UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

COMMONWEALTH OF KENTUCKY, by and through its Attorney General, Russell Coleman; STATE OF NEBRASKA, by and through its Attorney General, Michael T. Hilgers; STATE OF TENNESSEE, by and through its Attorney General, Jonathan Skrmetti; STATE OF WEST VIRGINIA, by and through its Attorney, General Patrick Morrisey; STATE OF IOWA, by and through its Attorney General, Brenna Bird; STATE OF TEXAS, by and through its Attorney General, Ken Paxton; STATE OF MISSISSIPPI, by and through its Attorney General, Lynn Fitch; STATE OF MONTANA, by and through its Attorney General, Austin Knudsen; STATE OF ARKANSAS, by and through its Attorney General, Tim Griffin; STATE OF OHIO, by and through its Attorney General, David Yost; STATE OF KANSAS, by and through its Attorney General, Kris W. Kobach; STATE OF MISSOURI, by and through its Attorney General, Andrew Bailey; STATE OF INDIANA, by and through its Attorney General, Theodore E. Rokita; STATE OF UTAH, by and through its Attorney General, Sean D. Reyes; STATE OF LOUISIANA, by and through its Attorney General, Elizabeth B. Murrill; STATE OF SOUTH CAROLINA, by and through its Attorney General, Alan Wilson; STATE OF OKLAHOMA, by and through its Attorney General, Gentner Drummond; STATE OF FLORIDA, by and through its Attorney General, Ashley Moody; and DEFI EDUCATION FUND,

Plaintiffs,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION; GARY GENSLER, in his official capacity as Chair of the U.S. Securities and Exchange Commission; CAROLINE A. CRENSHAW, JAIME E. LIZÁRRAGA, HESTER M. PEIRCE; MARK T. UYEDA, in their official capacity as Commissioners of the U.S. Securities and Exchange Commission,

Defendants.

No. ______

COMPLAINT

Plaintiffs Commonwealth of Kentucky, State of Nebraska, State of Tennessee, State of West Virginia, State of Iowa, State of Texas, State of Mississippi, State of Montana, State of Arkansas, State of Ohio, State of Kansas, State of Missouri, State of Indiana, State of Utah, State of Louisiana, State of South Carolina, State of Oklahoma, State of Florida (collectively, "the States"), and DeFi Education Fund bring this civil action against the above-listed Defendants for declaratory and injunctive relief and allege as follows:

1. The development of blockchain technology has launched a vibrant new trillion-dollar digital asset industry that has encouraged innovation, created jobs, and made financial services more accessible for millions of people throughout the Nation. That promising new industry has not gone unnoticed by state governments, which have exercised their broad authority to build new regulatory frameworks to encourage the growth of this emerging sector while also protecting consumers. By taking the regulatory lead in this rapidly changing area, States have fulfilled their constitutional role as "laboratories for experimentation to devise various solutions" for government oversight of the digital asset industry, allowing other States and the federal government to learn from their experiences. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

2. Some States, for instance, have enacted regulatory regimes for financial institutions focused on digital assets; others have required digital asset platforms to obtain money-transmitter licenses and security bonds to guarantee liquidity; others have embraced the rise of digital assets more generally, such as by allowing citizens to use digital assets to pay taxes and fees, or by amending their unclaimed-property laws to provide specific procedures for escheatment of digital assets. While state regulatory approaches have varied in accordance with local needs, they have consistently endeavored to provide transparent and administrable rules of the road. And Congress has repeatedly declined proposals to give federal agencies broad regulatory power over digital assets.

3. The Securities and Exchange Commission (SEC) has not respected this allocation of authority. Instead, without Congressional authorization, the SEC has sought to unilaterally wrest regulatory authority away from the States through an ongoing series of enforcement actions targeting the

digital asset industry, premised on the theory that practically all purchases and sales of digital assets are "investment contracts"—and so qualify as securities transactions under the Securities Act of 1933 and the Exchange Act of 1934—because some digital asset buyers expect those assets to increase in value based on the efforts of their creators. According to the SEC, that theory is sufficient to empower it to regulate secondary-market sales of digital assets as securities transactions, and to require digital asset platforms both to register with the SEC as securities exchanges, dealers, brokers, and clearing agencies and to comply with all manner of requirements under the federal securities laws—even though doing so preempts some state laws, pressures States to change others, and subjects the entire digital asset industry to a single ill-fitting regime that Congress enacted for an entirely different kind of financial instrument.

4. The SEC's sweeping assertion of regulatory jurisdiction is untenable. The digital assets implicated here are just that—assets, not investment contracts covered by federal securities laws. They do not entail any traditional investment relationship, in which the investor invests capital and the promoter assumes an ongoing obligation to use that capital in a common enterprise to generate returns that the investor will share. Under the plain text of the federal securities laws, the well-settled meaning of the term "investment contract" when Congress enacted those laws, and binding Supreme Court precedent, the SEC does not have expansive power to regulate any and all transactions involving such digital assets as securities transactions.

5. The SEC's approach also runs headlong into the major questions doctrine, as it would require interpreting 90-year-old statutory text to empower the SEC to exercise novel and transformative authority that Congress has never afforded (and, in fact, has conspicuously declined to grant). The SEC's logic would empower the agency to regulate (and displace State regulation of) not only all transactions in digital assets but also a boundless array of other assets as well, from collectibles to luxury goods and beyond. Someone who purchases limited-run Nike sneakers intending to resell them, for example, may well expect to turn a profit based on Nike's managerial and promotional efforts to create demand for and otherwise increase the value of those desirable shoes. Under the SEC's newly minted view of its statutory reach, that would apparently be enough to turn the sale of

those sneakers into a securities transaction regulated by the SEC, and any auction house or consignment store that facilitates such sales into an unregistered securities exchange—subjecting them to the onerous and ill-suited requirements of the federal securities laws, and displacing state regulations that should properly govern. That sweeping claim of agency dominion reaches far beyond anything Congress authorized in any statute, and certainly far beyond anything Congress authorized with the clarity that would be necessary to evince its intention to grant such extraordinary regulatory power.

6. Perhaps recognizing the problems with its regulatory landgrab, the SEC has scrupulously avoided promulgating its position in a written rule through notice-and-comment rulemaking. Instead, the SEC is in "enforcement-only" mode. Danny Nelson, *SEC in 'Enforcement Only Mode' for Crypto, Commissioner Peirce Says at ETHDenver*, CoinDesk (Mar. 8, 2024), https://tinyurl.com/bdzd4z4x. For an agency bound and determined to stretch its authorities "as far as they go," this regulating-by-enforcement approach has the advantage of limitless enforcement discretion. Letter from Gary Gensler, SEC Chair, to Sen. Elizabeth Warren (Aug. 5, 2021), https://tinyurl.com/4c9tfn3t [hereinafter "Gensler Letter"]. But it is a disaster for the entities subjected to the SEC's enforcement whims. The SEC's exaggerated understanding of its own authority—and its studious refusal to expose that understanding to public scrutiny—leaves current and potential industry participants struggling to discern what legal obligations they may be undertaking. And even if not all SEC enforcement actions may succeed, the threat alone chills the entire industry, as "the power of the sword of Damocles is not that it falls but that it hangs." *Biloxi Reg'l Med. Ctr. v. Bowen*, 835 F.2d 345, 352 (D.C. Cir. 1987). Indeed, given the reputational disadvantages and other business harms (not to mention legal costs) that defending against an enforcement action imposes, it is little wonder that some digital asset platforms threatened with such actions have opted for quick settlements and that others have even pulled up stakes and moved overseas.

7. At bottom, the SEC's regulatory overreach defies basic principles of federalism and separation of powers. In our federal system, it is the States that have "broad authority to enact legislation for the public good," while "the National Government possesses only limited powers" defined by the Constitution. *Bond v. United States*, 572 U.S. 844, 854 (2014); *see also* Eric Wessan & Phil Pillari,

Problems with Rulemaking by District Court Enforcement Action: The SEC's Improper Cryptocurrency Regulation, 31 Harvard J.L.P.P.: Per Curiam 2 (Summer 2024) (noting SEC's enforcement actions do not adequately consider preemption concerns). And Article I of the Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Instead of respecting that constitutional balance of power, and allowing States to develop and enforce their own tailored digital asset regulations based on their own policy priorities (furthering their constitutional role as laboratories of democracy), the SEC's assertion of sweeping jurisdiction without congressional authorization deprives States of their proper sovereign role and chills the development of innovative regulatory frameworks for the digital asset industry. Still worse, by attempting to shoehorn digital assets into ill-fitting federal securities laws and inapt disclosure regimes, the SEC is harming the very citizens it purports to protect, by displacing better-suited state laws that have been carefully designed to ensure consumer protection in the digital asset industry. Plaintiffs therefore bring this suit seeking declaratory and injunctive relief to prevent the SEC from continuing its unlawful campaign of regulatory overreach and interference with state sovereignty.

PARTIES

8. Plaintiff Commonwealth of Kentucky is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Kentucky is authorized to bring legal actions on behalf of the Commonwealth and its citizens. Ky. Rev. Stat. §15.020. The Attorney General is "charged with the duty of protecting the interest of all the people," *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710, 715 (Ky. 1973), including by ensuring that government actors perform their duties lawfully, *see Commonwealth ex rel. Beshear v. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016); *see also Cameron v. EMW Women's Surgical Ctr., PSC*, 595 U.S. 267, 278 (2022) (recognizing that the Attorney General is "deemed Kentucky's 'chief law officer' with the authority to represent the Commonwealth 'in all cases'").

9. Plaintiff State of Nebraska is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. Michael T. Hilgers is the Attorney General of Nebraska. He is authorized to appear for the State in any civil matter in which

the State has an interest. Neb. Rev. §Stat. 84-203.

10. Plaintiff State of Tennessee is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. Jonathan Skrmetti, the Attorney General and Reporter of Tennessee, is authorized by statute to direct "all civil litigated matters … in which the state … may be interested." Tenn. Code Ann. §8-6-109(b)(1).

11. Plaintiff State of West Virginia is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. Patrick Morrisey is the Attorney General of the State of West Virginia. The Attorney General "is the State's chief legal officer," *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 107 (W. Va. 2002), and his express statutory duties include "appear[ing] as counsel for the state in all causes pending … in any federal court[] in which the state is interested," W. Va. Code §5-3-2.

12. Plaintiff State of Iowa is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. Brenna Baird is the Attorney General of Iowa. She is authorized by state law to sue on Iowa's behalf. *See* Iowa Code §13.2.

13. Plaintiff State of Texas is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. Ken Paxton is the Attorney General of Texas. He is the chief legal officer of the State of Texas and has the authority to represent Texas in civil litigation. *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001).

14. Plaintiff State of Mississippi is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. Lynn Fitch is the Attorney General of Mississippi. She is authorized by state law to sue on Mississippi's behalf. *See* Miss. Code Ann. §7-5-1.

15. Plaintiff State of Montana is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. Montana brings this suit through its Attorney General, Austin Knudsen. He is the chief legal officer of the State of Montana and has the authority to represent the State in federal court. Mont. Const. art. VI, §4(4); Mont. Code Ann. §2-15-501(1).

16. Plaintiff State of Arkansas is a sovereign State of the United States of America. Arkansas sues to vindicate its sovereign, quasi-sovereign, financial, and proprietary interests. Tim Griffin is the Attorney General of Arkansas. General Griffin is authorized to "maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts." *See* Ark. Code Ann. §25-16-703.

17. Plaintiff State of Ohio is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. Dave Yost is the Attorney General of Ohio. He is "the chief law officer for the state and all its departments." Ohio Rev. Code Ann. §109.02. He is authorized to represent the State of Ohio "in any court or tribunal in a cause … in which the state is directly interested." *Id.*

18. Plaintiff State of Kansas is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. Kansas brings this suit through its Attorney General Kris W. Kobach. He is the chief legal officer of the State of Kansas and has the authority to represent Kansas in federal court. Kan. Stat. Ann. §75-702(a).

19. Plaintiff State of Missouri is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. Missouri brings this suit through its Attorney General Andrew Bailey. He is the chief legal officer of the State of Missouri and has the authority to represent Missouri in federal court. Mo. Rev. Stat. §27.060.

20. Plaintiff State of Indiana is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. Indiana brings this suit through its Attorney General Theodore E. Rokita. He is authorized to "represent the state in any matter involving the rights or interests of the state." Ind. Code §4-6-1-6.

21. Plaintiff State of Utah is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. Utah brings this suit through its Attorney General Sean D. Reyes. He is the chief legal officer of the State of Utah and has the authority to represent Utah in federal court. Utah Const. art. VII, §16; Utah Code §67-5-1(1)(b).

22. Plaintiff State of Louisiana is a sovereign State of the United States of America, and it

sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. Louisiana brings this suit through its Attorney General Elizabeth B. Murrill. She is authorized by Louisiana law to sue on the State's behalf. La. Const. art. IV, §8.

23. Plaintiff State of South Carolina is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. South Carolina brings this suit through its Attorney General Alan Wilson. He is authorized by South Carolina law to sue on the State's behalf. S.C. Code Ann. §1-7-40.

24. Plaintiff State of Oklahoma is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and proprietary interests. Oklahoma brings this suit through its duly elected Attorney General Genter Drummond. Being "the chief law officer of the state," Okla. Stat. tit. 74 §18, General Drummond is empowered to "appear for the state and prosecute and defend all actions and proceedings in any of the federal courts in which the state is interested as a party," *id.* §18b(A)(2).

25. Plaintiff State of Florida is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Florida, Ashley Moody, is authorized to appear for the State in any civil matter in which it has an interest. *See* Fla. Stat. §16.01(4)-(5). General Moody possesses broad power to vindicate injuries to the State at any governmental level. *See, e.g., Florida v. Nelson*, 576 F.Supp.3d 1017, 1030 (M.D. Fla. 2021); *Florida v. Becerra*, 544 F.Supp.3d 1241, 1253–54 (M.D. Fla. 2021).

26. Plaintiff DeFi Education Fund (DEF) is a nonpartisan, nonprofit research and advocacy group based in Washington, D.C. DEF's mission is to explain the benefits of decentralized finance, which is part of the digital-asset ecosystem, and to advocate for and educate about sound policy for decentralized finance. DEF advocates for the rights of decentralized-finance users, participants, and software developers working to create new decentralized finance products using blockchain technology. Among other things, DEF educates the public about decentralized finance through weekly newsletters, op-eds, podcasts, and print media; meets with members of Congress to discuss decentralized finance and related issues; and submits public comments on proposed rulemakings that

impact decentralized finance. DEF also uses digital assets itself.

27. Defendant SEC is an agency of the federal government headquartered at 100 F Street NE, Washington DC 20549. The SEC is charged with enforcing the federal securities laws, including the Securities Act of 1933, 15 U.S.C. §77a *et seq.*, and the Exchange Act of 1934, 15 U.S.C. §78a *et seq*.

28. Defendant Gary Gensler is Chair of the SEC. He is sued in his official capacity.

29. Defendant Caroline A. Crenshaw is a Commissioner of the SEC. She is sued in her official capacity.

30. Defendant Jaime E. Lizárraga is a Commissioner of the SEC. He is sued in his official capacity.

31. Defendant Hester M. Peirce is a Commissioner of the SEC. She is sued in her official capacity.

32. Defendant Mark T. Uyeda is a Commissioner of the SEC. He is sued in his official capacity.

JURISDICTION AND VENUE

33. This Court has subject-matter jurisdiction under 28 U.S.C. §§1331 and 1346.

34. An actual controversy exists between the parties under 28 U.S.C. §2201(a).

35. This Court has authority to grant Plaintiff States' requested relief and other appropriate relief pursuant to 5 U.S.C. §§705-06, 28 U.S.C. §§2201-02 (the Declaratory Judgment Act), and its inherent equitable powers.

36. Plaintiffs' claims "seek[] relief other than money damages," so the government has waived sovereign immunity. 5 U.S.C. §702; *see Webster v. Doe*, 486 U.S. 592, 601-05 (1988); *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 672 (6th Cir. 2013) ("§702's waiver of sovereign immunity extends to all non-monetary claims against federal agencies and their officers sued in their official capacity, regardless of whether plaintiff seeks review of 'agency action' or 'final agency action' as set forth in §704."). And a suit against an individual officer for injunctive relief is not a suit against the sovereign. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88 (1949).

37. Venue is proper in this district under 28 U.S.C. §1391(e)(1). Defendants are United

States agencies and officers sued in their official capacities. Plaintiff Commonwealth of Kentucky is a resident of every judicial district in its sovereign territory, including this judicial district and division.

NATURE OF THE ACTION

A. The Digital Asset Industry and State Regulation.

38. Digital assets are an application of blockchain technology. A blockchain is what is known as a distributed ledger, which is a database maintained by many computers that can record and verify data across the entire network. States and other innovators across the United States and around the world have adopted blockchain technology for a wide range of uses, including numerous non-financial uses such as identity verification, supply chain management, and records and data storage. *See, e.g.*, Will Canny, *California Leads the Way as U.S. Federal, State Agencies Consider Blockchain's Applications: Bank of America*, CoinDesk (Mar. 24, 2023), https://tinyurl.com/yc623vyu (describing how California's Department of Motor Vehicles created a blockchain-based solution to record vehicle titles).

39. Digital assets, including those known as "cryptocurrencies," "crypto assets," "tokens," or "coins," are essentially computer code entries on blockchain technology that record the owner's specific rights associated with a digital asset. Each blockchain has its own "native" or "base" token—i.e., a digital currency designed to interact directly with the blockchain and ensure the proper function of the blockchain's protocol. The validity of the blockchain is generally maintained by the efforts of a distributed network of validators (for instance, by carrying out validating transactions or by staking tokens on the validity of transaction records). Those users are then rewarded by the blockchain protocol with additional tokens for their efforts, creating a financial incentive to ensure the ongoing stability and accuracy of the blockchain.

40. Digital assets are initially offered by their creators in a variety of ways. Once issued, they can be bought and sold through secondary transactions on digital asset exchanges, such as Coinbase or Kraken. On these exchanges, one customer's offer to buy or trade an asset at a particular price is matched with another customer's offer to sell or trade the asset at that price—the parties trade one digital asset for another digital asset or fiat currency, much as two parties might trade any other type

of asset or commodity.

41. Although this history of digital assets can be traced to the early 1990s, the industry gained national salience with the 2008 debut of Bitcoin, the first widely used—and still the world's most common—digital asset. *See* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (Oct. 31, 2008), https://tinyurl.com/4536hnsv. Since then, the digital asset industry has exploded, attracting ever more entrepreneurs and developers and powering a wide range of applications.

42. Many digital assets supply a means to transfer funds or pay for products and services without an intermediary like a bank, reducing wait times, settlement delays, and fees, while also providing 24/7 liquidity and access to markets. In that way, digital assets help provide access to financial services for the nearly 20% of American adults who have no or very limited access to banking. *See* Bd. of Governors of the Fed. Rsrv. Sys., *Economic Well-Being of U.S. Households in 2021*, at 43-44 (May 2002), https://tinyurl.com/yr53p9f3; Cecilia Chapiro, *Working Toward Financial Inclusion with Blockchain*, Stanford Soc. Innovation Rev. (Nov. 24, 2021), https://tinyurl.com/4xhjrxpy.

43. Digital assets also can offer a cheaper and easier way to send cross-border payments. *See Crypto Could Help Save People in the US Billions of Dollars a Year in Remittance Fees*, Coinbase (Apr. 3, 2023), https://tinyurl.com/msj3mxjk. Digital assets have also facilitated cross-border charitable contributions in the wake of natural disasters and conflict, *see, e.g.*, *Crypto Donations Provide Fast Relief for Earthquake Victims in Turkey and Syria*, Chainalysis (Feb. 21, 2023), https://tinyurl.com/yzbtjzem; Anna Baydakova, *Ukraine Has Raised $225M in Crypto to Fight Russian Invasion, but Donations Have Stagnated Over The Last Year: Crystal*, CoinDesk (July 27, 2023), https://tinyurl.com/bdmrbzrs. Companies like Nike have created digital assets to promote their products, *see .SWOOSH*, Nike, https://tinyurl.com/mr3adkjx (last visited Nov. 13, 2024), and celebrities like Snoop Dogg have created collectible digital assets that can be bought or traded like traditional merchandise, *see* Rosie Perper, *Snoop Dogg Drops New NFTs That Evolve With His Tour*, Coindesk (June 13, 2023), https://tinyurl.com/5bnhruee.

44. In recent years, digital assets have become ubiquitous. Roughly one in every five Americans—more than 50 million people—has acquired a digital asset. *See, e.g.*, *New Survey of 2,000+*

American Adults Suggests 20% Own Crypto and the Vast Majority See an Urgent Need to Update the Financial System, Coinbase (Feb. 27, 2023), https://tinyurl.com/39h8w744. And more and more U.S. businesses now accept Bitcoin and other digital assets as payment for anything from groceries to airline tickets to real estate. *See The Use of Cryptocurrency in Business*, Deloitte (June 2023), https://tinyurl.com/yzw6xy5d; Jenn Hall, *Can You Buy A House With Bitcoin?*, Bitcoin Magazine (May 26, 2022), https://tinyurl.com/3w6vz2wp.

45. Collectively, the digital asset industry is now valued at more than $3 trillion, *see Cryptocurrency Prices Today By Market Cap*, Forbes, https://tinyurl.com/mryuw5uk (last visited Nov. 13, 2024), and has been predicted by some to continue growing exponentially, *see* James Hunt, *Bernstein Predicts Crypto Market Cap Could Grow to $7.5 Trillion by End of 2025*, The Block (Mar. 14, 2024, 8:00 AM), https://tinyurl.com/yx849nb3. Its daily trading volume is in the tens of billions of dollars. *See 2024 Q2 Crypto Industry Report*, CoinGecko (updated July 16, 2024), https://tinyurl.com/53fhwaw5. Bitcoin alone has a total value in circulation of some $450 billion, making it an important international currency. *See* Federal Reserve Bank of NY, *The Financial Stability Implications of Digital Assets*, No. 1034, at 9 (Sept. 2022), https://tinyurl.com/5b2rkafh. In addition, more than $25 billion in Bitcoin is held in exchange-traded funds—with some $1 billion of that amount coming in the two weeks after the SEC blessed proposals by Nasdaq and the New York Stock Exchange to list shares of trusts holding Bitcoin. *See* Avik Roy, *The SEC's Bitcoin ETF Approvals Have Forever Altered the Global Monetary System*, Forbes (Jan. 24, 2024), http://tinyurl.com/yyj92pbf.

46. These benefits have in turn redounded to States and their localities, many of which—including the Plaintiff States here—have worked to attract digital asset industry participants by providing them with regulatory flexibility and certainty to facilitate their operations, helping the State diversify its economy and increase its tax base in the process. *See, e.g.*, Shelby Stewart, *Cryptocurrency Gets Warm Texas Welcome from Gov. Abbott*, Houston Chronicle (Jun. 22, 2021), https://tinyurl.com/k895x23x; *Gov. DeSantis Seeks 'Crypto Friendly' Florida*, CBS News (Dec. 10, 2021), https://tinyurl.com/yc8a7pk6; David Yaffe-Bellany, *The Rise of the Crypto Mayors*, N.Y. Times (Jan. 25, 2022), https://tinyurl.com/2sp9xu2j.

47. One way States have sought to attract digital asset industry participants is through tax policy. States such as Kentucky, Texas, and Wyoming offer tax breaks to digital asset miners—the entities and people responsible for validating digital asset transactions on the underlying blockchain network. *See* Sebastian Sinclair, *These 5 Crypto-friendly US States Show Initiative on Tax Laws* (Jan. 25, 2023), https://tinyurl.com/yyj657tn. Other States, such as Colorado, have made the forward-leaning choice to accept digital assets as a medium of payment for state tax obligations. *See* Colo. Dep't of Rev., *Cryptocurrency* (2024), https://tinyurl.com/2s37rdy7.

48. Utah has welcomed the digital asset industry by fostering the creation of a new corporate form built on blockchain technology: the decentralized autonomous organization. Decentralized autonomous organizations offer an alternative structure for businesses looking to shift decisional authority away from centralized boards or managers and to instead put power in the hands of individual stakeholders, harnessing the power of blockchain technology to democratize decision-making, increase efficiency, improve transparency, and decrease costs. *E.g.*, Utah Dep't of Commerce, *The Benefits of Registering Your LLC as a DAO* (Mar. 27, 2024), https://tinyurl.com/4bwkjwwu.

49. Wyoming has chartered a new type of financial service company bridging the gap between digital assets and the traditional financial system. Known as special purpose depository institutions, these companies give citizens a safe place to store digital assets, freeing them from the risks of loss and fraud associated with self-storing items of value. *See* Wyo. Div. of Banking, *Special Purpose Depository Institutions* (2021), https://tinyurl.com/3rdpkf5p. And Nebraska has gone even further, creating a new charter for digital asset depositories and authorizing existing state-chartered banks to operate digital asset divisions. *See* Neb. Dep't of Banking & Fin., *Digital Assets*, https://tinyurl.com/34htakfn (last visited Nov. 13, 2024). For Nebraska, this helps "bring high-tech jobs and digital asset operations to the state," Neb. Rev. Stat. §8-3002(1); *see id.* §8-3001; for its citizens, it offers the ability to lend and borrow digital assets, use digital assets as collateral, and provide digital asset payment services.

B. The SEC's Authority Under the Securities Act and the Exchange Act.

50. The Securities Act and the Exchange Act authorize the SEC to regulate "securities," a term statutorily defined by a long list of various categories of financial instruments:

> The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in 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(a)(1); *see* 15 U.S.C. §78c(a)(10) (similar).

51. Distilled to their essence, the Acts make it unlawful for an entity to deal in securities without registering both itself and the security with the SEC, making detailed disclosures, and obtaining the SEC's pre-approval. Notably, the Acts also carve out certain areas for exclusive federal control. For instance, the Exchange Act expressly prohibits States from imposing their own "capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements" on entities that qualify as securities brokers or dealers. 15 U.S.C. §78*o*(i)(1). As a result, entities that must register with the SEC as brokers or dealers cannot be subject to bonding or licensing-fee requirements imposed by, e.g., state money-transmitter licensing regimes. *Cf. supra* ¶2.

52. While the definition of "securities" in the Securities and Exchange Acts is extensive, it does not purport to include anything and everything one might obtain as an "investment" in the colloquial sense, or even everything traded by investors on markets. For instance, it does not include commodities—things like gold, wheat, or sugar—even though they are traded by sophisticated investors on markets all throughout the country. The limited restrictions Congress has imposed in the commodities trading context are very different from the restrictions governing securities, and Congress has allocated their enforcement to other agencies (first the U.S. Department of Agriculture's Commodity Exchange Authority, and later the Commodity Futures Trading Commission (CFTC)).

Likewise, in its original form, the definition of "securities" did not include any currency—i.e., things like the U.S. dollar—even though currency trading is older than our Republic. Congress had to amend the statute in 1982 when it decided that it wanted to empower the SEC to regulate certain instruments traded on "exchange[s] relating to foreign currency." *Id.* §78c(a)(1); *see* Pub. L. No. 97-303, §2, 96 Stat. 1409 (1982).

53. The common feature among the instruments included in the definition of "securities" thus is not that people may purchase them hoping to turn a profit, but that they all involve some sort of *ongoing relationship* between the purchaser and the issuer or seller. Broadly speaking, the purchaser agrees to invest its capital in exchange for a stake in the enterprise, and the issuer or seller agrees in return to put the investor's capital to work in that enterprise's affairs and share with investors some sort of returns. For instance, purchasing a "stock" entitles the purchaser both to a share in the company and to a commitment that the company's management will endeavor to maximize shareholder value and return it through things like dividends. So too with a "bond," or a "note," or "participation in any profit-sharing agreement"; those investments are backed by a forward-looking commitment to use the investor's capital to generate and share whatever form of return may be promised. Those commitments and continuing obligations on the part of the issuer or seller are typically embodied in contracts, giving effect to the parties' ongoing relationship.

54. So too for "investment contracts," which are another of the enumerated categories of "security" in the Securities and Exchange Acts. As the Supreme Court explained in its seminal decision addressing "investment contracts," that term does not encompass any and all transactions involving something one may purchase with the hope that it will increase in value. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946). It instead applies only when parties have entered into "a contract or scheme for 'the placing of capital or laying out of money in a way intended to secure income or profit from its employment'"—that is, an ongoing relationship involving an investment into a common enterprise, with continuing obligations on the part of the issuer or seller to put that capital to work in the enterprise and share resulting profits. *Id.* (quoting *State v. Gopher Tire & Rubber Co.*, 177 N.W. 937, 938 (Minn. 1920)).

55. The facts of *Howey* are illustrative. There, a Florida corporation sold buyers plots of land planted with orange trees along with a service contract to cultivate, harvest, and market the oranges. *Id.* at 295-96. In return, the purchasers were entitled to a percentage of the net profits from the sale of the orange crop from the entire grove. *Id.* at 296. The Supreme Court concluded that this arrangement constituted an investment contract. As the Court explained, neither "an ordinary real estate sale" nor "an agreement by the seller to manage the property for the buyer" alone would constitute an "investment contract"—even if the purchaser may expect the land to prove profitable. *Id.* at 297-98. But the seller there was "offering something more than fee simple interests in land, something different from a farm or orchard coupled with management services." *Id.* at 299. It was "offering an opportunity to contribute money and to share in the profits of a large citrus fruit enterprise managed and partly owned by" the seller. *Id.* That kind of arrangement, in which "[t]he investors provide the capital and share in the earnings and profits," and "the promoters manage, control and operate the enterprise" for the investors' benefit, is an investment contract "regardless of the legal terminology in which such contracts are clothed." *Id.* at 300.

56. Courts have applied that same understanding of the term "investment contract" ever since the early decisions interpreting the state "blue sky" laws from which Congress drew that term. *See id.* at 298. For instance, courts have found an investment contract in a sale of muskrats coupled with a contract for the seller to raise those muskrats, sell the pelts, and pay the buyer a proportionate share of all proceeds from the muskrat-breeding operation—in other words, an ongoing relationship between the purchaser and the issuer or seller. *State v. Robbins*, 240 N.W. 456, 457 (Minn. 1932); *see Cont'l Mktg. Corp. v. SEC*, 387 F.2d 466, 468-71 (10th Cir. 1967) (similar case involving beavers). Likewise, courts have found an investment contract in a sale of land coupled with a contractual obligation for the seller to harvest crops from that land and divide any profits with the buyer. *See, e.g.*, *Prohaska v. Hemmer-Miller Dev. Co.*, 256 Ill.App. 331, 334-35 (1930); *Kerst v. Nelson*, 213 N.W. 904, 904-05 (Minn. 1927). But no court has ever found that the mere purchase of muskrats, or orange groves, or any other asset constitutes an investment contract just because the buyer expects that asset to produce or increase in value.

57. In short, in keeping with the other terms in the definition of "security," "investment contract" encompasses only transactions that contemplate some form of common enterprise, with ongoing obligations on the part of the issuer or seller toward the buyer, such as the sale of an asset coupled with a contractual promise by the seller to use the purchase price to develop that asset and share with the buyer any profits it generates. That distinction makes sense, because by coupling the sale of an asset with such a commitment, an acre in an orange grove or a muskrat becomes little different from a share in an orange-growing company or a furrier. But without that coupling, an asset is just an asset, and a muskrat is just a muskrat. *See Revak v. SEC Realty Corp.*, 18 F.3d 81, 87 (2d Cir. 1994) (explaining that an investment contract requires "something more" than the mere sale of an asset; it requires "the opportunity to join in a 'common enterprise'"); *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 11 (1st Cir. 1993) ("[W]hat was purchased in this case was not a share of a business enterprise and so not a security.").

58. That distinction also accounts for the very different federal regulatory regimes governing securities versus commodities. Because investors in securities are investing in the common enterprise itself, they need information about the plans, views, and qualifications of those who will manage it. The federal securities laws thus impose substantial disclosure requirements on those who issue securities. 15 U.S.C. §77e(a), (c); *see SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1085 (9th Cir. 2010).

59. No such federal disclosure obligations apply, by contrast, to sellers of commodities, because a commodity purchase embodies no ongoing obligation by the seller that would lead the purchaser to want more information about the seller's qualifications and plans. *See* 7 U.S.C. §1a(9) (defining "commodity"). The CFTC's authority over spot trading in commodities markets is accordingly much more limited than the SEC's authority over securities markets: The CFTC may regulate only to prevent and penalize fraudulent and manipulative activities. *See* 7 U.S.C. §9; 17 C.F.R. §§180.1, 180.2.

60. That long-settled understanding of the terms "security" and "investment contract" also ensures that the SEC cannot insert itself into all walks of commercial life. After all, people

purchase all manner of things with a reasonable expectation that they will increase in value, in part owing to the efforts of those who create and sell them. Someone who purchases limited-run Nike sneakers, for example, may well expect to turn a profit based on Nike's managerial and promotional efforts to enhance the value of those coveted shoes. So too for someone who purchases a bottle of wine from a well-known winery, a luxury watch from a famed watch company, or a painting from a prominent artist. People routinely purchase things that they hope will increase in value owing at least in part to the reputation and efforts of those who produce them. If that alone rendered all such transactions "investment contracts," then the SEC's regulatory authority would be boundless.

C. The SEC's Repeated Public Statements Disclaiming Broad Authority Over Digital Assets.

61. Whether or not a transaction is an "investment contract" has profound consequences for determining which governmental entity can properly exercise regulatory authority. For its part, in the early years of the digital asset industry, the SEC gave no indication that it thought it had sweeping authority over all digital asset transactions that would displace state regulation. In fact, Bitcoin had been around for nearly a decade, and many other digital assets were in broad circulation, before the SEC even suggested that it might have some authority over certain digital asset transactions.

62. The SEC's first such suggestion came in the context of exploring whether the terms of an initial offering of a digital asset by its developer might render it an "investment contract" under the Securities and Exchange Acts. In 2017, the SEC issued a report on an investigation into an unincorporated organization called the DAO that—according to the SEC—had sold DAO tokens in exchange for a stake in its plans to fund various projects using the money generated by those sales. *See* SEC, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO* (July 2, 2017), http://tinyurl.com/mrz4b8hw. In the SEC's view, that initial offering qualified as an offer of "investment contracts," rendering the DAO an unregistered "issuer" of securities. *Id.* at 15-16. The SEC further posited that the secondary transactions the DAO facilitated in its tokens were investment contracts. *Id.* at 16.

63. It was not entirely clear from that 2017 report just how broad a power the SEC was

claiming. But the following year, the SEC indicated that it was relatively narrow. According to the then-Director of the Division of Corporate Finance, while an initial offering of a digital asset may qualify as an "investment contract" if its terms entitle the purchaser to a "financial interest in an enterprise," a digital asset "all by itself is not a security." William Hinman, SEC Div. of Corp. Fin., *Digital Asset Transactions: When Howey Met Gary (Plastic)*, Remarks at the Yahoo Finance All Markets Summit: Crypto (June 14, 2018), https://tinyurl.com/ymbbncnd. The Director further opined that neither of the two most prominent digital assets, Bitcoin and Ethereum, is a security, and that secondary sales of those digital assets are not investment contracts. *Id.*

64. This understanding—that digital assets standing alone are not securities, and that their bare sale is not a securities transaction—was endorsed by then-SEC Chair Jay Clayton and other Commissioners. *See* Jay Clayton, SEC Chair, *Remarks on Capital Formation at the Nashville 26|86 Entrepreneurship Festival* (Aug. 29, 2018), https://tinyurl.com/58wn8rz2; Hester Peirce, SEC Comm'r, *Regulation: A View from Inside the Machine*, Remarks at Missouri Law School, Protecting the Public While Fostering Innovation & Entrepreneurship (Feb. 8, 2019), https://tinyurl.com/2dmt2u47. Current Chair Gary Gensler also endorsed this understanding as an academic, telling students that "3/4 of the [digital asset] market is non-securities. It's just a commodity, a cash crypto." Gary Gensler, MIT, Lecture Transcript: Blockchain and Money 11 (Fall 2018), https://tinyurl.com/3jpnxysn. And early in his tenure as SEC Chair, Gensler testified to Congress that "only Congress" could address the regulation of digital assets "because right now the exchanges trading in these crypto assets do not have a regulatory framework … at the SEC." *Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part III: Hearing Before the H. Comm. on Fin. Servs.*, 117th Cong. 12 (2021); *accord* Jesse Pound, *SEC Chairman Gary Gensler Says More Investor Protections Are Needed for Bitcoin and Crypto Markets* at 12:53-59 (May 7, 2021).

65. That initial understanding made good sense. Like any asset prone to market fluctuation because of supply, popularity, and utility—fine art, vintage cars, baseball cards, and real estate, among others—some people acquire digital assets in hopes that they can take advantage of these fluctuations in value to turn a profit. People who do so, however, are not "investing" in the sense of

becoming vested in a common profit-sharing enterprise, as digital assets do not typically convey any form of legal or equitable interest in any such enterprise, or any ongoing obligation on the part of the creator (or anyone else) to manage any such enterprise for the benefit of or share its profits with those who choose to acquire those digital assets. In fact, digital asset transactions—especially the minerun secondary transactions that take place every day on digital asset exchanges—typically entail no exchange of ongoing commitments or obligations of any kind, either between the parties to the transactions or between the parties and the asset's original creator. They are just an exchange of the digital asset for something else of value; the buyer possesses and holds the digital asset itself and nothing more. And if the buyer hopes to turn a profit on the asset, she will have to do so through her own efforts, e.g., by selling it at a time when its value exceeds its purchase price.

66. Of course, that does not mean that the digital asset industry is free from regulation. Like any other industry, its participants must comply with numerous generally applicable laws, including consumer-protection laws and prohibitions on fraudulent or deceptive practices. But the fact that typical digital asset transactions alone are not securities does have important consequences for who may take the lead in regulating the digital asset industry. Because digital asset platforms are just facilitating purchases and sales of assets (not securities transactions), they do not have to register with the SEC or figure out how to comply with a host of ill-fitting obligations designed for traditional securities brokers, dealers, and exchanges, and the securities laws do not divest States of the power to regulate them.

D. The SEC Reverses Course and Purports to Displace State Authority Over Digital Assets.

67. While the SEC was initially willing to let States take the regulatory lead with respect to digital assets, the SEC under Chair Gary Gensler has pivoted to a very different tack. Despite initially maintaining that the SEC "need[ed] additional Congressional authorities" if it wanted to try to regulate major sectors of the digital asset industry, Gary Gensler, *Remarks Before the Aspen Security Forum* (Aug. 3, 2021), https://tinyurl.com/4u3xvzn5, Gensler soon purported to discover that the SEC has "ha[d] enough authority" to regulate digital asset transactions all along; insisted that the necessary rules are

already "in []place," Jennifer M. Schonberger, *SEC's Gensler: The 'Runway Is Getting Shorter' for Non-Compliant Crypto Firms*, Yahoo! News (Dec. 7, 2022), http://tinyurl.com/4rwe2k8p [hereinafter "*The 'Runway Is Getting Shorter'*"]; and proclaimed that the SEC should and would "take [its] authorities as far as they go," Gensler Letter, *supra*.

68. Before embarking on this campaign to enforce its newfound "authority," the SEC did not proceed with a notice-and-comment rulemaking to establish rules with which digital asset industry participants must comply on a prospective basis—an endeavor that would have forced the agency to consider the views of the industry it seeks to regulate, provide clear notice of any new rules of the road, and subject any such rules to judicial review. The SEC's motivation for avoiding notice-and-comment rulemaking is self-evident: As at least one Commissioner has publicly conceded, a rulemaking would force the SEC "to admit that [it] likely need[s] more, or at least more clearly delineated, statutory authority to regulate certain crypto tokens and to require crypto trading platforms to register with us." Hester M. Peirce, SEC Comm'r, *Outdated: Remarks before the Digital Assets at Duke Conference* (Jan. 20, 2023), https://tinyurl.com/mv34u2mm [hereinafter "Pierce, *Outdated*"].

69. Instead, the SEC decided to effectuate this new policy by bringing a series of aggressive and unorthodox enforcement actions, based on expansive legal theories that the agency had previously disavowed, claiming that digital asset creators and platforms failed to comply with the Securities and Exchange Acts' registration and disclosure regime. In the months after Gensler announced that the agency would take its authorities "as far as they go," Gensler Letter, *supra*, the SEC doubled the size of its digital asset enforcement unit and began increasing its investigations of participants in the digital asset market—a development that Gensler was not shy about highlighting. *See* "*The 'Runway Is Getting Shorter*,*'*" *supra* (stating, in response to a question asking whether people "should … expect more enforcement action," that "[w]e have 1,300 people in our enforcement division" and "1,100 people in our examination division"); *see also* Press Release, SEC, *SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit* (May 3, 2022), https://tinyurl.com/w8aap5cn.

70. The SEC began by bringing a lawsuit in 2022 advancing the wholly new theory that Coinbase, a prominent digital asset platform licensed in many states as a money transmitter, is an

unregistered securities exchange. The SEC did so, however, *not* by suing Coinbase or the creators of the digital assets that the SEC claims give rise to securities transactions. Instead, the SEC brought an enforcement action against a 32-year-old former Coinbase employee and his brother, alleging that they had engaged in "securities" fraud by misappropriating Coinbase's confidential information to front-run purchases of certain digital assets traded on Coinbase's platform. Complaint, *SEC v. Wahi*, No. 2:22-cv-1009 (W.D. Wash. filed July 21, 2022), Dkt.1.

71. Notably, while the Justice Department brought a parallel criminal action against the same individuals, the Department did not allege that the digital assets at issue were securities. *See United States v. Wahi*, No. 1:22-cr-392 (S.D.N.Y. July 19, 2022). But the SEC did—thus producing the oddity of a suit in which Coinbase itself was not a party able to defend against the allegation that it was unlawfully operating as an unregistered securities exchange, and the digital asset creators were not parties able to contest the characterization of those assets as securities. *Cf.* Caroline D. Pham, CFTC Comm'r, *Statement on* SEC v. Wahi (July 21, 2022), http://tinyurl.com/ytny6a9w (criticizing that suit as "a striking example of 'regulation by enforcement'"). Confronted with a host of amicus briefs protesting that it was exceeding its statutory authority, the SEC summarily ended its suit in a settlement. *See* Final Judgment, *SEC v. Wahi*, No. 2:22-cv-1009 (W.D. Wash. filed June 1, 2023), Dkt.109.

72. The SEC soon followed *Wahi* with a slew of other enforcement actions, largely against smaller-scale or unsympathetic defendants, seeking to expand its regulatory authority over digital assets by imposing retrospective liability on industry participants. *See* SEC, *Crypto Assets and Cyber Enforcement Action*, http://tinyurl.com/nvyzb3e7 (last visited Nov. 13, 2024) (listing SEC digital asset enforcement actions).

73. And though nothing in the law had changed since Gensler and others had disclaimed SEC authority over digital assets, *see supra* ¶¶63-64, by December 2022, Gensler was claiming that "we have enough authority … in this space" to fully regulate digital asset platforms. *"The 'Runway Is Getting Shorter,'" supra*. He thus insisted that digital asset platforms must "come in, talk to us, and register" with the SEC or face the risk of an enforcement action—even though the SEC had not (and, to this day, still has not) promulgated any rules or regulations establishing how digital asset platforms should

register or explaining what the SEC thinks they must do to comply with the securities laws. Gary Gensler, *Kennedy & Crypto* (Sept. 8, 2022), https://tinyurl.com/8n8ryr2m [hereinafter "Gensler, *Kennedy & Crypto*"].

74. As multiple SEC Commissioners have observed, "[u]sing enforcement actions to tell people what the law is in an emerging industry" is not a "fair way of regulating," as "one-off enforcement actions and cookie-cutter analysis does not cut it" when it comes to providing fair notice of what the law requires. Hester M. Peirce, SEC Comm'r, *Kraken Down: Statement on* SEC v. Payward Ventures, Inc. (Feb. 9, 2023), https://tinyurl.com/2mwnuppr; *see also* Hester M. Peirce, SEC Comm'r, *Overdue: Statement of Dissent on LBRY* (Oct. 27, 2023), https://tinyurl.com/42wp6ptz ("The application of the securities laws to token projects is not clear, despite the Commission's continuous protestations to the contrary. There is no path for a company like LBRY to come in and register its functional token offering. … The time and resources we expended on this case could have been devoted to building a workable regulatory framework that companies like LBRY could have followed."); Hester M. Peirce & Mark T. Uyeda, SEC Comm'rs, *Statement Regarding Denial of Petition for Rulemaking* (Dec. 15, 2023), http://tinyurl.com/5cy5ux3w [hereinafter Pierce & Uyeda, *Coinbase PFR Denial*] (dissenting from denial of petition because "addressing these important issues is a core part of being a responsible regulator"); Hester M. Peirce, *At the SEC: Nothing but Crickets Remarks at SEC Speaks* (April 2, 2024), https://tinyurl.com/4evda697 ("[P]eople have told me that they desperately want to have substantive discussions with the staff but worry that the inevitable result of a such a meeting would be a call from enforcement, not a concerted effort to work through complex regulatory issues. The Commission's announcement of a large ramp-up in its cyber- and crypto-enforcement unit[and] repeated assertions that the crypto industry is lawless … add to these fears. … We are scaring people off from coming in and having a conversation with us."); Pham, *supra* (emphasizing that digital assets regulation should be "addressed through a transparent process that engages the public to develop appropriate policy with expert input—through notice-and-comment rulemaking," because "[r]egulatory clarity comes from being out in the open, not in the dark").

75. Over the dissent of those Commissioners, the SEC nevertheless has refused to

propose for public comment any regulations setting forth its view on what purportedly brings a digital asset (or a transaction involving a digital asset) within its regulatory domain—and in fact denied a petition for rulemaking imploring the agency to do so. *See* Letter from Vanessa Countryman, Secretary, SEC, to Paul Grewal, Chief Legal Officer, Coinbase Global, Inc. (Dec. 15, 2023), http://tinyurl.com/4ezj2wa2; *see also* Gary Gensler, SEC Chair, *Statement on the Denial of a Rulemaking Petition Submitted on Behalf of Coinbase Global, Inc.* (Dec. 15, 2023), http://tinyurl.com/3w7z9xfp. *But see* Pierce & Uyeda, *Coinbase PFR Denial*, *supra*.

76. Instead, the SEC has continued to sue participant after participant in the digital asset industry, faulting them for failing to comply with requirements the agency itself previously indicated do not apply. *See, e.g.*, Press Release, *SEC Charges Crypto Asset Trading Platform Bittrex and Its Former CEO for Operating an Unregistered Exchange, Broker, and Clearing Agency* (Apr. 17, 2023), http://tinyurl.com/bdh849ta.

77. In June 2023, the SEC began bringing enforcement actions against some of the largest digital asset exchanges, Coinbase and Binance, on the theory that all of the transactions that they facilitate in several common tokens are securities transactions, rendering the exchanges unregistered securities exchanges, brokers, and clearing agencies. *See* Complaint, *SEC v. Coinbase, Inc.*, No. 1:23-cv-4738 (S.D.N.Y. filed June 6, 2023) ("Coinbase Complaint"); Complaint, *SEC v. Binance Holdings, Ltd.*, No. 1:23-cv-1599 (D.D.C. filed June 5, 2023) ("Binance Complaint").

78. In the Coinbase case, the SEC asserted that all transactions in 12 tokens listed for trading on Coinbase (or available for trading on decentralized exchanges through Coinbase's Wallet application) are securities transactions covered by the federal securities laws, even when they are just secondary-market sales like those made using Coinbase or its Wallet application.

79. The digital assets that the SEC has targeted in the Coinbase suit include SOL, the native token of the Solana blockchain; ADA, the native token of the Cardano blockchain; MATIC, the native token of the Polygon blockchain; FIL, the native token of the Filecoin network; SAND, a token created on the Ethereum blockchain that is the native token of the Sandbox platform; AXS, or "Axie Infinity Shards" Ethereum tokens that are native to the Axie Infinity game; CHZ, a token on

the Ethereum blockchain that is the native digital token for a sports fan engagement platform, Chiliz; FLOW, the native token for the Flow blockchain; ICP, the native token of the "Internet Computer Protocol"; NEAR, the native blockchain of the NEAR blockchain protocol; VGX, the native token of the digital asset platform known as Voyager; DASH, the native token of the Dash blockchain; and NEXO, the native or "exchange" token for the Nexo platform, a digital asset trading and lending platform. *See* Coinbase Complaint ¶¶114, 119, 127-305.

80. As these descriptions suggest—and the SEC itself documented—those tokens are wildly diverse, differing in everything from how and why they were created, to how they were initially offered, to how they are used, to how they work as a technical matter, and more. *See id.* ¶¶127-305. Practically the only thing they have in common is that they are all digital assets sold on the secondary market using the Coinbase platform or its Wallet application. Indeed, their most evident similarity is that they happened to be the first 12 digital assets listed on Coinbase's trading page at the time that were not Bitcoin, Ether, or a stablecoin. *See* David Canellis, *Did the SEC Just Label Everything on Coinbase's Front Page a Security?* (June 7, 2023), http://tinyurl.com/3vu277ed. Yet in the SEC's view, each and every purchase or sale of those tokens is an "investment contract." *See* Coinbase Complaint ¶6. And because the SEC chose not to name the token creators as co-defendants, Coinbase was forced to defend all 12 digital assets against the allegation that they were unregistered securities—and the Court was forced to decide these assets' status without benefitting from the views of the people with the most relevant information.

81. According to the SEC, moreover, by allowing its users to sell those tokens on the secondary market through its platform, "Coinbase has operated as: an unregistered broker," "an unregistered exchange," and an unregistered clearing agency, in violation of the Exchange Act, 15 U.S.C. §§78e, 78*o*(a), and 78q-1(b)(1). *Id.* ¶3; *see id.* ¶¶8, 25-28, 206-08, 372-80. The SEC's complaint against Binance is much the same. *See* Binance Complaint ¶¶352-509.

82. And the SEC did not stop with Coinbase and Binance. On November 20, 2023, the agency filed a similar complaint against Payward, Inc. and Payward Ventures, Inc., doing business collectively as Kraken. *See* Complaint, *SEC v. Payward, Inc.*, No. 3:23-cv-6003 (N.D. Cal. Filed Nov. 20,

2023) ("Kraken Complaint"). As with Coinbase and Binance, the SEC alleged that, by operating a digital asset exchange, Kraken has "acted as a broker, dealer, exchange, and clearing agency" with respect to the digital assets traded on its platform, "many of which form the basis of investment contracts covered under U.S. securities laws." *Id.* ¶1.

83. Earlier this year, the agency announced that it had extracted a settlement from yet another company operating a digital asset platform. *See* SEC, AP Summary, *SEC Charges ShapeShift AG Crypto Platform with Operating as an Unregistered Dealer* (Mar. 5, 2024), https://tinyurl.com/3xppemtw. In that case, like all the others, SEC alleged that "the crypto assets offered by" the platform "included those that were offered and sold as investment contracts"—but the SEC utterly "fail[ed] to identify which crypto assets were investment contracts and provid[ed] no explanation for its conclusion." Hester M. Peirce & Mark T. Uyeda, SEC Comm'rs, *On Today's Episode of As the Crypto World Turns: Statement on ShapeShift AG* (Mar. 5, 2024), https://tinyurl.com/5n6huj7r [hereinafter Peirce & Uyeda, *ShapeShift*]. As two Commissioners pointed out, this "latest installment in the serial drama of the Commission's poorly conceived crypto policy" leaves it "entirely unclear how … to discern" what "the Commission" will next "consider … a security in the form of an investment contract." *Id.* In that way, it "underscores the adverse consequences of the Commission's approach … and adds to the" "untenable" "ambiguity that hangs over the crypto world" thanks to SEC's "opaque and arbitrary" standards. *Id.*

84. The SEC's sweeping enforcement campaign against multiple digital asset exchanges in multiple courts throughout the country shows no sign of abating. *See* Press Release, *SEC Enforcement of Cryptocurrency Reaches a New High*, Cornerstone Rsch. (Jan. 24, 2024), https://tinyurl.com/5752fx7z (observing a "[m]ore than 50% increase in SEC cryptocurrency-related enforcement actions in 2023 over 2022 …. In the first quarter of 2023 alone, the SEC brought 20 actions, the highest number in a single quarter."). Among other things, the SEC has reportedly notified Robinhood, another popular digital asset trading platform, that it is currently under investigation. *See* Michelle Chapman, *Robinhood Markets Receives SEC Notice for Alleged Securities Violations at Crypto Unit Associated Press* (May 6, 2024), https://tinyurl.com/mwbtydwu. Industry participants thus continue to face the constant threat of

unpredictable (and unlawful) federal enforcement actions based on the whims of an agency that now claims the power to supervise virtually the entire industry.

E. The Legal Problems With the SEC's Current Policy of Requiring Digital Asset Platforms to Register Under the Securities and Exchange Acts.

85. The SEC's "misguided enforcement-driven approach" to digital assets, Peirce, *Overdue*, *supra*, flows from the premise that practically all digital asset transactions qualify as securities transactions under federal law, even when they involve no traditional investor/investee relationship. In reality, digital assets are typically just that: standalone assets that do not constitute "investment contracts," and thus are not subject to SEC regulation. For much the same reasons, mere sales and purchases of those assets on digital asset exchanges likewise fall outside the SEC's jurisdiction. The SEC's contrary view, which would grant it sweeping authority to regulate not only the trillion-dollar digital asset industry but practically any transaction involving something a buyer might view as an investment, cannot be squared with basic principles of statutory interpretation.

1. The SEC's interpretation of the securities laws defies text, history, precedent, and common sense.

86. The SEC insists that nearly all digital asset transactions are "investment contracts," and hence "securities" subject to SEC regulation. *See, e.g.*, Coinbase Complaint ¶102 (claiming that digital assets traded on Coinbase "are offered and sold as investment contracts, and thus as securities"); Binance Complaint ¶352 (same); *see also* Gary Gensler, SEC Chair, *Statement on the Approval of Spot Bitcoin Exchange-Traded Products* (Jan. 10, 2024), http://tinyurl.com/4jmzwy3d ("[T]he vast majority of crypto assets are investment contracts and thus subject to the federal securities laws."). As noted above, that sweeping claim contravenes text, history, precedent, and common sense.

87. The Supreme Court made clear long ago that whether something qualifies as an "investment contract" depends on whether it entails "a contract or scheme for 'the placing of capital or laying out of money in a way intended to secure income or profit from its employment.'" *See supra* ¶54 (quoting *Howey*, 328 U.S. at 298). The SEC itself has thus long recognized that transactions in commodities and other assets are not securities transactions—even when they are purchased in hope

of appreciation—if the seller undertakes no post-sale obligations to the buyer. *See, e.g.*, *Am. Diamond Co.*, SEC No-Action Letter, 1977 WL 10907, at *4-5 (Aug. 15, 1977) (taking no action where seller intended to advertise "diamonds as an investment" but had no obligation to provide further services); *Future Sys. Inc.*, SEC No-Action Letter, 1973 WL 9653, at *3 (June 8, 1973) (taking no action on sales of silver where seller stored the silver but "would have no other relationship with the purchaser after the initial sale"). Indeed, even the SEC's proffered definition of an "investment contract" in *Howey* required an ongoing "contractual arrangement," not just an asset sale. Br. for SEC, *SEC v. W.J. Howey Co.*, No. 843, 1946 WL 50582, at *9 (U.S. Apr. 17, 1946) (describing the "definition of an 'investment contract' … as including any contractual arrangement for the investment of money in an enterprise with the expectation of deriving profit through the efforts of the promoters" (emphasis added)). The only dispute in *Howey* was whether it mattered that the agreement to purchase the orange-grove lot and the reciprocal agreement to manage it for the buyer's benefit were spread over two contracts rather than one. *See Howey*, 328 U.S. at 300.

88. That long-settled law dooms any claim that practically all digital asset transactions are "investment contracts," as the typical digital asset does not carry with it any obligation by its creator or seller to put purchasers' money to use generating shared returns. Just like land, muskrats, or diamonds, they are assets, not "investment contracts." *See, e.g.*, *SEC v. Ripple Labs, Inc.*, 682 F.Supp.3d 308, 324 (S.D.N.Y. 2023) ("XRP, as a digital token, is not in and of itself a 'contract, transaction, or scheme' that embodies the *Howey* requirements of an investment contract."), *appeal filed*, No. 24-2648 (2d Cir.) (SEC's opening brief on appeal due January 15, 2025); *SEC v. Terraform Labs Pte. Ltd.*, 684 F.Supp.3d 170, 194 (S.D.N.Y. 2023) ("Much as the orange groves in *Howey* would not be considered securities if they were sold apart from the cultivator's promise to share any profits derived by their cultivation," the "crypto-assets" at issue "when considered in isolation, might not then have been, by themselves, investment contracts"); *SEC v. Binance Holdings, Ltd.*, --- F.Supp.3d ---, 2024 WL 3225974, at *10 n.4 (D.D.C. June 28, 2024) (an "offering at issue [i]s not a security," even if the offeror "encouraged the buyers to anticipate future growth and development," as long as the offeror "did not promise to do anything to help achieve th[e] goal themselves").

89. That is especially obvious when it comes to the kinds of secondary transactions in digital assets that take place on digital asset exchanges every day. Those transactions simply transfer ownership of a digital asset from one party to another. They do not even involve the asset creator, let alone entail any kind of investor/investee relationship. The buyer does not acquire any right either to any managerial efforts or future profits; he acquires only the digital asset itself. And the price that the buyer pays for that asset goes to the asset seller, not its creator—because it is consideration for the digital asset, not an investment in some broader common enterprise. *See Ripple Labs*, 682 F.Supp.3d at 328-29 (recognizing that "the vast majority of individuals who purchased XRP from digital asset exchanges did not invest their money in Ripple at all" and so "could not reasonably expect" that the money they spent purchasing such assets would be used "to improve the XRP ecosystem and thereby increase the price of XRP").

90. Moreover, just as with any other commodity transaction, the digital asset buyer's fortunes are not even necessarily linked to the fortunes of the asset creator. Indeed, digital assets (like other commodities, but unlike shares in a company) can retain value and remain in circulation on exchange platforms even when the entity that created them no longer exists. An asset cannot plausibly represent a stake in a common enterprise with its creator when it is not even dependent on its creator's continued existence, let alone on any ongoing efforts by its creator to increase its value.

91. The SEC has nonetheless asserted that practically all sales of digital assets, including secondary sales on digital asset exchanges, qualify as investment contracts because "statements by the crypto asset issuers and promoters" that were "made and/or available to" the public have led digital asset buyers "reasonably to expect profits based on the managerial or entrepreneurial efforts of such issuers and promoters (and associated third persons)." Coinbase Complaint ¶126; *see also, e.g.*, *id.* ¶¶133, 145, 173, 195, 208; Binance Complaint ¶¶370, 382, 410, 434, 443; Kraken Complaint ¶¶235, 255, 276, 295, 324. But as already explained, the mere fact that a buyer may reasonably expect that an asset's creator will expend efforts to increase its value does not convert that purchase into an investment contract (or the platform into a securities exchange). *See supra* ¶60. That is equally true whether the buyer's expectations are based on its own evaluation of what the asset creator is likely to do in the

future, or on the creator's public statements about its future plans. Either way, the critical question is not whether (or why) the buyer *hopes* to turn a profit on its purchase, but whether the transaction *entitles* the buyer to a stake in a common enterprise and a share in it returns. Because a secondary sale of a typical digital asset on an exchange platform does not involve that kind of investor/investee relationship, it is not an investment contract.

92. The SEC's contrary theory defies both the statutory text and decades of caselaw. As *Howey* recognized, when Congress included "investment contract" in the definition of a security under the Securities and Exchange Acts, it "was using a term the meaning of which had been crystallized by … prior judicial interpretation" in state courts applying state blue-sky laws. 328 U.S. at 298. That body of prior judicial interpretation, in keeping with the plain meaning of the statutory text, routinely understood an "investment contract" to require an ongoing contractual obligation on the part of the seller to manage a common profit-sharing enterprise for the purchaser's benefit. *See, e.g.*, *Stevens v. Liberty Packing Corp.*, 161 A. 193 (N.J. Ch. 1932) (contracts for breeding rabbits and sharing profits or purchasing offspring); *Robbins*, 240 N.W. at 457 (contracts for breeding muskrats and sharing profits); *Prohaska*, 256 Ill.App. at 334-35 (contract for cultivating crops and sharing profits); *Kerst*, 213 N.W. at 904-05 (same); *State v. Ogden*, 191 N.W. 916 (Minn. 1923) (contract for drilling and connecting oil wells and sharing profits from their operation). And while some later cases suggested that a contractual obligation does not have to be enforceable via specific performance under state law to qualify, even those cases uniformly involved some ongoing business relationship between the parties—a relationship that is utterly absent in the typical digital asset transaction. *See, e.g.*, *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 349 (1943) (finding it "unnecessary to determine" whether the buyer "acquired a legal right to compel the drilling of the test well" by the seller under state law because the parties agreed to "a contract in which payments were timed and contingent upon completion of the well").

93. The SEC's contrary view would work a breathtaking expansion of its regulatory authority. Again, people routinely purchase assets with the hope—or often even expectation—that they will become more valuable over time due at least in part to the efforts of their creators. If that alone were enough to render those purchases "investment contracts," then the SEC could regulate sales of

everything from Nike sneakers to Rolex watches to baseball cards and more. That would leave the SEC with practically unbounded jurisdiction, and would impose the complex and detailed disclosure requirements of the federal securities laws on all kinds of transactions that have never been understood to fall within their scope. *Cf.* Mark T. Uyeda, SEC Comm'r, *Remarks to the Council of Institutional Investors – Dangers of the Unbounded Administrative State* (Mar. 5, 2024), https://tinyurl.com/mvet26d (warning of the absence of any limiting principle in the SEC's approach).

2. The SEC's interpretation of the securities laws runs afoul of the major questions doctrine.

94. Even if the Supreme Court had not settled the issue more than half a century ago, the major questions doctrine would foreclose the SEC's attempt to radically expand its power under unchanged statutory text at this late juncture. In determining "whether Congress in fact meant to confer the power the agency has asserted," *West Virginia v. EPA*, 597 U.S. 697, 721 (2022), courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance,'" *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). Courts are accordingly reluctant to interpret "'modest words,' 'vague terms,' or 'subtle devices'" as effecting "[e]xtraordinary grants of regulatory authority." 597 U.S. at 721 (quoting *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001)).

95. The major questions doctrine demands particular "skepticism" when an agency claims to have discovered in "a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Util. Air*, 573 U.S. at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). After all, a longstanding "want of assertion of power by those who presumably would be alert to exercise it" is a telling sign that no "such power was actually conferred." *West Virginia*, 597 U.S. at 726 (quoting *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941)). And courts are all the more skeptical when an agency claims to have discovered in a long-extant statute a regulatory power that more recent Congresses have considered but affirmatively decided *not* to grant, for when Congress has declined (or is still considering) a request to expand an agency's powers, the agency cannot credibly claim that it has actually possessed those expansive powers all along.

96. The SEC's attempt to rewrite the term "investment contract" to reach digital assets bought and sold on trading platforms implicates all of those concerns and then some. That late-breaking claim to power not only is "unprecedented" on its own terms, but rests on a theory that would effect a "fundamental revision of the statute" and work a "transformative expansion in [the SEC's] regulatory authority." *West Virginia*, 597 U.S. at 724, 728. The words "investment contract" in the Securities and Exchange Acts have been in place for nearly a century, and they have never been understood to allow the SEC to regulate pure asset sales without any accompanying ongoing contractual obligations or common enterprises. Nor has the SEC ever before claimed such expansive authority—and rightly so, as such a power not only would swallow the jurisdiction of other agencies like the CFTC whole, but would threaten to paralyze all manner of transactions in common goods.

97. And that is to say nothing of the impact that the SEC's approach would have on the digital asset industry. How that trillion-dollar industry should be regulated and by whom are indisputably questions of "deep economic and political significance." *King v. Burwell*, 576 U.S. 472, 485-86 (2015). Yet the SEC claims the power to unilaterally require every digital asset platform to register under the Securities and Exchange Acts, subjecting them to reporting and disclosure requirements that are not just ill-fitting, but in fact unworkable in the context of digital assets. *See* Matt Donovan, *Ripple Effect: The SEC's Major Questions Doctrine Problem*, 91 Fordham L. Rev. 2309, 2343 (2023); Rodrigo Seira et al., *SEC's Path to Registration*, Policy (Mar. 23, 2023), https://tinyurl.com/yyycdru7. They would also threaten the many applications of blockchain technology that are not financial in nature, such as digital art, identity verification, community governance, supply chain management, and records and data storage. Still worse, hammering the square peg of the burgeoning digital asset industry into the round hole of the SEC's existing regulatory regime could wipe out many new digital asset creators and prevent startups from entering the market altogether, suppressing competition and technological innovation. *See* Steven Lofchie et al., *The Securities Law Treatment of Utility Tokens (or Why It Is Past Time for the SEC to Engage with the Hard Questions)*, FFRI Commentary, Jan. 11, 2022, at 7, *available at* https://tinyurl.com/yc8fvt5p.

98. The SEC's regulatory grab also threatens States'—and the United States'—competitive

advantage in the development of these innovative technologies. *See* Letter from Miller Whitehouse-Levine, Policy Director, DEF, to Vanessa A. Countryman, Secretary, SEC (Apr. 18, 2022), https://tinyurl.com/3439e6p5; Letter from Jake Chervinsky, Head of Policy, Blockchain Association, and Miller Whitehouse-Levine, Policy Director, DEF, to Vanessa A. Countryman, Secretary, SEC (June 13, 2022), https://tinyurl.com/5d96p4bx. Indeed, the SEC's aggressive regulation-by-enforcement approach and the regulatory uncertainty it has spawned have already driven some digital asset companies abroad, where the rules are clearer and where those companies can more quickly develop and deploy their new products. *See, e.g.*, GAO, GAO-23-105346, *Blockchain in Finance: Legislative and Regulatory Actions Are Needed to Ensure Comprehensive Oversight of Crypto Assets* (June 2023), https://tinyurl.com/2neu5xhy; *A Review of the Fiscal Year 2024 Budget for the U.S. Securities and Exchange Commission: Hearing before the S. Subcomm. on Fin. Servs. & Gen. Gov't*, 118th Cong. at 1:38:00 (2023), https://tinyurl.com/3z6h3kxh; GAO, GAO-22-104625, *Blockchain: Emerging Technology Offers Benefits for Some Applications but Faces Challenges* (Mar. 23, 2022). Countries in Europe, the Middle East, and Asia are starting to lead the way in digital asset innovation and are attracting more and more of the industry, with roughly 70% of digital asset developers now living outside the United States. *See* Jeff Wilser, *US Crypto Firms Eye Overseas Move Amid Regulatory Uncertainty*, CoinDesk (updated Mar. 20, 2023), https://tinyurl.com/yxedxdyc; Linda Jeng, *Crypto Migration: European and Asian Regulators Welcome Crypto Innovation While U.S. Cracks Down* (Apr. 7, 2023), https://tinyurl.com/47hr5eee.

99. In short, authorizing the SEC to supervise practically all transactions involving digital assets would have a dramatic impact on a transformative industry that represents "a significant portion of the American economy," *Brown & Williamson*, 529 U.S. at 123, and threatens to stunt American leadership and innovation in a critical technological sector with countless potential financial and non-financial applications.

100. The SEC's position is particularly untenable given that Congress has repeatedly declined to afford the SEC the power it now seeks. Members of Congress have introduced dozens of bills related to digital asset regulation in recent years—many of which would make clear that the SEC lacks regulatory authority over digital assets, *see, e.g.*, Token Taxonomy Act of 2021, H.R. 1628, 117th

Cong. (2021) (defining "digital token" under the Securities Act and excluding it from the definition of "security"), and some of which would explicitly grant that authority to the CFTC, *see, e.g.*, Digital Commodity Exchange Act of 2022, H.R. 7614, 117th Cong. (2022) (providing CFTC jurisdiction over "digital commodity" markets); Digital Commodities Consumer Protection Act of 2022, S. 4760, 117th Cong. (2022) (amending Commodities Exchange Act to provide CFTC regulatory jurisdiction over the "digital commodity" spot market).

101. The most recent bill in this area—the Financial Innovation and Technology for the 21st Century Act, which passed the House of Representatives by an overwhelming and bipartisan 279-136 margin—takes precisely that approach, making the CFTC, not the SEC, the primary regulator of digital assets. H.R. 4763, 118th Cong. (2024); *see* Jesse Hamilton & Nikhilesh De, *U.S. House Approves Crypto FIT21 Bill With Wave of Democratic Support*, Coinbase (May 22, 2024), https://bit.ly/3V3GRip. Those bills thus all confirm the same core point: While Congress is actively wrestling with the complex how-and-who questions concerning the optimal regulatory approach for this significant new industry, it has so far "conspicuously … declined" to grant the SEC the authority it claims it has unwittingly possessed since the 1930s. *West Virginia*, 597 U.S. at 724. Unless and until Congress does so, the SEC cannot "work around the legislative process to resolve for itself a question of great political significance." *Id.* at 743 (Gorsuch, J., concurring).

102. In sum, all the "indicators from [the Supreme Court's] major questions cases are present" here, *Biden v. Nebraska*, 600 U.S. 482, 504 (2023), and they all compel the same conclusion: If Congress really did want to empower the SEC to regulate not only the trillion-dollar digital asset industry, but every transaction involving an asset that the purchaser expects will increase in value on account of some future action by its creator, then it would have to speak much more clearly than it did in the nearly century-old statutes that the SEC has belatedly invoked.

3. The SEC's regulation-by-enforcement campaign flouts the APA.

103. The SEC has concluded that secondary transactions in common digital assets are uniformly "investment contracts," and that any platform that facilitates such transactions is a securities

exchange, broker-dealer, and clearing agency subject to the registration requirements of the Securities and Exchange Acts. Multiple commissioners have described that conclusion as a settled "crypto policy," Peirce & Uyeda, *ShapeShift*, *supra*, and Gensler himself has contended that the SEC "has spoken with a pretty clear voice" through "dozens of enforcement actions" against digital asset platforms insisting that these platforms must "come in, talk to [the SEC], and register." *See* Gensler, *Kennedy & Crypto*, *supra* ("Not liking the message isn't the same thing as not receiving it.").

104. While the SEC has refused to issue a formal regulation stating its position, the agency's clear adoption of this "crypto policy" constitutes final agency action. *See* 5 U.S.C. §551(13); *see also Whitman*, 531 U.S. at 478 (noting that §551(13) "is meant to cover comprehensively every manner in which an agency may exercise its power"). In evaluating finality, "the core question is whether the agency has completed its decisionmaking process," *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992), as assessed "from the agency's perspective," *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267, 1271 (D.C. Cir. 2018). This "flexible" and "pragmatic" inquiry asks, in essence, whether an agency decision is "informal, or only the ruling of a subordinate official, or tentative," *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967) (citations omitted)—in other words, whether the decision is "properly attributable to the agency itself," *Soundboard Ass'n*, 888 F.3d at 1267.

105. Here, there is no question that the SEC's "crypto policy" is attributable to the agency itself, as scores of enforcement actions (not to mention public comments) attest. Nor is there any question that this policy "determine[s]" legal "rights" and "obligations" with "direct and appreciable legal consequences" for digital asset platforms, *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), including the "increased risk of prosecution and penalties," *Ipsen Biopharmaceuticals, Inc. v. Azar*, 943 F.3d 953, 957 (D.C. Cir. 2019), as well as for the digital assets themselves, which are categorically labeled "securities" without a direct avenue to challenge that label. And although it remains theoretically possible for the SEC to reconsider its policy, that possibility "does not make an otherwise definitive decision nonfinal." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 598 (2016).

106. For similar reasons, the SEC's "crypto policy" is also a legislative rule—i.e., "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties"

and that provides "the basis for an enforcement action for violations of those obligations or requirements." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (Kavanaugh, J.). Indeed, it not only squarely affects the rights and obligations of digital asset platforms, but has already formed the basis for multiple enforcement actions.

107. But for a legislative rule to be valid, the agency must promulgate it through the APA's notice-and-comment procedures. *See* 5 U.S.C. §553(b); *Chrysler Corp. v. Brown*, 441 U.S. 281, 313-14 (1979). This process "gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Servs.*, 587 U.S. 566, 582 (2019); *see Cmty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 511 (1983) (observing that "rulemaking is generally a 'better, fairer, and more effective' method of implementing a new industry-wide policy than is the uneven application of conditions in isolated" agency "proceedings").

108. The SEC has adopted its new "crypto policy" without any of those required procedures—over the vociferous and repeated objections of at least one Commissioner. *See, e.g.*, Peirce, *Outdated, supra* ("[T]he SEC should conduct some form of notice and comment process to resolve the thorniest crypto-related policy issues … [A] notice-and-comment process allows broad public and internal participation in developing a sound regulatory system. These public conversations should include our federal and state regulatory colleagues, people developing and using crypto, consumer protection advocates, and crypto critics to develop a reasonable regulatory approach.").

109. The fact that the SEC did not, and will not, subject its "crypto policy" to notice-and-comment rulemaking does not make that policy any less of an agency action. When "an agency[] deci[des] to" adopt a policy without "issu[ing] … a legislative rule" in order to "skirt notice-and-comment provisions," as the SEC did here, the underlying policy nevertheless remains subject to judicial review. *Perez v. Mort. Bankers Ass'n*, 575 U.S. 92, 105-06 (2015); *see Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (courts can review "effectively final agency action that the agency has not frankly acknowledged"); *see also Env't Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970) ("[A]n agency cannot preclude judicial review by casting its decision in the form of inaction.").

110. "Circumvent[ing]" those required "procedures" and "prospectively pronounc[ing] a broad, generally applicable requirement" outside of rulemaking constitutes "an abuse of discretion." *Patel v. INS*, 638 F.2d 1199, 1204 (9th Cir. 1980); *see Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001) ("An agency that, as a practical matter, has enacted a new substantive rule cannot evade the notice and comment requirements of the APA by avoiding written statements."). That is all the more true where the "new standard" is "adopted by" seriatim decisions like "adjudication" or enforcement, where "it departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application." *Pfaff v. HUD*, 88 F.3d 739, 748 (9th Cir. 1996). When that sort of "new agency policy represents a significant departure from long established and consistent[ly followed] practice that substantially affects the regulated industry, the new policy is a new substantive rule and the agency is obliged, under the APA, to submit the change for notice and comment." *Shell Offshore*, 238 F.3d at 630.

111. This "requirement of clarity in regulation" derives from "the protections provided by the Due Process Clause"—including the rule that agencies cannot "fai[l] to provide a person of ordinary intelligence fair notice of what is prohibited." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Regulated parties are not required to "divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012). Quite the opposite: "Entities regulated by administrative agencies have a due process right to fair notice of regulators' requirements." *Fortyune v. City of Lomita*, 766 F.3d 1098, 1105 (9th Cir. 2014).

112. A deliberate attempt to evade the notice-and-comment process for norms of widespread application also raises separation-of-powers concerns. Beyond affording the public protections unavailable in case-by-case adjudication—including a mechanism to challenge the legislative rule in court—the notice-and-comment process is critical to ensuring that legislative rules are subject to the Congressional Review Act, 5 U.S.C. §§801-808.

113. Had the SEC conducted notice-and-comment rulemaking, Plaintiffs would have

commented on its proposed expansion of authority to raise technical and logistical problems with applying the securities laws to secondary digital asset transactions, policy problems with stifling a promising new area for innovation, and legal defects with the proposed expansion, including that it exceeds the SEC's authority.

F. The SEC's "Crypto Policy" Has Caused the Plaintiff States to Suffer Sovereign and Pecuniary Injury.

114. The SEC's overreach is inflicting injury on the Plaintiff States. States have not stood idly by as the digital asset industry develops; they have actively worked (and competed) to develop innovative and appropriate regulatory frameworks to encourage the growth of this burgeoning industry while also protecting consumers. *See supra* ¶¶46-49. Those regulatory frameworks reflect the States' exercise of their inherent sovereign authority over the industries operating within their boundaries—authority that the SEC seeks to invade without Congress's approval. In promulgating those regulatory frameworks, the States have provided carefully designed protections for consumers, ensuring that digital asset buyers are protected against fraudulent or deceptive practices. The SEC's unlawful "crypto policy" threatens to impermissibly preempt several of these efforts.

1. Money Transmission and Other Financial Regulations

115. Almost every State in the country has adopted a licensing regime for entities that provide money transmitting services. These regimes impose a variety of substantive, recordkeeping, and reporting requirements designed to combat money laundering, guard against fraud, and serve other important consumer-protection interests.

116. West Virginia, for instance, broadly defines "[c]urrency transmission" or "money transmission" to include "the business of receiving currency, the payment of money, or other value that substitutes for money by any means for the purpose of transmitting … that currency." W. Va. Code §32A-2-1(i). Any party engaging in this practice must meet a variety of state-specific regulations. *Id.* §32A-2-2. These regulations include requirements that the party post a surety bond, *id.* §32A-2-10(a), comply with "periodic examination[s] of [their] business records," *id.* §32A-2-11(a), and invest only in "permissible investments," *id.* §32A-2-8b(a).

117. Other states like Kansas and Mississippi have a broad definition of "monetary value"—"a medium of exchange, whether or not redeemable in money"—and include the transfer of monetary value within their definition of money transmission. Kan. Stat. Ann. §9-508(i), (j); Miss. Code §75-15-3(f), (g).

118. These broad definitions of "currency transmission" or "money transmission" cover digital asset businesses like Coinbase, Binance, and Kraken that hold and transfer digital assets on behalf of their customers as part of executing trades. Indeed, in Kentucky—which likewise regulates people and entities engaged in the business of "money transmission," Ky. Rev. Stat. §286.11-001 *et seq*.—the Kentucky Department of Financial Institutions has issued specific guidance stating that transmitters of digital assets are money transmitters under its statute. And in Florida, virtual currency is expressly included in the statutory definition of "monetary instruments." *See* Fla. Stat. §896.101(f).

119. That makes sense, given that digital assets can serve as a "medium of exchange." For example, Ripple's XRP token is a type of currency that exists in digital format, with a value that is evidenced by its price marker listed on various trading platforms. *See, e.g.*, *XRP Price*, Coinbase, https://tinyurl.com/5yxe7mm3 (last visited Nov. 13, 2024). In addition, many stores accept XRP as a form of payment. *See Ripple Payment Method: How to Accept XRP as a Business*, Cryptomus, (Nov. 29, 2023), https://tinyurl.com/3bz7u3yd.

120. Proving the point, Coinbase, Binance, and Kraken have all obtained money transmitter licenses as required in the Plaintiff States that accordingly regulate money transmitters. *See* https://tinyurl.com/mux9sz3h (Coinbase); https://tinyurl.com/mvus4m3r (Binance); https://tinyurl.com/2s3rbfmy (Kraken).

121. As a matter of federal law, however, these state licensing regimes end where the Exchange Act begins. The Exchange Act expressly prohibits States from imposing "capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements" on securities brokers or dealers "that differ from, or are in addition to, the requirements in those areas established" by the Act. 15 U.S.C. §78*o*(i)(1). And the Act "set[s] forth a comprehensive regulatory regime" under which "exchanges, brokers, and clearing agencies" must

comply with a wide range of "disclosure, recordkeeping, inspection, and anti-conflict-of-interest provisions." *SEC v. Coinbase*, 2024 WL 1304037, at *2 (S.D.N.Y. Mar. 27, 2024). As a practical matter, then, the Exchange Act preempts application of many, if not most, aspects of state money transmitter laws to any entity that qualifies as a securities dealer, broker, or exchange under the Exchange Act.

122. The SEC's mistaken view that digital asset exchanges are governed by the Exchange Act is therefore imposing a direct sovereign injury on States. After all, if the SEC is correct in its view that Coinbase, Binance, Kraken, and other digital asset exchanges are really securities brokers, dealers, or exchanges that must register with the SEC, then States' efforts to require those platforms to comply with their own bonding and other requirements for money transmitters will be preempted.

123. "When a federal regulation purports to preempt state law, states have a sovereign interest to sue the United States." *Tennessee v. Dep't of Educ.*, 104 F.4th 577, 591 & n.11 (6th Cir. 2024); *see also, e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982) (recognizing that interference with a State's sovereign "power to create and enforce a legal code" establishes Article III standing); *Kentucky v. Biden*, 23 F.4th 585, 598 (6th Cir. 2022) (collecting cases recognizing same); *Daily Wire, LLC v. U.S. Dep't of State*, 2024 WL 2022294, at *5 (E.D. Tex. May 7, 2024) ("[S]tates may have standing based on (1) federal assertions of authority to regulate matters they believe they control, (2) federal preemption of state law, and (3) federal interference with the enforcement of state law.") (quoting *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015)).

2. Unclaimed Property Laws

124. The SEC's ultra vires "crypto policy" is also inflicting injury on States' ability to enforce their unclaimed property laws. "'Escheatment' is the power of a State, as a sovereign, to take custody of property deemed abandoned." *Delaware v. Pennsylvania*, 598 U.S. 115, 119 (2023). States have long enacted laws enabling them to take possession of abandoned property.

125. Many States have adopted provisions of the 2016 Revised Uniform Unclaimed Property Act ("RUUPA") that include digital assets in the definition of escheatable property. These States thus require entities in possession of presumably abandoned digital assets to remit them to the State

as unclaimed property. *See, e.g.*, Fla. Stat. §717.119(4); Idaho Code §§14-5-102(24)(b)(i) & (32), 14-5-603(9); Ind. Code §§32-34-1.5-3(24)(B)(i) & (31), 32-34-1.5-19(e); Mont. Code Ann. §70-9-809(3).

126. On information and belief, however, "no state has yet put a system in place to accommodate" digital assets in their native form. *See Escheatment and Unclaimed Funds*, Coinbase, https://tinyurl.com/yc63cexv (last visited Nov. 13, 2024). States instead instruct entities in possession of presumably abandoned digital assets to liquidate them (i.e., sell them for fiat currency) and remit the cash that they secure for doing so. *See, e.g.*, Office of Nevada State Treasurer Zach Conine, *Holder Reporting Manual* 11 (2024), https://tinyurl.com/3n3z8cwe; *see also Escheatment and Unclaimed Funds*, *supra*.

127. Kentucky is illustrative. Kentucky's version of RUUPA gives Kentucky the power to escheat, or take control of, abandoned property. Ky. Rev. Stat. §393A.010 *et seq*. And Kentucky expressly defines escheatable property to include "virtual currency." *See* Ky. Rev. Stat. §393A.010(24)(c). But like every other State that has enacted RUUPA, Kentucky does not have a means of taking control of virtual currencies themselves—in other words, it does not have a virtual currency "wallet." Accordingly, to escheat abandoned virtual currency, the holder must (and, indeed, is required by statute to) "liquidate the virtual currency" and turn the cash "proceeds" over to the State. Ky. Rev. Stat. §393A.330(9)(a). In Kentucky, measures have been used to escheat the value of XRP and other digital assets.

128. West Virginia's Uniform Unclaimed Property Act similarly applies to all "[v]irtual currency," defined as any "digital representation of value, including cryptocurrency, used as a medium of exchange, unit of account, or store of value, which does not have legal tender status recognized by the United States." W. Va. Code §36-8-1. Under that statute, virtual currency is deemed abandoned "three years after the owner's last indication of interest in the property." *Id.* §36-8-2(a)(17). And West Virginia does not have a system in place to hold virtual currency, so when such property is abandoned, the holder must "liquidate the virtual currency … and remit the proceeds to" the State. *Id.* §36-8-8(e).

129. Tennessee law likewise defines "virtual currency" as among the categories of "property" subject to the requirements of the State's Uniform Unclaimed Property Act. Tenn. Code Ann. §66-29-102(24)(B)(i). The Tennessee Department of Treasury administers the Uniform Unclaimed

Property Act and, as a result, may interact with holders of unclaimed "virtual currency," which may be custodied by the Department only in its liquidated or cash form.

130. But if digital assets are securities, then the liquidation of abandoned digital assets pursuant to state law could be considered an unlawful sale of an unregistered security. *See Coinbase*, 2024 WL 1304037, at *13; 15 U.S.C. §§77d, 77e. That would force these States to either (i) not enforce their RUUPA statute as to digital assets to avoid violating the securities laws (as interpreted by the SEC) or (ii) expend resources to build and manage a digital wallet that would allow them to take control of digital assets directly, and change state law to allow for this procedure instead of liquidation. Both scenarios harm the States and give rise to standing. *See Tennessee*, 104 F.4th at 587 ("States have 'proprietary' standing to sue if state entities 'reliant on the states' coffers' will 'become subject' to federal regulations that threaten those coffers."); *Tennessee v. Cardona*, -- F.Supp.3d --, 2024 WL 3019146, at *27-*28 (E.D. Ky. June 17, 2024); *Texas v. Cardona*, 2024 WL 3658767, at *11 (N.D. Tex. Aug. 5, 2024) (collecting cases recognizing that "pressure to change state law" constitutes injury in fact).

131. More broadly, the SEC's approach has also had an adverse effect on State economies, driving digital asset industry participants out of business or into other countries. *See* Peirce, *Outdated supra* ("Operating in such an opaque environment is very stressful for law-abiding people."). Take Bittrex Inc.—a digital asset platform founded by three Amazon alumni—that was forced to shut down after the SEC charged it with operating as an unregistered securities exchange. Underscoring the "direct and appreciable … consequences" of the SEC's "crypto policy," *cf. supra* ¶105, Bittrex deemed it "'no longer feasible' to operate in the US because of an uncertain regulatory environment." *See* Justin Wise, *Ex-Shearman Lawyer Closing Crypto Exchange Sees Rosy Days Ahead*, Bloomberg Law (Nov. 27, 2023), https://tinyurl.com/yc8nmarb. Shut-downs and relocations like that pose concrete, negative economic harm to the States, reducing the size and diversification of their economy, with corresponding effects on their tax bases. *See Kentucky*, 23 F.4th at 599-600 (noting that States "have a quasi-sovereign interest in defending their economies from" federal regulation that "threaten[] to damage" them).

G. The SEC's "Crypto Policy" Has Caused Industry-Wide Harms and Will Continue to Harm DEF Absent Relief.

132. The SEC's policy of treating secondary transactions in common digital assets as uniformly "investment contracts," and requiring platforms that facilitate such transactions to register with the SEC, has also had devastating consequences for all stakeholders in the digital asset industry. Beyond the obvious consequences—crippling the targeted platforms and those who trade on them—the SEC's *ad hoc* enforcement campaign has chilled the activities of other platforms and other traders (both current and prospective) as well. Going after platforms also has the second-order effect of cutting off market access for the entrepreneurs who create and issue the assets traded on the targeted platforms. And when the SEC targets a platform, those creators and issuers—the people with the most relevant information about the digital asset—are typically not parties to the action, and so are not entitled to litigate against the SEC's allegations. *See supra* ¶¶70-71, 80.

133. DEF is injured as well, because the SEC's piecemeal enforcement and refusal to initiate notice-and-comment has caused it to expend resources responding to the uncertainties and problems that the SEC's *ad hoc* approach engenders. DEF has dedicated labor and financial resources toward educating the public on the SEC's "crypto policy" and counteracting its negative effects. Those efforts would not be necessary but for the SEC's "crypto policy." And they differ significantly from DEF's routine activities because they require it to understand and educate users about the effects and implications of the SEC's unauthorized policy. DEF must expend resources on these efforts because the SEC's policy represents an existential threat to these digital asset users and the digital asset and decentralized finance ecosystem that DEF exists to protect and promote. DEF would otherwise expend these resources on promoting new projects and growth in the digital asset industry through grants to developers and funders.

134. What is more, the SEC's "crypto policy" causes classic economic harm to DEF. DEF owns digital assets, receives donations in the form of digital assets, and makes and accepts payments in the form of digital assets. In particular, DEF owns and has owned since its inception a substantial number of Uniswap (UNI) tokens. UNI is the Uniswap Protocol's governance token and enables

community ownership and active stewardship of the Uniswap protocol, which underpins a leading digital asset platform. UNI was distributed to historical users of the Uniswap Protocol through a free airdrop, which occurred in September 2020, and did not involve any investment of money. The SEC's change in policy, however, has led it to take high-profile enforcement steps against Uniswap Labs, the original developer of the Uniswap protocol. Those steps have included a Wells notice informing Uniswap Labs that the SEC is considering bringing an enforcement action against it in which the UNI token is at issue—at which point UNI's value dropped by over 33%. The SEC's policy that practically all digital asset transactions are unregistered securities transactions, and its actions to enforce that policy, thereby caused DEF substantial economic injury.

135. Given the looming threats posed by SEC's "crypto policy," Plaintiffs' claims are ripe for resolution. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-61 (2014) ("[A]n actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law."); *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (past enforcement against the same conduct is good evidence that the threat of enforcement is not "chimerical"); *Abbott Labs.*, 387 U.S. at 148-49 (a "purely legal" issue is "fit[] … for judicial resolution" once the "effects" of an "administrative decision" are "felt in a concrete way"); *id.* at 153 (when parties "deal in a sensitive industry, in which public confidence … is especially important," "[t]o require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily").

CLAIMS FOR RELIEF

Count One

Ultra Vires Executive Action

136. Plaintiffs re-allege and incorporate by reference the preceding allegations as though fully set out herein.

137. The Supreme Court has recognized "a long history of judicial review of illegal executive action" establishing "[t]he power of federal courts of equity to enjoin unlawful executive action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

138. The SEC's policy of treating secondary transactions in common digital assets as

uniformly "investment contracts," and of treating platforms that facilitate such transactions as securities exchanges, broker-dealers, and clearing agencies subject to the registration requirements of the Securities and Exchange Acts, exceeds the scope of the agency's statutory authority and unlawfully wrests primary regulatory authority away from States. And it has the practical effects of impermissibly preempting state laws regulating money transmitters, interfering with state unclaimed property regimes, and imposing broader economic harms on States. It also has harmed and will continue to harm the entire digital asset economy, from platforms, to users, to asset creators and issuers, and to organizations like DEF.

139. Because the SEC's "crypto policy" is "unlawful executive action," the Court should enter an order declaring that policy unlawful and enjoining the SEC from bringing future enforcement actions against digital asset platforms on that basis. *Armstrong*, 575 U.S. at 327.

Count Two
Administrative Procedure Act

140. Plaintiffs re-allege and incorporate by reference the preceding allegations as though fully set out herein.

141. The Administrative Procedure Act requires this Court to "set aside" final agency action that is "an abuse of discretion," "in excess of statutory … authority," "otherwise not in accordance with law," or taken "without observance of procedure required by law." 5 U.S.C. §706(2)(A), (C), (D).

142. The SEC's policy of treating secondary transactions in common digital assets as uniformly "investment contracts," and of treating platforms that facilitate such transactions as securities exchanges, broker-dealers, and clearing agencies subject to the registration requirements of the Securities and Exchange Acts, constitutes final agency action.

143. That policy is in excess of the SEC's statutory authority, an abuse of discretion, and taken without observance of required procedures in violation of the APA. This Court should accordingly set that policy aside and declare it unlawful.

RELIEF REQUESTED

Plaintiffs pray for the following relief from the Court:

a. A declaration that a digital asset transaction is not an investment contract under the Securities Act of 1933 or the Exchange Act of 1934 if it does not transfer any stake in any enterprise that the seller or anyone else has an obligation to manage for the asset owner's benefit and share resulting profits;

b. A declaration that digital asset platforms that facilitate secondary transactions that lack those characteristics need not register as securities exchanges, dealers, brokers, or clearing agencies under the Securities Act of 1933 or the Exchange Act of 1934;

c. An order enjoining Defendants from bringing enforcement actions premised on the failure of digital asset platforms facilitating such secondary transactions to register as securities exchanges, dealers, brokers, or clearing agencies under the Securities Act of 1933 or the Exchange Act of 1934;

d. A declaration that Defendants violated the Administrative Procedure Act by adopting the policy of treating secondary transactions in common digital assets as uniformly "investment contracts," and of treating platforms that facilitate such transactions as securities exchanges, broker-dealers, and clearing agencies subject to the registration requirements of the Securities Act of 1933 or the Exchange Act of 1934;

e. A declaration that Defendants' refusal to promulgate that policy through notice-and-comment rulemaking violated the Administrative Procedure Act;

f. An order awarding Private Plaintiffs attorneys' fees and costs pursuant to 28 U.S.C. §2412; and

g. Any further relief as the Court may deem just and proper.

Respectfully submitted,

RUSSELL COLEMAN
Attorney General of Kentucky

/s/ Justin D. Clark
JUSTIN D. CLARK
Civil Chief
ADRIAN DEL VALLE
Assistant Attorney General
COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
justind.clark@ky.gov
adrian.delvalle@ky.gov
Counsel for Commonwealth of Kentucky

MICHAEL T. HILGERS
Attorney General of Nebraska

/s/ Eric J. Hamilton
Eric J. Hamilton
Solicitor General
(pro hac vice forthcoming)
Zachary B. Pohlman
Assistant Solicitor General
(pro hac vice forthcoming)
OFFICE OF THE NEBRASKA
ATTORNEY GENERAL
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682
eric.hamilton@nebraska.gov
zachary.pohlman@nebraska.gov
Counsel for State of Nebraska

JONATHAN SKRMETTI
Attorney General and Reporter of Tennessee

/s/ Whitney D. Hermandorfer
Whitney D. Hermandorfer
Director of Strategic Litigation
(pro hac vice forthcoming)
Harrison Gray Kilgore
Strategic Litigation Counsel &
Assistant Solicitor General
(pro hac vice forthcoming)
OFFICE OF THE TENNESSEE
ATTORNEY GENERAL
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3491
whitney.hermandorfer@ag.tn.gov
harrison.kilgore@ag.tn.gov
Counsel for State of Tennessee

PATRICK MORRISEY
Attorney General of West Virginia

/s/ Michael R. Williams
MICHAEL R. WILLIAMS
Solicitor General
(pro hac vice forthcoming)
OFFICE OF THE WEST VIRGINIA
ATTORNEY GENERAL
State Capitol, Bldg. 1, Room E-26
1900 Kanawha Blvd. E.
Charleston, West Virginia 25305
304-558-2021
michael.r.williams@wvago.gov
Counsel for State of West Virginia

BRENNA BIRD
Attorney General of Iowa

/s/ Eric H. Wessan
Eric H. Wessan
Solicitor General
(pro hac vice forthcoming)
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 823-9117
(515) 281-4209 (fax)
eric.wessan@ag.iowa.gov
Counsel for State of Iowa

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

RALPH MOLINA
Deputy First Assistant Attorney General

AUSTIN KINGHORN
Deputy Attorney General for Legal Strategy

RYAN D. WALTERS
Chief, Special Litigation Division

/s/ David Bryant
David Bryant
Special Counsel
(pro hac vice forthcoming)
Munera Al-Fuhaid
Special Counsel
(pro hac vice forthcoming)
Mark A. Csoros
Special Counsel
(pro hac vice forthcoming)
OFFICE OF THE ATTORNEY
GENERAL OF TEXAS
Special Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Tel.: (512) 463-2100
david.bryant@oag.texas.gov
munera.al-fuhaid@oag.texas.gov
mark.csoros@oag.texas.gov
Counsel for State of Texas

LYNN FITCH
Attorney General of Mississippi

<u>*/s/ Whitney H. Lipscomb*</u>
Whitney H. Lipscomb
Deputy Attorney General
(pro hac vice forthcoming)
MISSISSIPPI ATTORNEY
GENERAL'S OFFICE
P.O. Box 220
Jackson, Ms 39205-0220
(601) 359-3680
Whitney.Lipscomb@Ago.Ms.Gov
Counsel for State of Mississippi

AUSTIN KNUDSEN
Attorney General of Montana

<u>*/s/ Christian B. Corrigan*</u>
Christian B. Corrigan
Solicitor General
(pro hac vice forthcoming)
Peter M. Torstensen, Jr.
Deputy Solicitor General
(pro hac vice forthcoming)
MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders Street
Helena, Montana 59601
(406) 444-2026
christian.corrigan@mt.gov
peter.torstensen@mt.gov
Counsel for State of Montana

TIM GRIFFIN
Attorney General of Arkansas

<u>*/s/ Dylan L. Jacobs*</u>
Dylan L. Jacobs
Deputy Solicitor General
(pro hac vice forthcoming)
OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-3661
Dylan.Jacobs@arkansasag.gov
Counsel for State of Arkansas

DAVE YOST
Attorney General of Ohio

<u>*/s/ T. Elliot Gaiser*</u>
T. Elliot Gaiser
Ohio Solicitor General
(pro hac vice forthcoming)
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 Fax
Thomas.Gaiser@Ohioago.Gov
Counsel For State Of Ohio

KRIS W. KOBACH
Attorney General of Kansas

<u>*/s/ Erin B. Gaide*</u>
Erin B. Gaide
Assistant Attorney General
(pro hac vice forthcoming)
120 SW 10th Avenue
Topeka, KS 66612-1597
(785) 296-7109
erin.gaide@ag.ks.gov
Counsel for State of Kansas

ANDREW BAILEY
Attorney General of Missouri

<u>*/s/ Caleb Rutledge*</u>
Caleb Rutledge
Assistant Attorney General
(pro hac vice forthcoming)
OFFICE OF THE ATTORNEY GENERAL
Post Office Box 899
Jefferson City, MO 65102
Tel: (573) 751-0812
Fax: (573) 751-0774
Caleb.Rutledge@ago.mo.gov
Counsel for State of Missouri

THEODORE E. ROKITA
Attorney General of Indiana

<u>/s/ James A. Barta</u>
James A. Barta
Solicitor General
(pro hac vice forthcoming)
INDIANA ATTORNEY
GENERAL'S OFFICE
IGCS – 5th Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-0709
james.barta@atg.in.gov
Counsel for State of Indiana

SEAN D. REYES
Attorney General of Utah

<u>/s/ Stanford E. Purser</u>
Stanford E. Purser
Solicitor General
(pro hac vice forthcoming)
UTAH ATTORNEY GENERAL'S OFFICE
160 East 300 South, 5th Floor
Salt Lake City, UT 84111
Tel. (801) 366-0100
spurser@agutah.go
Counsel for State of Utah

ELIZABETH B. MURRILL
Attorney General of Louisiana

<u>/s/ J. Benjamin Aguiñaga</u>
J. Benjamin Aguiñaga
Solicitor General
(pro hac vice forthcoming)
OFFICE OF THE LOUISIANA
ATTORNEY GENERAL
1885 North Third Street
Baton Rouge, LA 70804
(225) 326-6766
aguinagab@ag.louisiana.gov
Counsel for State of Louisiana

ALAN WILSON
Attorney General of South Carolina

<u>/s/ J. Emory Smith, Jr.</u>
J. Emory Smith, Jr.
Deputy Solicitor General
(pro hac vice forthcoming)
OFFICE OF THE ATTORNEY GENERAL
Post Office Box 11549
Columbia, South Carolina 29211
Phone: (803) 734-3642
Fax: (803) 734-3677
Email: esmith@scag.gov
Counsel for State of South Carolina

GENTNER DRUMMOND
Attorney General of Oklahoma

<u>/s/ Garry M. Gaskins, II</u>
Garry M. Gaskins, II
Solicitor General
(pro hac vice forthcoming)
OFFICE OF THE ATTORNEY GENERAL
State of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
garry.gaskins@oag.ok.gov
Counsel for State of Oklahoma

ASHLEY MOODY
Attorney General of Florida

<u>/s/ Christine K. Pratt</u>
Christine K. Pratt
Counselor to the Attorney General
(pro hac vice forthcoming)
OFFICE OF THE ATTORNEY GENERAL
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
christine.pratt@myfloridalegal.com
Counsel for State of Florida

/s/ Erin E. Murphy
Paul D. Clement, VA Bar #37915
(pro hac vice forthcoming)
Erin E. Murphy, VA Bar #73254
(pro hac vice forthcoming)
C. Harker Rhodes IV, VA Bar #99759
(pro hac vice forthcoming)
Kevin Wynosky, VA Bar #100624
(pro hac vice forthcoming)
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com
erin.murphy@clementmurphy.com
harker.rhodes@clementmurphy.com
kevin.wynosky@clementmurphy.com

Paul N. Watkins, AZ Bar #32577
(pro hac vice forthcoming)
Brunn (Beau) Roysden, AZ Bar #28698
(pro hac vice forthcoming)
FUSION LAW, PLLC
7600 N. 15th St., Suite 150
Phoenix, AZ 85020
(602) 315-7545
paul@fusion.law
beau@fusion.law

Counsel for DeFi Education Fund