No. 26-10312

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL LEWELLEN,
Plaintiff-Appellant,

v.

TODD WALLACE BLANCHE, U.S. Attorney General,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Texas
No. 4:25-cv-30 (O'Connor, C.J.)

REPLY BRIEF OF APPELLANT MICHAEL LEWELLEN

Dated: September 21, 2026

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CERTIFICATE OF INTERESTED PERSONS

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

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INTRODUCTION

To defend the district court's premature dismissal, the government declares war on the pleading standard. It says a complaint in a preenforcement suit must contain every detail of the plaintiff's planned conduct and predict—with absolute certainty—what the government will do once the plaintiff acts. It also thinks the government can keep prosecuting individuals under a reading of federal criminal law that covers the plaintiff, so long as the government's civil lawyers create enough doubts about what would happen to that plaintiff in their briefs—doubts that will bind no future prosecutor but that might deter courts from declaring the government's reading unlawful.

Missing from this story is the principle that complaints need only contain a "short and plain statement" that gives notice of the plaintiff's right to relief. Fed. R. Civ. P. 8. Also missing is the principle that courts cannot "question the credibility of the facts pleaded." *Ramirez v. Escajeda*, 921 F.3d 497, 501 (5th Cir. 2019). Courts must take the "'well-pled factual allegations of the complaint'" as true and view them "'in the light most favorable to the plaintiff.'" *Barilla v. City of Houston*, 13 F.4th 427, 431 (5th Cir. 2021) (cleaned up). "By design, this system of pleading makes it relatively easy for plaintiffs to subject defendants to discovery—even for claims that are likely to fail." *Berk v. Choy*, 607 U.S. 187, 194 (2026).

Especially at this early stage, Lewellen states a classic claim for declaratory relief: He wants to publish Pharos but cannot without committing a federal crime under the government's reading of 18 U.S.C. §1960. Contra the government, Lewellen can sue preenforcement, before he takes the last illegal step (and thus before the government investigates or prosecutes him). Contra the government, its current prosecutions of Tornado Cash and Samourai Wallet pose a credible threat to Lewellen, since the government's *factual* distinctions are irrelevant under the government's *legal* reading of "money transmitting business." And contra the government, the Blanche Memo only reaffirms the government's misreading—even if this post-complaint, nonbinding, policy-based shift in prosecutorial discretion could affect standing. The government still refuses to disavow prosecuting *Lewellen* for the conduct alleged in his complaint *here*.

If the Court reaches issues that the district court did not, it should reject the government's remaining arguments. This case is ripe: Once Lewellen publishes Pharos without registering as a money-transmitting business, no other fact must develop before a court can decide his claims. The whole point of the Declaratory Judgment Act is that Lewellen doesn't need to take the final step and publish his software to get his rights declared. Lewellen also did not need to seek FinCEN's guidance before suing—guidance that already favors him and that the Justice Department has already rejected. And though partial redressability is enough, the specific harm that Lewellen alleges—the risk of *criminal* prosecution—is fully redressable if the Court declares that the Justice Department cannot *criminally* prosecute him for publishing Pharos.

Perhaps the government can defend its reading of §1960 on the merits, or perhaps the record on standing will develop in the government's favor in discovery. But at this stage, Lewellen has alleged more than enough to proceed past the pleadings. The dismissal of his claims for failure to plausibly allege standing should be reversed.

ARGUMENT

Before addressing the core of this appeal, two matters warrant brief mention. First, the government doesn't re-up one of the arguments it raised below: sovereign immunity. If the Court reaches that issue, it should reject this defense for the reasons in Lewellen's opening brief. Blue-Br.32-35. Second, the government misstates certain facts. Pharos is not a "cryptocurrency." *Cf.* Red-Br.3. It's a non-custodial cryptocurrency software designed to help users more easily crowdfund causes they support. Blue-Br.3-5. Nor is Pharos an "intermediary gatekeeper." Red-Br.3. It's software that creates a decentralized, permissionless smart contract for executing the cryptocurrency version of an assurance contract. Blue-Br.3-5.

On the core of this appeal, Lewellen prevails. He plausibly alleged standing because he faces a credible threat of prosecution under §1960 if he publishes Pharos. If this Court goes further, it should also hold that Lewellen's injuries are redressable and his claims are ripe.

I. Lewellen faces a credible threat of prosecution if he publishes Pharos.

A plaintiff suffers an Article III injury when he intends to engage in conduct that is arguably protected, his intended conduct is arguably proscribed, and he faces a substantial threat of enforcement. *Barilla*, 13 F.4th at 431-32. Lewellen plans to engage in protected conduct that is arguably proscribed by §1960, Blue-Br.16-19, and the government doesn't contest either of these elements on appeal. That concession matters, as it means the government accepts Lewellen's argument that §1960 prohibits his planned conduct. Even on questions of Article III standing, the government's silence on these elements is "telling—the proverbial dog that did not bark." *Diamond Alternative Energy v. EPA*, 606 U.S. 100, 108 (2025); *accord Inst. for Free Speech v. Johnson*, 148 F.4th 318, 329 (5th Cir. 2025) (accepting that the second element of the preenforcement injury test was met after noting the defendants didn't dispute it).

The government contests only whether Lewellen faces a substantial threat of enforcement. It is wrong on that element, too, for four main reasons. That the government hasn't yet launched a Pharos-based investigation or prosecution just makes this case preenforcement; it doesn't undermine preenforcement standing. The prosecutions involving Tornado Cash and Samourai Wallet do support a credible threat of prosecution because they are similar to Lewellen's planned conduct in all material respects. Even absent prior prosecutions, the government's continued refusal to disavow prosecution establishes a credible threat. And the Blanche Memo either makes no difference or bolsters that threat. This Court should reverse on standing, the one issue the district court reached below.

A. Lewellen has standing to sue preenforcement, before any investigation or explicit threat is directed at him.

Throughout its brief, the government calls Lewellen's fear of prosecution too generalized to satisfy Article III because "he has not alleged a single enforcement or even investigatory action taken against him." Red-Br.20; *e.g.*, Red-Br.1, 5, 11. Yes this preenforcement suit is, in a word, preenforcement. Article III doesn't require Lewellen to wait around for the government to investigate or prosecute him before bringing a preenforcement challenge. *SBA List v. Driehaus*, 573 U.S. 149, 158 (2014); *accord Umphress v. Hall*, 133 F.4th 455, 466-67 (5th Cir. 2025) (finding "an imminent injury in fact" despite "no history of past enforcement" (cleaned up)); *Speech First v. Fenves*, 979 F.3d 319, 336-37 (5th Cir. 2020) (finding evidence that "plaintiffs had been the subject of the challenged policies" not "necessary"); *Franciscan All. v. Becerra*, 47 F.4th 368, 376 (5th Cir. 2022) (finding standing despite agency's confession that it hasn't "to date evaluated whether" it would enforce the law against plaintiff (cleaned up)). The "core purpose" of the Declaratory Judgment Act is to provide "clarification" "before" a plaintiff must break the law. *Braidwood Mgmt. v. EEOC*, 70 F.4th 914, 927-28 (5th Cir. 2023). The government's preferred wait-and-see approach, if anything, confirms that Lewellen *does* face a risk of being investigated or prosecuted if he publishes Pharos. *Franciscan All.*, 47 F.4th at 376.

Nor does the law require that "DOJ knew about Pharos prior to [Lewellen] filing … suit." Red-Br.1. The Constitution demands only that a plaintiff who wants to engage in conduct that the law arguably proscribes faces a substantial risk of prosecution if he moves forward. *Barilla*, 13 F.4th at 431-32. Lewellen meets that test: He alleges that he will publish Pharos without registering as a money transmitting business, which is conduct that the Justice Department's reading of §1960 criminalizes. The Court must accept those allegations as true at this stage. *Id.* at 431.

Nor did Lewellen need to *invite* the government's attention by seeking an advisory opinion from "FinCEN." Red-Br.20. Neither the Declaratory Judgment Act nor Article III requires a plaintiff to seek an advisory opinion before coming to federal court. *Barilla*, 13 F.4th at 431-32. And an advisory opinion from FinCEN, an agency of the Treasury Department, would do Lewellen no good against the Justice Department. The Justice Department has *already* rejected FinCEN's view. The government itself asked FinCEN whether Samourai Wallet qualified as a "Money Services Business" under FinCEN guidance. FinCEN representatives said no "[b]ecause Samourai does not take 'custody' of the cryptocurrency." Yet the government brought §1960 charges anyway. *United States v. Rodriguez*, Doc.86 at 1, 7, No. 24-cr-82 (S.D.N.Y. May 5, 2025). The Department likewise argued in Tornado Cash that "FinCEN guidance is not a regulation or rule and has no authoritative effect." *United States v. Storm*, Doc.53 at 33, No. 23-cr-430 (S.D.N.Y. Apr. 26, 2024). So the Justice Department does not feel bound by FinCEN's past or present views. Against that real history and practice, its suggestion that FinCEN guidance might protect Lewellen should be given no weight.

B. The Tornado Cash and Samourai Wallet prosecutions bolster the credible threat of prosecution.

The government next argues that its past and present prosecutions cannot support a credible threat. Its theme is that Lewellen can't possibly be both a law-abiding citizen and afraid of prosecution under the government's application of §1960(b)(1) in Tornado Cash and Samourai Wallet, Red-Br.11-12—as if the government has never overread a criminal law to prosecute lawful conduct, *but see, e.g.*, *Van Buren v. United*

States, 593 U.S. 374, 378 (2021); *McDonnell v. United States*, 579 U.S. 550, 580-81 (2016); *Yates v. United States*, 574 U.S. 528, 549 (2015). Calling Lewellen's desire to follow the law while also fearing the government's current reading of §1960 "two propositions" that are "mutually exclusive," the government stresses factual distinctions between Lewellen and the defendants it prosecuted for Tornado Cash and Samourai Wallet. Red-Br.11-16.

The government's arguments do not distinguish what matters: its own reading of §1960(b)(1), which criminalizes Lewellen's business under (b)(1)(B). To support a credible threat of enforcement based on other prosecutions, Lewellen needn't plan "precisely the same" conduct. *Braidwood*, 70 F.4th at 927; *accord Christian Healthcare Ctrs. v. Nessel*, 117 F.4th 826, 849 (6th Cir. 2024) (similar). Standing is supported "by actual indications that the authorities believe the statutes apply to the plaintiffs' conduct," including beliefs revealed in prior prosecutions. 13B Fed. Prac. & Proc. Juris. §3532.5 (3d ed. 1998). And a prior prosecution is relevant if it shows that the plaintiff's intended conduct puts him at odds with the "statutory provision as a whole," as interpreted and applied by the government. *Sandvig v. Sessions (Sandvig I)*, 315 F. Supp. 3d 1, 19 (D.D.C. 2018) (collecting cases). What matters is why the government thought those other defendants were money transmitters under §1960(b)(1)—not the additional conduct that allegedly exposed them to criminal liability under (b)(1)(C) as opposed to (b)(1)(A) or (b)(1)(B). And the conduct that made the Tornado Cash and Samourai Wallet defendants money transmitters—creating and publishing cryptocurrency software—is exactly what Lewellen plans. Blue-Br.9-10, 18. Whether those defendants also knowingly laundered money or committed other crimes affects whether they violated (b)(1)(C), but not whether they are money transmitters under (b)(1)—and thus not whether Lewellen faces a credible threat of prosecution as an unlicensed money transmitter under (b)(1)(B).

The government simply ignores the cases that Lewellen cited in his opening brief. *Block v. Canepa* holds that the government's interpretation of the *law*—regardless of whether the facts line up with other prosecutions—establishes a credible threat. 74 F.4th 400, 410 (6th Cir. 2023). The government doesn't even cite *Block* in its response. The government also ignores *N.H. Lottery Comm'n v. Rosen*, where the First Circuit deemed it irrelevant that the law hadn't been applied against the same types of defendants. 986 F.3d 38, 50-51 (1st Cir. 2021). It was enough that the government's reading reached the plaintiff, and that "DOJ [gave] no reason to think that" the factual distinctions it was stressing would be a "defense against enforcement under the government's reading of the statute." *Id.* at 51 (cleaned up).

The principle animating these cases governs here. "[T]he government has not articulated any reason why" any factual distinction it points to in Tornado Cash or Samourai Wallet "is a distinction that makes a difference." *Id.* at 50-51. As with the laws in *Block* and *Rosen*, the government's interpretation of §1960 is not limited to those who both run a money-transmitting business *and* launder money or commit other crimes. Lewellen's planned conduct falls squarely within the government's legal reading of

§1960. So the government cannot defeat standing unless *it* proves a history of *non*enforcement. *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 606 (8th Cir. 2022). Its successful and active prosecutions in New York mean it cannot.

Aside from stressing immaterial facts, the government tries to draw three other distinctions between the Tornado Cash and Samourai Wallet prosecutions and Lewellen. None makes a difference.

First, the government points to the differences between §1960(b)(1)(B) and (b)(1)(C). Red-Br.13-14. Lewellen acknowledges that (b)(1)(C) has different elements from (b)(1)(B). Blue-Br.11. But the government misses the key point: Both require the government to "prove that the business engaged in 'money transmitting' as that term is defined in Section 1960(b)(2)." *Rodriguez*-Doc.118 at 20 (June 26, 2025); *accord Storm*-Doc.241 at 63-64, 73 (Nov. 12, 2025). To be liable under any of the three crimes in §1960, a person must first engage in a "money transmitting business." Engaging in a "money transmitting business" under the Justice Department's erroneous reading of §1960(b)(1) is what makes Lewellen like the defendants in Tornado Cash and Samourai Wallet. Once the government views Lewellen's business as a "money transmitting business," it's irrelevant whether Lewellen plans to violate (b)(1)(B) by failing to register with FinCEN or (b)(1)(C) by transmitting "funds that are known to … have been derived from a criminal offense or are intended to be used to promote or support unlawful activity." The threshold determination that Lewellen's business is a "money transmitting business" is what chills Lewellen's conduct and is what he challenges as illegal.

What the government is *really* arguing is that, as a matter of prosecutorial discretion, it might not prosecute Lewellen unless he engaged in other conduct that could support a charge under (b)(1)(C). But a "voluntary exercise of prosecutorial discretion applied to one type of violation does not neutralize the otherwise credible threat of prosecution." *Canna Provisions v. Garland*, 738 F. Supp. 3d 111, 120 (D. Mass. 2024).

The government's attempt to differentiate Lewellen's (b)(1)(B) problem from the (b)(1)(C) charges in the other prosecutions fails for an additional reason: The government also charged both the Tornado Cash and Samourai Wallet defendants under (b)(1)(B)—a provision that requires none of the money laundering or other conduct that the government insists makes Lewellen's case different. Red-Br.12-16. The government's decision to indict those defendants under (b)(1)(B) only confirms that the "statutory provision as a whole" places Lewellen at a substantial risk of prosecution. *Sandvig I*, 315 F. Supp. 3d at 19. Indeed, when the government later decided not to proceed on the (b)(1)(B) charge in Tornado Cash, it stood by its original assessment that the prosecution was "consistent with the letter and spirit of the [Blanche Memo]." *Storm*-Doc.144 (May 15, 2025). Plus the government chose not to take the (b)(1)(B) charges to trial only *after* Lewellen filed his complaint in this case, meaning this development is irrelevant to standing. *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 377 (5th Cir. 2023) (en banc), *vacated on other grounds*, 144 S. Ct. 480 (2023). *Compare* ROA.10 (Lewellen sues in January 2025)*, with Storm*-Doc.144*, and Rodriguez*-Doc.118 at 8 n.2 (government drops (b)(1)(B) charges in May and June 2025).

Second, the government tries to distinguish the software that Lewellen plans to publish from the software in the other prosecutions. Red-Br.15-16. Lewellen agrees that the district court erred when it held that the "similarity of the tools" is entirely irrelevant. ROA.300. But a court cannot simply hold, at this stage, that the government is right and that Tornado Cash and Pharos are too dissimilar because Lewellen will have no custody over funds. Nothing distinguishing Tornado Cash from Pharos appears in Lewellen's complaint, and Roman Storm (one of the developers of Tornado Cash) vigorously contests the government's theory that he took custody or control of the funds. *See Storm*-Doc.230 at 66-69 (Sept. 30, 2025). Regardless, crediting this argument wouldn't affect Lewellen's standing. Once again, what matters is the government's view of the law. And the government argued in both Tornado Cash and Samourai Wallet that §1960 "does not require the business to have control of the funds." *Storm*-Doc.53 at 34; *accord Rodriguez*-Doc.118 at 32-33. So under the government's interpretation, the level of control makes no difference. Lewellen can take no comfort from a distinction that is factually dubious and, according to the government, legally irrelevant.

Third, the government argues that the Tornado Cash prosecution is meaningfully different because it is grounded in "affirmative" violations of the law. Red-Br.15-16. Again, a court cannot resolve this question, which is not supported by the complaint, in the government's favor on a motion to dismiss. *Berk*, 607 U.S. at 193. And again, Storm contests this characterization of the Justice Department's claims against him. *See Storm*-Doc.230 at 48-51. As Lewellen highlighted in his opening brief, the government routinely argues for a less-than-affirmative standard, like deliberate indifference, for knowledge elements. Blue-Br.6. The government could just as easily say the same of Lewellen once he takes the *affirmative* step of publishing Pharos knowing he must register—at least under what he knows is the government's reading of §1960. The government admits as much in the Blanche Memo. *See* Blanche-Memo.2-3 & n.2.

In short, Lewellen has plausibly alleged a credible threat of prosecution based on the Tornado Cash and Samourai Wallet prosecutions. Not because he necessarily plans all the same conduct that the government alleges there, but because the government's interpretation and application of §1960 makes his planned business criminal. The government pretends as though the chilling effect of its landmark prosecutions is some subjective paranoia unique to Lewellen. But as the Southern District of New York's chief of the Illicit Finance and Money Laundering Unit stated in 2024, "[W]hat we're trying to do is … bring the industry into compliance" by using "Tornado Cash as an example." Keely, *Feds' Crypto Focus Is No Longer On 'Whack-A-Mole' Cases*, Law360 (Feb. 23, 2024), perma.cc/B5FD-GG7A. Those within the reach of the government's reading of §1960 took its actions exactly as they were intended—a "clear shot across the bow." *Braidwood Mgmt.*, 70 F.4th at 927. "[D]evelopers, investors, trade associations, and other stakeholders began warning that DOJ's prosecutions of non-custodial software developers had fundamentally shifted the legal landscape," and many of these stakeholders changed their conduct as a result. Paradigm-Amicus-Br.11-15. And any hope that Congress would effectively override the Justice Department's erroneous reading has now vanished. *See* Goodman, *'The Bill Is Dead': Crypto Legislation Collapses on Senate Floor*, Politico (Sept. 15, 2026), perma.cc/3TGE-2QYK.

C. The government's refusal to disavow alone establishes a credible threat.

Prior prosecutions aren't the only way to establish a credible threat. As Lewellen's opening brief explains, the government's refusal to disavow prosecution can itself establish a credible threat, even with no history of enforcement. Blue-Br.20-27; *see Inst. for Free Speech*, 148 F.4th at 329; *La Union del Pueblo Entero v. Abbott*, 151 F.4th 273, 289 (5th Cir. 2025). Yet the government, after seeing this argument and these authorities a second time, *still* refuses to disavow prosecution against Lewellen. Its chosen silence effectively concedes that it may investigate or prosecute Lewellen under §1960 if he carries out his alleged plans. *Franciscan All.*, 47 F.4th at 376; *accord Ariz. All. for Retired Ams. v. Mayes*, 186 F.4th 622, 638 (9th Cir. 2026) ("a 'failure to disavow enforcement is sufficient to establish a credible threat of prosecution'").

Though the government once says "the mere creation and launching of software is not a crime," Red-Br.15, that statement isn't a disavowal for two reasons.

First, no one argues that the mere creation and launching of software is a crime. Lewellen argues that creating and publishing Pharos *without registering* is a crime under the government's reading of §1960(b)(1). And the government nowhere disavows the interpretation of "money transmitting business" that criminalizes Lewellen's business if he publishes it without registering. That Lewellen does not "specifically intend to transport criminal funds using Pharos" is beside the point. Red-Br.18; *cf.* Blue-Br.6

(showing that (b)(1)(C) does not require specific intent). He plans to run a "money transmitting business" under the government's reading of §1960(b)(1). So he would be violating (b)(1)(B) every day because he cannot register with FinCEN, irrespective of whether he would also be violating (b)(1)(C).

Second, a "litigation position" cannot be a disavowal in a meaningful sense. *Siders v. City of Brandon*, 123 F.4th 293, 300 (5th Cir. 2024). Even the government's decision to drop the similar charges in the Tornado Cash and Samourai Wallet prosecutions would not stop it from prosecuting Lewellen under (b)(1)(B). *See United States v. Mendoza*, 464 U.S. 154, 155 (1984) (declining to apply collateral estoppel against the government based on a resolution in another case against another party); *United States v. Age*, 136 F.4th 193, 225 (5th Cir. 2025) (same). Indeed, when dropping the (b)(1)(B) charge, the government stressed that it stood by the original prosecution, even after the Blanche Memo. *Storm*-Doc.144. Plus Presidents and Attorneys General change (and have since this case was filed), so litigating positions today cannot dispel the credible threat to Lewellen when he filed in early 2025 or when his business is running in early 2029. This Court and others "have repeatedly held that plaintiffs have standing in the face of similar prosecutorial indecision." *Franciscan All.*, 47 F.4th at 376; *accord Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) (finding standing when "there is nothing that prevents the State from changing its mind" and it "is not forever bound, by estoppel or otherwise, to the view of the law that it asserts in this litigation"); *Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019) ("Arkansas's in-court assurances do not rule out the possibility that it will change its mind and enforce the law more aggressively in the future"); *Kucharek v. Hanaway*, 902 F.2d 513, 519 (7th Cir. 1990) (deeming in-court concessions irrelevant when the prosecutor "may change his mind about the meaning of the statute" or "he may be replaced in office").

Rather than disavow prosecution under §1960(b)(1)(B), the government attacks the pleading standard. "It is unrealistic," the government complains, "to require the government to choose between facing burdensome litigation and discovery or issuing a specific disclaimer for a program with no independent public analysis at the cutting edge of a complex field." Red-Br.18. It is not unrealistic for the government to face litigation when it announces an overbroad reading of a criminal statute, prosecutes people under that statute, and chills protected conduct. If the government is worried that Pharos does not truthfully work as Lewellen alleges, that's precisely what discovery is for. *Inst. for Free Speech*, 148 F.4th at 329. For now, the Court must accept Lewellen's detailed allegations about how Pharos works as true. *Barilla*, 13 F.4th at 431. If Pharos doesn't operate as alleged, that is Lewellen's problem because a properly tailored remedy wouldn't reach software that functions differently. *See E.T. v. Paxton*, 19 F.4th 760, 769 (5th Cir. 2021).

The government asks "what more confirmation Lewellen wants." Red-Br.17. Lewellen wants the government to confirm that he does not operate a "money transmitting business," and that his alleged course of conduct does not make Pharos an "unlicensed money transmitting business" under §1960, because he does not control the funds transferred. In sum, Lewellen wants the government to abandon its erroneous reading of "money transmitting business" and disavow prosecution based on his alleged conduct and software. But the government will not give Lewellen that. Article III thus lets him bring this declaratory-judgment action so he can know his rights before risking federal prison.

D. The Blanche Memo does not support the district court's order.

As Lewellen's opening brief explained, the district court erred by relying on the Blanche Memo. That Memo is irrelevant to standing because it was issued *after* Lewellen sued. *Feds for Med. Freedom*, 63 F.4th at 377. It confirms that Lewellen faces a credible threat of prosecution. Blue-Br.26. And it reflects only policy, not a changed view of the law. Blue-Br.26-27.

The government never engages with any of these arguments. It instead repeats that Lewellen's complaint should be immediately dismissed because he "has no intent to engage in or facilitate" the crimes that the Memo identifies as current Department priorities (use of "digital assets in furtherance of criminal offenses such as terrorism, narcotics and human trafficking, organized crime, hacking, and cartel and gang financing"). Red-Br.17. But as Lewellen explained, the Memo does not disavow the government's *authority* to prosecute publishers of non-custodial cryptocurrency software. Instead, it reiterates that the government *will* prosecute individuals under §1960(b)(1)(B) when "there is evidence that the defendant knew of the licensing or registration requirement at issue and violated such a requirement willfully." Blanche-Memo.2-3 & n.2. The government has confirmed that it believes the Memo permits (b)(1)(B) prosecutions for failure to register cryptocurrency software. *Storm*-Doc.144. The Blanche Memo sets a low bar for developers like Lewellen who know the government deems their protected conduct illegal, even assuming this post-complaint, discretionary document has any relevance to standing.

The government also argues that Lewellen improperly elevates the Tornado Cash and Samourai Wallet prosecutions over the government's Memo. *See* Red-Br.17. But actions speak louder than words. Even if the Blanche Memo could be read to disfavor the §1960 prosecution that Lewellen fears, the government's continued §1960 prosecutions—on a theory that implicates Lewellen's planned conduct—would make any promises of peace in the Blanche Memo illusory.

The government's only other point is that the district court didn't improperly rely on the Blanche Memo; it merely recognized that the Blanche Memo "align[ed] with the reason why [Lewellen] did not have a credible fear of prosecution *at the time of filing*." Red-Br.18. If the government means the district court could not consider the Blanche Memo as a post-filing development that defeats standing, Lewellen agrees. Blue-Br.25-27. If the government means the Blanche Memo reflects the state of affairs when Lewellen sued, that suggestion makes no sense. When Lewellen sued, now-General Blanche was a private citizen. Both the Biden administration and Attorney General Garland were—to quote the Blanche Memo—"pursu[ing] a reckless strategy of [cryptocurrency] regulation by prosecution." Blanche-Memo.1. The second Trump administration may have ended that strategy in many ways; but unfortunately for Lewellen, those ways did not include abandoning the Biden administration's expansive reading of §1960(b) and its prior prosecutions under that reading.

* * *

The government closes by asserting that "Lewellen is not entitled to unqualified pre-enforcement review" because "fear alone is not sufficient to create an injury in fact." Red-Br.20. Lewellen does not ask this Court to adopt either position. He does not seek "unqualified pre-enforcement review" of §1960; he seeks normal preenforcement review because he meets all the criteria. And "fear alone" is not enough to establish standing when it is subjective or unreasonable, but it is enough when it is objectively credible; no specific threat of enforcement against Lewellen is required. *See SBA List*, 573 U.S. at 160. Lewellen has alleged that he will engage in conduct that the government's reading of §1960 forbids; the government has prosecuted others on that theory; and the government has not disavowed prosecutions under §1960 for Lewellen's conduct. That is a credible threat of prosecution any day of the week, especially at this early stage where Lewellen's allegations must be accepted as true, everything must be construed in his favor, and no countervailing evidence has been discovered or introduced.

II. Lewellen's claims are redressable.

Turning to redressability, the government again defies the pleading standard and pretends preenforcement review isn't a thing. The government says Lewellen's injury isn't redressable because his "business is not yet in existence." Red-Br.22. But again, this case is preenforcement: That Lewellen hasn't taken the last step to launch his business—because of the very threat of prosecution he challenges—does not undermine redressability. Redressability is "easily satisfied" when "[p]otential enforcement of [a] statute cause[s] the [plaintiff's] self-censorship" because a judicial remedy removes the threat that causes the censorship. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006).

The government also argues that Lewellen's injuries aren't redressable because he might publish a version of Pharos that works differently than what the complaint alleges. Red-Br.22. But again, this argument refuses to credit the complaint's allegations as true. *Barilla*, 13 F.4th at 431. Lewellen has explained in far more detail than was required at the pleading stage what Pharos is designed to do, and he seeks relief that protects only the publication and operation of the software as alleged.

The government's remaining redressability arguments ignore the settled rule that even a "partial remedy satisfies the redressability requirement." *Uzuegbunam v. Preczewski*, 592 U.S. 279, 280 (2021) (cleaned up); *accord La Union del Pueblo Entero v. Nelson*, 163 F.4th 239, 261 & n.146 (5th Cir. 2025) (similar); *Sanchez v. R.G.L.*, 761 F.3d 495, 506 (5th Cir. 2014) (plaintiff "need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm" (cleaned up)). For example, the government wonders what would happen if Lewellen engaged in "money laundering or national security sanctions violations." Red-Br.23. That injury isn't redressable, it argues, because an injunction wouldn't protect

Lewellen in those circumstances. Red-Br.23 ("an injunction only against the money-transmitter statutes … would be no meaningful protection"). No kidding. Lewellen seeks no relief shielding that conduct. He seeks only a declaration that his specific "planned cryptocurrency business" doesn't violate "the federal money-transmitting laws" and that, if it does, it is protected under the First and Fifth Amendments. ROA.38-39. The ease with which the government associates Lewellen with potential money laundering—ominously referring to Pharos as an "obscuring money-transfer service[]," Red-Br.29-31—only proves why he needs relief.

The government also argues that Lewellen's injury isn't redressable because he might "still be subject to potential investigation and enforcement by FinCEN." Red-Br.24. But again, Lewellen sued to enjoin the Justice Department from threatening him with *federal prison* based on its erroneous reading of §1960(b)(1). That the relief here might not bind FinCEN *as a party* is irrelevant to Article III, since partial relief suffices. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982); *e.g.*, *K.P. v. LeBlanc*, 627 F.3d 115, 123-24 (5th Cir. 2010) (finding redressability where the defendants, though not "the sole participant in the application of the challenged statute," had some "definite responsibilities"). As one court recently explained, "Where a state statute specifically grants enforcement powers to multiple government authorities, an injunction against the exercise of those powers by any one of those authorities suffices to establish redressability. That proposition is supported by decades of Supreme Court precedent." *Matsumoto v. Labrador*, 122 F.4th 787, 801 (9th Cir. 2024). Even if FinCEN someday switched to the Justice

Department's view (a development no one has suggested and isn't alleged in the complaint), the threat of civil penalties is far less onerous and enterprise-ending than the threat of criminal prosecution; and Lewellen has not alleged that the threat of penalties from FinCEN would deter him from publishing Pharos.

More practically, FinCEN already agrees with Lewellen's reading of §1960. Blue-Br.7-9. The government's speculation that Lewellen also needs protection from possible FinCEN civil penalties is both baseless and improper at this stage. *Barilla*, 13 F.4th at 431. If Lewellen prevails on the merits, moreover, the Attorney General would be bound to apply an interpretation of the law under which publishing Pharos does not make Lewellen a money transmitter. It is exceedingly unlikely that FinCEN would advance a contrary interpretation to the Attorney General in that context. As the President recently explained, "[n]o employee of the executive branch acting in their official capacity may advance an interpretation of the law as the position of the United States that contravenes the President or the Attorney General's opinion on a matter of law." Exec. Order No. 14,215, *Ensuring Accountability for All Agencies* §7 (Feb. 18, 2025).

III. Lewellen's claims are ripe.

As Lewellen explained in his opening brief, his claims are ripe because he has standing. Blue-Br.30-31. The Supreme Court's decision in *MedImmune v. Genentech* "all but obliterated" any distinction between standing and ripeness. 13B Fed. Prac. & Proc. Juris. §3532.5 (3d ed.) (citing 549 U.S. 118 (2007)). Though this Court might continue to "recognize the doctrine" of prudential ripeness despite the Supreme Court's questions about its "continuing vitality," *Umphress*, 133 F.4th at 468, Lewellen fully explained why he also meets prudential-ripeness principles, *see* Blue-Br.30-32.

The government says a court needs "further factual development related to [Lewellen's] proposed Pharos program and his associated conduct." Red-Br.9. But the government identifies no fact that must be developed. It instead proposes a novel approach to ripeness that would bar nearly any preenforcement challenge. Though Lewellen has described his software in great detail, the government asks the Court to hold his claims unripe absent some "independent analysis of Lewellen's code" that confirms Pharos operates as alleged. Red-Br.29. And instead of using the liberal discovery rules and adversarial litigation to conduct that independent analysis, the government apparently discovers an "independent analysis" threshold requirement in the penumbral emanations of Article III that plaintiffs must affirmatively plead at the outset.

At the motion-to-dismiss stage, the law imposes no such independent-verification requirement. *See Berk*, 607 U.S. at 192-93 (rejecting an "expert affidavit" pleading requirement because "evidence of the claim is *not* required" at the pleading stage). Lewellen's allegations about how Pharos works are detailed and must be accepted as true. *Barilla*, 13 F.4th at 431. The government cites no precedent to the contrary.

The government's main case is irrelevant. In *National Park Hospital Association v. DOI*, the petitioner brought a facial challenge to a regulation of concession contracts with the National Park Service. 538 U.S. 803 (2003). Because only certain types of contracts fell within the reach of the regulation and there was no "particular concession contract" yet in dispute, the Supreme Court held the claims were not ripe. *Id.* at 812. There is no such uncertainty here. Lewellen has alleged exactly what Pharos is and how he plans to operate it. The only obstacle is the government's interpretation of §1960. The "unanswered questions" are ones the government dreams up because it refuses to take Lewellen's allegations at face value. Red-Br.29-31. Yet precedent requires courts to take Lewellen's factual allegations at face value, including how Pharos will operate. *Barilla*, 13 F.4th at 431.

The government's proposal for how Lewellen could "fix" this nonexistent ripeness problem is wrong too. The government says Lewellen should have asked FinCEN whether Pharos was legal. Red-Br.30. Yet in the same breath, the government concedes that Lewellen didn't need to seek FinCEN's guidance before suing. Red-Br.30. And it never explains what good a FinCEN advisory opinion would do him. As explained, the Justice Department's interpretation of §1960 ignores longstanding FinCEN guidance already on the books, Blue-Br.7-8, and it rejected FinCEN's specific guidance on whether Samourai Wallet violated §1960 when it brought that prosecution, *Rodriguez*-Doc.86 at 1, 7. Lewellen did not need to seek advice from an agency that agrees with him before suing an agency that disagrees with him (and the other agency).

Paxton v. Restaino—the lone case the government cites for the idea that Lewellen's failure to seek non-binding guidance matters—doesn't support the government. The case doesn't even discuss ripeness. The law there required a person to apply for a silencer, and the plaintiffs lacked standing because they never applied and so were not injured by the challenged law. 683 F. Supp. 3d 565, 569-70 (N.D. Tex. 2023). The case's reasoning has no force, even persuasive force, here.

At bottom, Lewellen's claims are ripe because they are not impermissibly "abstract and hypothetical." *Braidwood*, 70 F.4th at 930. There are no "additional fact[s]" needed before the Court can adjudicate the merits of his claims. *Id.* at 929; *see, e.g.*, *Crown Castle Fiber v. City of Pasadena*, 76 F.4th 425, 437 (5th Cir. 2023) ("no further factual development" needed about business's general plan to develop a communications network in the region). A court can and should measure the legality of his planned conduct against the government's interpretation of §1960—something federal courts do in all sorts of contexts every day.

CONCLUSION

This Court should reverse the district court on standing and remand.

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7) because it contains 6,104 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: September 21, 2026 /s/ *Cameron T. Norris*

CERTIFICATE OF SERVICE

I filed this brief on the Court's electronic filing system, which will email everyone requiring notice.

Dated: September 21, 2026 /s/ *Cameron T. Norris*