No. 23-3202

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COINBASE, INC.
Petitioner,
v
SECURITIES & EXCHANGE COMMISSION,
Respondent.

On Petition for Review of the Order of
the Securities and Exchange Commission, Docket No. 4-789

BRIEF OF THE CRYPTO COUNCIL FOR INNOVATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Crypto Council for Innovation (CCI)[1] is an 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 some of the 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.

CCI has a strong interest in this action arising from harm to its members and to the broader digital asset industry caused by the U.S. Securities and Exchange Commission's (SEC or Commission) continued

[1] Amicus files this brief with the consent of all parties. *See* Fed. R. App. P. 29(a)(2). Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Amicus affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Coinbase is a member of CCI; its counsel, however, has not authored this brief in whole or in part, nor has Coinbase contributed funds specifically intended for the preparation or submission of this brief.

determination to pursue its flawed interpretation of securities laws through a regulation-by-enforcement approach without providing any basis for meaningful participation in agency decision making. The Commission's recent denial of Coinbase's petition for rulemaking to define digital asset securities and govern the regulation of digital securities markets is the latest in the long line of Commission decisions that flouts basic principles of fairness, diminishes faith in domestic markets, and will continue to harm consumers and innovators alike.

The relief Coinbase seeks in its petition for review would provide essential guidance to the digital assets industry. As a coalition of industry leaders with substantial expertise in the digital asset space, CCI has a vital perspective to offer on issues of importance for digital asset holders, developers, operators, and investors building the digital asset ecosystem. Unless these stakeholders can rely on clear, consistent guidance—and work within a regulatory framework that makes compliance possible—digital assets (and the growing industry they fuel) will not achieve their full potential in the United States and will be pushed to the many other jurisdictions actively seeking to host the next wave of innovation. The context surrounding the SEC's approach to

digital assets should inform this Court's analysis of the legal questions presented in this case.

SUMMARY OF ARGUMENT

The Commission has attempted to enshrine an arbitrary and baseless enforcement policy without giving interested parties an opportunity to contribute meaningfully to the rules that the SEC claims governs their actions. Deprived of traditional rulemaking, good actors are forced to decipher the SEC's evolving views based on public statements by officials, litigation filings, and (sometimes contradictory) judicial rulings in enforcement actions. Industry participants seeking regulatory clarity are fleeing abroad to jurisdictions that offer the regulatory guidance the SEC refuses to provide. The United States is thus losing its role as a leader in the global digital assets financial system and will eventually occupy a back seat in the technological frontier. These trends deprive American consumers of access to digital assets, their diversification, decentralization, and manifold benefits, and pose a present danger to U.S. competitiveness. The Commission's refusal to engage in traditional rulemaking in favor of vague and inconsistent

enforcement actions has caused and will continue to cause significant harm to American business in the new, digital age.

STANDARD

"Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). A reviewing court will reverse an agency's denial of a petition for rulemaking if that action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's "reasons for action or inaction must conform to the authorizing statute." *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). That agency may validly deny a petition by offering "some reasonable explanation as to why it cannot or will not exercise its discretion," *id.*, and a court must examine whether the agency "has adequately explained the facts and policy concerns it relied on" to satisfy the court "that those facts have some basis in the record." *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981).

ARGUMENT

In 1934, the first Chair of the Commission made a promise: "If a business does the right thing, it will be protected and given a chance to

live, make profits and grow, helping itself, and helping the country. Honest business needs nothing more; the Commission promises nothing less."[2] When it comes to digital assets, the Commission has failed in that promise. It has embarked on a path of enforcement without standards; it has used ill-fitted statutory tools to prosecute enforcement actions; and it has created a regime of uncertainty that stifles a burgeoning industry that plays an important and growing role in the world economy.

The number of digital assets users grew 320% between 2020 and 2022, and as of 2023, more than 420 million people globally have invested in, traded, or used digital assets.[3] As of March 12, 2024, the market

[2] Joseph P. Kennedy, *Speech to the Boston Chamber of Commerce* (Nov. 15, 1934), www.sec.gov/news/speech/1934/111534kennedy.pdf.

[3] Ziang Lin, How *Many Crypto Users Are There in 2024? (Updated Statistics)*, https://coinweb.com/trends/how-many-crypto-users-are-there/ (last visited Mar. 11, 2024). Roughly three-in-ten Americans ages 18 to 29 (31%) say they have ever invested in, traded or used a cryptocurrency such as Bitcoin or Ether, compared with smaller shares of adults in older age groups. Overall, 86% of Americans say they have heard at least a little about cryptocurrencies, including 24% who say they have heard a lot about them, according to the survey of U.S. adults, conducted Sept. 13-19, 2021. *See* Andrew Perrin, *16% of Americans Say They Have Ever Invested In, Traded or Used Cryptocurrency*, Pew Research Center (Nov. 11, 2021), www.pewresearch.org/short-reads/2021/11/11/16-of-americans-say-they-have-ever-invested-in-traded-or-used-cryptocurrency/. According to CoinMarketCap, as of March 12,

capitalization for digital assets was about $2.7 trillion.[4] This technology is novel and many traditional agency regulations do not cleanly map to the digital assets industry. The SEC's approach of regulation by enforcement only deprives the digital assets industry of the predictability and coherence necessary for honest and responsible businesses to "live, make profits, and grow" in the United States. Instead, it introduces uncertainty and confusion to an emerging and growing economic sector in need of greater clarity and predictability. Traditional rulemaking is necessary for the SEC to honor its longstanding promise to protect honest business.

I. The SEC's refusal to engage in substantive rulemaking perpetuates an unworkable regulatory black hole

The specific and novel features of decentralized digital assets differ from traditional financial instruments issued by a central bank. This, in turn, feeds distinct market structures. A workable regulatory framework requires an explanation specific to the digital assets industry. The SEC, however, has resisted substantive rulemaking, and instead endeavored

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2024, the market capitalization for crypto assets was about $2.7 trillion. https://coinmarketcap.com/charts/.

[4] CoinMarketCap, *Global Live Cryptocurrency Charts & Market Data*, https://coinmarketcap.com/charts/ (last visited Mar. 13, 2024).

to regulate largely by enforcement. The resulting uncertainty has harmed innovation and failed to provide clarity to the industry.

The SEC's suggestion that digital asset organizations can simply "come in and register" is not feasible for the industry for numerous reasons. *First*, there is no actionable guidance to delineate which assets the SEC thinks require registration. *Second*, the registration requirements that exist are ill-fitting and inadequate, and not built for the nuances and complexities of the digital asset market.[5] And, even if some assets or market participants did register, which again is not viable, securities laws preclude market participants from servicing a category of assets (like digital assets) that may include both securities and non-securities. Simply put, the SEC has provided no viable pathway for digital asset firms to comply with existing regulations.[6]

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[5] These ill-fitting registration requirements have been criticized from within the SEC by Hester M. Peirce, *Rendering Innovation Kaput: Statement on Amending the Definition of Exchange* (Apr. 14, 2023), by 29 members of Congress serving on the Committee with jurisdiction over digital assets, Letter to SEC Chairman Gensler, Committee on Financial Services (Apr. 18, 2023), https://tinyurl.com/2s395y3t, as well as policy experts, Paradigm Policy, *The Current SEC Disclosure Framework Is Unfit for Crypto*, (Apr. 20, 2023), https://policy.paradigm.xyz/writing/secs-path-to-registration-part-iii.

[6] The SEC has only once published a list of nearly three dozen factors—without any guidance on how they are to be weighted—to

The SEC's actions highlight its inconsistency about which assets the SEC thinks require registration. For example, although SEC staff repeatedly opined that Bitcoin is not a security,[7] the Commission sat on and then denied approval of spot Bitcoin exchange traded funds (ETFs) even though it approved Bitcoin futures-based ETFs. The SEC provided insufficient rationale for its decision to differentiate between two functionally indistinguishable products. In litigation, the SEC cited alleged concerns about fraud and manipulation in the Bitcoin spot market, but the Court of Appeals for the District of Columbia held that the SEC's decision fell "short of the standard for reasoned decision making" and "was arbitrary and capricious because the Commission failed to explain its different treatment of similar products," failing to dispute evidence of "almost perfect correlation" between spot and futures

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predict which digital assets are securities and must actually be registered. Securities & Exchange Commission, Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019), https://tinyurl.com/bdej9c94. This non-exhaustive list of factors, which is now nearly five years out-of-date, has been compared unfavorably to a "Jackson Pollock approach to splashing lots of factors on the canvas without any clear message." Hester M. Peirce, Commissioner, SEC Address at Securities Enforcement Forum (May 9, 2019).

[7] Ankush Khardori, *Can Gary Gensler Survive Crypto Winter?* N.Y. Magazine, (Feb. 23, 2023).

markets. *Grayscale Invs., LLC v. SEC*, 82 F.4th 1239, 1242, 1248 (D.C. Cir. 2023).

Since 2018, the SEC has received multiple petitions for rulemaking seeking clarity on the Securities and Exchange Acts' application to the digital asset economy,[8] including the petition from Coinbase at issue in this case. It nevertheless has refused to provide regulatory clarity through the traditional rulemaking process, insisting instead that the existing system is workable. Coinbase Petition for Review, Ex. A at 2. And yet, even the Commission's litigation tactics evade a consistent approach.

In lieu of traditional rulemaking, the SEC has focused its efforts on enforcement, launching 46 new enforcement actions in 2023—a 53% increase from 2022 which in turn was a 50% rise from 2021. Such enforcement actions have now more than *doubled on a per year basis* since 2021. Cornerstone Research, *SEC Crypto-currency Enforcement* (2023), https://tinyurl.com/45e34yw2. But even those enforcement

[8] Kara McKenna Rollins, *Have the SEC's Delay Tactics Made Its Petition for Rulemaking Process Vulnerable to Challenge? A Look at In re Coinbase Inc. and SEC's Nullification of 5 U.S.C. § 553(e) by Inaction*, Yale Journal on Regulation (May 3, 2023); *see also* SEC File Nos. 4-736, 4-743, 4-771, 4-782, 4-789.

actions highlight the opacity of the regulatory landscape.[9] In 2020, for example, seven years after Ripple Labs began selling the digital asset XRP, the SEC alleged that Ripple issued unregistered securities to investors under the test to determine an "investment contract" set forth in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). Three years later, a federal judge rejected the SEC's position that XRP in and of itself was a security and held that three of the four transaction types at issue were not securities transactions. *SEC v. Ripple Labs, Inc.*, No. 20 CIV. 10832 (AT), 2023 WL 4507900 (S.D.N.Y. July 13, 2023).

The SEC's positions in its enforcement actions provide little clarity on the agency's view of which digital assets are investment contracts. Just this month, the SEC settled an enforcement action against ShapeShift, a Swiss online platform that facilitated trading in 79 distinct digital assets, which it asserted sold investment contracts and therefore securities.[10] Nowhere did the order identify which of the 79 digital assets

[9] *Due to SEC Inaction, Registration is Not a Viable Path for Crypto Projects, Paradigm* (Mar. 9, 2023), https://policy.paradigm.xyz/writing/secs-path-to-registration-part-i.

[10] ShapeShift wound down its U.S. operations in 2021 to move to Switzerland, which has widely been viewed as having a developed but innovation-friendly regulatory system—one of various examples of

the SEC believed were investment contracts, and the order provided no explanation for its conclusion.[11] "It [wa]s entirely unclear how ShapeShift was to discern that the Commission would consider digital assets generally—and any digital asset in particular—a security in the form of an investment contract." Statement by Commissioners Peirce and Uyeda, *On Today's Episode of As the Crypto World Turns: Statement on ShapeShift AG*, https://www.sec.gov/news/statement/peirce-uyeda-statement-a-crypto-world-turns-03-06-24 (Mar. 5, 2024). As SEC Commissioners Peirce and Uyeda explained, "[t]he standards are so opaque and arbitrary that the Commission itself is unwilling to stand by its own analysis. If case-by-case determination is possible, we respectfully request that the Commission show its work." *Id.*

Notwithstanding the Commission's representation that organizations can simply "come in and register," existing registration requirements are ill-fitting. For example, the key registration form for

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digital asset companies departing the United States for more certain shores. *See* pp. 13–15, *infra*.

[11] *SEC Charges ShapeShift AG Crypto Platform with Operating as an Unregistered Dealer*, File No. 3-21891, www.sec.gov/enforce/34-99676-s (last modified Mar. 5, 2023).

domestic issuers, Form S-1, requires issuers to determine whether the securities are equity or debt securities for purposes of certain disclosures. Many digital assets, however, do not resemble debt or equity because they convey no legal relationship to any issuer and do not entitle the holder of a token to anything other than the token's functionality, such as the ability to execute a transaction.[12]

Registration is not a viable pathway to compliance. Numerous companies have faced high fees and long waits, only to discover that they will not receive clearance or that the onerous and vague process set forth by the SEC, ostensibly intended to confer legitimacy, had instead proven fatal to their business. *See* Rodrigo Seira, Justin Slaughter, Katie Biber, *Lessons from Crypto Projects' Failed Attempts to Register with the SEC* – Part II, Paradigm (Mar. 23, 2023). As RobinHood's Chief Compliance Officer told Congress: "When Chair Gensler at the SEC in 2021 said, 'Come in and register,' we did." "We went through a 16-month

[12] *See* Lewis Cohen *et al.*, *The Ineluctable Modality of Securities Law: Why Fungible Crypto Assets Are Not Securities* (Nov. 10, 2022) (providing an exhaustive review of every single relevant federal appellate case to have applied the *Howey* test to establish that no such authority exists for the notion that "an asset that is the object of an investment contract transaction [e.g., a token] is itself a security.").

process . . . And then we were pretty summarily told in March that that process was over and we would not see any fruits of that effort."[13] Even if companies were to somehow successfully register, which again is not currently possible, "legitimate" tokens face a "choke point" because the SEC refused to license intermediary exchanges, creating a Catch-22 where legality perversely leads to lack of digital trading value.

Despite lack of guidance on the definition of digital asset security, or any viable path to registration, the SEC has doubled down on enforcement, seeking to subject companies—like Coinbase—to strict liability for failing to register digital products as securities. *See, e.g.*, 15 U.S.C. § 77(e) (strict liability on issuers for failure to register a securities offering); 15 U.S.C. § 78(e) (strict liability on exchanges for failure to register, if they facilitate transactions in securities).

The Commission's refusal to construct the legal building blocks of a coherent regulatory framework leaves no viable path for good actors. Market participants cannot discern when or how digital assets constitute

[13] Jesse Hamilton, *Robinhood Joins Coinbase in Saying It Tried to 'Come In and Register' Like SEC Wanted* (June 7, 2023) Yahoo Finance, https://finance.yahoo.com/news/robinhood-joins-coinbase-saying-tried-180908883.html.

securities and thus cannot structure their behavior to meet the SEC's requirements. Far from protecting investors, the SEC's approach exposes them to increased risk by pushing good and responsible actors out of the market, creating a vacuum attractive to those least concerned with compliance.

II. The SEC's refusal to engage with industry beyond an enforcement-only approach is causing irreparable harm to the development of the United States digital assets market

The Commission's refusal to engage in an open process and instead proceed behind the curtain of an enforcement-only approach is causing irreparable harm to the development of a domestic digital asset market.

While the SEC deprives the American market of regulatory clarity, other countries are actively courting the next wave of technology by providing clear regulatory frameworks. The United Kingdom is creating a framework in an effort to become a hub for innovation in the industry.[14]

[14] See HM Treasury, *Future Financial Services Regulatory Regime for Cryptoassets—Consultation and Call for Evidence* (2023) (explaining that the UK government has taken steps to develop "clear, effective, timely regulation" of digital assets that will allow it "to be home to the most open, well-regulated, and technologically advanced capital markets in the world"). *See also DP23/4: Regulating cryptoassets Phase 1: Stablecoins, UK Financial Conduct Authority* (June 11, 2023), www.fca.org.uk/publications/discussion-papers/dp23-4-regulating-cryptoassets-phase-1-stablecoins (discussing the UK Financial Conduct Authority's

The European Union parliament's "Markets in Crypto Act" seeks 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 priorities to make Europe fit for the digital age and to build a future-ready economy that works for the people."[15] Swiss civil law recognizes digital assets as intangible assets and permits the transfer of tokens as a representation of value (while also regulating transfer of rights through digital registers).[16] Recently, French regulators have explicitly enticed fleeing U.S. companies by "contrasting" the stability of its system "sharply with the situation across the Atlantic."[17]

Markets in Asia Pacific have also successfully offered a contrast to American regulatory limbo. Hong Kong regulators expanded jurisdiction to offer "investor protection" while building a "regulatory framework

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proposed legislative framework for stablecoins to ensure further regulatory clarity for this distinct category of digital asset).

[15] Regulation of the European Parliament and of the Council on Markets in Crypto-assets, 2020/0265 (COD).

[16] Libr. of Congress, *Switzerland: New Amending Law Adapts Several Acts to Developments in Distributed Ledger Technology* (Mar. 3, 2021), http://tinyurl.com/4zxc2aft.

[17] Jack Shickler, *Fleeing U.S. Crypto Firms 'Welcome,' French Regulator Says*, Coindesk (May 17, 2023) Case No. 1:23-cv-04738.

across the entire ecosystem such that Hong Kong" has become "a hub for cryptocurrency activity" in Asia.[18] The United Arab Emirates established guidelines on digital assets in 2018 and the Dubai Financial Services Authority recently approved Toncoin, Ripple, Bitcoin, Ether, and Litecoin for trading within the Emirate.[19] Japan has also led when it comes to stablecoin regulation–for example, it amended its Payment Services Act in 2022 to provide a regulatory framework that categorizes tokens based on their functions and utility.[20] In addition, Singapore continues to grant new licenses to Digital Payment Token (DPT) service providers, with Upbit (approved in January 2024) joining the likes of Coinbase, Circle, Paxos, and Crypto.com as a licensed Major Payment Institution (MPI).[21]

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[18] *See* Gaven Cheong et al., *Government Attitude and Definition in Blockchain & Cryptocurrency Laws and Regulations 2024 | Hong Kong*, Global Legal Insights, http://tinyurl.com/25n32h2d (last visited Mar. 9, 2024).

[19] Sebastian Widmann, *How the UAE Become a Crypto Hub Poised for Explosive Growth*, Forbes (Nov. 16, 2023), www.forbes.com/sites/digital-assets/2023/11/16/how-the-uae-became-a-crypto-hub-poised-for-explosive-growth.

[20] *See* Takeshi Nagase et al., *Blockchain & Cryptocurrency Laws and Regulations 2024 Japan, Global Legal Insights*, https://tinyurl.com/4nc8776s (last visited Mar. 12, 2024).

[21] *See* Jared Kirui, *Upbit Singapore Granted MPI License for Institutional Crypto Services*, Finance Magnates (Jan. 8, 2023), www.financemagnates.com/cryptocurrency/upbit-singapore-granted-

Good actors looking for regulatory guidance can find abroad the clarity the SEC refuses to provide in the United States.[22] When a large digital assets exchange secured a virtual asset service provider license in Ireland, observers noted that "the timing of [the] announcement coincides with a widespread crypto crackdown in the U.S. that's

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mpi-license-for-institutional-crypto-services/. *See also* Fintech News Singapore, *Here Are All The Licensed Crypto Services Providers in Singapore* (Jan. 25, 2024), https://fintechnews.sg/63023/blockchain/here-are-all-the-licensed-crypto-services-providers-in-singapore/.

[22] *See* Jeff Wilser, *Senator Cynthia "Crypto Queen" Lummis: Lack of Laws Pushing Industry Overseas*, NASDAQ (Mar. 20, 2023) (Senator Lummis observing that the United States is falling behind as firms turn their attention and hiring abroad because "our regulatory framework is not fleshed out."). In 2022, the Government Accountability Office noted in a report that one of the key challenges facing blockchain-based products in the U.S. was regulatory complexity, which has led to flight from the U.S. *Report by Government Accountability Office, Technology Assessment: Blockchain – Emerging Technology Offers Benefits for Some Applications but Faces Challenges*, GAO (March 2022), www.gao.gov/assets/gao-22-104625.pdf ("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, according to multiple experts we interviewed. 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 the fragmented U.S. regulatory structure and differing agency positions on blockchain related topics.").

prompted firms to look abroad." Ben Weiss, *Kraken secures license in Ireland as U.S. crypto companies look abroad for "clarity"*, Fortune Crypto (Apr. 18, 2023). Relatedly, Coinbase, the petitioner, has also taken steps in pursuit of its global expansion strategy.[23] In response to questions from former U.K. Chancellor George Osbourne about whether Coinbase could leave the U.S., Coinbase CEO Brian Armstrong commented that the company would consider a move from the U.S. if the regulatory environment in the U.S. does not become clearer.[24]

Digital assets firms have also turned to Paris and Hong Kong "as more friendly bases for operations than cities in the U.S." *Id.*[25] Other

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[23] *See Introducing Coinbase International Exchange, Coinbase* (May 2, 2023), www.coinbase.com/blog/introducing-coinbase-international-exchange; *Coinbase launches international crypto derivatives exchange*, Reuters (May 2, 2023), https://www.reuters.com/technology/coinbase-launches-international-crypto-derivatives-exchange-2023-05-02/.

[24] Jamie Crawley, *Coinbase Could Move Away From U.S. if No Regulatory Clarity: CEO Brian Armstrong*, CoinDesk (Apr. 18, 2023), www.coindesk.com/business/2023/04/18/coinbase-could-move-away-from-us-if-no-regulatory-clarity-ceo-brian-armstrong.

[25] *Lugano stakes claim to become digital assets capital of Europe*, BBVA, Feb. 23, 2023; Emily Nicolle & Suvashree Ghosh, *US Crypto Crackdown Boosts Appeal of Friendlier Overseas Hubs*, Bloomberg Industry Group, Feb. 17, 2023 (describing how other countries are capitalizing on U.S. inaction); *id.* (Chief Investment Officer at Arca

exchanges have quit the U.S. market altogether: one of Europe's most valuable startups, challenger bank Revolut, stopped digital assets services for U.S. domestic customers, citing the "evolving regulatory environment" and the "uncertainties around the [American] crypto market."[26]

Such flight harms American interests. The White House has recognized that "digital assets present potential opportunities to reinforce U.S. leadership in the global financial system and remain at the technological frontier."[27] These opportunities are lost when innovative, responsible organizations who were created and operate in the United States move to other jurisdictions.

A foundation of our financial system is that consumer and national security protections are strongest—whether buttressed by disclosure,

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stating that the new companies his firm is exploring are "not even bothering with the U.S.").

[26] Ben Weiss, *$33 billion startup Revolut cites 'evolving regulatory environment' in decision to end crypto service to U.S. Customers*, Fortune Crypto (May 2, 2023), https://fortune.com/crypto/2023/08/04/revolut-us-market-withdrawal-regulatory-uncertainty/.

[27] The White House, *FACT SHEET: White House Releases First-Ever Comprehensive Framework for Responsible Development of Digital Assets* (May 2, 2023), https://tinyurl.com/3yc2bpvu.

sanctions, or anti-money laundering laws—when this activity occurs on American soil and under the purview of U.S. regulators.[28] While calling for an investigation of exchanges used to finance terror, U.S. Senator Lummis observed: "we need to be making it more difficult to operate a crypto asset intermediary in the shadows offshore. But we also need to make it possible to operate a compliant exchange in the United States."[29] The Commission's refusal to engage in substantive rulemaking perpetuates a legal and regulatory purgatory where good actors cannot act, and bad actors thrive.

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[28] The current Administration has explicitly recognized this continued U.S. interest in setting the international standards for digital assets. The White House, *Executive Order on Ensuring Responsible Development of Digital Assets* (Mar. 9, 2022), https://tinyurl.com/4rbfya2w ("The United States has an interest in ensuring that it remains at the forefront of responsible development and design of digital assets and the technology that underpins new forms of payments and capital flows in the international financial system, particularly in setting standards that promote: democratic values; the rule of law; privacy; the protection of consumers, investors, and businesses; and interoperability with digital platforms, legacy architecture, and international payment systems.")

[29] *See* Statement by Senator Cynthia Lummis, *Crypto Assets Are Not The Enemy, Bad Actors Are* (May 2, 2023), www.lummis.senate.gov/press-releases/lummis-crypto-assets-are-not-the-enemy-bad-actors-are/.

III. The SEC's Order is arbitrary and capricious

"Regulated parties," like those in the digital asset industry, "are entitled to know what an agency's rules require and to assume that administration of the rules will be reasonably predictable and coherent across cases." *Baltimore Gas & Elec. Co. v. FERC*, 954 F.3d 279, 286 (D.C. Cir. 2020). The notice and comment rulemaking process facilitates democratic values, ensuring "an exchange of views, information, and criticism between interested persons and the agency." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977). An agency "must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which the rule is based." *Id.* By fulfilling this obligation, the agency makes its "views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." *Id. at 36.* These procedures are not mere formalities. There is an "openness, explanation, and participatory democracy required by the [Administrative Procedure Act] APA" that is essential to promoting legitimacy and the principle that those affected by rules have a stake in the creation of those rules. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (1978).

As this Administration observed, "members of the public are often the best situated to identify and explain the potential effects of a regulation, identify impacts that can be difficult to measure, and offer creative approaches to challenging problems."[30] The digital assets industry must have a chance to weigh in on the standards by which they are governed. Such a process would yield several distinct benefits.

First, the system will have fixed and predictable rules. It is black-letter administrative law that regulated parties "are entitled to know what an agency's rules require and to assume that administration of the rules will be reasonably predictable and coherent across cases." *Baltimore Gas*, 954 F.3d at 286. Rulemaking provides a lodestar for consumers and industry to structure their actions. That lodestar is absent from enforcement actions, which require industry participants to decipher applicable rules based on an agency's briefs and their wins or losses in court.[31]

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[30] *Strengthening Our Regulatory System for the 21st Century*, The White House (Apr. 6, 2023), www.whitehouse.gov/omb/briefing-room/2023/04/06/strengthening-our-regulatory-ystem-for-the-21st-century/.

[31] The Commission has recognized that enforcement actions must be used to "to carefully and effectively send clear messages to securities industry participants regarding what is, and what is not, acceptable behavior." *Statement on the Importance of Clarity in Commission*

Second, the notice and comment process promotes legitimacy of the rule and respect for the law. "[C]itizens will accept the legitimacy of collective decisions that go against them, but only if they think their arguments and reasons have been given a fair hearing, and that others have taken seriously what they have to say."[32] As opposed to an enforcement action, rulemaking requires the agency to explain the statutory basis for its actions and subject itself to the rigors of public comment and judicial review. These checks not only provide assurances that the agency has acted within the proper bounds of its authority but confer legitimacy onto the future exercise of that authority in the eyes of the public, who are afforded a chance to be heard outside the ballot-box.

Orders, Securities and Exchange Commission, (Aug. 10, 2015), www.sec.gov/news/statement/importance-clarity-commission-orders. Despite this, SEC settlements or consent orders with the industry offer virtually no detail about *why* a certain digital asset was a security, often repeating or referring back to conclusory allegations in the complaint that certain facts about an asset or exchange amounted to the sale of a security. *See, e.g., Kraken to Discontinue Unregistered Offer and Sale of Crypto Asset Staking-As-A-Service Program and Pay $30 Million to Settle SEC Charges*, Securities and Exchange Commission (Feb. 13, 2023), https://www.sec.gov/litigation/litreleases/lr-25637; *In the Matter of Nexo Capital Inc*, Order Instituting Cease-And- Desist Proceedings, 3-21281, https://www.sec.gov/files/litigation/admin/2023/33-11149.pdf.

[32] Will Kymlicka, *Contemporary Political Philosophy: An Introduction* 291 (2d Ed. 2002).

Third, SEC access to information and decision-making would be improved. Because agencies must respond to the substance of comments, *Sierra Club v. EPA*, 863 F.3d 834 (D.C. Cir. 2017), the APA compels them to consider alternative points of view. Industry participants could alert the SEC to real-time problems and difficulties; they can work constructively with the agency to address them proactively, ameliorating the need for escalating enforcement.

The SEC's failure to engage in this process is arbitrary and capricious. The SEC summarily denied Coinbase's rulemaking petition in a two-page letter that merely asserted that the SEC "disagrees" with Coinbase's representation that the existing regime is "unworkable."[33] Without SEC guidance, industry participants must "try[] to figure out whether they have to register as dealers and, if so, which assets they can handle in the registered entity. To do so, they need to understand whether the assets for which they provide liquidity are securities."[34] Yet

[33] Response to Petition for Rulemaking, File No. 4-789, Securities and Exchange Commission (Dec. 15, 2023), www.sec.gov/files/rules/petitions/2023/4-789-letter-secretary-grewal-121523.pdf.

[34] Statement by Commissioners Peirce and Uyeda, *On Today's Episode of As the Crypto World Turns: Statement on ShapeShift AG* (Mar. 5, 2024), www.sec.gov/news/statement/peirce-uyeda-statement-a-crypto-world-turns-03-06-24.

the SEC has denied them access to a coherent framework to measure their actions and has thus not met the APA's basic promise "of fair notice and equal treatment inherent to the rule of law." *Baltimore Gas*, 954 F.3d at 286.

* * *

CCI supports the development of a robust, regulated market for digital assets in the United States. Technological innovation enhances Americans' lives in meaningful ways, but innovation has never been an unchecked good. For a digital asset market to responsibly grow, there must exist a careful balancing of risks within an appropriate framework to promote the growth of the industry while also protecting customers and investors, promoting market integrity, and ensuring transparency. These goals are served by clear, prospective rules of the road.

CONCLUSION

For the foregoing reasons, this Court should grant Coinbase's petition and direct the SEC to begin the rulemaking process.

March 18, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g), and Third Circuit L.A.R. 28.3(d) and 31.1(c), the undersigned counsel for amicus curiae certifies as follows:

1. Pursuant to this Court's Rule 46.1(e), I hereby certify that I am a member of the bar of this Court in good standing.
2. This brief complies with the type-volume limitation of Rule 29(a)(5) because the brief contains 5066 words, excluding the parts of the brief exempted by Rule 32(f).
3. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the brief was prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century font.
4. Pursuant to this Court's Rule 31.1(c), the text of the electronic brief is identical to the text in the paper copies.
5. Pursuant to this Court's Rule 31.1(c), CrowdStrike 7.10.18011.0, a virus detection program, has been run on the file and no virus was detected.

I understand that a material misrepresentation may result in the Court's striking the brief and imposing sanctions.

March 18, 2024

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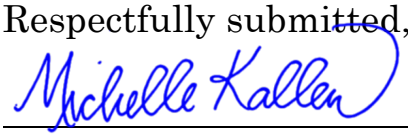

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2024, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

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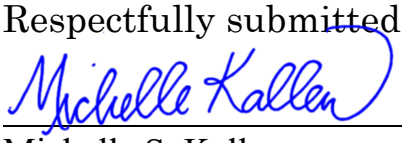

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