UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

LEJILEX; CRYPTO FREEDOM ALLIANCE OF TEXAS,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION; ERIC R. WERNER; GARY GENSLER; CAROLINE A. CRENSHAW; JAIME E. LIZÁRRAGA; HESTER M. PEIRCE; and MARK T. UYEDA, in their official capacities,

Defendants.

Civil Action No. 4:24-cv-00168-O

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 4

A. The Securities Act and the Exchange Act. 4

B. The Digital Asset Industry. 6

C. The SEC's Assertion of Authority Over Digital Asset Transactions........ 9

1. For years, the SEC acknowledged that it does not possess broad authority to regulate digital assets........ 9

2. The SEC moves to expand its regulatory authority via enforcement........ 11

D. LEJILEX and CFAT. 19

STANDARD OF REVIEW 21

ARGUMENT 22

I. The SEC Has No Statutory Authority To Regulate The Digital Asset Transactions That Will Occur On LEJILEX's Platform 22

A. Investment Contracts Under the Federal Securities Laws Require an Ongoing Reciprocal Relationship in Which the Promoter Must Use the Investor's Capital to Generate Value for the Investor 24

B. Digital Asset Transactions on LEJILEX's Platform Will Contain None of the Essential Characteristics of an Investment Contract 31

C. The SEC's Attempts to Transform Digital Asset Transactions Into Investment Contracts Are Unavailing 36

II. The Major Questions Doctrine Confirms That The SEC Has No Authority To Regulate The Digital Asset Transactions That Will Occur On LEJILEX's Platform........ 43

CONCLUSION........ 48

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INTRODUCTION

This case turns entirely on a single legal question: Does the Securities and Exchange Commission ("SEC") have the power to regulate virtually all digital asset transactions? The SEC insists that it does, but it is wrong as a matter of law, as its sole basis for that extravagant claim ignores the fundamental difference between a discrete asset sale and the kind of investor/investee relationships with which the federal securities laws are concerned. The SEC therefore does not have authority to regulate the types of transactions that will occur on the digital asset trading platform that Plaintiff LEJILEX plans to launch, or that are already occurring on platforms operated by other members of Plaintiff Crypto Freedom Association of Texas ("CFAT").

The SEC insists that digital asset transactions qualify as "investment contracts" regulated by the federal securities laws and so fall within its regulatory domain, but the SEC is incorrect. Under the plain text of those laws, the well-settled meaning of the term "investment contracts" when Congress enacted those laws, and binding Supreme Court precedent interpreting that term, the SEC's authority is confined to traditional investment arrangements, where one party supplies capital in exchange for a promise that the other party will use it to generate returns that must be shared with the investor. Digital asset transactions indisputably look nothing like that. When someone purchases the kinds of common digital assets at issue here, that person does not become vested in some sort of profit-sharing arrangement with those assets' creators (or anyone else). No one is obligated to put the purchase price of the digital asset to work trying to generate future returns that must be shared with whoever purchased it. That is because the purchaser did not purchase a stake in an ongoing "digital asset enterprise." The purchaser simply exchanged one thing of value for another. That is an asset sale, not an investment.

To be sure, some people may purchase digital assets with the hope that those assets will increase in value so that they can later sell those assets at a profit. But that kind of speculation in

the value of assets has never been understood to qualify as "investing" within the meaning of the federal securities laws. If it did, then the SEC's regulatory domain would extend to all walks of commercial life, as there is no end to the number of things that people purchase with the hope that they will increase in value. Someone who purchases limited-run Nike sneakers intending to resell them for profit, for example, may expect that Nike will continue to try to create demand for and otherwise increase the value of those desirable shoes. But that does not turn those sneakers into securities, their purchase into a securities transaction regulated by the SEC, or any auction house or consignment store that facilitates their sale into an unregistered broker-dealer, securities exchange, or clearing agency. Digital assets are no different: Whatever reasons people may have for purchasing them, they are purchasing only an asset, not a stake in a common profit-sharing enterprise.

Indeed, the SEC itself seemed to recognize as much when digital assets first came on the scene. For years, the agency claimed no authority to regulate digital assets, recognizing—as the SEC Chair himself did before taking that post—that the typical digital asset is "just a commodity," not a security. Gary Gensler, MIT, *Lecture Transcript: Blockchain and Money* 11 (Fall 2018), https://tinyurl.com/3jpnxysn. And both present and former Commissioners have continued to recognize as much to this day. Nevertheless, in recent years the SEC has done an about-face, launching actions against all manner of participants in the digital asset industry (including practically all of the major trading platforms) premised on the theory that virtually all digital asset transactions (including transactions in the only digital assets at issue here) are "investment contracts." More remarkable still, the SEC has embarked on this ever-more-aggressive campaign of regulation-by-enforcement even as Congress has repeatedly considered but so far declined to grant the agency the power it now claims to already possess.

The SEC's attempt to rewrite 90-year-old text to claim regulatory dominion over this burgeoning industry, without any change in that governing text or grant of new statutory authority, thus not only fails on its own terms, but runs head-on into the major questions doctrine. In insisting that it may regulate nearly all digital asset transactions, the SEC purports to discover previously unrecognized power in the words "investment contract" even though trading standalone assets is nothing new, and those words have never been understood to cover it. The SEC claims to possess power that Congress has conspicuously declined to grant it, and that Congress is actively considering assigning (at least in part) to a *different* agency. And more troubling still, the SEC asserts a power that would extend its regulatory domain far beyond even the trillion-dollar digital asset industry, reaching all manner of everyday asset sales. Absent the kind of "clear delegation" plainly lacking here, a "decision of such magnitude and consequence" on a matter of "earnest and profound debate across the country" rests with Congress. *West Virginia v. EPA*, 597 U.S. 697, 732, 735 (2022).

Instead of recognizing the limits of its authority, the SEC has ramped up its efforts to sue digital asset industry participants one after the other, asserting sweeping power that it does not have. As a result of that overreach, LEJILEX and other CFAT members—companies that want to comply with the law—are faced with an imminent threat of unlawful SEC enforcement actions for engaging in activities that the SEC has no authority to regulate, forcing them to seek relief from this Court. This Court should grant summary judgment for Plaintiffs and put an end to the SEC's unlawful campaign to unilaterally extend its authority to practically all digital asset transactions.

BACKGROUND

A. The Securities Act and the Exchange Act.

The Securities Act of 1933, 15 U.S.C. §77a *et seq.* ("Securities Act"), and the Exchange Act of 1934, 15 U.S.C. §78a *et seq.* ("Exchange Act"), authorize the SEC to regulate transactions involving "securities," a term 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 id.* §78c(a)(10) (similar). Someone who wishes to issue and sell securities must file a registration statement for those securities with the SEC providing expansive disclosures and is subject to other disclosure requirements prescribed by the SEC as well. *See id.* §§77e, 77f, 77g, 77j. Any broker, dealer, exchange, or clearing agency that facilitates securities transactions must likewise either register with the SEC or obtain an exemption from registration. *See id.* §§78e, 78*o*(a), 78q-1(b)(1). If the SEC concludes that someone has violated these provisions, it may bring an enforcement action seeking injunctive and equitable relief, disgorgement, and monetary penalties. *Id.* §78u(d).

While the statutory list of instruments that qualify as securities is extensive, it does not include anything and everything one might obtain as an "investment" in the colloquial sense of purchasing it in hopes of making money of its future sale, or even everything traded by investors on markets with that goal. Most notably, it does not include commodities—i.e., things like gold,

wheat, sugar, or oil—even though they are traded by sophisticated investors on markets all across the country hoping to turn a profit. Instead, to the extent Congress has imposed restrictions on the trading of such commodities, those restrictions are not found in the federal securities laws, they look very different from the more onerous securities regulations, 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")). *See* 7 U.S.C. §2(a)(1)(A) (defining the CFTC's jurisdiction).

The common feature among the instruments included in the definition of "securities" thus is not that people may purchase them hoping or even expecting to turn a profit, but that they all involve some sort of ongoing profit-sharing relationship. Broadly speaking, the investor agrees to invest its capital into an enterprise in exchange for a stake in that enterprise. The issuer, in return, agrees to use that capital to manage the enterprise's affairs for the benefit of its investors, and to share its returns with them, putting investor and investee together in a common enterprise. For instance, purchasing a "stock" entitles the purchaser to a share in the company, which entails a commitment that the company's management will use the capital shareholders have supplied to maximize value that it will return through dividends and the like. 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 produce whatever form of return may be promised. Those commitments and continuing obligations on the part of the issuer are typically embodied in written contracts, giving effect to the parties' profit-sharing relationship.

The same is true for "investment contracts." 15 U.S.C. §§77b(a)(1), 78c(a)(10). As the Supreme Court explained in *SEC v. W.J. Howey Corp.*, its seminal decision construing that term, "investment contract" does not encompass any and all transactions involving something one may

purchase with the hope or expectation that it will increase in value. 328 U.S. 293, 298-99 (1946). Rather, that term applies only to a "contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party"—that is, an ongoing relationship in which the promoter must use the capital its investors supply to generate profits that it must share with them. *Id.* at 298-99.

B. The Digital Asset Industry.

Digital assets, including those known as "cryptocurrencies," "crypto assets," and "tokens," are essentially computer code entries on blockchain technology that record the owner's right to access an application or service on a computer network. *See* App.1 (Wawszczak Decl. ¶3). Many blockchains have their 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. App.1 (Wawszczak Decl. ¶3). 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 a transaction record). App.1-2 (Wawszczak Decl. ¶3). 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. App.2 (Wawszczak Decl. ¶3).

The first widely used digital asset, Bitcoin, debuted in 2008 and has developed into an important international currency. *See* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (Oct. 31, 2008), https://tinyurl.com/4536hnsv. In the years since, thousands more digital assets have been developed, with a wide variety of functions and uses. Today, the digital asset industry is valued at more than two trillion dollars, with a daily trading volume in the tens of billions of dollars, and it has produced hundreds of thousands of new jobs. *See, e.g.*, *Global Live Cryptocurrency Charts & Market Data*, CoinMarketCap, https://coinmarketcap.com/charts (last

visited June 26, 2024); Navdeep Singh, *Crypto Price Today: Bitcoin Below $22,800; Crypto Market Cap Crosses $1 Trillion*, The Economic Times (Jan. 23, 2023), https://tinyurl.com/2bxn6r9b; *2023 Q1 Crypto Industry Report*, CoinGecko (updated Oct. 16, 2023), https://tinyurl.com/3ptehpzm. Digital assets also 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 2022), https://tinyurl.com/yr53p9f3, and offer those with dependents living abroad a way to send cross-border remittance payments—a form of financial support relied upon by one billion people globally—at a significantly reduced cost, *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.

Unsurprisingly, given their ease and benefits of use, digital assets have quickly become ubiquitous. Roughly one in every five Americans—more than 50 million people—has purchased 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; Jenna Hall, *Can You Buy A House With Bitcoin?*, Bitcoin Magazine (May 26, 2022), https://tinyurl.com/3w6vz2wp. 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 recent SEC approval of NYSE, Nasdaq, and BZX proposals 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.

Once issued by its developer, a digital asset can be traded on a secondary trading platform. *See* App.2 (Wawszczak Decl. ¶4). On a typical centralized trading platform, one user's offer to buy or trade an asset at a particular price is matched with another user's offer to sell or trade the asset at that price; the parties trade one digital asset for another digital asset or fiat currency. *See* App.2 (Wawszczak Decl. ¶4). On a typical decentralized trading platform, a user can interact with a "pool" of assets held in a computer script known as a "smart contract," and trade one digital asset for another without interacting with another human being at all. In either case, the digital asset's creator is not involved in these secondary transactions, which entail no ongoing promises, either between the parties or by the asset's creator. App.2 (Wawszczak Decl. ¶4). Each transaction is simply a trade of the digital asset at issue, much as two parties might trade any other type of asset or commodity.

As with any asset prone to market fluctuation, 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 strict sense of becoming vested in a common enterprise, as digital assets do not typically convey any form of legal or equitable interest in any forward-looking profit-sharing arrangement with their issuer or seller. *See* App.2 (Wawszczak Decl. ¶7). In fact, digital asset transactions typically entail no ongoing commitments or obligations of any kind; they are just an exchange of the digital asset for something else of value. *See* App.2 (Wawszczak Decl. ¶¶4, 7).

To be sure, it is certainly *possible* for a digital asset to encompass or be accompanied by ongoing rights and obligations. For instance, a business could create a digital asset that represents a traditional share of stock in that business, and that carries with it a contractual right to a percentage of the business's future profit, creating an ongoing investor-investee relationship. *See*

App.2 (Wawszczak Decl. ¶7). Digital assets of that nature, however, are not typical. *See id.* And absent that kind of ongoing investor-investee relationship, those who acquire digital assets in hopes of making a profit are simply relying on their own ability to predict whether and when the value of a particular digital asset may increase—like those who acquire gold, a limited edition Nike sneaker, or a Rolex watch. They are not obtaining (let alone relying on) any commitment or obligation on the part of the asset creator or seller to share the profits of a common enterprise that it must manage for the purchaser's benefit.

C. The SEC's Assertion of Authority Over Digital Asset Transactions.

1. For years, the SEC acknowledged that it does not possess broad authority to regulate digital assets.

Given those features, the SEC unsurprisingly claimed no authority to regulate digital assets sales, whether on secondary markets or otherwise, for years. Indeed, 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 regulatory authority over transactions involving digital assets.

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 may render it an "investment contract" within the meaning of the Securities Act and the Exchange Act. In 2017, the SEC issued a report on an investigation into an unincorporated organization called The DAO, which (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 25, 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 secondary

transactions The DAO facilitated in its tokens were investment contracts as well, rendering The DAO an unregistered securities exchange too. *Id*. at 16.

It was not entirely clear from that 2017 report just how broad a power the SEC was claiming. But the following year, the Director of the SEC Division of Corporation Finance, Bill Hinman, indicated that it was relatively narrow. According to Hinman, while an initial offering of a digital asset may render it an "investment contract" (and hence a security) 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, Dir., 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. Hinman further opined that neither of the two most prominent digital assets, Bitcoin and Ether ("ETH"), is a security, and that secondary market sales of those digital assets are not investment contracts. *Id.*

Hinman's understanding that the typical digital asset is not a security was endorsed by then-SEC Chair Jay Clayton and other Commissioners. Jay Clayton, SEC Chair, *Remarks on Capital Formation at the Nashville 36|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 School of Law, Protecting the Public While Fostering Innovation & Entrepreneurship (Feb. 8, 2019), https://tinyurl.com/2dmt2u47. As a professor (before becoming SEC Chair), Defendant Gary Gensler likewise echoed Hinman's statements when he told his students that "3/4 of the [digital asset] market is nonsecurities. It's just a commodity, a cash crypto." Gary Gensler, MIT, Lecture Transcript: Blockchain and Money 11 (Fall 2018), https://tinyurl.com/3jpnxysn. And in May 2021, Gensler testified before Congress in his role as SEC Chair 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) (statement of Gary Gensler, SEC Chair). At least one SEC Commissioner has continued to express a similarly narrow view of the SEC's power, explaining that if the agency "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 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/2p8z7f2r; *see Risley v. Univ. Navigation Inc.*, 690 F.Supp.3d 195, 203 (S.D.N.Y. 2023) ("Congress and the courts have yet to make a definitive determination as to whether [digital assets] constitute securities, commodities, or something else.").

2. The SEC moves to expand its regulatory authority via enforcement.

Notwithstanding those public statements acknowledging limitations on and doubts about its power to regulate digital asset transactions, the SEC's regulatory strategy has shifted markedly over the past few years. In August 2021, Gensler vowed to "take [the SEC's] authorities as far as they go" in pursuit of regulating digital assets and platforms that facilitate their trading. Letter from Gary Gensler, SEC Chair, to Sen. Elizabeth Warren (Aug. 5, 2021), https://tinyurl.com/4c9tfn3t. The SEC did not proceed, however, with a notice-and-comment rulemaking to establish rules with which digital asset creators or trading platforms 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 defend any such rules against judicial challenge. Instead, the SEC began trying to expand its regulatory domain through a series of aggressive and unorthodox enforcement actions claiming that digital

asset creators and trading platforms had violated rules that the SEC has never established, by failing to comply with a registration and disclosure regime that does not currently exist for digital assets, based on expansive legal theories that the agency had previously disavowed.

To that end, over the following months, the SEC doubled the size of its digital asset enforcement unit and began increasing its investigations of participants in the digital asset market. Press Release, SEC, *SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit* (May 3, 2022), https://tinyurl.com/w8aap5cn; *see, e.g.*, Press Release, *SEC Charges Poloniex for Operating Unregistered Digital Asset Exchange* (Aug. 9, 2021), http://tinyurl.com/wuyau6ne (reporting $10 million settlement of administrative charges against Poloniex for operating a digital assets platform without registering it as a securities exchange). The SEC proceeded to bring a lawsuit in 2022 advancing the view that Coinbase, a prominent digital asset platform, is an unregistered securities exchange. The SEC did so, however, not by suing Coinbase or the creators of the digital assets that the SEC claimed were securities. 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-01009-TL (W.D. Wash. filed July 21, 2022), Dkt.1.

Notably, while the United States brought a parallel criminal action against the same individuals, it did not allege that the digital assets at issue were securities. *See United States v. Wahi*, No. 1:22-cr-00392-LAP (S.D.N.Y. filed 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 explaining that it was vastly exceeding its statutory authority, the SEC summarily ended its suit against the employee and his brother in a settlement. *See* Final Judgment, *SEC* v. *Wahi*, No. 2:22-cv-01009-TL (W.D. Wash. filed June 1, 2023), Dkt.109.

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 Actions*, http://tinyurl.com/nvyzb3e7 (last visited June 26, 2024) (listing SEC digital asset enforcement actions). And though nothing in the law had changed since Gensler and others had indicated otherwise over the previous several years, by December 2022, Gensler was claiming that "we have enough authority … in this space" to assert jurisdiction over digital asset and trading platforms. Transcript, *SEC's Gensler: The 'Runway Is Getting Shorter' for Non-compliant Crypto Firms*, Yahoo! Fin. (Dec. 7, 2022), http://tinyurl.com/4rwe2k8p. He thus insisted that digital asset issuers and platforms must "come in, talk to us, and register" with the SEC or face the risk of an enforcement action, Gary Gensler, SEC Chair, *Kennedy and Crypto* (Sept. 8, 2022), https://tinyurl.com/595n6xjz—even though the SEC had not (and, to this day, still has not) promulgated any rules or regulations establishing how they should register or explaining what else the SEC thinks they must do to comply with the securities laws. *See generally Due to SEC Inaction, Registration Is Not a Viable Path for Crypto Projects*, Policy at Paradigm, https://policy.paradigm.xyz/writing/secs-path-to-registration-part-i (Mar. 23, 2023).

As one SEC Commissioner 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 Peirce, SEC Comm'r, *Kraken Down*: *Statement on* SEC v. Payward Ventures, Inc., et al. (Feb. 9, 2023), https://tinyurl.com/2mwnuppr; *see also* Hester Peirce, SEC Comm'r, *Overdue: Statement of Dissent on LBRY* (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. 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."); 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").

The SEC has nevertheless refused to propose for public comment any regulations setting forth its view on what purportedly brings a digital asset within its regulatory domain—and in fact explicitly denied a recent 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; 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* Hester M. Peirce & Mark T. Uyeda, SEC Comm'rs, *Statement Regarding Denial of Petition for Rulemaking* (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"). 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 (announcing a suit against digital asset platform Bittrex).

In June 2023, the SEC stepped things up yet another notch, bringing enforcement actions against Coinbase and Binance, two of the largest platforms that facilitate secondary-market sales of digital assets, on the theory that they are unregistered securities exchanges, brokers, and clearing agencies. *See* Complaint, *SEC v. Coinbase, Inc.*, No. 1:23-cv-04738 (S.D.N.Y. filed June 6, 2023), Dkt.1 ("Coinbase Complaint"); Complaint, *SEC v. Binance Holdings Ltd.*, No. 1:23-cv-01599 (D.D.C. filed June 5, 2023), Dkt.1 ("Binance Complaint"). In the Coinbase case, the SEC has asserted that 12 tokens listed for trading on Coinbase (or available through Coinbase's Wallet application) are securities, and that any sale of those assets—including secondary-market sales, like the transactions Coinbase and its Wallet application facilitate—is covered by the federal securities laws.

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 the token used for financial transactions on the Dash platform; 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.

As these descriptions suggest—and the SEC itself has 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 that have been sold on the secondary market using the Coinbase platform or its Wallet application.[1] Yet the SEC has alleged that each and every purchase or sale of those tokens is an "investment contract," *id*. ¶6, and that by allowing its users to purchase and 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 15 U.S.C. §§78e, 78*o*(a), and 78q-1(b)(1). *Id*. ¶¶8, 25-38, 306-08, 372-380.

The SEC's complaint against Binance is much the same. It alleges that Binance facilitated secondary-market sales of the SOL, ADA, MATIC, FIL, SAND, and AXS tokens at issue in the Coinbase complaint, as well as four others: ATOM, the native digital asset of the Cosmos Hub; MANA, a digital token minted by Decentraland; ALGO, the native token of the Algorand blockchain; and COTI, the native token of the Coti blockchain. Binance Complaint ¶¶352-509.

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[1] Those assets also apparently happened to be the first twelve digital assets listed on a screenshot of Coinbase's trading page that were not Bitcoin, ETH, 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.

According to the SEC, by allowing these tokens to be sold on its platform, Binance "unlawfully offered three essential securities market functions—exchange, broker-dealer, and clearing agency—on the Binance Platforms without registering with the SEC." *Id*. ¶3; *see id*. at ¶¶14-15.

The SEC's campaign has since continued unabated. 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-06003 (N.D. Cal. filed Nov. 20, 2023), Dkt.1 ("Kraken Complaint"). As with Coinbase and Binance, the SEC alleged that, by operating a digital asset trading platform, Kraken had "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. In particular, the SEC claimed that the SOL, ADA, FIL, FLOW, ICP, MATIC, and NEAR tokens from the Coinbase complaint and the ALGO, ATOM, and MANA tokens from the Binance complaint, as well as OMG, the native token of the OMG network, were all offered and sold as investment contracts. *Id.* ¶¶59-62. Apparently relying on similar theories, the SEC has also issued a Wells notice (a notice informing the recipient that the SEC is considering bringing an enforcement action against it) to Universal Navigation Inc. (d/b/a Uniswap Labs), a leading decentralized digital asset trading platform, and another to Robinhood Markets, Inc. with respect to its digital asset platform. *See Fighting for DeFi*, Uniswap Labs Blog (Apr. 10, 2024), https://tinyurl.com/3ppnb44t; *Robinhood Crypto Gets Wells Notice From SEC*, Reuters (May 6, 2024), https://tinyurl.com/bdfrmmsv.

Most recently, the SEC has underscored the arbitrariness and inconsistency at the heart of its campaign to regulate digital assets by reversing—and then re-reversing—its position on whether ETH is a security. ETH is the native token of the Ethereum blockchain and the second most common digital asset after Bitcoin, with a market capitalization today of over $400 billion.

See Ethereum, CoinMarketCap, https://coinmarketcap.com/currencies/ethereum (last visited June 26, 2024). As laid out in Hinman's speech in 2018, the SEC originally recognized that ETH is not a security. *See supra* p.10. By April 2023, however, the SEC had apparently reached an internal determination that ETH is a security after all, leading it to issue multiple subpoenas investigating putative potential violations of the federal securities laws based on ETH transactions. *See* Unredacted Complaint ¶¶71-72, *Consensys Software Inc. v. SEC*, No. 4:24-cv-369, Dkt.18 (N.D. Tex. filed Apr. 29, 2024), Dkt.18 ("Consensys Complaint"). And in congressional testimony that same month, SEC Chair Gensler pointedly declined to reaffirm the SEC's prior position that ETH is not a security (or confirm that the SEC had changed its position), repeatedly evading questions on the topic. *See* Nikhilesh De, *SEC Chair Gensler Declines to Say if Ether Is a Security in Contentious Congressional Hearing*, CoinDesk (Apr. 19, 2023), https://tinyurl.com/5n7zcpbe.[2] As recently as April 2024, the SEC continued to pursue investigations premised on the theory that ETH is a security—even while simultaneously approving exchange-traded funds ("ETFs") in ETH and ETH futures, allowing investment in what the agency simultaneously appeared to be asserting were unregistered securities. *Compare* Consensys Complaint ¶¶72-76, *with* Lucy Brewster, *SEC Approves 9 Ether Futures ETFs*, etf.com (Oct. 2, 2023), https://tinyurl.com/2d3z4f4r, *and* Vicky Ge Huang & Caitlin Ostroff, *SEC Widens Accessibility of Crypto Investing with Approval of ETFs for Ether*, Wall St. J. (May 23, 2024), https://on.wsj.com/4dXa5Id.

Apparently the agency has now had yet another change of heart: Just a few days ago, the SEC—without explanation—informed a subpoena recipient that it is no longer pursuing its

[2] The SEC implied the same view again the following month by approving a special purpose broker-dealer license to allow a startup called Prometheum to custody digital assets including ETH, suggesting that ETH should be considered a security. *See* Yueqi Yang & Allyson Versprille, *Crypto Startup Says It Found Path to Register With SEC Under a Broker Rule*, Bloomberg (May 23, 2023), https://tinyurl.com/2s6eh957.

investigation premised on the view that ETH is a security and does not presently plan to bring an enforcement action on that basis—albeit while leaving open the possibility that it might change its mind *yet again* in the future. *See* Nikhilesh De, *SEC Ends Probe Into Consensys, Won't Sue Over Ethereum*, CoinDesk (June 19, 2024), https://tinyurl.com/2s483pv5. While that unexplained decision not to treat ETH as a security (at least for now) was welcome news for the digital asset industry, it underscores that the SEC's aggressive regulation-by-enforcement campaign has no evident guiding principle beyond the SEC's shifting desires about which assets it wants to regulate. Industry participants are thus left faced with the constant threat of unpredictable (and unlawful) enforcement actions based on the whims of an agency that now claims the power to supervise virtually the entire industry.

D. LEJILEX and CFAT.

LEJILEX is a Texas corporation that is developing a new digital asset trading platform called the Legit.Exchange, which will enable its users to engage in secondary-market transactions in certain digital assets. App.1 (Wawszczak Decl. ¶2). LEJILEX has taken significant steps to prepare for the launch of its platform, including developing code, a user interface, and a website for the platform, engaging service providers and contractors to host, design, and develop the site and product features, and raising funds for its operation. App.3 (Wawszczak Decl. ¶11). LEJILEX will not be developing or issuing any digital assets of its own or facilitating any primary issuances of digital assets by others; its trading platform will allow users to engage only in peer-to-peer secondary transactions—i.e., purchases and sales of already-issued digital assets, in which one user will sell a digital asset to another in exchange for a different digital asset or a fiat currency like U.S. dollars. App.2-3 (Wawszczak Decl. ¶¶4, 9-10).Those transactions will be structured as blind bid/ask trades, meaning that buyers and sellers will not know who is on the other side of a transaction. App.2 (Wawszczak Decl. ¶5).

LEJILEX's platform will be a "non-custodial" trading platform, meaning that LEJILEX will never have custody of any digital assets traded on the platform. App.2 (Wawszczak Decl. ¶6). Nor will LEJILEX be making any contractual or other commitments to its users to provide any managerial services with respect to any digital assets that may be exchanged on its platform. App.3 (Wawszczak Decl. ¶10). Instead, LEJILEX's platform will simply facilitate peer-to-peer secondary transactions in already-existing tokens that LEJILEX approves for trading, with LEJILEX taking a commission on those transactions. App.2-3 (Wawszczak Decl. ¶¶4, 7, 10). And LEJILEX will approve trading on its platform only in digital assets that do not carry with them any ongoing right to participate in a common profit-sharing enterprise that their issuer or seller must manage on their purchasers' behalf, such as MANA, POWR, RGT, RLY, SAND, DASH, XYO, and ETH. *See* App.2-3 (Wawszczak Decl. ¶¶7-8). LEJILEX will not permit trading on its platform in any of the rare digital assets that are structured like a traditional share of stock, with an ongoing investor/investee relationship. App.2 (Wawszczak Decl. ¶7).

LEJILEX does not believe that the SEC has regulatory authority over secondary transactions in the digital assets that it will permit to be traded on the Legit.Exchange, so it does not intend to register as a securities exchange, broker, or clearing agency with the SEC. Nor could LEJILEX do so if it wanted to, because the SEC has not promulgated any regulations providing for the registration of digital asset trading platforms. Nevertheless, the SEC has now brought enforcement actions against numerous digital asset platforms, including Coinbase, Binance, and Kraken, alleging that they are unlawfully acting as unregistered securities exchanges, brokers, and clearing agencies because they facilitate non-custodial secondary transactions in the same assets LEJILEX plans to permit on its platform—i.e., because they engage in the same conduct in which LEJILEX plans to engage. *See* Gary Gensler, SEC Chair, *Statement on the Approval of Spot*

Bitcoin Exchange-Traded Products (Jan. 10, 2024), http://tinyurl.com/4jmzwy3d (asserting that "for the most part," digital asset trading platforms "are non-compliant with the federal securities laws"). LEJILEX therefore faces a genuine threat that, when it launches its platform, the SEC will bring a similar action claiming that LEJILEX likewise is operating as an unregistered securities exchange, broker, dealer, and clearing agency.

LEJILEX is also a member of CFAT, a non-profit organization that advocates for the responsible development of digital asset policies in Texas, and that is injured twice over by the SEC's ongoing campaign of regulatory overreach. App.5-8 (Quintenz Decl. ¶¶2-3, 7-9). First, CFAT has members (including LEJILEX) who face a clear and imminent threat of unlawful SEC enforcement actions for their existing or intended activities. App.7 (Quintenz Decl. ¶7). Second, the SEC's capacious view of its own authority hinders CFAT from pursuing its mission of advocating for the responsible development of digital asset policies in Texas to foster innovation and economic growth while protecting consumers. App.7-8 (Quintenz Decl. ¶¶8-9). By asserting broad dominion over the digital asset industry, the SEC impedes the ability of other authorities whose jurisdiction may properly extend to digital assets to enter the field, making it harder for CFAT to convince Texas policymakers to develop and adopt the sensible policies that the Texas digital asset industry needs. App.7-8 (Quintenz Decl. ¶¶8-9).

STANDARD OF REVIEW

"Summary judgment should be granted where the pleadings and evidence show 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Bear Creek Bible Church v. EEOC*, 571 F.Supp.3d 571, 593 (N.D. Tex. 2021) (O'Connor, J.) (quoting Fed. R. Civ. P. 56(a)), *affirmed in relevant part sub nom. Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914 (5th Cir. 2023). "Summary judgment is not 'a disfavored procedural shortcut,' but rather an 'integral part of the Federal Rules as a whole, which are designed "to secure the just,

speedy and inexpensive determination of every action.”’” *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). “When reviewing the evidence on a motion for summary judgment, courts must resolve all reasonable doubts and draw all reasonable inferences in the light most favorable to the non-movant.” *Id.* (citing *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988)). A party asserting that a fact is not genuinely disputed must support the assertion by “citing to particular parts of materials in the record” such as “affidavits or declarations.” Fed. R. Civ. P. 56(c)(1)(A). “The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim.” *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). When the facts are undisputed and “the only issue before the court is a pure question of law,” summary judgment “is appropriate.” *Sheline v. Dun & Bradstreet Corp.*, 948 F.2d 174, 176 (5th Cir. 1991).

ARGUMENT

I. The SEC Has No Statutory Authority To Regulate The Digital Asset Transactions That Will Occur On LEJILEX’s Platform.

The SEC’s sole basis for asserting regulatory authority over purchases and sales of digital assets is its claim that those transactions are “investment contracts,” and so constitute securities transactions under the Securities and Exchange Acts. That claim fails as a matter of law.

As the Supreme Court made clear long ago, an “investment contract” under the federal securities laws requires a traditional investor/investee relationship—i.e., “a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.” *Howey*, 328 U.S. at 298-99. That is, the *sine qua non* of an investment contract is an ongoing relationship involving “the placing of capital or laying out of money in a way intended to secure income or profit from its employment,” *id.* at 298, in which the investor contributes capital to a common enterprise and the seller or a third party

assumes a continuing obligation to manage that common enterprise and share its profits with its investors. That ongoing relationship, which distinguishes investment contracts from discrete asset sales, was recognized by state courts interpreting state "blue sky" laws before the federal securities laws were enacted; was carried over into federal law when Congress included that settled term in the Securities and Exchange Acts; was embraced by the Supreme Court in its pathmarking decision in *Howey*; and has been regularly acknowledged by the federal courts of appeals in the decades since *Howey* was decided. That necessary attribute also serves a critical role in delineating the boundaries of the SEC's authority, since without it the SEC could deem practically any asset purchase an investment contract, extending its regulatory domain to all walks of commercial life.

The digital asset transactions at issue here are missing that essential attribute of an "investment contract." Those transactions do not involve any ongoing relationship between the buyer and the seller (or a third party), or any obligation to use the purchase price of a digital asset to generate profits that must be shared with its purchaser. A buyer who purchases a digital asset on LEJILEX's platform obtains title to the asset itself, and nothing else; the asset does not carry with it any form of equity in another enterprise, right to a share of any profits, or any other continuing rights or obligations. The transaction is complete as soon as payment is made and title to the asset is transferred, and once it is complete, there is no further obligation on any party to do anything more. Those undeniable facts eliminate any possible basis for SEC authority over the transactions at issue here. As a matter of law, absent the kind of ongoing participation in a common profit-sharing enterprise and ongoing obligations toward the buyer that no one could claim any of the types of transactions at issue here involves, a digital asset sale is not an investment contract. The SEC therefore has no more authority to regulate the bare purchase and sale of digital assets on LEJILEX's platform than it has to regulate the bare purchase and sale of any other asset.

A. Investment Contracts Under the Federal Securities Laws Require an Ongoing Reciprocal Relationship in Which the Promoter Must Use the Investor's Capital to Generate Value for the Investor.

As the Supreme Court has recognized for the better part of a century, an investment contract is not a contract to purchase an asset, but rather is "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 (quoting *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 56 (1920)). In other words, there must be something more than a mere exchange of one thing of value for another: There must be a reciprocal arrangement in which the investor puts up capital in exchange for the promise that it will be used to generate profit to be shared with the investor on an ongoing basis, rendering the investor and the manager part of a common profit-making enterprise. That conclusion follows directly from the statutory text, history, and precedent.

First, by its plain language, the term "investment contract" requires an arrangement that can be understood as involving an investment, i.e., the provision of capital that will be put to use to generate shared returns, such that the person outlaying capital becomes vested in an ongoing enterprise. That kind of ongoing profit-sharing relationship is what differentiates an "investment" from a mere asset sale. The latter is simply an exchange of one thing of value for another; the parties' relationship ends as soon as the transaction is consummated. The buyer does not become vested in any ongoing enterprise, and no responsibility is vested in the seller, who is free to do with the proceeds from the sale whatever it pleases. In an investment contract, by contrast, the purchase price is not just a purchase price; it is capital that must be used to try to generate returns that must be shared with the party that supplied it.

That is evident not just from the term "investment contract," but from the words that surround it. *See Dubin v. United States*, 599 U.S. 110, 126 (2023) (under *noscitur a sociis* canon, a statutory term "should be read in a similar manner to its companions"); *Howey*, 328 U.S. at 299

(concluding that the term "investment contract" must cover only instruments or arrangements that fall within "the ordinary concept of a security"); *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) (Posner, C.J.) (investment contracts must have "the essential properties of a conventional security"). The common feature of all of the various instruments that Congress included in its long statutory definitions of "security" in the Securities and Exchange Acts is some kind of reciprocal relationship in which one party invests capital in exchange for an entitlement to future returns. *See, e.g.*, *Marine Bank v. Weaver*, 455 U.S. 551, 559-60 (1982) (business agreement fell outside "the ordinary concept of a security," and so was not an investment contract because, *inter alia*, it did not involve any right to future profits). Any attempt to read "investment contract" to omit that core feature, and to reach bare asset sales in which the parties' relationship is confined to exchanging one form of value for another, would render the term so broad as to swallow the rest of the lengthy definition whole.

History and precedent confirm the point. As the Supreme Court explained in *Howey*, the term "investment contract" was "common in many state 'blue sky' laws in existence prior to the adoption of the [Securities Act]," and its meaning "had been crystallized by … prior judicial interpretation." 328 U.S. at 298; *see Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019) ("When a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'"); Br. for SEC, *SEC v. W.J. Howey Co.*, 1946 WL 50582, at *9 (U.S. Apr. 18, 1946) ("[I]n adopting the definition of a security from the 'blue sky' laws, Congress must be deemed to have intended also to adopt that construction of the term which was uniformly followed by the state courts."). By the time the Securities and Exchange Acts were enacted, state courts had routinely interpreted "investment contract" to refer to contractual arrangements that entail an ongoing obligation to use the investor's investment to generate and deliver future value—and courts had

specifically invoked that requirement to distinguish investment contracts from bare asset sales. *See, e.g.*, *McCormick v. Shively*, 267 Ill. App. 99, 102 (1932) (no investment contract where seller had no obligation to make any "payment of money at a future time to the purchaser"); *Lewis v. Creasey Corp.*, 248 S.W. 1046, 1049 (Ky. Ct. App. 1923) (no investment contract where seller had no obligation to "shar[e] in either the capital or profits of a company"); *Creasy Corp. v. Enz Bros. Co.*, 187 N.W. 666, 667 (Wis. 1922) (similar).

For instance, the Minnesota Supreme Court concluded that, while selling a muskrat by itself plainly would not constitute an investment contract, the sale of muskrats did become part of an investment contract when it was coupled with an agreement that the seller would raise those muskrats, sell their pelts, and pay the buyer a proportionate share of all proceeds from the muskrat-breeding operation. *State v. Robbins*, 240 N.W. 456, 457 (Minn. 1932). Once the asset sale was accompanied by an ongoing obligation to devote the capital the purchaser infused into breeding the muskrats, and to share the profits of the muskrat-breeding operation with the purchaser, the arrangement as a whole constituted "a sale of an interest in a profit-sharing scheme or venture," and so qualified as an investment contract. *Id.* Unsurprisingly, numerous other state courts reached the same conclusion when confronted with a variety of analogous arrangements. *See, e.g.*, *Prohaska v. Hemmer-Miller Development Co.*, 256 Ill. App. 331 (1930) (seller of land obligated to harvest crops from that land and share profits); *State v. Ogden*, 191 N.W. 916, 917 (Minn. 1923) (seller of leasehold interest obligated to drill wells and divide profits among purchasers); *State v. Gopher Tire & Rubber Co.*, 177 N.W. 937, 937-38 (Minn. 1920) (seller of purported service contract obligated to pay buyers a pro rata share of future profits from sale of tires and tubes).[3]

[3] *See also, e.g., Stevens v. Liberty Packing Corp.*, 161 A. 193, 193-94 (N.J. Ch. 1932) (finding investment contract where seller was obligated to breed rabbits and purchase offspring); *Kerst v.*

The U.S. Supreme Court embraced the same understanding in *Howey*. There, a Florida corporation sold plots of land planted with orange trees along with a service contract to cultivate, harvest, and market the oranges. 328 U.S. at 295-96. In return, 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 Court concluded that this arrangement constituted an investment contract. As it explained, neither "an ordinary real estate sale" nor "an agreement by the seller to manage the property for the buyer" standing alone would constitute an "investment contract"—even if the purchaser might 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 ongoing relationship, 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 a classic investment contract "regardless of the legal terminology in which such contracts are clothed." *Id.* at 300. By contrast, where the transaction between the parties is simply an asset sale, with no ongoing profit-generating or profit-sharing obligation, there is no investment contract. *Id.* at 297-98.

Of course, as both *Howey* and state "blue sky" cases like *Robbins* make clear, while an investment contract must involve some sort of profit-sharing arrangement, that does not mean that

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Nelson, 213 N.W. 904, 904-05 (Minn. 1927) (similar); *Fid. Inv. Ass'n v. Emmerson*, 235 Ill. App. 518, 521-22 (1924) (same for promoter obligated to invest money and pay annual annuity), *rev'd on other grounds*, 149 N.E. 530 (Ill. 1925); *Agnew v. Daugherty*, 209 P. 34, 34-35 (Cal. 1922) (same for seller obligated to deliver share of profits from exploitation of mineral lease); *State v. Agey*, 88 S.E. 726 (N.C. 1916) (same for seller obligated to cultivate trees and deliver share of profits).

the parties' arrangement must be reduced to the four corners of something labeled an "investment contract" to qualify. As *Howey* explained, the term "investment contract" looks to "economic reality" rather than formality, and it "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Id.* at 298-99. It accordingly reaches any "contract, transaction or scheme" in which the investor invests in a common enterprise in exchange for a share of the profits that its capital will be used to help generate, regardless of whether that "contract, transaction or scheme" is embodied in one contract or many. *Id.*; *see id.* at 300 (finding that the relevant "land sales contracts, warranty deeds and service contracts," which together presented "all the elements of a profit-seeking business venture," collectively constituted investment contracts "regardless of the legal terminology in which such contracts are clothed"). Likewise, a seller who undertakes ongoing obligations to its investors to help generate profits for them cannot avoid the securities laws by asserting that its investors may not be able to actually compel performance of those obligations under state law. *See, e.g.*, *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 349 (1943) (finding it "unnecessary to determine" whether the purchaser "acquired a legal right to compel" performance by the seller under state law where the parties' contract made clear that the purchaser "was paying both for a lease and for a development project"). But when a transaction is just a bare asset sale, in which neither the seller nor anyone else undertakes any continuing obligations whatsoever toward the buyer (whether as part of the sale itself or in any accompanying agreement), the absence of any such agreement forecloses any attempt to regulate that sale as an investment contract.

Consistent with that understanding, every arrangement the Supreme Court has found to qualify as an investment contract since *Howey* has involved some kind of ongoing reciprocal

relationship in which the seller undertook an obligation to use the investor's capital to generate a return. *See, e.g.*, *SEC v. Edwards*, 540 U.S. 389, 395 (2004) (payphone sale-and-leaseback agreement in which seller was obligated to pay investors a fixed monthly return); *Tcherepnin v. Knight*, 389 U.S. 332, 338-39 (1967) ("withdrawable capital share" that provided dividend rights); *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 204-05 (1967) (contracts in which life insurance company was obligated to pay a proportionate share of gains); *SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 71 (1959) (same). Unsurprisingly, courts of appeals have taken the same approach. *Compare, e.g.*, *Warfield v. Alaniz*, 569 F.3d 1015, 1021 (9th Cir. 2009) (finding investment contract where seller was obligated to make annuity payments and distribute remaining funds to charity), *and SEC v. Banner Fund Int'l*, 211 F.3d 602, 615 (D.C. Cir. 2000) (same where promoters were obligated to pay future returns from "arbitrage and leveraging"), *with Revak v. SEC Realty Corp.*, 18 F.3d 81, 88-89 (2d Cir. 1994) (no investment contract where condo sale was unaccompanied by any obligation to provide future rental income), *Rodriguez v. Banco Central Corp.*, 990 F.2d 7, 11 (1st Cir. 1993) (no investment contract where sale of land was unaccompanied by any obligation to develop), *and De Luz Ranchos Inv. Ltd. v. Coldwell Banker & Co.*, 608 F.2d 1297, 1301 (9th Cir. 1979) (same). Indeed, the SEC itself long ago recognized that continuing obligations are a *sine qua non* of investment contracts. *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 undertook 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 silver sales where seller stored silver but "would have no other relationship with the purchaser after the initial sale").

That understanding also makes sense of the very different regulatory regimes that govern securities and commodities. Because investors in securities depend for their returns on the obligations that are undertaken by those who will be managing the common enterprise into which they are investing their capital, they need information about the qualifications and plans of those managers. The securities laws impose extensive disclosure requirements to ensure that prospective investors can obtain that information. *See, e.g.*, 15 U.S.C. §77e(a), (c); *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1085 (9th Cir. 2010). No such disclosure requirements apply, by contrast, to sellers of commodities, because a commodity purchase embodies no obligation on the seller's part to use the purchase price to produce future value for the purchaser. *See* 7 U.S.C. §1a(9) (defining "commodity"). Those who hope to make money by purchasing commodities are just banking on their ability to predict how supply and demand for that commodity may fluctuate. And when a buyer is simply purchasing a standalone asset in the hope of profits that "depend upon market forces," that buyer already has access to all the necessary "public information … by which [it] can independently evaluate the possible success of the investment." *SEC v. Mut. Benefits Corp.*, 408 F.3d 737, 744 n.5 (11th Cir. 2005).

Equally important, the long-settled understanding that "investment contract" is limited to reciprocal investment-in-exchange-for-return arrangements prevents the SEC from inserting itself into all walks of commercial life. After all, people purchase all manner of assets with a reasonable expectation that future actions of the seller or a third party will cause them to increase in value, enabling the purchaser to sell them for a profit. A person who purchases limited-run Nike sneakers for future resale, for example, may well expect to sell those coveted shoes for a profit based on Nike's managerial and promotional efforts to enhance their value. So too for a person who purchases a luxury watch from a famed watch company, a bottle of wine from a well-known

winery, or a baseball card from a prominent collectibles manufacturer. The buyers in those hypothetical transactions might consider their purchases "investments" in a colloquial sense. But those transactions plainly would not be investment contracts under the federal securities laws, because none involves any obligation to use the purchase price to operate a common enterprise for the buyer's benefit. If the mere fact that the buyer might *expect* to profit from the seller's future strategic and marketing efforts were sufficient to transform those transactions into investment contracts under the securities laws, then the SEC's regulatory authority would be boundless.

B. Digital Asset Transactions on LEJILEX's Platform Will Contain None of the Essential Characteristics of an Investment Contract.

The digital asset transactions that LEJILEX's platform will facilitate on its secondary market lack the essential characteristics of an investment contract under the federal securities laws. The digital assets that will be listed on the Legit.Exchange are just that—assets, pure and simple, with no accompanying obligation by the seller or the asset's creator to use the purchase price to generate profits in which the purchaser is entitled to share. While it is certainly possible to create a contractual arrangement in which a digital asset secures that kind of stake in the entity that created it, there can be no serious dispute that the vast majority of digital assets (and, more importantly, *all* the digital assets that will appear on LEJILEX's platform) are just standalone assets that entitle their purchaser to nothing but the asset itself. Those digital assets—like oranges, muskrats, or Nike sneakers—are therefore just assets, and buying and selling them does not give rise to any investment contract or constitute a securities transaction under federal securities law.

That conclusion follows directly from *Howey* itself, which makes plain that an investment contract requires "the placing of capital or laying out of money in a way intended to secure income or profit from its employment." 328 U.S. at 298-99. But it is equally clear from considering the three essential (and interrelated) components of an investment contract that lower courts have

distilled from *Howey*: An investment contract requires "(1) an investment of money; (2) in a common enterprise; and (3) on an expectation of profits to be derived solely from the efforts of individuals other than the investor." *SEC v. Arcturus Corp.*, 928 F.3d 400, 409 (5th Cir. 2019); *see Howey*, 328 U.S. at 300 (finding "all the elements of a profit-seeking business venture" present where "[t]he investors provide the capital and share in the earnings and profits," and "the promoters manage, control and operate the enterprise"). Digital asset transactions typically entail none of those components. Buying a digital asset is not an "investment of money" in whoever created it, *Arcturus*, 928 F.3d at 409, any more than buying sneakers from a store is an investment in Nike, or buying a baseball card is an investment in The Topps Company. The buyer acquires only the asset itself, not a right to participate in some "common enterprise" with its creator. And any "profit" must come from the independent actions of the purchaser (e.g., selling the asset at a higher price than it was purchased for), not from "individuals other than the investor." That is the difference between buying an asset (like sneakers) and buying a share in the company that produced it (like Nike).

That difference is especially evident when it comes to the kinds of secondary transactions in digital assets that the Legit.Exchange will facilitate. *See* App.2 (Wawszczak Decl. ¶¶4, 7). In the context of primary transactions, where the buyer is purchasing a digital asset directly from its creator, it is at least conceivable that a digital asset creator could make promises and representations to the buyer to create an inducement to invest, and that such statements could form the basis of an ongoing relationship between the buyer and seller. But the dynamics are starkly different in the context of secondary transactions, where the transaction simply transfers ownership of a digital asset from one party to another. After all, secondary-market transactions typically do not involve the asset creator, do not involve inducements to invest by the asset creator, and do not

encompass any ongoing obligations by the creator (or anyone else) to put the purchase price toward managing some enterprise for the secondary-market buyer's benefit and sharing the profits it generates. The secondary transactions that the Legit.Exchange will facilitate likewise will not include any of those components. The buyer acquires only the digital asset itself, and the price it pays for the asset goes to the asset seller, not its creator—because it is consideration for the digital asset, not an investment in some kind of common profit-sharing enterprise. *See SEC v. Ripple Labs, Inc.*, 682 F.Supp.3d 308, 328-29 (S.D.N.Y. 2023) (recognizing that "the vast majority of individuals" who purchased a digital asset on the secondary market "did not invest their money in [the asset's creator] at all").

That readily distinguishes such secondary-market transactions from, say, secondary-market transactions in shares of a company. A share in a company carries with it the same management and profit-sharing obligations (both statutory and contractual) that the issuer undertook to the original investor, which is why exchanges that facilitate such transactions are properly regulated by the SEC under the Exchange Act. Secondary-market transactions in the kinds of digital assets at issue here, by contrast, cannot conceivably carry with them any such obligations. Indeed, unlike shares in a company, digital assets can be and often are traded long after their original creator ceases to exist. *See infra* p.41. Any profit the buyer may ultimately turn on the purchase of a digital asset thus will have to come from actions like selling the asset for more than the purchase price, not from some form of profit-sharing supplied by the asset's creator or seller. In fact, LEJILEX's platform will facilitate only blind bid/ask transactions—meaning that buyers will not even know who the sellers are, let alone have any basis to expect that they (or anyone else) will be supplying them with some sort of future returns. App.2 (Wawszczak Decl. ¶5); *see Ripple*, 682 F.Supp.3d at 329 (finding no investment contract where "the economic reality is" that the buyer

"did not know to whom or what it was paying its money"). Notably, neither *Howey* nor any of the Supreme Court's cases applying it have involved claims against an entity whose only involvement is to facilitate secondary-market transactions; they have instead all involved claims against the issuers of the alleged investment contracts. *See, e.g.*, *Edwards*, 540 U.S. at 391-92; *Tcherepnin*, 389 U.S. at 333-34; *Howey*, 328 U.S. at 294-97. Put simply, *Howey* was designed to address claims by putative investors against issuers for their failure to uphold the obligations that induced the investment, not to turn secondary-market asset sales into securities transactions by inventing obligations where none exist.

For much the same reasons, the purchase of a digital asset does not involve the kind of "reasonable expectation of profits" from the efforts of others that the federal securities laws demand. *Edwards*, 540 U.S. at 395 (quoting *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975)). As *Howey* made clear, simply purchasing an asset with the expectation that it may increase in value based on the actions of third parties is not enough. If it were, then the Court would not have gone out of its way to distinguish "an ordinary real estate sale," or "an agreement by the seller to manage the property for the buyer," from the arrangement before it. *See* 328 U.S. at 297-98. What made that arrangement different from an ordinary asset sale is that the purchaser was securing the right to participate in a "profit-seeking *business venture*," where the seller was obligated to actually "share … earnings and profits" generated using the purchaser's capital. *Id.* at 298-300 (emphasis added). That kind of obligation on the part of a third party to actually *supply* a return on capital is what the securities laws require. A mere expectation—no matter how reasonable—that someone else's actions may increase the value of an asset does not suffice.

All of that underscores the basic point: A buyer who decides to purchase a digital asset, like a buyer who decides to purchase any other standalone asset, "is in no way investing his money

in a common enterprise" with a profit-sharing arrangement. *Moody v. Bache & Co.*, 570 F.2d 523, 526 (5th Cir. 1978). To the extent that transaction is part of an "enterprise" at all, that enterprise "is an individual one," in which the buyer seeks to profit not from future returns that the seller has promised to use the purchase price to generate, but from "the speculative hope that the market price of the underlying commodity will vary in [the buyer's] favor, permitting purchase or sale at a profit." *Id.* To be sure, whether that hope comes to fruition may sometimes (albeit not always, *see infra* p.41) depend in part on the efforts of the asset's creator to enhance its value. But there is nothing unusual about that. The market price of Nike sneakers and the market value of Nike may often move in tandem, and both may be influenced by Nike's efforts. But that hardly means that Nike is somehow part of a common profit-sharing enterprise with everyone who purchases its sneakers. That is precisely why courts "have generally rejected the novel contention that the regulatory features of the securities acts be extended into the vast domain of the commodities markets." *Id.*; *see, e.g.*, *SEC v. Belmont Reid & Co.*, 794 F.2d 1388, 1391 (9th Cir. 1986) (no investment contract for purchase of gold coins because "[p]rofits to the coin buyer depended upon the fluctuations of the gold market"); *Noa v. Key Futures, Inc.*, 638 F.2d 77, 79 (9th Cir. 1980) (per curiam) (same for silver); *cf. Rodriguez*, 990 F.2d at 11 ("[W]hat was purchased in this case was not a share of a business enterprise and so not a security.").

In short, the digital asset transactions that will occur on LEJILEX's platform are missing the core features of an investment contract: "an investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey*, 328 U.S. at 301. Those transactions are just bare asset sales, with no accompanying obligation on the part of the seller or anyone else to use the purchase price to generate profits to be shared with the purchaser. That remains true regardless of whether buyers may purchase digital assets with the hope or even expectation that

they will increase in value. After all, buyers routinely purchase all kinds of assets with the hope that they will grow in value based on the creator's entrepreneurial or managerial efforts. But those purchases cannot plausibly be described as investment contracts, because the buyer is simply purchasing an asset, not investing in a profit-sharing enterprise. So too for the digital asset transactions that will occur on LEJILEX's platform: Whatever reasons buyers may have for purchasing digital assets or expecting them to increase in value, that transaction remains just an asset sale. The SEC therefore has no more authority to regulate the digital asset transactions that the Legit.Exchange will facilitate than it has to regulate the sale of any other standalone asset.

C. The SEC's Attempts to Transform Digital Asset Transactions Into Investment Contracts Are Unavailing.

The SEC's ever-shifting efforts to justify its regulatory grab cannot transform the standalone digital asset sales that will occur on LEJILEX's platform into investment contracts subject to the federal securities laws.

As an initial matter, it is clear beyond any reasonable dispute that typical digital assets of the kind that will be listed on the Legit.Exchange are not *themselves* investment contracts. Standing alone, those digital assets are just assets, like oranges, muskrats, or sneakers. While the SEC has at times suggested that they could nevertheless be considered investment contracts, *see, e.g.*, Coinbase Complaint ¶¶1, 6, 102, 114; Binance Complaint ¶¶352, 362; Kraken Complaint ¶¶4, 14, 58, 62, 228, that view has been correctly rejected by multiple courts, and even the SEC now appears to have disavowed it. *See, e.g.*, *SEC v. Terraform Labs Pte. Ltd.*, 684 F.Supp.3d 170, 194 (S.D.N.Y. 2023) (recognizing that "[m]uch 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," digital assets "taken by themselves, might not qualify as investment contracts"); *Ripple*, 682 F.Supp.3d at 324 (recognizing that a digital asset "is not in and of itself … an

investment contract"); Transcript at 100, Dkt.212, *SEC v. Binance Holdings Ltd.*, No. 23-cv-1599 (D.D.C. filed Jan. 26, 2024) (SEC clarifying it was "not alleging that the token itself is a crypto asset security"); Transcript at 21, Dkt.101, *SEC v. Coinbase, Inc.*, No. 23-cv-4738 (S.D.N.Y. filed Jan. 22, 2024) ("Coinbase Tr.") ("[SEC]: The token itself is not the security. THE COURT: I understand that. Right.").

Instead, the SEC has suggested that even if digital assets are not themselves securities or investment contracts, transactions in those assets become investment contracts whenever a buyer "would reasonably have expected to profit from the efforts of [their] issuers and promoters" to increase the asset's value. Kraken Complaint ¶62; *see also, e.g.*, *id.* ¶63 (alleging that statements by the assets' "issuers and promoters … would have indicated to a reasonable investor that future profits through the increased value of the [assets] would come through the efforts of these issuers and promoters"); *id.* ¶¶66, 228, 235, 237, 255; Coinbase Complaint ¶¶18, 126, 133, 145 (similar); Binance Complaint ¶¶370, 382, 389 (similar); SEC Opp. to Mot. for Judgment on the Pleadings at 1, Dkt.69, *SEC v. Coinbase, Inc.*, No. 23-cv-4738 (S.D.N.Y. filed Oct. 3, 2023) ("Coinbase Opp.") (asserting that creators of digital assets "invited" buyers "reasonably to expect the value of their [assets] to increase based on the issuer's broadly-disseminated plan to develop and maintain the asset's value"); SEC Opp. to Mot. to Dismiss at 3, Dkt.172, *SEC v. Binance Holdings Ltd.*, No. 23-cv-1599 (D.D.C. filed Nov. 7, 2023) ("Binance Opp.") (asserting that digital asset buyers "were offered the opportunity to participate—via the potential appreciation of the value of the crypto assets—in the promoters' efforts to develop and grow the issuers' blockchain-based business"). That sweeping argument, which would render the SEC's jurisdiction over commercial transactions effectively limitless, flouts nearly a century of case law.

To be sure, *Howey* recognized that an investment contract can arise only when the investor "is led to expect profits solely from the efforts of the promoter or a third party." 328 U.S. at 298-99; *see Arcturus*, 928 F.3d at 409 (investment contract requires "expectation of profits to be derived solely from the efforts of individuals other than the investor"). But to divorce that language from *Howey*'s core holding that an investment contract requires "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*,'" 328 U.S. at 298 (emphasis added), and simply ask whether a purchaser "reasonably expected" someone else to help increase the purchased asset's value, would make nonsense of *Howey*'s careful efforts to distinguish standalone asset sales from investment contracts. *See id*. at 297-98.

Whether the creators of digital assets publicly stated their plans to develop those assets and try to increase their utility and value therefore makes no difference. *See, e.g.*, Kraken Complaint ¶236 (SEC alleging that asset creators made "public statements … describ[ing] the efforts they have made and will continue to make" to develop those assets and "attract users to the technology"). The critical question is not whether (or why) the buyer reasonably expects to turn a profit, but whether that profit is reasonably expected to come from some sort of ongoing profit-sharing enterprise into which the parties have jointly entered. Mere promotional statements about an asset seller's future intentions do not begin to give rise to that kind of expectation. *See, e.g.*, *De Luz*, 608 F.2d at 1300-01 (seller's representations in promotional materials about its intended future development efforts did not convert land sales into investment contracts). Of course, that does not mean that digital assets purchasers have no legal recourse against unscrupulous sellers; if an asset seller made statements about its future plans that it knew were false, with the intent to induce people to purchase them, then the buyer may well have a fraudulent inducement claim, just

as it would with any other commodity. But for digital assets as for other assets, the mere fact that a seller has advertised its intent to work to increase the value of its product does not convert every purchase of that product into a securities transaction.

Indeed, the SEC itself has elsewhere conceded that an asset transaction does *not* become an investment contract just because the buyer expects the asset to increase in value based on another's efforts. *See, e.g.*, Coinbase Tr.49 (SEC disavowing the position that "any asset purchased with an expectation that its value will go up based on the entrepreneurial or managerial efforts of others is an investment contract"); *id.* at 56 (SEC recognizing that "just buying an item, and … hoping that it appreciates … is not a securities transaction"); *cf.* Br. for SEC at 8-15, *Hocking v. Dubois*, 885 F.2d 1449 (9th Cir. 1989) (No. 85-1932) (en banc) (concluding that the sale of a condominium was not an investment contract even though the buyer was also entitled to obtain management services through a rental pool, because the seller had no affiliation with the rental pool operator).

The SEC has nevertheless tried to distinguish digital assets from other types of assets on the theory that a digital asset is tied to a particular "ecosystem" (a term the SEC has never defined), and that its value necessarily grows or declines in tandem with efforts to develop that "ecosystem." *See, e.g.*, Binance Opp.18 (asserting that the value of a digital asset is "dependent on the success of the enterprise" because digital asset value is "tied … to the token ecosystem"); Coinbase Tr.19 (SEC: "[T]hat network or ecosystem, that is what drives the value of the token because the token as code is linked to that ecosystem. It is tied to it. It cannot be separated from it. As the value of that network or platform or ecosystem increases, so does the value of the token."); *id.* at 57 (SEC: "[W]hat is the enterprise here? … It's the network. It's the ecosystem. You are buying into that ecosystem with your token. … The token would be worthless without the ecosystem[.]"); *cf. SEC*

v. Coinbase, Inc., 2024 WL 1304037, at *21 (S.D.N.Y. Mar. 27, 2024) (finding the SEC plausibly alleged horizontal commonality by asserting that a digital token's value depends on the "development and expansion of the token's ecosystem," such that "[i]f the development of the token's ecosystem were to stagnate, all purchasers of the token would be equally affected"); *Terraform*, 684 F.Supp.3d at 195-96 (similar). That is not even a viable distinction, let alone one that has anything to do with what constitutes an investment contract.

At the outset, there is nothing particularly unusual about an asset whose value depends in whole or in part on a broader "ecosystem." The value of a Tesla electric car, for instance, is tied to at least some extent to Tesla's efforts to continue expanding its network of "Supercharger" charging stations that allow drivers to quickly recharge their Tesla automobiles. *See* Supercharger, Tesla, http://tinyurl.com/2fntfuj2 (last visited June 26, 2024). The value of a Pokémon card is likewise tied to at least some extent to The Pokémon Company's efforts to develop and expand its network of customers who play that popular trading card game, *see* Pokémon Trading Card Game, Pokémon, http://tinyurl.com/4xcra4rn (last visited June 26, 2024), as well as service providers who create venues for trading cards, vendors who sell branded merchandise, fan groups who create a secondary market, and countless others. But none of that changes the fact that someone who purchases a Tesla or Pokémon card is purchasing just that, not securing an entitlement to share in the profits of Tesla or The Pokémon Company. So too here. Even assuming the value of a digital asset is tied to the "ecosystem" in which it operates, that does not render purchasers of that asset part of a common profit-sharing enterprise. At the end of the day, any profit a purchaser will make off its purchase will come from its own actions of, e.g., selling when the asset's value is high. That

is the difference between a mere asset purchase and the kinds of investments with which the federal securities laws are concerned.[4]

If anything, the SEC's "ecosystem" argument makes even less sense in the digital asset context, as there is not necessarily any connection between the value of a digital asset and any ongoing efforts by its creator (or any successor to its creator's rights) to develop that asset or its "ecosystem." On the contrary, a digital asset may retain substantial value even if its creator is no longer putting any effort into it—indeed, even if its creator has disappeared or become defunct, and no new "owner" has taken its place. That is no hypothetical. Two of the most popular digital assets, Bitcoin and ETH, retain substantial value even though there is no single entity overseeing those assets on whose managerial efforts or expertise a buyer could even theoretically be said to rely when purchasing them. *See, e.g.*, *Cryptocurrencies: Oversight of New Assets in the Digital Age, Hr'g Before the U.S. H. Comm. on Agric.*, 115th Cong. 28 (2018) (statement of Gary Gensler); William Hinman, Director, SEC Div. of Corp. Fin., *Digital Asset Transactions: When Howey Met Gary (Plastic)*, June 14, 2018, http://tinyurl.com/58c42rds.[5] There is not even a sensible way to apply the federal securities laws' disclosure requirements to an asset that no single centralized entity remains responsible for issuing. And it would be more than passing strange to treat platforms

[4] Nor does it matter whether digital assets have any "innate or inherent value" outside of the digital "ecosystem" in which they exist. Coinbase Opp.14-15. As *Howey* explained in responding to the inverse argument, whether a transaction involves "a sale of property with or without intrinsic value" is "immaterial" to whether that transaction is an investment contract. 328 U.S. at 301. An iPhone app has no intrinsic value without the iPhone's "ecosystem" of supporting infrastructure and network of users. But that does not convert buying an iPhone app into a securities transaction.

[5] The DOGE token likewise continues to retain value and trade at high volumes even though its creator has publicly walked away from it, *see* Shalini Nagarajan, *Dogecoin's Creator Sold All His Coins 6 Years Ago After Getting Laid Off* (Feb. 12, 2021), http://tinyurl.com/37t3kbj8, as does the FTT token even though FTX is in bankruptcy proceedings, *see* Marco Quiroz-Gutierrez, *FTX Is Bankrupt and SBF Was on Trial, So Why Are People Still Buying FTT Tokens?* (Nov. 3, 2023), http://tinyurl.com/3efyys2d.

that facilitate sales of digital assets as securities exchanges when there is no "issuer" from whom the information on which the federal securities laws are focused could be procured. Moreover, those assets continue to have extensive "ecosystems"—making the SEC's recognition (at least for now) that they are not securities, *see supra* pp.18-19, impossible to reconcile with its view that the existence of an "ecosystem" is somehow determinative. That is presumably why the SEC has never cogently explained why it believes (again, at least for now) that Bitcoin and ETH are not securities, but that other digital assets with seemingly indistinguishable characteristics are.

In sum, the kinds of digital asset transactions LEJILEX's exchange will facilitate lack the essential feature of a securities contract, as they do not entail any kind of ongoing profit-sharing relationship between the buyer and the seller, or the issuer, or anyone else. They are asset sales, no more and no less, and the SEC lacks jurisdiction over bare asset sales. To the extent a few district courts have concluded or suggested otherwise, they have mistakenly read *Howey*'s instruction to look to economic realities rather than contract-law formalities as an invitation to do away with the core requirements of an investment contract. *See, e.g.*, *Coinbase*, 2024 WL 1304037, at *19, *24-25 (concluding that because "there need not be a formal contract … for an investment contract to exist," the "full set of expectations and understandings surrounding the sale and distribution of the asset" can give rise to an investment contract even absent any ongoing profit-sharing arrangement); *Terraform*, 684 F.Supp.3d at 193-94 (similar).[6] But *Howey* itself made clear that while the term "investment contract" "embodies a flexible rather than a static

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[6] Other cases involved claims against issuers of digital assets who conceded that their offerings *did* entail the kinds of contractual obligations that suffice to render them securities. *See, e.g.*, *SEC v. Kik Interactive Inc.*, 492 F.Supp.3d 169, 174-75 (S.D.N.Y. 2020) (integrated offering that included sale of digital assets for future delivery, through agreements that the seller acknowledged were securities); *SEC v. Telegram Grp., Inc.*, 448 F.Supp.3d 353, 361-63, 367 (S.D.N.Y. 2020) (offering of digital assets for future delivery, through agreements that the seller acknowledged were securities).

principle," it still reaches only arrangements that have "all the elements of a profit-seeking business venture"—i.e., "the placing of capital or laying out of money in a way intended to secure income or profit from its employment." 328 U.S. at 298-300. Because the kinds of digital assets transactions LEJILEX's platform will facilitate indisputably lack those essential elements, they are not securities transactions within the SEC's regulatory domain.

II. The Major Questions Doctrine Confirms That The SEC Has No Authority To Regulate The Digital Asset Transactions That Will Occur On LEJILEX's Platform.

If there were any remaining doubt that the SEC's novel assertion of regulatory jurisdiction over digital asset transactions exceeds its statutory authority, the major questions doctrine would dispel it. The SEC's attempt to reinterpret the 90-year-old text of the Securities and Exchange Acts to radically expand its regulatory power, and to seize jurisdiction over not only the trillion-dollar digital asset industry but countless other standalone asset transactions, cannot be sustained.

In determining "whether Congress in fact meant to confer the power the agency has asserted," *West Virginia*, 597 U.S. at 721, courts must "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 723 (quoting *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001)). 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 725 (quoting *FTC v. Bunte Brothers, 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 grant of regulatory power that more recent Congresses have considered but affirmatively declined to grant, for when Congress has declined (or is still considering) a request to expand an agency's powers, the agency cannot colorably claim that it has actually possessed those expanded powers all along.

The SEC's attempt to rewrite the decades-old term "investment contract" in the federal securities laws to reach digital asset sales implicates all of those concerns and more. The SEC's late-breaking claim to power over the digital asset industry 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 Act and the Exchange Act 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 profit-sharing enterprises. Nor has the SEC ever before claimed such expansive authority—and rightly so, as the sweeping power it now claims 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. After all, if an investment contract arises whenever a buyer expects an asset to appreciate based on its seller's or a third party's efforts, then the federal securities laws and their extensive disclosure requirements would be practically limitless. A theory that would turn buying diamonds, Teslas, or Pokémon cards into securities transactions cannot be right.

And that is to say nothing of the devastating 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. 473, 485-86 (2015). Yet the SEC claims the power to unilaterally turn countless digital asset networks into securities exchanges, brokers, and clearing agencies under century-old laws, subjecting them to net-capital requirements, SEC examinations, and all manner of other constraints that cannot even sensibly be applied to an industry that, by design, facilitates *de*centralized management and operation. Those demands would cause chaos across the board, destroying value by rendering thousands of transactions infeasible due to unworkable and ill-fitting disclosure requirements and transfer restrictions. *See, e.g.*, 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, e.g.*, 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.

The SEC's regulatory grab also threatens the United States' competitive advantage in the development of these innovative technologies. *See, e.g.*, Letter from Miller Whitehouse-Levine, Policy Director, DEF, to Vanessa A. Countryman, Secretary, SEC (Apr. 18, 2022), https://tinyurl.com/3439e6p5. The SEC's aggressive regulation-by-enforcement approach, and its ever-shifting efforts to justify it, have produced significant confusion in the industry, as the agency's lack of any coherent theory makes it impossible to predict what digital asset transactions

the SEC will or will not deem to be "investment contracts." *See supra* pp.17-19 (describing SEC's reversal and re-reversal on whether ETH is a security). That regulatory uncertainty has already driven some digital asset companies abroad, where the rules are clearer and those companies can more quickly develop and deploy their new products. As a result, 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, e.g.*, Jeff Wilser, *US Crypto Firms Eye Overseas Move Amid Regulatory Uncertainty*, CoinDesk (updated Mar. 27, 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. 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 would threaten to stunt American leadership and innovation in a critical technological sector with countless potential financial and non-financial applications. That is precisely the kind of major question that one would expect Congress to decide for itself, and that courts cannot presume Congress would hand over to the agency absent clear and unambiguous statutory text.

The SEC's regulatory grab is particularly untenable given that Congress has repeatedly declined to afford the SEC the power it now claims. 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). 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 U.S. House Approves Crypto FIT21 Bill With Wave of Democratic Support*, Coinbase (May 22, 2024), https://bit.ly/3V3GRip.

Congress has enacted none of these bills, which itself makes the SEC's claim to already have broad jurisdiction over digital assets remarkable. But more remarkable still, *none* of the bills Congress has considered even *contemplates* vesting the SEC with sole regulatory authority over transactions in digital assets; at most, they envision a role for both the SEC and the CFTC, rather than the exclusive authority the SEC now claims. These 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 that the agency 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).

In sum, all the "indicators from [the Supreme Court's] major questions cases are present" here, *Biden v. Nebraska*, 143 S.Ct. 2355, 2374 (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 the 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. Absent unambiguous statutory text empowering the SEC to regulate standalone digital asset sales, the SEC has no authority to regulate the transactions that LEJILEX's platform will facilitate. Because no such text exists, the SEC's claim to regulatory power fails as a matter of law.

CONCLUSION

This Court should grant Plaintiffs' motion for summary judgment.

Dated: June 26, 2024

Respectfully submitted,

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