25-145

United States Court of Appeals

for the

Second Circuit

COINBASE, INC., COINBASE GLOBAL, INC.,

Petitioners,

– v. –

UNITED STATES SECURITIES & EXCHANGE COMMISSION,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
NO. 1:23-CIV-4788 (KPF) (HON. KATHERINE POLK FAILLA)

BRIEF OF *AMICUS CURIAE* U.S. SENATOR CYNTHIA M. LUMMIS IN SUPPORT OF PETITIONERS COINBASE INC. AND COINBASE GLOBAL, INC.

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae, United States Senator Cynthia M. Lummis of Wyoming, is a member of the Senate Committee on Banking, Housing and Urban Affairs (Senate Banking), which has jurisdiction over digital assets and the U.S. Securities and Exchange Commission (SEC). She is the newly-appointed Chair of Senate Banking's Subcommittee on Digital Assets. Senator Lummis' commitment to balanced, thoughtful regulation of digital assets has cemented her as a preeminent policy leader in Congress.

In July 2023, Senator Lummis and Senator Kirsten Gillibrand of New York reintroduced the *Lummis-Gillibrand Responsible Financial Innovation Act*, S. 2281, 118th Cong. (2023) (RFIA). The RFIA has set the standard for comprehensive and bipartisan digital asset legislation in Congress. Through this brief, Senator Lummis seeks to highlight the growing importance of digital assets to our Nation's economy; emphasize the many legislative efforts in Congress to establish a framework for digital asset regulation; and detail the ways in which the SEC's enforcement actions under its former Chair interfere with these legislative initiatives and hamper efforts

[1] This brief was not authored in whole or in part by counsel for either party, and no one other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this brief.

to ensure that the United States remains a leader in emerging digital asset technologies.

Senator Lummis also has a special interest in upholding the Constitution's separation of powers by ensuring that federal agencies do not exceed the authority conferred upon them or encroach upon Congress's ongoing legislative efforts. Senator Lummis believes that the SEC's approach to enforcement in this case and in the digital asset industry more broadly flouts that separation of powers.

The SEC cannot legislate by enforcement.

PRELIMINARY STATEMENT

This case raises a question of national importance: whether the SEC has the authority to regulate secondary market trading in digital assets under legislation passed almost a century ago. The District Court held that this Court's immediate review of this question is necessary and appropriate. Senator Lummis agrees.

Digital assets like Bitcoin, Ether, stablecoins, and others have taken the world by storm. From 2013 to 2024, the global market capitalization for the digital asset market grew from $1.5 billion to more than $3.64 trillion. These cryptographically secured assets—which can be transferred without centralized intermediaries—represent groundbreaking technology, but as with many emerging technologies, laws passed by distant generations are not appropriately calibrated to meet the challenges and opportunities presented by the new technology. Decades-old securities statutes and regulations often do not apply or are not ready to meet the challenges facing those engaging with the digital asset sector.

Digital asset regulation is of vital importance to the global economy and, in recognition of the limits of existing laws and the transformative promise of digital asset technologies, legislators in Congress and around the world—including Senators Lummis and Gillibrand—are actively debating how to regulate digital assets. Undoubtedly this is a complicated question, but as elected representatives with access to the highest-quality experts, as well as fact-finding and investigative

tools, legislators are best-positioned (and constitutionally directed) to address these issues. Indeed, following several years of constructive engagement with constituents, technology users, consumer protection advocates, and technologists, Congress is well on the path to creating an effective regulatory framework for the digital asset sector. Senators Lummis and Gillibrand, for example, have introduced comprehensive bipartisan legislation, and several other members of Congress have offered similar frameworks.

Complicating these efforts, the SEC has aggressively pursued jurisdiction over all digital assets through a "legislation-by-enforcement" campaign. In this enforcement action, and several others, the SEC claims broad jurisdiction over digital assets by invoking a strained and unworkable reading of securities laws that were drafted nearly a century ago. Through its enforcement actions, the SEC has advanced a novel interpretation of the meaning of an "investment contract"—which qualifies as a security under the Securities Act of 1933 and the Securities Exchange Act of 1934. Advancing an unprecedented application of the Supreme Court's seminal decision in *SEC* v. *W.J. Howey Co.*, 328 U.S. 293 (1946)—which sets forth the standard for determining whether a contract, transaction or scheme qualifies as an investment contract—the SEC has attempted to expand the definition of "security" so as to cover a vast swath of digital assets that simply cannot be squared with the statutory definition, and are nothing like the securities Congress intended

to grant the SEC authority to regulate. Indeed, the SEC's ill-advised attempt to vastly expand its regulatory ambit over digital assets runs counter to Congressional efforts to develop a thoughtful framework for digital asset activity and risks stymying innovation in this revolutionary field.

The SEC's attempts to regulate digital assets through enforcement also raise serious separation of powers concerns—concerns acknowledged by the very architect of this strategy, former SEC Chairman Gary Gensler—who opined in 2021 that "it is only Congress that could really address" the thorny and complex issues surrounding digital asset regulation.[2]

Fortunately, with Coinbase's Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) (the "Petition"), the Second Circuit has an opportunity to clarify the scope of the SEC's authority and provide much-needed guidance to the SEC and industry participants. With lawsuits pending across the country that rely on the SEC's overzealous interpretation of the securities laws, it is vital that the Second Circuit—the country's leading securities law court—weigh in now and halt the SEC's contravention of the separation of powers and encroachment on Congress's

[2] *Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part III: Hearing Before the House Committee on Financial Services*, 117th Cong. (2021) (statement of Chairman Gary Gensler, Securities and Exchange Commission), https://tinyurl.com/mtrnkbn2.

lawmaking powers. A Second Circuit standard regarding when digital assets qualify as securities is urgently needed.

ARGUMENT

I. Digital Asset Regulation is a Matter of National Importance Being Addressed by Congress and Regulators around the World

Digital asset technology is transformational and has created a once-in-a-generation opportunity for a new, globally integrated, and internet-based financial system. As the Third Circuit recently acknowledged, "digital assets are a growing part of the financial sector and are emerging as an increasingly important form of online payment." *Coinbase, Inc.* v. *SEC*, 2025 WL 78330, at *20 n.11 (3d Cir. Jan. 13, 2025). With proper guardrails, this new system promises to be more fair, accessible, efficient, reliable, safe, and transparent than any of the modes of commerce that have come before it. In just ten years, the market capitalization of the digital asset industry has grown nearly *200,000%*.[3] Barriers to entry are lower, and digital assets are now accessible to everyday Americans. As of 2021, at least 16% of Americans have invested in, traded, or used digital assets.[4] And just as

[3] *See Crypto Market Overview*, COINMARKETCAP (Jan. 22, 2025), https://tinyurl.com/9swydwdu (noting growth of the digital asset industry from $1.5 billion in 2013 to over $3.2 trillion in 2024).

[4] Andrew Perrin, *16% of Americans Say They Have Ever Invested In, Traded or Used Cryptocurrency*, PEW RESCH. CTR. (Nov. 11, 2021), https://tinyurl.com/2p9fnjys.

exchange-traded funds (ETFs) historically empowered retail investors to invest in commodities like gold or oil, ETFs now offer the same exposure to commodities in the form of digital assets.[5]

The promise of digital assets has sparked bipartisan interest in supporting the industry's growth. Newly-inaugurated President Trump has advocated for a whole-of-government effort to make America the "crypto capital of the planet,"[6] and former President Biden also sought to capitalize on the "dramatic growth in markets for digital assets" to promote America's "interest in responsible financial innovation, expanding access to safe and affordable financial services, and reducing the cost of domestic and cross-border funds transfers and payments, including through the continued modernization of public payment systems."[7] Although there are many different views on the appropriate way to regulate digital assets, Republican and Democratic legislators alike have objected to the SEC's current legislation-by-enforcement, which threatens to erode America's competitive edge in digital assets

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[5] *See* Lawrence Wintermeyer, *The Growing Gap for Investors Outside the U.S. to Access Crypto ETFs*, FORBES (Oct. 17, 2024), https://www.forbes.com/sites/lawrencewintermeyer/2024/10/17/the-growing-gap-for-investors-outside-the-us-to-access-crypto-etfs/ ("Following the launch of spot bitcoin and Ethereum ETFs, the U.S. captured 83.3 percent of the global market.")

[6] Kimberlee Kruesi, *Trump Calls for US to be 'Crypto Capital of the Planet' in Appeal to Nashville Bitcoin Conference*, ASSOCIATED PRESS (Jul. 27, 2024), https://tinyurl.com/yt5k5yef.

[7] Exec. Order No. 14,067, 87 Fed. Reg. 14,143 (Mar. 9, 2022).

and drive the industry overseas. For example, just last year, Senator Lummis and a bipartisan cohort of legislators passed a joint resolution overturning the SEC's implementation of Staff Accounting Bulletin 121, which imposed prohibitive capital requirements on digital asset custodians.[8] Even though the resolution was vetoed by President Biden, Rep. Wiley Nickel noted that "Congress will not stand idly by as Gary Gensler and the SEC deliberately sidestep the statutory rulemaking process and overstep their regulatory authority."[9] Staff Accounting Bulletin 121 was rescinded by the SEC on January 23, 2025.[10]

Concern over the SEC's current approach has led Congress to consider whether existing laws, including those relating to securities and commodities, should be revised to clarify the regulatory regime surrounding digital assets. In 2021, Congress took testimony from the chief executives of six digital asset companies on the promises and risks of digital assets.[11] And last September, the House Financial Services Subcommittee on Digital Assets, Financial Technology and Inclusion held

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[8] *See* H.J. Res. 109, 118th Cong. (2024) (vetoed).

[9] Casey Wagner, *Senate Passes Resolution to Overturn SAB 121*, BLOCKWORKS (May 16, 2024), https://tinyurl.com/3p69y9b6.

[10] *Staff Accounting Bulletin No. 122*, U.S. SEC. & EXCH. COMM'N (Jan. 23, 2025), https://tinyurl.com/5a9zej85.

[11] Ephrat Livni, *Congress Gets A Crash Course on Cryptocurrency*, N.Y. TIMES (Dec. 8, 2021), https://tinyurl.com/bdezzyvv.

a hearing on the SEC's approach to regulating digital assets.[12] Congress has clearly concluded that it must act. As set forth further below in Section II, members of Congress have proposed several bills to tackle digital asset regulation. And as the new Administration pushes to make America the "crypto capital," even more robust debate and thorough regulatory proposals are sure to follow.

Foreign policymakers are also working to deliver regulatory clarity. For example, in 2018, Swiss financial regulators created a regulatory structure distinguishing between payment tokens, utility tokens, and asset tokens.[13] The European Parliament has also since passed comprehensive crypto regulation.[14] And English, Qatari, Singaporean, and Canadian authorities have issued their own digital asset-specific frameworks.[15]

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[12] H. Comm. On Fin. Servs., *Hill Delivers Remarks at Hearing to Break Down the SEC's Politicized Approach to Digital Assets* (Sept. 18, 2024), https://tinyurl.com/ypvee6ps.

[13] *FINMA Publishes ICO Guidelines*, FINMA (Feb. 16, 2018), https://tinyurl.com/5ebsfhne.

[14] Regulation 2023/1114 of the European Parliament and of the Council on Markets in Crypto-Assets, 2023 O.J. (L 150) (EU), https://tinyurl.com/4f3zh8x6.

[15] *See Financial Services and Markets Act 2023*, c. 29 (UK), https://tinyurl.com/45naa5k4; *Qatar Financial Centre Issues QFC Digital Assets Framework 2024*, QATAR FIN. Ctr. (Sept. 1, 2024), https://tinyurl.com/2te2wexb; *MAS Expands Scope of Regulated Payment Services [And] Introduces User Protection Requirements for Digital Payment Token Service Providers*, MONETARY AUTH. SING. (Apr. 2, 2024), https://tinyurl.com/ycxe8xf9; *Notice and Request for Comment on Proposed 29 Amendments to 81-102 on Investment Funds Pertaining to Crypto Assets*, ONTARIO SEC. COMM. (Jan. 18, 2024),

The SEC's attempt to dramatically expand the century-old definition of "security" to cover all digital assets threatens to create conflict with these regulatory regimes. The Department of Justice has acknowledged challenges from "[d]ifferences in the substantive treatment or regulation of digital assets across legal systems."[16] And as Senator Lummis and her colleagues have recognized, this creates a significant risk that U.S. companies will move operations overseas due to regulatory uncertainty, costing us American jobs, investment opportunities, and tax revenue.[17]

II. The SEC's Legislation-By-Enforcement Regime Undermines Legislative Efforts and Threatens to Stifle Digital Asset Innovation.

The U.S. Senate and House of Representatives are actively considering how the United States should classify and regulate digital assets. For example, the House and Senate have established subcommittees dedicates specifically to digital asset

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https://tinyurl.com/ywj9y3du.

[16] *Report of the Attorney General Pursuant to Section B(b)(iv) of Executive Order 14067: How To Strengthen International Law Enforcement Cooperation For Detecting, Investigating, and Prosecuting Criminal Activity Related to Digital Assets*, U.S. DEP'T OF JUSTICE (2022), https://tinyurl.com/4ttbpj9s.

[17] *See* Julie Tsirkin, *Sen. Cynthia Lummis: Crypto Regulation Bill Could Prevent Another FTX-style Crisis*, NBC NEWS (Jul. 19, 2023), https://tinyurl.com/8ay2v6jc.

regulation,[18] the latter of which Senator Lummis chairs.[19] And since January 2022, Senator Lummis and her colleagues on Senate Banking and the House Committee on Financial Services have held multiple hearings examining the role of digital assets in our economy and potential regulatory approaches.[20] These hearings have made

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[18] *See* Subcomm. On Digital Assets, Fin. Tech. and Inclusion (118th Congress), https://tinyurl.com/mr3ut7yw; Brady Dale, *Senate Banking Committee convenes its first digital assets subcommittee,* AXIOS (Jan. 23, 2025), https://tinyurl.com/4krpzhc2.

[19] Office of Senator Cynthia Lummis, Senator for Wyoming, *Lummis to Chair Historic Senate Panel on Digital Assets* (Jan. 23, 2025), https://tinyurl.com/47s5x5ra.

[20] *See, e.g., The Future of Digital Assets: Identifying the Regulatory Gaps in Digital Asset Market Structure, Hearing Before the Subcomm. on Digit. Assets, Fin. Tech., and Inclusion of the H. Comm. on Fin. Servs.*, 118th Cong. (2023), https://tinyurl.com/2yp22fwm; *The Future of Digital Assets: Providing Clarity for the Digital Asset Ecosystem*, *Hearing Before the H. Comm. on Fin. Servs.*, 118th Cong. (2023), https://tinyurl.com/4ar5vxsj; *Dazed and Confused: Breaking Down the SEC's Politicized Approach to Digital Assets*, *Hearing Before the Subcomm. on Digit. Assets, Fin. Tech., and Inclusion of the H. Comm. on Fin. Servs.*, 118th Cong. (2024), https://tinyurl.com/2jzsf3by; *Crypto Crash: Why Financial System Safeguards are Needed for Digital Assets Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 118th Cong. (2023), https://tinyurl.com/uphtw2nk; *Crypto Crash: Why the FTX Bubble Burst and the Harm to Consumers Before the S. Comm. on Banking, Hous., and Urban Affs.*, 117th Cong. (2022), https://tinyurl.com/56hc2chw; *Investigating the Collapse of FTX, Part I Before the H. Comm. on Fin. Servs.*, 117th Cong. (2022)**,** https://tinyurl.com/56hc2chw; *Protecting Investors and Savers: Understanding Scams and Risks in Crypto and Securities Markets Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 117th Cong. (2022), https://tinyurl.com/3ku4b4y5; *Putting the 'Stable' in 'Stablecoins:' How Legislation Will Help Stablecoins Achieve Their Promise Before the H. Subcomm. on Digit. Assets, Fin. Tech. and Inclusion of the H. Comm. on Fin. Serv.*, 118th Cong. (2023), https://tinyurl.com/cbhpnc62; *The Future of Digital Assets: Measuring the Regulatory Gaps in the Digital Asset Markets Before the H. Comm.*

plain that existing law is simply not ready to address digital assets and that new legislation is needed.

The SEC's unjustified assertion of authority over secondary market digital asset trading in this case runs counter to these active legislative efforts. The SEC's legislation-by-enforcement strategy treats nearly all digital assets as securities, but the RFIA and the numerous other bills advanced in Congress acknowledge that reality is far more nuanced and that existing securities laws are a poor fit for the digital assets industry. Notable bills pending in Congress include:

The Lummis-Gillibrand Responsible Financial Innovation Act (RFIA), S. 2281, 118th Cong. (2023-2024), introduced by *amicus* Senator Lummis and Senator

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on Fin. Servs. & H. Comm. on Agric. Joint Subcomm., 118th Cong. (2023), https://tinyurl.com/3z482ech; *The Future of Digital Assets: Identifying the Regulatory Gaps in Digital Asset Market Structure Before the H. Comm. on Financial Services & H. Comm. on Agric. Joint Subcomm.*, 118th Cong. (2023), https://tinyurl.com/muedwru9; *Understanding Stablecoins' Role in Payments and the Need for Legislation Before the H. Subcomm. On Digit. Assets, Fin. Tech. and Inclusion of the H. Comm. on Fin. Servs.*, 118th Cong. (2023), https://tinyurl.com/59zwum75; *Coincidence or Coordinated? The Administration's Attack on the Digital Asset Ecosystem Before the H. Subcomm. on Digit. Assets, Fin. Tech. and Inclusion of the H. Comm. on Fin. Serv.*, 118th Cong. (2023), https://tinyurl.com/mr2ea497; *Digital Assets and the Future of Finance: Examining the Benefits and Risks of a U.S. Central Bank Digital Currency Before the H. Comm. on Fin. Servs.*, 117th Cong. (2022), https://tinyurl.com/wfyutvdf; *Understanding the Role of Digital Assets in Illicit Finance Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 117th Cong. (2022), https://tinyurl.com/3b6x8978; *Digital Assets and the Future of Finance: The President's Working Group on Financial Markets' Report on Stablecoins Before the H. Comm. on Fin. Servs.*, 117th Cong. (2022), https://tinyurl.com/mrym983k.

Kirsten Gillibrand. This bipartisan bill would not only take wide-ranging steps to regulate the digital asset sector and impose much-needed consumer protections, but also would clearly specify the roles of the SEC and the U.S. Commodity Futures Trading Commission (CFTC) in overseeing digital asset markets. Following current law, the bill takes care to note that while many initial sales of tokens may be investment contract transactions subject to SEC purview, the underlying digital assets themselves are typically commodities. Accordingly, the RFIA would require digital asset exchanges to register with, and be subject to the supervision of, the CFTC. The RFIA would also grant the SEC important new ongoing disclosure authority applicable to companies that conduct fundraising transactions using digital assets, and would appropriate $1.4 billion in additional funding over the next five years to the CFTC, the SEC, and other financial agencies.

The Financial Innovation and Technology for the 21st Century Act (FIT 21), H.R. 4763, 118th Cong. (2023-2024), introduced by Representatives Glenn Thompson and French Hill, was approved by bipartisan majorities in the House. This bill would provide the CFTC with primary jurisdiction over "digital commodities" while explicating the circumstances under which certain digital assets would fall under SEC jurisdiction. It would also create a digital commodity exchange framework that would provide an important vehicle for consumer protection.

The Digital Commodities Consumer Protection Act of 2022 (DCCPA), S. 4760, 117th Cong. (2021-2022), introduced by Senators Debbie Stabenow and John Boozman, would grant sole authority to the CFTC over activities involving digital commodities while excluding securities and stablecoins backed by the full-faith and credit of the United States. The DCCPA would additionally establish a new registration regime for all "digital commodity platforms" under the Commodity Exchange Act, 7 U.S.C. § 1a *et seq*.

Each of these bills approaches the regulation of activity involving digital assets in a significantly different manner than the SEC's expansive and novel interpretation of its own authority. Congress—with its lawmaking power buttressed by fact finding and investigative functions—is far better equipped than the SEC to craft a regulatory framework that considers the interests of the federal government, digital asset consumers, and the industry itself.

Indeed, the SEC's lack of statutory power to regulate the variety of innovative products being developed in the digital asset sector along with the variety of interests that these different products raise counsels against centralizing all regulation within a single agency. Before its aggressive and unprecedented enforcement efforts in this arena, the SEC itself acknowledged as much and disclaimed complete authority to regulate digital assets. Former Chairman Gensler admitted in 2021 that "[t]here are some gaps in [the digital asset regulatory] space . . . . We need additional

Congressional authorities to prevent transactions, products, and platforms from falling between regulatory cracks."[21]

Despite this recognition of the need for Congress to speak, the SEC later changed course under former Chairman Gensler, seeking to commandeer all authority to regulate digital assets for itself. This flip-flop strongly suggests "there is substantial ground for difference of opinion" regarding the SEC's authority here. 28 U.S.C. § 1292(b).

When changing course, the SEC did not proceed through notice-and-comment rulemaking consistent with the processes mandated by Congress in the Administrative Procedure Act, 5 U.S.C. §§ 551 – 559, or by encouraging a traditional political process. The SEC instead adopted a legislation by enforcement strategy, seeking to regulate virtually all activity involving digital assets as securities transactions. *See, e.g.*, *Coinbase, Inc.* v. *SEC*, No. 23-3202 (3d Cir. filed Dec. 15, 2023); *SEC* v. *Payward, Inc. et al.*, No. 23 Civ. 6003 (N.D. Cal. filed Nov. 20, 2023); *SEC* v. *Binance*, No. 23 Civ. 1599 (D.D.C. filed Jun. 5, 2023). The SEC's strategy relies on a novel interpretation of two words—"investment contract."[22] The SEC's

[21] *Remarks Before the Aspen Security Forum*, U.S. SECURITIES AND EXCHANGE COMMISSION (Aug. 3, 2021), https://www.sec.gov/newsroom/speeches-statements/gensler-aspen-security-forum-2021-08-03.

[22] Over ninety years ago in the Securities Act of 1933, Congress defined "security" to include "any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in

attempt to bring the digital asset industry under its purview depends entirely on its ahistorical interpretation of this phrase, treating commodity assets as if they were securities. If digital assets themselves, and secondary market trading in these assets, do not involve "investment contracts," this case—and the SEC's other enforcement actions against digital asset trading platforms like Binance and Kraken—would largely (or completely) falter. Indeed, this is a threshold issue and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

The SEC's attempted power grab is a marked departure from the existing definition of a "security" established by Congress and relies on an unworkable expansion of the test set forth in *Howey*.

The SEC's approach is also inconsistent with nearly one hundred years of case law. As an initial matter, there cannot be securities without an issuer.[23] The SEC's

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any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." 15 U.S.C. § 77b.

[23] *See* Cohen, Strong, Lewin, and Chen, *The Ineluctable Modality of Securities Law: Why Fungible Crypto Assets Are Not Securities* (November 10, 2022), available at:

unfounded interpretation of the term "investment contract" in this action would create the first class of issuer-independent securities—*i.e.*, securities that do not carry any legal relationship to any issuer, a concept that Congress has not sanctioned and that runs contrary to all precedent and the text of the securities laws.[24]

In addition to the legal flaws in the SEC's pursuit of authority, its *ad hoc* legislation-by-enforcement approach is arbitrary and capricious and does not provide sufficient guidance to the industry, despite industry participants' pleas for the SEC to provide clarity.

Coinbase, for example, specifically petitioned the SEC to promulgate rules clarifying how and when the securities laws apply to digital assets, arguing that the

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https://ssrn.com/abstract=4282385 or http://dx.doi.org/10.2139/ssrn.4282385. If the Second Circuit grants Coinbase's Petition, *amicus* Senator Lummis intends to request leave to file an *amicus* brief explaining why the securities laws do not support "issuer-independent" securities and how nearly 100 years of appellate case law have consistently affirmed this principle.

[24] Each type of "security" enumerated in the securities laws (*e.g.*, "stocks," "bonds") has an entity that is readily identifiable as the issuer of that security. And for each of these types of instruments, there is always a legal relationship deliberately entered into by an identifiable legal entity that issues the security and various other parties who, from time to time, own the security. Likewise, there is always an entity against whom the security-holder's rights can be enforced. Furthermore, many sections of the Securities Exchange Act also presume the existence of an issuer. *See, e.g.*, 15 U.S.C. § 78c(a)(53)(A)(ii) (directly referencing an "issuer" under the definition of "small business related security"); 15 U.S.C. § 78g(f)(2)(B) (same when defining "United States Security").

existing securities-law framework does not account for certain unique attributes of digital assets which make compliance economically and even technically infeasible. *See Coinbase, Inc.* v. *SEC*, 2025 WL 78330 at *1. The SEC rejected the plea for clarity, stating in a single paragraph that it disagreed with Coinbase's concerns; that it had higher-priority agenda items; and that it may prefer to gather additional information through incremental action before engaging in more far-reaching rulemaking. *Id.* at *1.

Less than two weeks ago, Coinbase's concerns were vindicated and the Third Circuit excoriated the SEC for its arbitrary and capricious denial of Coinbase's petition. *Id.* The Third Circuit held that the SEC's order denying Coinbase's rulemaking petition was "insufficiently reasoned" and ordered the SEC to better explain its decision in refusing rulemaking. The Court found that the SEC's denial did not provide "any assurance that the SEC considered Coinbase's workability objections, nor does it explain how it accounted for them." *Id.* at *16. Importantly, the Circuit emphasized that "[the SEC] has said that it believes the existing securities-law framework is not unworkable for digital assets, but we have no basis in the record for determining *why* it believes that or how it arrived at that conclusion." *Id.* at *17 (emphasis in original). And in a concurring opinion, Judge Bibas went further still, stating: "The SEC repeatedly sues crypto companies for not complying with the law, yet it will not tell them how to comply. That caginess

creates a serious constitutional problem; due process guarantees fair notice." *Id.* at *27.

The SEC's legally dubious overreach is also likely to stifle innovation. To avoid the risk of an SEC enforcement action, innovators have been forced to attempt novel and unnecessary constructs to avoid touching the United States. Those interested in building and promoting blockchain-based projects (or other offerings that the SEC views as securities) continue to proactively wall themselves off from the United States without any Congressional mandate for such an impactful outcome. Without U.S. investors and innovators involved in the development of blockchain and digital asset projects, *amicus* fears that the U.S. will be far less likely to become a leader in these developing technologies.

Today, the Second Circuit can help provide needed clarity and protect the United States' emerging presence in the digital asset sector by granting Coinbase's petition for interlocutory appeal and resolving how far the SEC's authority reaches under *Howey* in a manner consistent with Congress's intention.

III. The SEC's Novel and Expansive View of its Own Authority Violates Fundamental Separation of Powers Principles and the Major Questions Doctrine

Article I, Section 1 of the U.S. Constitution vests all legislative powers in Congress. This foundational principle underscores that federal agencies, including the SEC, can only exercise the powers Congress has explicitly delegated to them.

Indeed, to prevent an over-concentration of power in any given branch, the Constitution provides for a separation of powers between the legislative, executive, and judicial branches. This fundamental principle ensures that decisions involving significant shifts in policy or regulatory authority are made by the branch of government directly accountable to the people—Congress—rather than by unelected administrative agencies. This principle is especially applicable "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000)). As the Supreme Court recently emphasized in *West Virginia* v. *EPA*, agencies are not entitled to treat enabling legislation as "an open book to which the agency may add pages and change the plot line." 142 S. Ct. 2587, 2609 (2022) (internal quotation marks and citation omitted).

Indeed, the major questions doctrine provides an essential check on administrative overreach by requiring agencies to point to "clear congressional authorization" when asserting regulatory authority over issues of vast economic and political significance. *Utility Air Regulatory Group*, 573 U.S. at 324. The doctrine assumes that Congress would not grant agencies such sweeping authority through "modest words," "vague terms," or "subtle devices." *West Virginia* v. *EPA*, 142 S. Ct. at 2609.

The SEC's recent approach to digital assets manifested in this case represents a sharp departure from the historical understanding of the concept of what is a "security" and is exactly the kind of "discovered power" the Supreme Court has cautioned against. Many digital assets lack the characteristics of securities over which Congress has granted the SEC authority, and nothing in the text of the federal securities laws supports the SEC's unilateral expansion of its authority to include nearly all activity involving digital assets. By attempting to exercise broad jurisdiction over the entire digital assets sector, the SEC is attempting to expand its statutory authority by extending the underlying legislation well beyond its breaking point. But the U.S. Constitution clearly leaves legislative powers to Congress alone.

Accepting the SEC's expansive interpretation of its authority would effectively permit the agency to usurp Congress's legislative role and impose a regulatory framework that Congress has neither debated nor enacted. Congress alone has the authority to determine which assets fall in the SEC's purview. And as described above, determining which digital assets fall within the SEC's jurisdiction involves complex policy considerations that demand deliberation and democratic input—a task that properly belongs to Congress.

Regulation of digital assets also plainly constitutes a matter of great economic and political significance. The digital asset industry represents a growing and transformative sector of the global economy, with billions of dollars in market

capitalization and the potential to reshape financial markets. Courts have consistently hesitated to assume that Congress intended to delegate this type of significant regulatory authority without explicit and unambiguous statutory language. For example, in *Biden* v. *Nebraska,* the Supreme Court found that the Secretary of Education's attempt to unilaterally forgive $430 billion in student loans was a matter of such economic and political importance that it required clear Congressional authorization. 143 S. Ct. 2355, 2372 (2023).

Similarly, the SEC's efforts to unilaterally assert jurisdiction over digital assets lack the clear statutory basis required under the major questions doctrine. The absence of explicit congressional authorization underscores that regulatory oversight of this emerging industry should be left to Congress, the body best positioned—and constitutionally mandated—to weigh competing policy considerations and develop a comprehensive legislative framework.

IV. Addressing the Issues Raised by Coinbase's Petition Would Provide System-Wide Benefits and Would Prevent Legal Uncertainty that Threatens to Stifle Innovation

The district court's order sanctioning the SEC's regulatory approach threatens to interfere with the legislative process and introduces significant industry uncertainty. Moreover, the SEC is pursuing numerous enforcement actions and private civil actions are seeking to recover under the theories of liability that the district court adopted here—namely, that every holder of the digital assets in

question has standing to assert claims under the securities laws.[25] Courts—including courts within the same district—have reached conflicting conclusions when considering fundamental questions about digital assets.[26] The conflicting decisions easily demonstrate that "there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Moreover, whether the SEC has the authority it claims is a threshold question such that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* As the district court properly held, "conflicting authority exists here" and "immediate interlocutory appeal would materially advance the ultimate termination of the litigation because it could result in dismissal of the bulk of the SEC's claims against Coinbase." *SEC* v. *Coinbase, Inc.*, 2025 WL 40782, at *12 (S.D.N.Y. Jan. 7, 2025).

The lack of judicial clarity created by the conflicting decisions has also created unnecessary uncertainty for industry participants. There are accordingly system-wide benefits to considering Coinbase's interlocutory appeal now. *See Klinghoffer*

[25] *See, e.g.*, *Williams* v. *Binance*, No. 20 Civ. 2803 (S.D.N.Y. filed May 13, 2024); *Houghton* v. *Leshner*, No. 22 Civ. 07781 (N.D. Cal. filed Dec. 8, 2022).

[26] For example, courts have taken different positions on how *Howey* applies to secondary-market crypto transactions. Judge Failla's Order and *SEC* v. *Terraform Labs Pte. Ltd.*, concluded that a blind, bid-ask trade of a digital asset carrying no post-sale obligations can be an "investment contract," and *SEC* v. *Ripple Labs, Inc.* reached a different conclusion. *Compare Terraform*, 684 F. Supp. 3d 170, 194 (S.D.N.Y. 2023) and Order at 45-46, 58, with *SEC* v. *Ripple*, 682 F. Supp. 3d 308 (S.D.N.Y. 2023).

v. *S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990) ("[T]he impact that an appeal will have on other cases is a factor that we may take into account in deciding whether to accept an appeal that has been properly certified by the district court.").

The Second Circuit providing its views in this case will undoubtedly aid other courts grappling with similar issues, including many pending cases within this Circuit.[27] And opining on these questions now will also allow lower courts to resolve cases based on a consistent standard without the risk of an intra-circuit split.[28]

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[27] *See, e.g.*, *SEC* v. *Sun*, No. 23 Civ. 2433 (S.D.N.Y. filed Mar. 22, 2023), *SEC* v. *Ripple Labs, Inc.*, No. 20 Civ. 10832 (S.D.N.Y. filed Dec. 20, 2020), *SEC* v. *Safemoon*, No. 23 Civ. 8138 (E.D.N.Y. filed Nov. 1, 2024), *SEC* v. *Bankman-Fried*, No. 22 Civ. 10501 (S.D.N.Y. filed Dec. 13, 2022), *SEC* v. *Eisenberg*, No. 23 Civ. 503 (S.D.N.Y. filed Jan. 20, 2023), *SEC* v. *Schueler*, No. 23 Civ. 5749 (E.D.N.Y. filed July 31, 2023), *SEC* v. *Consensys*, No. 24 Civ. 4578 (E.D.N.Y. filed Nov. 1, 2024), *SEC* v. *Al-Naji*, No. 24 Civ. 5738 (S.D.N.Y. filed July 30, 2024), *SEC* v. *Grybniak*, No. 20 Civ. 327 (E.D.N.Y. Sept. 30, 2024).

[28] *Compare Williams* v. *BlockOne*, 2022 WL 5294189, at *7 (S.D.N.Y. Aug. 15, 2022) (finding that "'irrevocable liability' is incurred when the transaction has been verified by at least one individual node of the blockchain"), *with Barron* v. *Helbiz Inc.*, 2021 WL 229609, at *6 (S.D.N.Y. Jan. 22, 2021) (holding that the location of a blockchain transaction does not turn on the location of the nodes or servers that make up the blockchain), *vacated and remanded on other grounds*, 2021 WL 4519887 (2d Cir. Oct. 4, 2021), *and Andersen* v. *Binance*, 2022 WL 976824, at *4 (S.D.N.Y. Mar. 31, 2022) (plaintiffs "must allege more than stating that Plaintiffs bought tokens while located in the U.S. and that title 'passed in whole or in part over servers located in California that host Binance's website'"), *reversed and remanded sub. nom.*, *Williams* v. *Binance*, 96 F.4th 129 (2d Cir. 2024).

Clarifying these issues at this stage will also guide litigants weighing whether to settle, thus saving costs for the entire court system.

The possibility that the SEC under new leadership could abandon its present theories on this issue does not change this analysis. These questions will still be relevant because a subsequent administration could revive them. And more immediately, private litigants will continue to raise these questions in cases pending in the lower courts.[29]

Furthermore, the digital asset sector and the public would additionally benefit from the Court considering the issue now. The SEC's current *ad hoc* approach does not provide market participants sufficient clarity to operate. The digital asset industry's substantial (and growing) size demands clear compliance obligations to ensure stability and proper functioning. While regulation is essential, the functional impossibility of securities registration for activity involving digital assets stifles innovation and risks the loss of crypto businesses (along with jobs and tax revenue) in the United States—a matter of great concern to Congress.[30]

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[29] *See, e.g.*, *Clifford* v. *Tron Foundation*, No. 20 Civ. 2804 (S.D.N.Y.), ECF No. 114 at 22 (in order denying motion to dismiss, considering the argument that the plaintiffs "could not have known that TRX was a security until they read the [SEC's] Framework"); *Williams* v. *Binance*, No. 20 Civ. 2803 (S.D.N.Y.), ECF No. 1 ¶ 9 (alleging in complaint that certain digital assets are securities).

[30] *See, e.g.*, Letter from Paul Grewal, Chief Legal Officer, Coinbase Global, Inc., to Vanessa Countryman, Sec'y, U.S. SEC. & EXCH. COMM'N, Re: Petition for Rulemaking – Digital Asset Securities Regulation at 13 (July 21, 2022),

This regulatory uncertainty leaves even firms that are admirably compliant and serve essential market functions, like Coinbase, in a constant state of limbo. Even if the SEC were to abandon this litigation, this case offers an ideal opportunity to definitively interpret existing law and timely guide legislative drafters aiming to fill regulatory gaps.

The Second Circuit and its sister Circuits have not opined on the application of *Howey* to secondary transactions involving digital assets. This Court—as a leader in the development of the securities laws and the most popular destination for putative securities class actions—has a unique role to play in helping provide needed clarity here.[31] Although the Court's ruling in *SEC* v. *Ripple Labs* is pending, the issue here is distinct. The defendant in *Ripple Labs* is a company that sold digital assets in fundraising transactions, while Coinbase simply provides a platform for

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https://tinyurl.com/2s493w7x.

[31] *See, e.g.*, *Morrison* v. *National Australia Bank*, 561 U.S. 247, 260 (2010) (noting that D.C. Circuit deferred to Second Circuit in adopting erroneous conduct and effects test "because of [the Second Circuit's] 'preeminence in the field of securities law'") (quoting *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987)); *id*. at 276 (Stevens, J., concurring) (describing Second Circuit as the "'Mother Court' of securities law'") (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting)); *see also Karen Patton Seymour, Securities and Financial Regulation in the Second Circuit*, 85 FORDHAM L. REV. 225, 225 (2016) ("[T]he Second Circuit has been the leading interpreter of U.S. securities laws and arguably the most influential court in the area of securities regulation in the world.").

users to effect blind bid-ask transactions in digital assets. This raises independent questions that require careful examination. Now is an appropriate time for the Second Circuit to lend its expertise to the weighty questions raised by the intersection of digital assets and our Nation's securities laws.

CONCLUSION

For the reasons discussed above, this Court should grant Coinbase's Petition.

Dated: January 24, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief complies with the type-volume limitation of 2nd Cir. R. 29.1, Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains **6322** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

Dated: January 24, 2025

/s/ *Samson A. Enzer*
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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed on this date with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users such that service will be accomplished by the appellate CM/ECF system.

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