**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**WACO DIVISION**

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| BEBA LLC and DEFI EDUCATION FUND,<br><br>Plaintiffs,<br><br>-against-<br><br>SECURITIES AND EXCHANGE COMMISSION and GARY GENSLER, Commissioner of the Securities Exchange Commission, in his official capacity,<br><br>Defendants. | Case No. 6:24-cv-153 |

**BRIEF OF *AMICI CURIAE* BLOCKCHAIN ASSOCIATION AND THE CRYPTO COUNCIL FOR INNOVATION**

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## INTERESTS OF *AMICI CURIAE*

Blockchain Association (the "Association") is the leading membership organization dedicated to promoting a pro-innovation policy environment for the digital asset economy. The Association endeavors to achieve regulatory clarity and to educate policymakers, regulators, courts, and the public about how blockchain technology can create a more secure, competitive, and consumer-friendly digital marketplace. The Association represents nearly 100 member companies reflecting the wide range of the blockchain industry, including software developers, infrastructure providers, exchanges, custodians, investors, and others supporting the public blockchain ecosystem.

The Crypto Council for Innovation ("CCI") is the premier global alliance of industry leaders with a mission to communicate the opportunities presented by digital assets and demonstrate the technology's transformational potential. CCI's members, which include leading global companies and investors in the industry, share the goal of encouraging responsible global regulation of digital assets to unlock economic potential, improve lives, foster financial inclusion, protect national security, and combat illicit activity. CCI believes that achieving these goals requires informed, evidence-based policy decisions realized through collaborative engagement with regulators and industry.

The Association and CCI have a strong interest in this action and a vital perspective to provide on issues of importance for digital asset users, developers, investors, and operators. The issues raised by Plaintiffs Beba LLC ("Beba") and DeFi Education Fund (collectively, "Plaintiffs") indeed affect *amici*, their members, and the broader digital asset industry. Airdrops like those at issue in this case are utilized across the digital asset industry and beyond as an important

promotional tool. The Securities and Exchange Commission's ("SEC") view that airdrops constitute investment contracts and are therefore securities is inconsistent with both common sense and legal precedent. Furthermore, the SEC's strategy of "regulation by enforcement" has caused a significant amount of uncertainty in the digital asset industry, leading to a brain drain of digital asset talent and businesses away from the United States, which seriously undermines the U.S.'s ability to be an innovation leader.

This *amicus* brief reflects the views of the Association and of CCI, but does not reflect the views of any individual member of those two organizations.

## INTRODUCTION AND SUMMARY OF ARGUMENT

"Airdrops" of digital assets – a free distribution to users or prospective users of a system or product – are a common mechanism to raise awareness for a new digital asset project. While there are many different types of airdrops, typically the recipient does not pay for the airdropped token. The first prong of the Supreme Court's *Howey* test to determine whether a particular instrument is an "investment contract" and therefore a security requires a court to find that there has been an "investment of money." In an airdrop, there is no investment of money because the recipient generally receives a token for free.

However, as Plaintiffs describe in the context of Beba's BEBA token, the SEC has taken the position that airdropped tokens are investment contracts and thus can be unregistered security offerings. That view should not be – and cannot be – the law. The Supreme Court meant what it said by "investment of money;"[1] and the SEC cannot just read that prong out of the *Howey* test to the detriment of an entire multi-trillion dollar[2] industry that frequently relies on airdrops.

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[1] *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946).

[2] The current global market cap for digital assets is over $2.3 trillion. *See* CoinMarketCap, *coinmarketcap.com* (last visited Oct. 28, 2024). That amount includes the collective value of

Airdrops are just the tip of the iceberg. Plaintiffs also describe the "cloud of uncertainty" hanging over the entire digital asset industry, forcing participants to sit idly by while the SEC "regulates by enforcement" and disseminates inconsistent and incomplete public statements, displaying an unwarranted hostility towards this groundbreaking technology. The Association and CCI can attest that the SEC's actions have significantly harmed their members. And even though the U.S. should be leading the way in this exciting and innovative new sector of the economy, regulatory uncertainty has led to a "brain drain"[3] where digital asset industry participants are leaving the U.S. for other jurisdictions that have either developed or made significant progress towards developing a regulatory framework for digital assets. *Amici* support Plaintiffs' opposition (ECF No. 31) to the motion to dismiss by Defendants the SEC and Gary Gensler (ECF No. 30, the "Motion to Dismiss") and support Plaintiffs' request for relief in this action.

## ARGUMENT

## I. PLAINTIFFS' CONCERNS REGARDING AIRDROPS AFFECT THE ENTIRE DIGITAL ASSET INDUSTRY

### A. Summary of Airdrops

Plaintiffs' concerns about airdrops extend beyond the circumstances in this case. Airdrops are common in and necessary for the digital asset industry. As CCI has explained, airdrops are a "marketing strategy employed by blockchain projects to encourage protocol activity, generate awareness, and foster community engagement."[4] The "earliest users of a protocol are usually the

digital asset tokens alone, and does not even account for digital asset companies' equity value, personnel, intellectual property, technology, network effects, and more.

[3] For example, the *New York Times* reported that due to a "growing law enforcement crackdown," U.S.-based digital asset companies "are expanding into new markets and weighing the possibility of leaving the country entirely." David Yaffe-Bellany, *Crypto Firms Start Looking Abroad as U.S. Cracks Down*, New York Times (June 7, 2023), https://tinyurl.com/2dpcuezh.

[4] Sean Butterfield, *What are Airdrops*, Crypto Council for Innovation (June 15, 2024), https://cryptoforinnovation.org/what-are-airdrops/.

beneficiary of an airdrop."[5] The opportunity to receive airdropped cryptocurrency "is especially appealing for those new to the cryptocurrency world, as it encourages learning about crypto wallet management, transfer of digital assets, and interacting with smart contract protocols."[6] Airdrops can help establish a token's legitimacy, market the token, and reward loyal members.[7]

The Association's and CCI's members frequently utilize airdrops in different ways. In a standard airdrop, "participants provide their wallet address to receive tokens, often on a first-come, first served basis."[8] Bounty airdrops are given to users who "perform[] tasks like social media resharing or referrals to earn points."[9] Other examples of tasks entitling users to a bounty airdrop include "becoming a member of its online community, signing up for its newsletter, getting friends and family to sign up for its newsletter, or even providing software and coding support."[10] Holder airdrops "automatically reward existing token holders, aligning the distribution with the number of tokens held, thus favoring more involved community members."[11] In a holder airdrop, "[n]o action is required on the part of the receiver. They simply check their wallet one day to find that new tokens have been deposited."[12] Exclusive airdrops "target individuals based on specific criteria beyond token ownership, such as owning a particular NFT collection."[13] Raffle airdrops are more like a game of chance, "where participants earn entries through various actions, randomly selecting winners and making it a more exciting method for distributing tokens."[14]

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5 *Id.*
6 *Id.*
7 *See* Fidelity Viewpoints, *What is a Crypto Airdrop?*, Fidelity (Jan. 3, 2024), https://www.fidelity.com/learning-center/trading-investing/crypto-airdrop.
8 *See* Butterfield, *supra*.
9 *Id.*
10 *See* Fidelity Viewpoints, *supra*.
11 *See* Butterfield, *supra*
12 *See* Fidelity Viewpoints, *supra*.
13 *See* Butterfield, *supra*.
14 *Id.*

Airdrops have played a significant role in raising attention for, and generating use of, dozens of major protocols or platforms in the Web3 world, including some of the largest:

- "Layer 1" blockchains (the primary networks recording blockchain transactions);
- "Layer 2" blockchain networks (networks that provide more cost- and time-efficient transaction efficacy as "add-ons" to layer 1 blockchains);
- Asset bridging services (enabling users to port assets across different blockchains);
- Trading protocols (allowing users to trade, borrow, or lend digital assets);
- Naming services (which convert human-readable names into machine-readable identifiers such as Ethereum addresses and other cryptocurrency addresses, enhancing user interaction across the digital landscape);
- "Zero-knowledge" protocols (enabling users to prove certain aspects of their identity, such as being "white-listed" as an accredited investor, or as being checked and cleared from being on any sanctions lists, without revealing their full identity, in order to balance regulatory compliance and privacy); and
- Social communities (using "meme coins" or digital artwork as their signifier of belonging to that community).

For all of these types of distributions, users are not "investing" "money" into anything – they are receiving tools that allow them to interact with the networks, prove their identities, belong to a social club, or any other countless functions one can perform with digital assets.

### B. The SEC's View that Airdrops Constitute Investment Contracts Is Contrary to Supreme Court Precedent

As Plaintiffs explain, the SEC has taken the incorrect and untenable position that the airdropping of tokens – such as the BEBA token – constitutes an investment contract and thus is a

security, even though market participants that receive airdropped tokens, for free or in exchange for services, did not make an "investment of money."

The Securities Act and the Exchange Act both authorize the SEC to regulate "securities." That term is defined in the statutes by a long list of various categories, including "investment contract[s]." 15 U.S.C. § 77(a)(1); 15 U.S.C. § 78c(a)(10). Whether or not a given token is a security typically turns on whether it is an "investment contract;" the Supreme Court has explained that the relevant "test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey*, 328 U.S. at 301.

The first element analyzes whether there has been an "investment of money." In *Howey*, the Supreme Court explained that under the "blue sky" laws in existence prior to the Securities Act – and relevant to the ultimate holding in *Howey* – an "[i]nvestment contract thus came to mean 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." *Howey*, 328 U.S. at 298, *citing State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 56 (1920) (emphasis added). The Supreme Court subsequently confirmed that to qualify as an investment contract, one must "g[i]ve up some tangible and definable consideration in return for an interest that had substantially the characteristics of a security." *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 560 (1979) (rejecting argument that exchange of labor in return for participation in employee pension plan was an investment of money). *See also Fraser v. Fiduciary Tr. Co. Int'l*, No. 04 Civ. 6958 (RMB) (GWG), 2005 U.S. Dist. LEXIS 48059, at *14 (S.D.N.Y. June 23, 2005)

("The notion that the exchange of labor will suffice to constitute the type of investment which the Securities Acts were intended to regulate was rejected in *Daniel*.") (citation omitted).[15]

Tokens airdropped to users who did not provide any consideration in exchange – and certainly did not "place capital" or "lay out money" in connection with the airdrop – are not and cannot be securities, because again there was no investment of money. Notwithstanding the fact that the Supreme Court is clear on this point, the SEC has taken the position that the "investment of money" prong of *Howey* is somehow satisfied even where there is a "lack of monetary consideration for digital assets."[16] The SEC has publicly ventured (in a footnote in April 2019 guidance, among other places) that the "lack of monetary consideration for digital assets, such as those distributed via a so-called 'air drop,' does not mean that the investment of money prong is not satisfied; therefore, an airdrop may constitute a sale or distribution of securities."[17] But simply saying something does not make it so, and these conclusory assertions have real-world consequences for digital asset market participants.

The SEC's position is not limited to informal guidance, it has been asserted against digital asset market participants in litigation. In one filed complaint, the SEC alleged that the defendants violated securities laws by airdropping tokens for free to thousands of developers, and by airdropping tokens to users that had engaged in marketing efforts for the project. *See SEC v. The Hydrogen Tech. Corp., et al.*, Case No. 1:22-cv-08284-LAK, ECF No. 3 ¶¶ 43-45, 48 (S.D.N.Y.

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15 To the extent that the SEC might claim that the term "investment contract" in the Securities Act is ambiguous, the SEC's interpretation is not entitled any deference under the recent Supreme Court decision, *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Courts are the arbiters of ambiguous statutory language, and the Supreme Court has already stated that an "investment contract" requires an investment of money or monetary value.

16 *See Framework for "Investment Contract" Analysis of Digital Assets*, SEC (Apr. 3, 2019), n.9, https://www.sec.gov/files/dlt-framework.pdf.

17 *Id.*

Sept. 29, 2022). In another complaint, the SEC detailed how defendants engaged in an unregistered securities offering by airdropping a token to individuals who had purchased and held another token promoted by defendants. *See SEC v. Justin Sun, et al.*, Case No. 1:23-cv-02433, ECF No. 1 ¶ 92 (S.D.N.Y. Mar. 22, 2023). In that complaint, the SEC conceded that in a typical airdrop, the recipient is not required "to pay cash consideration for the asset." *Id.* Regardless, the SEC alleged that the consideration paid for the first token somehow extended to all subsequent airdrops of the second token to holders of the first token, creating a new investment contract each time. *Id.* This construction would allow the SEC to extend its jurisdiction to a conceptually unlimited number of transactions that bear no meaningful resemblance to investment contracts.

The SEC has also pressed companies into settling administrative proceedings on the same legally flawed theory. In one settlement, the SEC stated that the free distribution of tokens to individuals who had promoted a project was an investment contract. *See In the Matter of Tomahawk Expl. LLC and David Thomas Laurance*, SEC Admin Proc. 3-18641 (Aug. 14, 2018), https://www.sec.gov/litigation/admin/ 2018/33-10530.pdf (citation omitted). The SEC added that the defendant "received value in the creation of a public trading market for its securities." *Id.*

Were the SEC's views upheld, the "investment of money" prong of *Howey* would be rendered a nullity. Under the SEC's view in *Sun*, providing an asset for free to users who, at some prior time, purchased a different asset, constitutes an investment contract. In *Tomahawk*, according to the SEC, a giveaway of any asset could arguably create a public trading market for that asset, creating an investment contract. The SEC's positions are completely divorced from *Howey*. There is a reason the Supreme Court ruled that an investment contract must involve an "investment;" the mere fact of giving an asset away for free cannot, by itself, constitute a securities offering. The SEC should not be able to flout *Howey* in such a brazen manner.

### C. The SEC's View on Airdrops Is Contrary to the Views of Lawmakers, Out of Step with Other Regulators, and Violative of the APA

The SEC's position on airdrops has even baffled prominent lawmakers in Congress. Representatives Tom Emmer and Patrick McHenry sharply criticized the SEC's position in an open letter, highlighting that "airdrops play a crucial role in the development of a decentralized blockchain ecosystem" and "a misapplication of the securities laws will prevent this technology from achieving decentralization and its full potential."[18] They noted that "[g]iven the SEC's unwillingness to establish a regulatory framework in the United States, developers have been forced to block Americans from claiming ownership of a digital asset in an airdrop."[19]

The SEC's position also stands in stark contrast with the way that other leading jurisdictions have treated airdrops. For example, the European Union ("EU"), apparently recognizing that airdrops do not involve a contribution of money and are often used to introduce new projects and incentivize participation on blockchain-based applications, intentionally exempted airdrops from several provisions of the Markets in Crypto Assets Regulation statute ("MiCA"), passed in June 2023. MiCA, a comprehensive legal framework for regulating digital assets in the EU,[20] explicitly states that, with some limited exceptions, "no requirements of this Regulation should apply to offers to the public of crypto-assets … that are offered for free."[21] MiCA also explicitly exempts "crypto-asset[s] … offered for free" from several provisions.[22]

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[18] Tom Emmer and Patrick McHenry, Letter to SEC Chair Gary Gensler (Sept. 17, 2024), https://tinyurl.com/yerevus6.

[19] *Id.*

[20] *See* Jack Schickler, *MiCA, EU's Comprehensive New Crypto Regulation, Explained*, CoinDesk (Sept. 7, 2023), https://www.coindesk.com/learn/mica-eus-comprehensive-new-crypto-regulation-explained.

[21] Regulation (EU) No. 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, at Recital 26, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R1114.

[22] *Id.* at Art. 4.3(a).

Furthermore, as Plaintiffs explain, the SEC's apparent view that airdrops are securities offerings – which has thus far been articulated in complaints and settlements – is akin to promulgating a new rule, yet the SEC has failed to undertake the required process of notice-and-comment rulemaking under the APA. ECF No. 24 (the "Am. Compl.") ¶¶ 129-70. *See also* 5 U.S.C. § 553. "The purpose of the 'notice-and-comment' requirement is to 'assure fairness and mature consideration of rules having a substantial impact on those regulated' and for the agency to 'disclose its thinking on matters that will affect regulated parties.'" *Tex Med. Ass'n v. U.S. HHS*, 587 F. Supp. 3d 528, 543 (E.D. Tex. 2022). Notice-and-comment allows "an exchange of views, information, and criticism between interested persons and the agency." *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977). Notice-and-comment rulemaking would have required the SEC to explain its rationale in clear terms. Just as important, industry participants – such as the Association, CCI, and their members – would certainly have provided comments. As SEC Commissioner Peirce has stated, a "notice-and-comment process allows broad public and internal participation in developing a sound regulatory system,"[23] and the industry has certainly participated vigorously in past notice-and-comment rulemaking.

In sum, the SEC's view would have devastating real-world effects on the digital asset industry. *Amici* agree with Plaintiffs that requiring such projects to follow the registration rules for airdrop giveaways is not consistent with the securities laws or *Howey*. Am. Compl. ¶¶ 89-104.

[23] Hester M. Peirce, Comm'r, SEC, *Outdated: Remarks Before the Digital Assets at Duke Conference*, SEC (Jan. 20, 2023), https://tinyurl.com/bdcuy43e.

## II. THE SEC'S INCONSISTENT TREATMENT OF DIGITAL ASSETS HAS STIFLED AMERICAN INNOVATION

### A. The SEC Has Not Established a Coherent, Consistent Framework for Regulating Digital Assets

Plaintiffs describe, and we reiterate, that the SEC's strategy of regulation by enforcement has created a compliance minefield for digital asset market participants that extends well beyond airdrops. The SEC's inconsistency and hostility has left industry participants with a Sword of Damocles hanging over their heads: break some unspecified purported rule and risk the expensive and potentially existential threat of an SEC investigation or enforcement action. These tactics seem designed to force a groundbreaking industry out of existence. Indeed, the Third Circuit recently articulated these same concerns; one judge was concerned that the SEC was "interested in picking off wrongs without giving higher-level guidance," and that it was "seeking to penalize people who don't comply with things they don't know."[24] Another noted that "it almost looks like … [the SEC is] going after the platforms in a way that will crush the industry without really getting into rulemaking."[25]

The nearly eighty-year-old *Howey* test does not map neatly onto new technologies like digital assets. Instead of guiding industry participants towards a principled approach for navigating the intersection between the securities laws and digital assets, the SEC has only made things more uncertain. Both the Association and CCI, as industry groups, can attest that their members have been confused and harmed by the SEC's inconsistent approach.

The SEC has engaged principally in "guidance" through enforcement actions, which are impossible to parse for a unified theory as to what is or is not a security, because each SEC

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[24] *See* Aislinn Keely, *3rd Circ. Probes SEC's 'Close to Vacuous' Reply to Coinbase*, Law360 (Sept. 23, 2024), https://www.law360.com/articles/1881617/3rd-circ-probes-sec-s-close-to-vacuous-reply-to-coinbase.

[25] *Id.*

enforcement action is based on the unique facts and circumstances of the particular case. And the vast majority of those enforcement actions are never adjudicated by a court or a jury, either resulting in immediate settlement, or concluding at the pleading stages of litigation.

The SEC's rare informal guidance and inconsistent enforcement actions create a tangled mess. The SEC has argued at various times, that digital assets themselves are not securities;[26] that digital assets themselves are securities;[27] and that digital assets are sometimes securities, depending on a facts and circumstances test.[28] In a particularly egregious recent example, on September 12, 2024, after being admonished by a court for incorrectly arguing that tokens themselves are securities,[29] the SEC sought to amend its complaint, and in that motion claimed to "regret any confusion it may have invited" by using the term "crypto asset securities."[30] Yet, the very same day, the SEC settled a separate investigation in an order that still utilized the term "crypto asset securities."[31] Then just ten days later, in a settlement with a different digital asset

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[26] *See* William Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, Remarks at the Yahoo Finance All Markets Summit: Crypto (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418; *SEC v. Coinbase, Inc.*, 2024 U.S. Dist. LEXIS 56994, at *38 (S.D.N.Y. Mar. 27, 2024) ("[t]he SEC does not appear to contest that tokens, in and of themselves, are not securities").

[27] *See SEC v. Binance Holdings Ltd.*, No. 23-1599 (ABJ), 2024 U.S. Dist. LEXIS 114924, at *31-32 (D.D.C. June 28, 2024) ("the SEC's suggestion that the token is 'the embodiment of the investment contract,' as opposed to the *subject* of the investment contract, muddied the issues before the Court") (citations omitted, emphasis in original); SEC Release No. 81207, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, SEC (July 25, 2017), https://www.sec.gov/litigation/investreport/34-81207.pdf (the "DAO Report") ("DAO Tokens Are Securities").

[28] *Framework for "Investment Contract" Analysis of Digital Assets*, SEC (Apr. 3, 2019), https://www.sec.gov/files/dlt-framework.pdf.

[29] *See Binance Holdings*, 2024 U.S. Dist. LEXIS 114924, at *57-60.

[30] *See SEC v. Binance Holdings Ltd.*, No. 23-1559, ECF No. 271-1 at 24 n.6 (D.D.C. Sept. 12, 2024).

[31] *In the Matter of eToro USA LLC*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 12C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (Sept. 12, 2024), https://www.sec.gov/files/litigation/admin/2024/34-101001.pdf.

company, the SEC tried again to distance itself from the term "crypto asset security," and instead used "investment contracts in the form of the crypto asset."[32] Since "investment contracts" are securities, the SEC's new formulation is the exact same term, just with the words reordered.

The muddle extends to the fora in which digital assets are traded. The SEC claimed it did not have a regulatory framework for digital asset exchanges,[33] then – despite the fact that there had been no regulatory or legislative developments – suddenly stated that it actually did have a regulatory framework,[34] and then, that it had a framework sufficient to bring an enforcement action against Coinbase.[35]

The SEC's own Commissioners Peirce and Uyeda have filed numerous dissents and statements criticizing SEC's unclear treatment of digital assets.[36] Commissioner Peirce has observed that "[u]sing enforcement actions to tell people what the law is in an emerging industry is not an efficient or fair way of regulating … A paternalistic and lazy regulator settles on a solution like the one in this settlement: do not initiate a public process to develop a workable registration process that provides valuable information to investors, just shut it down."[37] In another,

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[32] Press Release, *SEC Charges Crypto Companies TrustToken and TrueCoin With Defrauding Investors Regarding Stablecoin Investment Program*, SEC (Sept. 24, 2024), https://www.sec.gov/newsroom/press-releases/2024-145.

[33] SEC, Correspondence Related to Draft Registration Statement, at 4 (Dec. 7, 2020), https://bit.ly/3lRrY4y.

[34] *SEC's Gensler: The 'Runway Is Getting Shorter' for Non-Compliant Crypto Firms*, yahoo!finance (Dec. 7, 2022), https://yhoo.it/3EJrqo1.

[35] Complaint, *SEC v. Coinbase, Inc*., No. 1:23-cv-04738, ECF No. 1 (S.D.N.Y. June 6, 2023).

[36] *See, e.g.*, Hester Peirce, Comm'r, SEC, *Overdue: Statement of Dissent on LBRY*, SEC (Oct. 27, 2023), http://tinyurl.com/42wp6ptz ("The application of the securities laws to token projects is not clear, despite the Commission's continuous protestations to the contrary."); Hester Peirce and Mark Uyeda, Comm'rs, SEC, *Statement Regarding Denial of Petition for Rulemaking*, Securities and Exchange Commission (Dec. 15, 2023), http://tinyurl.com/5cy5ux3w (dissenting from denial of petition because "addressing these important issues is a core part of being a responsible regulator").

[37] Hester Peirce, Comm'r, SEC, *Kraken Down: Statement on SEC v. Payward Ventures, Inc., et al.* (Feb. 9, 2023), https://tinyurl.com/2mwnuppr.

Commissioner Peirce and then-Commissioner Elad L. Roisman explained that they were "disappointed that the Commission's settlement … did not explain *which* digital assets … were securities, an omission which is symptomatic of our reluctance to provide additional guidance about how to determine whether a token is being sold as part of a securities offering or which tokens are securities."[38] Commissioner Peirce has stated that if the SEC "seriously grappled with the legal analysis and our statutory authority, as we would have to do in a rulemaking, we would have to admit that we likely need more, or at least more clearly delineated statutory authority to regulate certain digital asset tokens and to require digital asset trading platforms to register."[39]

Commissioners Peirce and Uyeda recently criticized a settlement that "fails to identify which crypto assets were investment contracts and provides no explanation for its conclusion."[40] They even wrote a short script about the SEC's "manifestly unsatisfying" mantra that digital asset companies "just come in and register." As the "SEC" states in the script: "Well, if you don't know whether you're dealing in securities, you can't register. And by the way, if some of the assets you're dealing in are not securities, you also can't register."[41] When asked to help "think through which assets are securities," the fictional SEC "suggest[s] that you read the 2017 DAO report, and it will all be clear to you" and to look at enforcement actions.[42] As is evident to anyone reading the script, the DAO Report, and enforcement actions, the SEC's position is anything but clear.

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38 Hester M. Peirce and Elad Roisman, Comm'rs, SEC, *In the Matter of Coinschedule* (July 14, 2021), https://www.sec.gov/news/public-statement/peirce-roisman-coinschedule (emphasis in original).

39 Hester M. Peirce, Comm'r, SEC, *Outdated: Remarks Before the Digital Assets at Duke Conference* (Jan. 20, 2023), https://tinyurl.com/bdcuy43e.

40 Hester Peirce and Mark Uyeda, Comm'rs, SEC, *On Today's Episode of As the Crypto World Turns: Statement on ShapeShift AG* (Mar. 6, 2024), https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-crypto-world-turns-03-06-24.

41 *Id.*

42 *Id.*

Even if an entity operating in the digital asset space decided that it wanted to register with the SEC, registration would be nearly impossible. Robinhood recently testified that it "spent significant time, money and effort to pursue registration as a digital asset special purpose broker-dealer with the SEC over a year and a half to discuss its cryptocurrency business" but "the staff was generally non-responsive to Robinhood's requests for guidance or feedback on how to move its registration proposal forward."[43] Another company debunked the SEC's "claim that crypto projects can 'just come in and register.'"[44] The "current registration forms rely on a set of disclosures that are inadequate for crypto's unique aspects and leave investors vulnerable."[45]

### B. Regulatory Uncertainty Is Causing Talented and Innovative Individuals and Companies to Leave the U.S. for Jurisdictions Friendlier to Digital Assets

The uncertainty described by Plaintiffs has caused innovators, jobs, and funding in the digital asset space to move offshore, which has severely impeded the U.S.'s ability to be a leader in digital asset innovation. The digital asset industry provides good, high-paying jobs.[46] Those jobs, however, have been and continue to leave the U.S. for jurisdictions that have achieved some level of regulatory clarity involving digital assets (or are actively working to do so). Even though the U.S. was the "first and biggest hub for Web3 software development," the U.S. has lost market share to countries like India, China, and others "as the relative pace of U.S. Web3 development slows. Global Web3 software development activity has grown more outside the U.S., threatening

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43 Daniel Gallagher, *Testimony Before the U.S. House of Representatives House Financial Services Subcommittee on Digital Assets, Financial Technology and Inclusion, "Dazed and Confused: Breaking Down the SEC's Politicized Approach to Digital Assets,"* U.S. House of Representatives (Sept. 18, 2024), https://tinyurl.com/3p365ws6.

44 See Rodrigo Seira, Justin Slaughter, Katie Biber, *Due to SEC Inaction, Registration is Not a Viable Path for Crypto Projects*, Paradigm (Mar. 23, 2023), https://policy.paradigm.xyz/writing/secs-path-to-registration-part-i.

45 *Id*.

46 *See* Zackary Skelly and Chris Ahsing, *2023 Crypto Compensation Report*, Dragonfly Capital (Mar. 19, 2024), https://dccr23.dragonfly.xyz/ (the "Dragonfly Report").

the U.S.'s preeminence in finance and technology."[47] The "[a]mbiguous legal and regulatory framework has chilled U.S. innovation, especially when coupled with vague enforcement threats."[48] Between 2018 and the end of 2023, the U.S. lost 14% in developer share.[49] Non-U.S. digital asset companies are much more likely to issue tokens than U.S. digital asset companies, "potentially in light of the regulatory landscape" in the U.S.,[50] and more likely than their U.S. counterparts to pay employees in digital assets rather than fiat currency[51] – perks that attract talented employees away from U.S. companies. The *New York Times* reported that due to a "growing law enforcement crackdown," U.S.-based digital asset companies "are expanding into new markets and weighing the possibility of leaving the country entirely."[52]

Senator Cynthia Lummis has stated that Congress's failure "to enact policy [regarding digital assets] is pushing the industry to other countries."[53] And the United States Government Accountability Office affirmed that:

> Unclear and complex regulation could cause some blockchain-based businesses to alter development of their blockchain product, fail to launch their product, or move their product to areas with greater regulatory clarity … One industry association report stated that the regulatory complexity in the U.S. has driven many new blockchain ventures overseas and caused many existing companies to stop providing service to the U.S. market. Staff from one U.S. firm that developed a blockchain-based payments technology previously told us that they and their peers only work with foreign customers due to

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47 *See Report: U.S. Share of Web3 Developers is Shrinking*, Electric Capital (Dec. 16, 2022), https://tinyurl.com/445nknvk.

48 *Id.*

49 *See The US Continues to Lose Its Share of Crypto Developers While Emerging Markets Start to Take Off*, Electric Capital (2023), https://www.developerreport.com/developer-report-geography.

50 Dragonfly Report, *supra*.

51 *Id.*

52 *See* Yaffe-Bellany, *supra*.

53 Jeff Wilser, *US Crypto Firms Eye Overseas Move Amid Regulatory Uncertainty*, CoinDesk (Mar. 27, 2023), https://www.coindesk.com/consensus-magazine/2023/03/27/crypto-leaving-us.

> the fragmented U.S. regulatory structure and differing agency positions on blockchain related topics.[54]

Digital asset companies have confirmed the brain drain away from the United States. The CEO of prominent cryptocurrency exchange Coinbase stated that "[t]his is the reason why we need clarity about legislation and regulation onshore because … if the U.S. doesn't have this, these firms are going to be built in offshore havens."[55] The CEO of digital assets company Ripple stated that "[c]onfusing" U.S. regulations are "why you're seeing entrepreneurship and investment flowing into other jurisdictions."[56] The founder of investment manager ARK Invest argued that the lack of regulatory clarity "has contributed to a 'brain drain,' with talent and enterprises migrating to more crypto-friendly jurisdictions to escape the American regulatory quagmire."[57]

Examples of these losses abound. Digital asset exchange Bittrex shut down its U.S. platform in 2023, because "[o]perating in the U.S. is no longer feasible"[58] (Bittrex was later sued by the SEC and filed for bankruptcy). Finance app company Revolut decided to no longer place buy orders for digital assets for U.S. customers "[a]s a result of the evolving regulatory environment and the uncertainties around the crypto market in the U.S."[59] Digital asset market

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54 *See* GAO, *Blockchain: Emerging Technology Offers Benefits for Some Applications but Faces Challenges*, at 31-32, GAO-22-104625 (Mar. 23, 2022), https://www.gao.gov/assets/gao-22-104625.pdf.

55 Tom Wilson and Elizabeth Howcroft, *Crypto Firms Will Develop 'Offshore' Without Clear US Rules, Coinbase Chief Says*, Reuters (Apr. 18, 2023), https://tinyurl.com/42y9hwrx.

56 Sheila Chiang, *Ripple CEO Says More Crypto Firms May Leave U.S. Due to 'Confusing' Rules*, CNBC (May 18, 2023), https://tinyurl.com/bdcscn78.

57 Murtuza Merchant, *Cathie Wood: US Crypto Industry Suffers from 'Brain Drain,' Praises Hong Kong's Regulatory Approach (CORRECTED)*, Benzinga (Apr. 8, 2024), https://tinyurl.com/4f4bxtwv.

58 *See* Helene Braun, *Crypto Exchange Bittrex to Wind Down U.S. Operations Next Month*, CoinDesk (Mar. 31, 2023), https://tinyurl.com/yc88rw4v.

59 *See* Ben Weiss, *$33 Billion Startup Revlout Cites 'Evolving Regulatory Environment' in Decision to End Crypto Service to U.S. Customers*, yahoo!finance (Aug. 4, 2023), https://finance.yahoo.com/news/33-billion-startup-revolut-cites-145042470.html.

makers Jane Street and Jump Trading both pulled back from U.S. markets in 2023.[60] Also in 2023, GameStop removed support from digital asset wallets and more recently terminated its NFT marketplace due to "regulatory uncertainty of the crypto space" in the U.S.[61] Digital asset wallet companies Wasabi and Phoenix suspended services for U.S. customers earlier in 2024.[62]

By contrast, many countries outside the U.S. have provided clarity – such as by developing and/or passing regulatory frameworks – to allow for a clear way for digital asset companies to operate and innovate. MiCA, a comprehensive law regulating digital assets in the E.U., was praised as a "landmark" and for providing "clear rules of the game."[63] Indeed, MiCA was originally introduced as part of a "package of measures to further enable and support the potential of digital finance in terms of innovation and competition while mitigating the risks … in line with the Commission['s] priorities to make Europe fit for the digital age and to build a future ready economy that works for the people."[64] The United Kingdom plans to introduce formal legislation for cryptocurrency[65] and is set to advance legislation addressing stablecoins and cryptocurrency

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60 *See* Aoyon Ashraf, *Market Makers Jane Street, Jump Retreating From U.S. Crypto Trading: Bloomberg*, CoinDesk (May 9, 2023), https://tinyurl.com/2ps6uy5c.

61 *See* Helene Braun, *GameStop to Remove Crypto Wallets Citing 'Regulatory Uncertainty'*, CoinDesk (Aug 1, 2023), https://tinyurl.com/mvzb34ys (Aug 2, 2023); Zack Abrams, *GameStop Axes NFT Marketplace, Citing Regulatory Uncertainty*, The Block (Jan. 13, 2024), https://tinyurl.com/4rkjd6wm.

62 *See Crypto Wallets Exit US Amid Regulatory Pressure*, yahoo!finance (Apr. 30, 2024), https://finance.yahoo.com/news/crypto-wallets-exit-us-amid-152459422.html.

63 *See* Jack Schickler, *MiCA, EU's Comprehensive New Crypto Regulation, Explained*, CoinDesk (Sept. 7, 2023), https://www.coindesk.com/learn/mica-eus-comprehensive-new-crypto-regulation-explained.

64 Proposal for a Regulation (EU) 2020/0265 of the European Parliament and of the Council on Markets in Crypto-assets, and Amending Directive (EU) 2019/193, https://tinyurl.com/3c4sh78a.

65 *See* Ryan Browne, *UK Confirms Plans to Regulate Crypto Industry with Formal Legislation*, CNBC (Oct. 30, 2023), https://www.cnbc.com/2023/10/30/uk-confirms-plans-to-regulate-crypto-industry-with-formal-legislation.html.

staking, exchange, and custody.[66] Switzerland has been described as having a "clear regulatory framework" for digital assets,[67] and has dubbed itself "Crypto Valley."[68] French regulators have stated that digital asset companies fleeing the U.S. would be "welcome" in France, which has been praised for its "predictable and stable" regulatory regime.[69] Dubai established the world's first independent cryptocurrency regulator,[70] which has "published a set of rule books setting out a comprehensive framework of digital assets activities … The presence of this regime has attracted a wide range of established and new businesses to the region."[71] The Hong Kong Monetary Authority is creating a regulatory regime for stablecoins,[72] and Hong Kong has become a "hub for cryptocurrency activity."[73] Singapore "has started issuing licenses to crypto companies again and it recently issued proposed guidelines on regulating stablecoins."[74] Japan became one of the first

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66 *See* Camomile Shumba, *UK to Issue New Crypto, Stablecoin Legislation by July, Minister Says*, CoinDesk (Apr. 15, 2024), https://tinyurl.com/mskmypv8.

67 *See* Jeff Wilser, *Zug: Where Ethereum Was Born and Crypto Goes to Grow Up*, CoinDesk (June 27, 2023), https://tinyurl.com/yc7nemby.

68 *See About the Association*, Crypto Valley Association, https://cryptovalley.swiss/about-us/ (last visited Oct. 28, 2024).

69 *See* Jack Schickler, *Fleeing U.S. Crypto Firms 'Welcome,' French Regulatory Says*, CoinDesk (May 17, 2023), https://www.coindesk.com/policy/2023/05/17/fleeing-us-crypto-firms-welcome-french-regulator-says.

70 *See* Dillin Massand, *Dubai: Launching a Crypto Regulatory Arm to Become a Global Financial Power*, CoinDesk (June 27, 2023), https://tinyurl.com/28xt3n9b.

71 *See* Sebastian Widmann, *How The UAE Became a Crypto Hub Poised for Explosive Growth*, Forbes (Nov. 16, 2023), https://www.forbes.com/sites/digital-assets/2023/11/16/how-the-uae-became-a-crypto-hub-poised-for-explosive-growth.

72 *See* Katherine Ross & Jack Kubinec, *Hong Kong to Create Regulatory Regime for Stablecoin Issuers*, Blockworks (Dec. 27, 2023), https://blockworks.co/news/hong-kong-stablecoin-regulation.

73 Gaven Cheong, Esther Lee, Peter B. Brewin & Duncan G Fitzgerald, *Blockchain & Cryptocurrency Laws and Regulations 2024*, Global Legal Insights (2024), https://tinyurl.com/2fjhkn7x.

74 *See* Weilun Soon, *Crypto Companies Are Looking Outside the U.S. for Growth*, The Wall Street Journal (Sept. 21, 2023), https://tinyurl.com/d7rak9mz.

countries to regulate stablecoins,[75] and its Prime Minister has extolled digital assets.[76] South Korea recently passed its first digital asset regulatory framework.[77] Australia has proposed a regulatory framework for digital assets.[78] The Cayman Islands and the British Virgin Islands have both promulgated robust Virtual Assets Service Providers Acts.[79] Indeed, digital asset firms looking for regulatory guidance can find abroad the clarity the SEC refuses to provide in the U.S.

The flight of digital asset companies and jobs to other countries has negative effects extending far beyond the digital asset industry. It is difficult to even conceive of all the different ways that the U.S.'s economic and global leadership positions could be impacted by ceding primacy in an emerging technological sector. That choice will lead to a loss of talent, of course, but will also have downstream effects including loss of tax revenue and supporting jobs. Digital asset companies and their employees leaving the U.S. will neither pay for real estate nor frequent local businesses.[80] The overall economic loss from the unduly harsh regulatory climate is difficult to calculate, but is obviously significant. The SEC's behavior, including its assertions that airdrops constitute securities transactions, contributes to that climate, and must be reined in.

## CONCLUSION

The Association and CCI respectfully request that the Court consider the issues presented herein, deny the Motion to Dismiss, and grant Plaintiffs the relief they seek in this action.

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75 *See* Emily Parker, *How Japan Is Leading the Race to Regulate Stablecoins*, CoinDesk (Oct. 25, 2023), https://tinyurl.com/5ev34sth.

76 *See* Lavender Au, *Japan Signals More Web3 Promotion Policies Are Coming*, CoinDesk (July 25, 2023), https://tinyurl.com/e4rt66hx.

77 *See* Danny Park, *South Korea's Inaugural Crypto Law Goes Into Full Effect*, The Block (July 18, 2024), https://tinyurl.com/yjrnbkpj.

78 *See* Liz Mills, *Australia Takes Cautious Approach to Regulating Crypto*, Crypto Council for Innovation (Dec. 13, 2023), https://cryptoforinnovation.org/australia-takes-cautious-approach-to-regulating-crypto/.

79 *See* Virtual Asset (Service Providers) Act (2022 Revision), Cayman Islands (Jan. 31, 2022), https://tinyurl.com/3x7e97cb.

80 *See* Wilser, *supra*.

Dated: Dallas, Texas
October 28, 2024

DOWD BENNETT LLP

By: */s/ Ben A. Barnes*

Ben A. Barnes
State Bar No. 24092085
2100 Ross Ave.
Suite 955
Dallas, TX 75201
(214) 347-7346
bbarnes@dowdbennett.com

MORRISON COHEN LLP

Jason Gottlieb (*pro hac vice* to be filed)
Michael Mix (*pro hac vice* to be filed)
Emma McGrath (*pro hac vice* to be filed)
909 Third Avenue
New York, New York 10022
(212) 735-8600
jgottlieb@morrisoncohen.com
mmix@morrisoncohen.com
emcgrath@morrisoncohen.com

*Attorneys for Amici Curiae Blockchain Association and The Crypto Council for Innovation*

**CERTIFICATE OF SERVICE**

I certify that on October 28, 2024, a true and correct copy of the foregoing motion was filed and served in accordance with the Federal Rules of Civil Procedure via the CM/ECF filing system on all counsel of record.

Dated: Dallas, Texas
October 28, 2024

*Ben A. Barnes*
Ben A. Barnes