I should be dismissed because notice and comment rulemaking was not required. *See* Motion at 24-26.

STANDARD

"Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." ‼ *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007) (cleaned up). "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Id*. at 94. Similarly, "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

ARGUMENT

I. ForUsAll Has Adequately Pleaded Standing.

A. ForUsAll's Injury Was Caused By the Predictable Reactions of Third Parties to the Release.

Defendants argue that ForUsAll lacks Article III standing because any injury to ForUsAll is attributable to third parties' reactions to Defendants' conduct. *See* Motion at 11-14. This argument fails as a matter of law. "It is impossible to maintain, of course, that there is no standing to sue regarding action of a defendant which harms the plaintiff only through the reaction of third persons." *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.). In fact, as the D.C.

Circuit just reaffirmed, "an entire line of cases finds redressability, as well as causation, in comparable circumstances turning on third-party conduct that is voluntary but reasonably predictable." *Competitive Enter. Inst. v. FCC*, 970 F.3d 372, 384 (D.C. Cir. 2020). *See also Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019) (holding that "traceability is satisfied" for Article III standing purposes by "the predictable effect of Government action on the decisions of third parties").

It was obviously "reasonably predictable," *Competitive Enter. Inst.*, 970 F.3d at 384, that the Release – which described cryptocurrency in exclusively negative terms, singled out cryptocurrency as requiring fiduciaries to "exercise extreme care before" including it, and told fiduciaries that if they included cryptocurrency, they "should expect to be questioned [by the Department] about how they can square their actions with their duties of prudence and loyalty," *see* Release – would lead to some plan fiduciaries deciding not to include cryptocurrency. Defendants do not contend otherwise. Unable to dispute that the reactions of third parties to the Release were "reasonably predictable," *Competitive Enter. Inst.*, 970 F.3d at 384, Defendants engage in misdirection and ask the Court to invent standards of causation that the Supreme Court and D.C. Circuit have repeatedly rejected.

First, Defendants repeatedly suggest that the reactions of plan fiduciaries cannot establish standing because "the Department . . . has [not] ***directly precluded*** the company from offering its services to [them]" or "forbid[den] any plan from contracting with ForUsAll." Motion at 13 (emphasis added). *See also id*. at 11. But, as discussed above, the D.C. Circuit squarely held that third-party reactions establish standing where they are "***voluntary*** but reasonably predictable." *Competitive Enter*, 970 F.3d at 384 (emphasis added). Similarly, the Supreme Court held that there was Article III standing to challenge the inclusion of a citizenship question on the census

based on the theory that some noncitizens might choose to decline to respond to the census. *See Dep't of Com.*, 139 S. Ct. at 2565. There is simply no requirement under Supreme Court or D.C. Circuit precedent that the reactions of third parties be legally compelled in order to establish Article III standing.

Second, Defendants argue that because deciding not to include cryptocurrency was only "some plans' reactions to the Release," while other plans "decided to include ForUsAll's cryptocurrency services," "ForUsAll's injury is not 'fairly traceable' to the *defendants'* conduct." Motion at 13. But there is no requirement that all third parties must react the same way in order for their reactions to establish standing. In *Department of Commerce*, the Supreme Court rejected the argument "that any harm to respondents is not fairly traceable to the Secretary's decision" where the district court had concluded there would likely be a mere "5.8%" decline in noncitizens' responses to the census as a result of the government's action. *See Dep't of Com.*, 139 S. Ct. at 2565. By contrast, the decline at issue here is "approximately one-third," Compl. ¶ 50, which is more than six times the decline that the Supreme Court held was sufficient to establish standing in *Department of Commerce*. *See also Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.").[4]

Third, Defendants argue that there is no "basis for concluding that the Release was a substantial motivating factor in the third-party plans' actions" since it is "unclear what role, if any, *the Release* – as opposed to plan fiduciaries' interpretation of the Release . . . played in these plans'

[4] The frivolity of Defendants' position in this regard is further confirmed by the one case they cite in support of this argument, in which this Court dismissed a *pro se* complaint seeking "$50 billion" from, *inter alia*, the D.C. Bar because lawyers in D.C. "lobbied Congress and other governmental agencies to secure various types of [hurricane] relief for their clients" and the plaintiff did not receive any of the money. *See Jones v. Louisiana State Bar Ass'n*, 738 F. Supp. 2d 74, 77 (D.D.C. 2010), *aff'd*, No. 10-5327, 2011 WL 11025624 (D.C. Cir. Oct. 3, 2011); Motion at 13.

change of course." Motion at 13-14. But whether the harm was caused by the Release itself or "plan fiduciaries' interpretation of the Release" is irrelevant under D.C. Circuit precedent. *See Block*, 793 F.2d at 1309 (rejecting the government's argument "that the public reaction which underlies all the alleged harm in the present case is an irrational one, based upon a 'false impression' of the meaning of the 'political propaganda' classification—so that the harm cannot properly be said to have been caused by the government" as "irrelevant to the question of core, constitutional injury-in-fact, which requires no more than *de facto* causality"). *See also Dep't of Com.*, 139 S. Ct. at 2566 (rejecting argument that there was no standing because any "third-party action would be motivated by unfounded fears that the Federal Government will itself break the law").[5] Defendants' suggestion that they can defeat standing to challenge the Release simply by making public statements about it, *see* Motion at 13-14, would create a loophole every agency could use to avoid judicial review of their actions.

Fourth, Defendants suggest that ForUsAll must disprove every hypothetical factor that could have played any role in any of the plan's decisions. *See* Motion at 13-14 (speculating, without any basis, that "it is unclear what role, if any, *the Release* – as opposed to . . . the plans' risk tolerance, or something else entirely – played in these plans' change of course" and that "ForUsAll has the burden") (emphasis in original). Defendants are wrong both procedurally and substantively. Procedurally, "[f]or purposes of ruling on a motion to dismiss for want of standing,

[5] Similarly, there is no material difference between the Release itself and plan fiduciaries' "interpretation of the Release" on the one hand, and "their consideration of their duties following the Release," Motion at 13-14, on the other hand, particularly given that the Release provides explicit directions to plan fiduciaries about what they must "consider[]" in connection with their fiduciary duties in this context. *See, e.g.*, Release at 3 ("***Fiduciaries who are considering whether to include a cryptocurrency investment option will have to*** include in their analysis how regulatory requirements may apply to issuance, investments, trading, or other activities and how those regulatory requirements might affect investments by participants in 401(k) plans.") (emphasis added).

both the trial and reviewing courts must accept as true all material allegations of the complaint." *Warth*, 422 U.S. at 501. The Complaint squarely alleges that "approximately one-third of the plans ForUsAll has discussed the matter with have indicated that, despite their interest in including cryptocurrency, they do not intend to proceed at this time in light of Defendants' enforcement threats." Compl. ¶ 50. The Court must accept this allegation as true. While Defendants recite that "[w]hen reviewing a challenge pursuant to Rule 12(b)(1), the court may consider documents outside the pleadings to assure itself that it has jurisdiction," Motion at 9 (quoting *Sandoval v. DOJ*, 322 F. Supp. 3d 101, 104 (D.D.C. 2018)), Defendants have not provided the Court with any such documents to consider other than the Release itself, which was already incorporated into the Complaint. Substantively, ForUsAll need not show that no "other causal factors" impacted any of the plans' decisions. *See Tozzi v. HHS*, 271 F.3d 301, 309 (D.C. Cir. 2001) ("It is not too speculative to conclude that the Report will injure Brevet economically, even with the presence of other causal factors."). *See also Energy Future Coal. v. EPA*, 793 F.3d 141, 144 (D.C. Cir. 2015) (Kavanaugh, J.) ("It is true that vehicle manufacturers may have valid business reasons other than EPA's test fuel regulation for not seeking to use E30 as a test fuel. But that does not undermine causation here.") (cleaned up).

ForUsAll is only required to plead that "the agency's actions materially increased the probability of injury," not that the Release was "the sole or proximate cause of the harm suffered, or even that the action must constitute a but-for-cause of the injury." *Nat'l Treasury Emps. Union v. Whipple*, 636 F. Supp. 2d 63, 73 (D.D.C. 2009) (cleaned up). ForUsAll has easily exceeded this bar. The cases cited by Defendants in which the D.C. Circuit found causation arguments to be too "speculative" to support Article III standing bear no resemblance whatsoever to the facts of this case. For example, in *Florida Audubon Society v. Bentsen*, plaintiffs "premise[d] their claims . . .

on a lengthy chain of conjecture . . . contend[ing] that [a] tax credit will cause more ETBE production, which in turn will cause more ethanol production, which consequently will cause more production of the corn and sugar necessary for ethanol, which will then cause more agricultural pollution, which, as this pollution is likely to occur on farmland bordering wildlife areas appellants visit, is also likely to harm the areas visited by appellants." *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 666 (D.C. Cir. 1996) (en banc).[6]

Finally, Defendants argue there is no allegation "that the Department has subsequently engaged in any actual investigation against ForUsAll or the third parties relating to the concerns in the Release." Motion at 14.[7] Defendants cite no case law imposing such a requirement, which would be particularly nonsensical as applied to the facts of this case given that the Release explicitly says that the Department "expects to conduct an investigative program aimed at plans that offer participants investments in cryptocurrencies . . . ." Release at 3. The Complaint alleges actual harm that is the result of "Defendants' enforcement threats," Compl. ¶ 50, which was clearly "reasonably predictable" and more than satisfies the standards under D.C. Circuit precedent to establish standing based on third-party reactions to agency action. *See supra* at 8-12.

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[6] *See also Cmty. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 669 (D.C. Cir. 1987) ("From appellants' pleadings, declarations, and briefs, we gather that appellants posit the following line of causation. . . . [T]he Report wrongly minimizes the number of homeless Americans. Those involved in addressing the problem of the homeless will read the Report. They will be convinced that its findings and conclusions are accurate and definitive, and they will disregard other estimations that are significantly higher. This, in turn, will alter their consciousness about homelessness: they will no longer perceive homelessness as a severe and pressing problem (or at least they will view it to be less acute). This decrease in sensitivity will inevitably cause them to reduce their contributions of time, money and resources to support the homeless.").

[7] Despite correctly asserting that they have the ability, in connection with a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, to ask "the court [to] consider documents outside the pleadings to assure itself that it has jurisdiction," Motion at 9, Defendants have neither submitted evidence nor made any representations to the Court on this topic, even though the full scope of Defendants' actual or attempted investigative activities or lack thereof is uniquely and readily in their possession..

B. Once Causation is Established, Defendants May Not Defeat Redressability by Threatening to Ignore the Court's Interpretation of the Law.

As Defendants admit, their arguments regarding redressability largely just re-hash the same arguments they made regarding causation. *See* Motion at 15 (arguing no redressability because "as explained above, ForUsAll has not pleaded or established that the Release was a substantial factor in the third-party plans choosing not to do business with ForUsAll" and that "[c]ausation and redressability are sometimes considered 'two sides of a causation coin'"). These arguments fail for the same reasons as their causation arguments. *See supra* at 8-13. Indeed, as the D.C. Circuit recently held, in order for "redressability on the back end to diverge from traceability on the front end," there must be "a 'new status quo' . . . 'held in place by other forces' besides the government action at issue." *Competitive Enter.*, 970 F.3d at 385 (citations omitted). There is no evidence here of any such "new status quo" and Defendants do not argue otherwise. Indeed, none of the cases Defendants rely on held there was causation but no redressability.

Undeterred, Defendants argue that there is no redressability because "the Release has no legal force in and of itself" separate and apart from the underlying statute, such that "the Department['s] . . . authority" under the statute "would remain unchanged." *See* Motion at 15-17. This Court has repeatedly rejected similar arguments, finding that they impermissibly conflate Article III standing with merits issues. *See, e.g.*, *Ciox Health, LLC v. Azar*, 435 F. Supp. 3d 30, 52 (D.D.C. 2020) ("Having found that Ciox satisfies the element of causation, the issue of redressability is straightforward. . . . HHS resists this uncomplicated logic. It contends that the 2016 Guidance works no change in the law; it simply clarified what the 2013 Regulation requires. And the 2013 Regulation, in turn, implemented the HITECH Act. Therefore, vacating the 2016 Guidance would also have no legal effect. But this is a merits argument, and for purposes of standing, the court must assume the merits of Ciox's claims—the precise opposite interpretation

put forward by HHS.") (cleaned up); *Sierra Club v. Mainella*, No. CIV.A. 04-2012 JDB, 2005 WL 3276264, at *8 (D.D.C. Sept. 1, 2005) ("Defendants argue that the actual source of the harm to plaintiffs' interests is not the 2003 Guidance or the Comstock decisions but rather the regulatory language of § 9.32(e) promulgated in 1978 . . . . For that same reason, defendants contend that a favorable decision from the Court would provide no redress because the 1978 regulations-unchallenged here-would remain in place. However, defendants' argument presumes that it will prevail on the merits-that is, that the Court will agree with their interpretation of § 9.32(e). This ignores the requirement that, in reviewing standing, a court presumes that the plaintiff will prevail in the action.").

In the face of this case law – which Defendants ignore – Defendants claim that any merits decision would be ineffectual because "the Court lacks the authority to direct the Department to take a particular interpretation of . . . any . . . statutory provision." Motion at 16. But, of course, the Court has the authority to interpret the law and order Defendants to comply with the Court's interpretation. Defendants' contrary suggestion is based entirely on a 1923 decision, which the Supreme Court has since clarified was based on concerns about "a taxpayer seek[ing] to employ a federal court as a forum in which to air his ***generalized grievances*** about the conduct of government or the allocation of power in the Federal System." *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (citing *Frothingham v. Mellon*, 262 U.S. 447 (1923)) (emphasis added). As the D.C. Circuit has explained, *Mellon* applies only to a "very limited factual setting," *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 477 (D.C. Cir. 2009), and where, as here, a plaintiff has a "particularized injur[y] . . . *Mellon* poses no barrier to suit." *Clean Wisconsin v. EPA*, 964 F.3d 1145, 1159 (D.C. Cir. 2020).

II. The Release Constitutes Final Agency Action.

A. The Release Represents the Consummation of the Department's Decisionmaking Process.

Defendants correctly concede that "[t]he consummation prong of the finality inquiry requires [the Court] to determine 'whether an action is properly attributable to the agency itself and represents the culmination of that agency's consideration of an issue, or is, instead, only the ruling of a subordinate official, or tentative." *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020) (cleaned up). *See* Motion at 18. Defendants' arguments that this standard is not satisfied are frivolous.

To begin with, Defendants argue that the Release "was not issued in the Secretary's name nor published in the Federal Register." Motion at 20. But far from being "the ruling of a subordinate official," *Wheeler*, 955 F.3d at 78, the Release was issued in the name of the "U.S. Department of Labor Employee Benefits Security Administration" and, by its own terms, repeatedly sets forth the position of "the Department." *See generally* Release. The D.C. Circuit recently held that where "[g]uidance consistently speaks in the [agency]'s voice," and "was approved by" the agency's "Assistant . . . Administrator," who is "no mere subordinate within [the agency]," the guidance represented the "consummat[ion] [of the agency's] decision making." *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 404-05 (D.C. Cir. 2020). Here, not only was the Release clearly approved by at least the Acting Assistant Secretary of Labor – who heads the Department's Employee Benefits Security Administration and who, in his own name, made an accompanying blog post purporting to explain the basis for the Release, *see* Compl. ¶ 37 – but the Secretary of Labor himself has publicly described the Release as a "ruling[]" of the "Department of Labor." *See id.* ¶ 36; *supra* at 6. Defendants ignore these facts. Nor does the fact that the Release was not published in the Federal Register demonstrate that it is not final. Indeed, the

guidance at issue in *POET Biorefining* and *Ciox Health*, each of which constituted final agency action, were not published in the Federal Register.[8]

Nor is the Release "of a merely tentative or interlocutory nature." Motion at 18 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). Defendants argue "the Release contemplates further action on the subject by the Department," i.e., investigations, and therefore the Department has not completed its "fact-finding process" as purportedly required under Supreme Court precedent. *See* Motion at 19-20 (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599-600 (2016)). *Hawkes* says nothing of the sort. To the contrary, in finding that there was final agency action, the Supreme Court reaffirmed its longstanding precedent that even where an agency "order had no authority except to give notice of how the Commission interpreted the relevant statute, and would have effect only if and when a particular action was brought against a particular carrier . . . the order was nonetheless immediately reviewable." *Hawkes Co.*, 578 U.S. at 599-60 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and *Frozen Food Express v. United States*, 351 U.S. 40 (1956)) (cleaned up). Relying on *Hawkes* and *Frozen Food*, this Court recently rejected the argument that agency guidance was not final because it "breaks no new ground and merely 'publicly clarifies' what the regulations have meant all along" because "[a]ny regulated entity that runs afoul . . . of the . . . Guidance does so at the risk of inviting an agency investigation and incurring civil penalties." *Ciox Health*, 435 F. Supp. 3d at 61.

[8] "Guidance on Qualifying an Analytical Method for Determining the Cellulosic Converted Fraction of Corn Kernel Fiber Co-Processed with Starch," *POET Biorefining*, 970 F.3d at 397, does not exist in the Federal Register and, much like the Release, is simply available on the EPA's website at https://www.epa.gov/renewable-fuel-standard-program/guidance-qualifying-analytical-method-determining-cellulosic. "Individuals' Right under HIPAA to Access their Health Information," *Ciox Health*, 435 F. Supp. 3d at 42, also does not exist in the Federal Register, save for a lone link to its presence on HHS's website in a response to a comment regarding a separate rule. *See* Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688, 68,721 (Oct. 4, 2016).

Finally, it is simply not true that the Release does not take "a definitive position." Motion at 19. As discussed above, the Release takes at least two definitive positions, each of which break new ground: (i) a new standard of care, "extreme care," applicable only to cryptocurrency; and (ii) an obligation to monitor investments in "brokerage windows" also applicable only to cryptocurrency. As discussed below, *see infra* at 22-23, these are "purely legal question[s] . . . amenable to immediate judicial review." *CSI Aviation Servs., Inc. v. DOT*, 637 F.3d 408, 412-13 (D.C. Cir. 2011) (rejecting the government's argument "that final agency action . . . requires the completion of a full enforcement action").

B. The Release Has Given Rise to Direct and Appreciable Legal Consequences.

Defendants argue that the Release does not "give rise to direct and appreciable legal consequences" because "the Release merely repeats binding case law interpreting plan fiduciaries' duty of prudence" and "restate[s] . . . settled interpretations." Motion at 20-22. Nonsense. While one sentence of the Release quotes a recent Supreme Court decision and other sentences provide general background information, the Release takes at least two legal positions that are certainly neither "settled" nor found in any "case law." In particular, as discussed above, the Release sets forth a new standard of care, "extreme care," applicable only to cryptocurrency, and an obligation to monitor investments in "brokerage windows" also applicable only to cryptocurrency. *See supra* at 4-5.

Defendants make no effort to reconcile the Release's creation of a brand-new standard of care, "extreme care," with any source of existing law. In fact, after quoting the portion of the Release that says "extreme care" one time in the "Factual Background" section of their brief, *see* Motion at 6, the word "extreme" never appears again a single time in their brief. Without confronting what the Release actually says, Defendants claim that the Release "does not indicate

that the Department will judge fiduciaries by anything other than the well-worn standard embodied in the duty of prudence." Motion at 22. But the Release never mentions the actual standard of care the statute provides for the duty of prudence – "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity . . . would use . . . ," 29 U.S.C. § 1104(a)(1)(B) – and instead recites the newly-invented standard of "extreme care." *See* Release at 1.

Defendants also make no effort to reconcile the Release's creation of an obligation to monitor cryptocurrency in brokerage windows with any source of existing law. Instead of addressing what the Release actually says – that "fiduciaries responsible for . . . allowing such investments through brokerage windows should expect to be questioned about how they can square their actions with their duties of prudence . . . in light of the risks described above" – Defendants attempt to rely on after-the-fact statements of Department officials. *See* Motion at 22 ("[T]he complaint purports to quote a senior Department official as stating that the Department didn't 'impose the obligation' that the Release's critics allege . . . ."") (citing Compl. ¶ 43) (cleaned up). But those officials did not say there was no duty to monitor cryptocurrency investments in a brokerage account – they said there was no duty to monitor anything ***other than*** cryptocurrency in a brokerage account. *See* Compl. ¶ 43 (denying that the Department had "imposed [an] obligation" "to monitor ***all of the investments*** participants can access") (emphasis added); *see also* Kellie Mejdrich, *Under Fire From Biz Groups, DOL Stands By Crypto Guidance*, Law360 (Apr. 22, 2022) ("Khawar said that plan sponsors should consider the brokerage window reference in the context of a compliance assistance release focused on cryptocurrency. . . . People shouldn't really be interpreting this as a broader statement about what your obligations are – or are not – in other contexts."). These are not exculpatory statements, they are confessions that the Department is

inventing a legal duty its own senior officials concede does not exist and applying it only to cryptocurrency.

As discussed below, because the Release is inconsistent with the Department's existing regulations, it is a legislative rule subject to notice and comment rulemaking. *See infra* at 23-27. As the D.C. Circuit has recently clarified, "a legislative rule is . . . necessarily final." *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 635 (D.C. Cir. 2019). However, even if the Court concludes that the Release is not a legislative rule, it still may constitute final agency action. *See id. See also Ciox Health*, 435 F. Supp. 3d at 60–61 ("HHS's insistence that the 2016 Guidance breaks no new ground and merely 'publicly clarifies' what the regulations have meant all along . . . does not defeat its classification as a final agency action.") (citation omitted).

As Defendants concede, "[w]hether an agency action has 'direct and appreciable legal consequences' . . . is a ***'pragmatic'*** inquiry." *Sierra Club v. EPA*, 955 F.3d 56, 62 (D.C. Cir. 2020) (quoting *Hawkes*, 136 S. Ct. at 1815) (emphasis added). *See also* Motion at 21. Nevertheless, Defendants argue that if the Release itself is not formally binding and does not explicitly command fiduciaries to take action, *see* Motion at 20-24,[9] then, under *Hawkes*, the Release cannot create any risk for plan fiduciaries. *See id.* at 23 (citing *Hawkes*). In reality, *Hawkes* held exactly the opposite. The Supreme Court explained that a "pragmatic inquiry" requires looking beyond whether the agency action "had no authority except to give notice of how the [agency] interpreted the relevant statute" and whether a "proceeding can be brought for failure to conform to the [agency action] itself." *Hawkes*, 578 U.S. at 599–600 (holding that "while no administrative . . . proceeding can be brought for failure to conform to the [agency order] itself, that final agency

[9] Of course, the Release does, in fact, make pronouncements in mandatory terms. *See, e.g.*, Release at 3 ("Fiduciaries who are considering whether to include a cryptocurrency investment option ***will have to*** include in their analysis . . . .") (emphasis added).

determination . . . warns that if they [stray from the terms of the agency order], they do so at the risk of significant . . . penalties"). Indeed, as the D.C. Circuit recently emphasized, "in undertaking this inquiry [in *Hawkes*], the Court [did not ask] whether the action at issue had the force and effect of law." *Cal. Cmtys*, 934 F.3d at 635.

Unlike the cases on which Defendants rely that found no final agency action, plan fiduciaries are not "free to completely ignore" the Release "with total impunity." *See Sierra Club*, 955 F.3d at 64 (rejecting challenge to EPA guidance which "permitting authorities are free to completely ignore"); *Cal. Cmtys*, 934 F.3d at 639 ("As EPA concedes, in receiving such an application to modify a permit, a state permitting authority may – with total impunity – ignore the Wehrum Memo and deny the application.") (citation omitted). *See also Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 248, 252 (D.C. Cir. 2014) (rejecting challenge to EPA guidance which "advises EPA staff to ***ask*** state permitting authorities to assess the potential for elevated conductivity in proposed Section 402 permits") (emphasis added); *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19 (D.C. Cir. 2006) (rejecting challenge to "a budget request to Congress"). Nor does the Release "only present[] [the Department']s position on what the law is" without causing any "identifiable effect on the regulated community" or "expos[ing] any regulated party to the possibility of an enforcement action . . . ." *Valero Energy Corp. v. EPA*, 927 F.3d 532, 536 (D.C. Cir. 2019). In this case, there has undeniably been an "identifiable effect on the regulated community," *id*., a significant portion of which has responded by changing their decision to include cryptocurrency "in light of Defendants' enforcement threats." Compl. ¶ 50. *See also CSI Aviation*, 637 F.3d at 412–13 (holding that "[h]aving flexed its regulatory muscle" in a manner "sufficiently burdensome to make six other GSA contractors terminate their air charter operations . . . DOT cannot now evade judicial review.").

Defendants, relying on the standard set forth in *Nat'l Min. Ass'n*, assert that "the agency's characterization of the guidance . . . indicate[s] that the Release does not create direct legal consequences." Motion at 21. In *Nat'l Min. Ass'n*, the D.C. Circuit emphasized that "[t]he Final Guidance repeatedly states that it 'does not impose legally binding requirements'" and "[o]n its face . . . disclaims any intent to require anyone to do anything." *Nat'l Min. Ass'n*, 758 F.3d at 252. By contrast, in this case, the Department chose ***not to include*** its standard disclaimer that: "The contents of this document do not have the force and effect of law, and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies." *See* Compl. ¶ 40. This Court has held that an agency's decision not to include its normal disclaimer of binding legal effect weighs in favor of finality. *See Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 42 (D.D.C. 2018) ("Nor, in contrast to at least one of USCIS's later-issued CARRP guidance memos, does the original memo include boilerplate language stating that it 'is intended solely for the guidance of USCIS personnel' and 'may not[ ] be relied upon to create any right or benefit, substantive or procedural.'"). Incredibly, Defendants' response is to claim the D.C. Circuit's decision in *Appalachian Power* held that the existence of a disclaimer "is meaningless," Motion at 23, even though that interpretation of *Appalachian Power* was rejected by the D.C. Circuit in *Nat'l Min. Ass'n*, which Defendants cite as the governing standard. *See Nat'l Min. Ass'n*, 758 F.3d at 252.

Finally, as discussed above, Defendants' argument that the Release is not final because it "contemplates that the Department would conduct plan-specific investigations," Motion at 23, is contradicted by Supreme Court precedent. *See infra* at 17-18 (addressing this argument in the context of the "consummation prong of the finality inquiry"); *Hawkes Co.*, 578 U.S. at 599-60 (reaffirming longstanding precedent that even an order which "had no authority except to give

notice of how the Commission interpreted the relevant statute, and would have effect only if and when a particular action was brought against a particular carrier . . . was nonetheless immediately reviewable") (cleaned up). Nor is any "plan-specific investigation[]," Motion at 23, necessary for the Court to review the Release. The Release's declaration that the relevant standard of care is "extreme care" and that there is a duty to monitor cryptocurrency in brokerage windows, *see* Release at 1, 3, raises "purely legal question[s] . . . amenable to immediate judicial review." *CSI Aviation Servs.*, 637 F.3d at 413 (rejecting the government's argument "that final agency action . . . requires the completion of a full enforcement action").[10]

III. The Release Is a Legislative Rule Requiring Notice and Comment Rulemaking.

Defendants argue that the Release is merely an "interpretive rule" not subject to notice and comment rulemaking under the APA because "the Release does not create new substantive obligations for regulated entities" and "merely offers the Department's interpretation of the duty of prudence with respect to cryptocurrency investment options – a hallmark of interpretive rules." Motion at 24-25. Defendants are wrong.

As Defendants' own case law makes clear, interpretive rules "clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or merely track preexisting requirements and explain something the statute or regulation already required," while "legislative rules . . . effect a substantive change in existing law or policy." *POET Biorefining*, 970 F.3d at 407 (cleaned up). Where, as here, an agency "adopt[s] a new position inconsistent with any of [its] existing regulations," "APA rulemaking" is "required." *Shalala v. Guernsey*

[10] Nor would a "plan-specific investigation[ ]" be necessary for the Court to conclude that the Department acted arbitrarily and capriciously, by, *inter alia*, "rel[ying] on inaccurate and outdated information and irrational assumptions, and fail[ing] to incorporate relevant information and the views of relevant stakeholders, including but not limited to information and views provided by the President of the United States." Compl. ¶ 57.

Mem'l Hosp., 514 U.S. 87, 100 (1995). *See also U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005) (explaining that although courts' "formulations vary somewhat" between "adopts a new position inconsistent with an existing regulation," "effects a substantive change in the regulation," and "effectively amends a prior legislative rule," "their underlying principle is the same: the APA bars courts from permitting agencies to avoid [notice and comment rulemaking] by calling a substantive regulatory change an interpretive rule") (cleaned up). "[I]t is well established that an agency may not label a substantive change to a rule an interpretation simply to avoid the notice and comment requirements." *Air Transp. Ass'n of Am., Inc. v. FAA*, 291 F.3d 49, 55 (D.C. Cir. 2002). As ForUsAll alleges in the Complaint, and Defendants do not dispute in their Motion, "DOL has publicly acknowledged that it considered using notice and comment rulemaking, but decided not to for reasons unrelated to the substantive nature of the rules prescribed in the Release, including what it deemed to be political expedience." Compl. ¶ 53. *See also id*. ¶¶ 7, 41; *Comm. For Fairness v. Kemp*, 791 F. Supp. 888, 895 and n.25 (D.D.C. 1992) (holding that "statements of other agency officials that such rules should be promulgated" combined with the fact that the agency previously used "notice and comment" rulemaking "with respect to th[e] same subject matter" "supports the proposition that the changes were deserving . . . of rulemaking procedures").

The Release clearly "adopt[s] a new position inconsistent with . . . [the Department's] existing regulations," thus "requir[ing]" "APA rulemaking." *Guernsey Mem'l Hosp.*, 514 U.S. at 100. As discussed above, the Department's longstanding regulations provide that the "duty to prudently select and monitor" investments applies to "designated investment alternatives" and does not extend to investments in brokerage windows. *See supra* at 4-6; Compl. ¶ 21; 29 C.F.R. 29 C.F.R §§ 2550.404a-5(f), (h)(4). Yet, the Release states that the duty of prudence applies to

cryptocurrency investment options even if those investment options are only included within brokerage windows. *See* Release at 3 ("The plan fiduciaries responsible for overseeing such investment options ***or allowing such investments through brokerage windows*** should expect to be questioned about how they can ***square their actions with their duties of prudence*** and loyalty in light of the risks described above.") (emphasis added). Not only have Defendants not "offer[ed] any coherent rationale for how there could be a duty to select and monitor investments in a brokerage window if those investments are cryptocurrency, but not if they are any other type of investments," Compl. ¶ 44, but Defendants' Motion entirely ignores the existence of the Department's regulations on this topic.

Again unable to defend the contents of the Release, Defendants fall back on their argument that "the Release was [not] published in the Code of Federal Regulations . . . ." Motion at 25. But the D.C. Circuit has held that if an agency action "effectively amends a prior legislative rule," it is "a legislative rule, not an interpretive rule" regardless of "whether the agency has published the rule in the Code of Federal Regulations." *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (holding that "if the answer to ***any*** of [four] questions is affirmative," including publication in the Code of Federal Regulations and effectively amending a prior rule, then a rule is legislative) (emphasis added). *See also Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) (explaining that the D.C. Circuit has not "taken publication in the Code of Federal Regulations, or its absence, as anything more than a snippet of evidence of agency intent" with respect to whether a rule is legislative or interpretive).

Finally, Defendants argue that "there is no allegation that the Department has taken actions following the Release's publication to suggest that it has the force of law" such as "rel[ying] upon the Release in initiating investigations" and that "Department personnel . . . ma[de] [public]

statements suggesting that . . . the Release . . . is an interpretive rule." Motion at 25. This argument requires a remarkable degree of chutzpah, as the Department's stated intent to rely on the Release as a basis for initiating investigations appears on the face of the Release itself:

> ***Based on these*** and other ***concerns***, ***EBSA expects to conduct an investigative program aimed at plans that offer participant investments in cryptocurrencies*** and related products, and to take appropriate action to protect the interests of plan participants and beneficiaries with respect to these investments. The plan fiduciaries responsible for overseeing such investment options or allowing such investments through brokerage windows ***should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks described above***.

Release at 3 (emphasis added). Moreover, contrary to Defendants' suggestion, Department officials have not backed down from this threat in public statements after the Release was issued. To the contrary, senior Department officials went out of their way to confirm to multiple media outlets that the agency "isn't backing down," "continue[s] to have concerns that were raised in that guidance and stand by its conclusions," "aren't planning to revoke the guidance" (despite repeated calls to do so from the industry), and had "scheduled a conversation with Fidelity to discuss some of the concerns that were highlighted in the March 10 guidance." *See* Austin R. Ramsey, *Fidelity's 401(k) Crypto Plan Sets Up Regulatory Guessing Game*, Bloomberg Law (Apr. 28, 2022);[11] Mark Schoeff Jr., *Advisers cautiously upbeat about crypto 401(k) investing with Fidelity imprimatur*, InvestmentNews (Apr. 26, 2022);[12] Anne Tergesen, *Labor Department Criticizes Fidelity's Plan to Put Bitcoin on 401(k) Menu*, Wall Street Journal (Apr. 28, 2022).[13]

[11] https://news.bloomberglaw.com/daily-labor-report/fidelitys-new-401k-crypto-product-outside-federal-oversight.

[12] https://www.investmentnews.com/advisers-cautiously-upbeat-about-crypto-401k-investing-with-fidelity-imprimatur-220601.

[13] https://www.wsj.com/articles/labor-department-criticizes-fidelitys-plan-to-put-bitcoin-on-401-k-menu-11651197309.

Nor, as discussed above, have Department officials backed down from the Release's assertion that there is a duty to monitor cryptocurrency investments in a brokerage account. *See supra* at 25-26. Rather, their public statements following the Release confirm that there is no such general duty to monitor investments in a brokerage account, but that the Department nevertheless intends to impose one only with respect to cryptocurrency investments. *See supra* at 19-20. *See also* Compl. ¶ 44 ("Neither the Release nor statements by DOL officials offer any coherent rationale for how there could be a duty to select and monitor investments in a brokerage window if those investments are cryptocurrency, but not if they are any other type of investments."). These statements, which admit that the Department is inventing new rules only applicable to cryptocurrency, do not "suggest that . . . the Release . . . is an interpretive rule." Motion at 25. Rather, they only further confirm that it is a legislative rule. *See, e.g.*, *POET Biorefining*, 970 F.3d at 407 (distinguishing between legislative rules which "effect a substantive change in existing law or policy" from interpretive rules which "clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or merely track preexisting requirements and explain something the statute or regulation already required").

IV. If the Court is Persuaded by Defendants' Positions, Any Dismissal Should Make Explicit that Defendants Will Be Bound by Those Positions.

This is not the first case in which a federal agency, put on the defensive by a lawsuit under the APA, has told a court that its actions are not as extreme as they appeared on their face and suggested that it will not enforce its own position in a manner that might raise legal problems. Generally speaking, "a determination of reviewability must be predicated on the nature of an agency action when undertaken, not on the agency's characterization after the fact." *Am. Portland Cement All. v. EPA*, 101 F.3d 772, 778 (D.C. Cir. 1996).

There is some case law, however, which could authorize the dismissal of lawsuits based on such representations by the government. For example, in *Wheaton Coll. v. Sebelius*, the government "represented to the court that it would *never* enforce [a regulation] in its current form against appellants or those similarly situated," which the D.C. Circuit took "as a binding commitment." 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam). "Based expressly upon the understanding that the government will not deviate from its considered representations to this court, [the D.C. Circuit] conclude[d] that the cases are not fit for review at this time . . . ." *Id*. In the event that the Court accepts Defendants' positions and dismisses the lawsuit, ForUsAll respectfully requests that the Court make explicit that any such dismissal is "in reliance upon the Departments' binding representations," *id*. at 553, including but not limited to:

> • Nothing in the Release, including the use of the term "extreme care," is intended to or will be applied as imposing a heightened standard of care with respect to the inclusion of cryptocurrency beyond the generally applicable duty of prudence set forth in ERISA and applicable case law. *See* Motion at 21-22.
>
> • Plan fiduciaries have no obligation to monitor investments in brokerage windows, including cryptocurrency. *See* Motion at 22-33.
>
> • The Department will not rely "upon the Release in initiating investigations or in moving forward with any enforcement action." *See* Motion at 25. *See also id.* at 14.[14]

To the extent Defendants have merely implied such positions and cannot or will not commit to being bound by them, they should be given no weight at the motion to dismiss stage, where all inferences are to be drawn in favor of ForUsAll.

[14] If Defendants were amenable to reaching a stipulation addressing these or similar points, ForUsAll would welcome a referral to the Court's Mediation Program. *See* Local Civil Rule 84.4(a) (authorizing "District judges" to "refer civil cases to mediation" either "by encouraging litigations to submit to mediation voluntarily and entering a consent order referring the case . . . or by requiring litigations to participate after giving them an opportunity, in response to an order to show cause, to explain why mediation would not be appropriate . . . ."). Unfortunately, at this time, ForUsAll does not believe such a resolution would be possible without the Court's assistance.

CONCLUSION

For the reasons set forth above, Defendants' Motion should be denied.

Dated: October 6, 2022

Respectfully submitted,

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