United States Court of Appeals

for the

Third Circuit

Case No. 23-3202

COINBASE, INC.,

Petitioner,

– v. –

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
SECURITIES AND EXCHANGE COMMISSION DOCKET NO. 4-789

BRIEF FOR *AMICUS CURIAE* LEJILEX IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, LEJILEX hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% of its stock.

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Gary Gensler, *Testimony by Chair Gensler Before the U.S. House of Representatives Committee on Financial Services* (Sept. 28, 2023), https://corpgov.law.harvard.edu/2023/09/28/testimony-by-chair-gensler-before-the-u-s-house-of-representatives-committee-on-financial-services/ 16

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Model T, Ford, https://corporate.ford.com/articles/history/the-model-t.html 15

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Representative Ritchie Torres (D), *Statement to SEC Chair Gensler* (July 26, 2023), https://twitter.com/RepRitchie/status/1684282890245271555 8

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae LEJILEX[1] is a Texas corporation that is developing a new digital asset trading platform called the Legit.Exchange. The Legit.Exchange will be a secondary trading platform. In other words, LEJILEX will not be developing or issuing any digital assets or facilitating issuances of digital assets by others; its trading platform will only allow users to trade already-issued digital assets in peer-to-peer secondary transactions. Those transactions will be structured as blind bid/ask trades, meaning buyers and sellers will not know who is on the other side of a transaction.

On February 21, 2024, LEJILEX and another entity initiated an action against Respondent Securities and Exchange Commission (the "SEC") and certain other Defendants in the United States District Court for the Northern District of Texas, Case 4:24-cv-00168-O, ECF No. 1 (N.D. Tex.) (the "LEJILEX Complaint"). The LEJILEX Complaint seeks declaratory and injunctive relief to ensure that LEJILEX does not have to register with the SEC as a securities exchange, broker, or clearing agency – contrary to the SEC's view, as expressed in the multiple enforcement

[1] Pursuant to Fed. R. App. P. 29(a)(2), LEJILEX files this brief with the consent of all parties. No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person other than LEJILEX and its counsel, and the Crypto Freedom Alliance of Texas, contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4).

actions that the SEC has brought against comparable digital asset trading platforms such as Petitioner Coinbase, Inc. ("Coinbase").

Here, Coinbase's brief urges that an "entire industry needs the SEC to provide rational answers to the basic questions presented in Coinbase's rulemaking petition: whether and how the SEC believes the securities laws apply to digital assets. The agency must answer those questions in forward-looking rules." (Pet.'s Br. at 35). Coinbase further explains that SEC Commissioners Hester Peirce and Mark Uyeda "recently characterized the current state of affairs as 'untenable' for the digital assets industry" and stated that the SEC was "dangling 'a regulatory sword of Damocles' above the heads of 'well-meaning entrepreneurs.'" (Pet's Br. at 19).

LEJILEX is a prime example of such an industry participant and a "well-meaning entrepreneur" in urgent need of those answers. LEJILEX thus shares the same concern as Coinbase, but provides a different perspective to the Court. Unlike Coinbase, an established public company, LEJILEX is a nascent company that has not yet launched its platform. LEJILEX faces a genuine threat that when the Legit.Exchange launches, the SEC will bring an enforcement action claiming that LEJILEX is operating an unregistered securities exchange, broker, or clearing agency, just as the SEC has recently done to other digital asset platforms – like Coinbase and others – that facilitate secondary transactions in the same digital assets that LEJILEX will allow on the Legit.Exchange.

ARGUMENT

I. The Current Regulatory Landscape for Digital Assets Is Baffling

How and when do securities laws apply to digital assets? That question is of extreme importance to LEJILEX, an American company wishing to do business in the digital asset space in a legal, legitimate manner. Sadly, due to the SEC's lack of clarity on its regulatory position regarding digital assets, the company is unable to divine answers to basic questions of securities law, such as when the SEC believes digital assets are securities within its regulatory authority, versus when those assets are simply things, no more under the SEC's purview than (say) oranges. LEJILEX believes that clear "rules of the road" on such basic questions – subject to the prescribed notice and comment process, and within the SEC's regulatory authority – would greatly assist American businesses in understanding how to comply with the law, and American consumers in providing clear maps of their protections.

The Securities Act and the Exchange Act authorize the SEC to regulate transactions involving "securities," a term statutorily defined by a long list of various categories of financial instruments. 15 U.S.C. § 77b(a)(1); 15 U.S.C. § 78c(a)(10). The SEC has taken positions in enforcement actions suggesting that almost all digital assets are "investment contracts," even where the digital assets in question are neither an "investment" nor a "contract."

Coinbase amply demonstrates the tortured history of the SEC's treatment of digital assets. (Pet.'s Br. at 7-12, 51-55). The SEC has argued at various times, and sometimes in the same case, that digital assets themselves are not securities;[2] and also that digital assets themselves are securities;[3] and also that digital assets are sometimes securities, depending on the facts and circumstances under a sixty-factor "Framework."[4]

At times, the SEC has stated that it did not have a regulatory framework for digital asset trading exchanges,[5] and sometimes that it did have a regulatory framework for digital asset trading exchanges[6] – including a regulatory framework sufficient to bring an enforcement action against Coinbase.[7]

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[2] William Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, Remarks at the Yahoo Finance All Markets Summit: Crypto (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418 (the "Hinman Speech").

[3] *SEC v. Payward, Inc.*, No. 23-cv-06003, ECF 26-2 at 92:14-15 (N.D. Cal. Feb. 22, 2024) (Hearing Tr. from *SEC v. Binance Holdings Ltd.*, No. 23-cv-1599 (D.D.C Jan. 22, 2024)).

[4] *Framework for "Investment Contract" Analysis of Digital Assets*, Securities and Exchange Commission (Apr. 3, 2019), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets.

[5] *Correspondence Related to Draft Registration Statement*, Securities and Exchange Commission, at 4 (Dec. 7, 2020), https://bit.ly/3lRrY4y.

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

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

It is not only Coinbase or LEJILEX, or even just other industry participants, who have criticized this inconsistent treatment. Two of the SEC's own Commissioners have been outspoken critics of the SEC's inconsistency and lack of clarity. Commissioners Peirce and Uyeda have filed multiple dissents and statements remarking on the SEC's ambiguous treatment of digital assets.[8] Commissioner Peirce has stated 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 digital asset tokens and to require digital asset trading platforms to register with us."[9]

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[8] *See, e.g.*, Hester Peirce, *Kraken Down: Statement on SEC v. Payward Ventures, Inc., et al.*, Securities and Exchange Commission (Feb. 9, 2023), https://tinyurl.com/2mwnuppr; *see also* Hester Peirce, *Overdue: Statement of Dissent on LBRY*, Securities and Exchange Commission (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."); Hester Peirce and Mark Uyeda, *Statement Regarding Denial of Petition for Rulemaking*, Securities and Exchange Commission (Dec. 15, 2023), http://tinyurl.com/5cy5ux3w (dissenting from denial of petition because "addressing these important issues is a core part of being a responsible regulator").

[9] Hester M. Peirce, *Outdated: Remarks Before the Digital Assets at Duke Conference*, Securities and Exchange Commission (Jan. 20, 2023), https://www.sec.gov/news/speech/peirce-remarks-duke-conference-012023.

Notably, in a recent dissent from a settled enforcement action with a company called ShapeShift AG (for allegedly operating as an unregistered securities dealer), Commissioners Peirce and Uyeda wrote a short script about the SEC's "manifestly unsatisfying" mantra inviting digital asset companies to "Just come in and register":

> Future ShapeShift ("FSS"): Hello, I would like to register as a dealer.
>
> SEC: Why?
>
> FSS: Because I think some of the assets that I plan to deal might be deemed at some point by the SEC to be securities.
>
> SEC: Which ones?
>
> FSS: I'm not sure because I can't really understand what criteria you use to decide whether a token offering is a securities transaction and, if it is, whether the token that was the subject of the investment contract remains a security in secondary market transactions.
>
> SEC: Well, if you don't know whether you're dealing in securities, you can't register. And by the way, if some of the assets you're dealing in are not securities, you also can't register.
>
> FSS: So can you help us think through which assets are securities?
>
> SEC: No. We suggest that you read the 2017 DAO report, and it will all be clear to you. You can also look at our enforcement actions if you want.
>
> FSS: I read it, and I've read about your enforcement actions. I still have questions.
>
> SEC: Hire a lawyer.
>
> FSS: I did, and the lawyer has even more questions.
>
> SEC: Sorry, we cannot help any more than we already have. We don't give legal advice.

END SCENE[10]

The "Future ShapeShift" companies that are baffled and have no recourse are not hypothetical or fanciful; LEJILEX is an example. And in the face of this significant uncertainty, some courts have predictably expressed inconsistent results.[11] Other courts have noted the lack of clarity in the law.[12] Other government officials have voiced exasperation and confusion with the SEC's ambiguity and "regulation by enforcement" rather than rulemaking, including at least one Commissioner from a different financial regulatory agency,[13] and, demonstrating that this is not a "party

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[10] Hester Peirce and Mark Uyeda, *On Today's Episode of As the Crypto World Turns: Statement on ShapeShift AG*, Securities and Exchange Commission (March 6, 2024), https://www.sec.gov/news/statement/peirce-uyeda-statement-a-crypto-world-turns-03-06-24.

[11] *Compare, e.g.*, *SEC v. Ripple Labs, Inc.*, No. 20 Civ. 10832 (AT), 2023 WL 4507900 (S.D.N.Y. July 13, 2023) (holding that some institutional sales of tokens were "investment contracts," blind bid-and-ask transactions involving those tokens were not investment contracts, and the tokens themselves, without more, were not securities) *with SEC v. Terraform Labs Pte. Ltd*., No. 23-cv-1346 (JSR), 2023 WL 4858299, at *12 (S.D.N.Y. July 31, 2023) ("[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," the tokens at issue "when considered in isolation, might not then have been, by themselves, investment contracts").

[12] *See, e.g.*, *Risley v. Univ. Navigation Inc*., No. 22 Civ. 2780 (KPF), 2023 WL 5609200, at *3 (S.D.N.Y. Aug. 29, 2023) ("Congress and the courts have yet to make a definitive determination as to whether [digital assets] constitute securities, commodities, or something else.").

[13] *See, e.g.*, Caroline D. Pham, *Statement on SEC v. Wahi*, Commodity Futures Trading Commission (July 21, 2022), http://tinyurl.com/ytny6a9w (criticizing the SEC's lawsuit as "a striking example of 'regulation by enforcement'").

line" political issue, members of Congress from both sides of the political aisle.[14]

The concerns over a lack of clarity are not abstract or academic. There are real questions of very specific substance that are key threshold issues for a business like LEJILEX. Those unanswered but critical questions include:

- Can a token or other digital asset itself "be," or "embody," a security, when no federal appellate court has ever found the commodity itself underlying an investment contract to itself "be" or "embody" the security?[15]

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[14] *See, e.g.*, Representative Patrick McHenry (R), Chair of the House Financial Services Committee, *McHenry to Chair Gensler: We Have a Constitutional Duty to Conduct Oversight of the Agencies Under Our Jurisdiction and Will Continue to Do So Aggressively* (April 18, 2023), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408707 ("[Y]ou have refused to provide clarity on whether digital assets offered as part of an investment contract are subject to securities laws. And, more importantly, how these firms should comply with those laws. You're punishing digital asset firms for allegedly not adhering to the law when they don't know it will apply to them. ... Regulation by enforcement is not sufficient nor sustainable. Your approach is driving innovation overseas and endangering American competitiveness.") (emphasis in original); Representative Ritchie Torres (D), *Statement to SEC Chair Gensler* (July 26, 2023), *available at* https://twitter.com/RepRitchie/status/1684282890245271555 ("The status quo of crypto regulation by enforcement has failed retail customers. ... The SEC has not issued a single rule clarifying the application of securities law to digital assets").

[15] *See, e.g.*, Lewis Rinaudo Cohen, Gregory Strong, Freeman Lewin, & Sarah Chen, *The Ineluctable Modality of Securities Law: Why Fungible Crypto Assets Are Not Securities*, DLx Law (Nov. 10, 2022), https://dlxlaw.com/wp-content/uploads/2022/11/The-Ineluctable-Modality-of-Securities-Law-DLx-Law-Discussion-Draft-Nov.-10-2022.pdf.

- If the SEC does contend that a token can be, or embody, a security, when, and in what circumstances, would that happen?

- If the SEC were correct that some tokens themselves "were" securities at their inception (which several courts have already rejected), can such tokens ever become non-securities (a theory outlined in the Hinman Speech)? When, and in what circumstances?

- Are blockchains brokers? Exchanges? Clearing agencies? Are entities that use blockchains any of these things? How could they be?

- How does custody work (under, for example, Rule 15c3-3 under the Securities and Exchange Act of 1934, 17 CFR § 240.15c3-3) where assets are self-custodied?

- If digital assets are securities, how can or should they be legended?

- If a digital asset offering is to be treated as a securities transaction, what is the path to a compliant offering? Are all such offerings to be treated as equity? What if a particular token has some (but not all) features of equity? Or some (but not all) features of debt? Or has none of those features at all? Or has features that programmably change over time?

- What happens when a token survives its initial creators – when that company terminates, or decentralizes itself, and no longer operates? How can any of the reporting rules apply? And to whom would they apply?

- Can transactions that are "peer-to-protocol" (i.e., interacting with a computer script but not another person) meet registration or disclosure requirements? How? Who would be responsible?[16]

Many of these questions arise from the simple fact that, at heart, digital assets are simply software. Like all software, digital assets are as programmable, flexible, and modular as the human imagination itself. Digital assets can be coded to have some features of equity securities, or debt securities, or both, or neither. They might be coded to have different features at different times. They can be coded to be the keys to use in a computer system, the output of a different computer system, or the software equivalent of a cog in a machine, a necessary piece to make a larger system run. Digital assets can also be, and most of them are, just "things" – digital art, digital music, a social media profile, a digital movie or concert ticket, a membership pass to a club, a fashion statement, or literally no more than a picture of a cute animal stored on a blockchain.

The SEC has seen this Precambrian explosion of different technologies, and like a hammer seeing nothing but nails, declared that many of them are securities. But the SEC has not taken the very next step that such a declaration would require:

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[16] These are just a small handful of the open questions posed by digital assets that have no good answers. As Commissioners Peirce and Uyeda wrote in their *Statement on ShapeShift AG*, *supra*, "the lawyer has even more questions."

providing a way for such tokens to be treated as securities under their regulatory purview. Very simply, the SEC has told Americans to comply with the law, or risk an expensive and time-consuming investigation or litigation. But the SEC has not told Americans what the law actually is, or how to comply with it.

II. LEJILEX is a Prime Example of an American Company In Limbo Because of the SEC's Lack of Rulemaking

As explained above, LEJILEX is developing a new digital asset trading platform called the Legit.Exchange. The Legit.Exchange will be a "non-custodial" trading platform, meaning LEJILEX will never have custody of any digital assets traded on the platform. 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. The Legit.Exchange will simply be dedicated to facilitating peer-to-peer secondary transactions in already-existing tokens that LEJILEX approves for trading, with LEJILEX taking a commission on those transactions. LEJILEX will approve trading, moreover, only in digital assets that do not embody rights to participation in common enterprise; it will not permit trading in any of the rare digital assets that are structured akin to a traditional share or stock and carry with them an ongoing commitment on the part of the asset seller or developer (or a third party) to manage a common venture for the asset buyer's benefit.

LEJILEX has taken significant steps to prepare for its launch of the Legit.Exchange, including developing code, a user interface, and a website for the Legit.Exchange, engaging service providers and contractors to host, design, and develop the site and product features, and raising funds for the Legit.Exchange's operation, and of course, engaging in regulatory due diligence.

LEJILEX does not believe that the SEC has regulatory authority over the secondary transactions in digital assets that will occur 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 even if it wanted to, because the SEC has not promulgated any regulations providing for the registration of digital asset platforms like the Legit.Exchange. But LEJILEX plans to permit trading on the Legit.Exchange of digital assets that the SEC has elsewhere claimed are "securities," despite LEJILEX's good faith legal assessment to the contrary.

LEJILEX therefore faces a genuine threat that, when the Legit.Exchange launches, the SEC will bring an enforcement action claiming that LEJILEX is operating an unregistered securities exchange, broker, or clearing agency, just as the SEC has recently done to other digital asset platforms (including Bittrex, Coinbase,

Binance, and Kraken) that facilitate secondary transactions in the same digital assets that LEJILEX will allow on the Legit.Exchange.[17]

For that reason, LEJILEX has been forced to take a drastic step: it has sued the SEC.

Under the SEC's current view, as expressed in the multiple enforcement actions that the SEC has brought against comparable digital asset trading platforms such as Coinbase, some unspecified and unknowable number of tokens are securities. In the face of such uncertainty, a cryptocurrency exchange such as Coinbase or LEJILEX simply cannot operate.

To be clear, such an exchange could not simply "come in and register." While the SEC has recited that mantra, it has not actually demonstrated how such registration is remotely possible under the current regulatory regime. The SEC has also insisted, in its actions against other exchanges, that the various functions those exchanges allegedly perform (brokerage, custody, matching, and/or clearing) should be separated, which is both technologically nonsensical when it comes to digital assets, but also conspicuously absent from the rules the SEC claims to be enforcing.

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[17] *See* Gary Gensler, *Statement on the Approval of Spot Bitcoin Exchange-Traded Products*, Securities and Exchange Commission (Jan. 10, 2024), http://tinyurl.com/4jmzwy3d (asserting that "for the most part," digital assets trading platforms "are non-compliant with the federal securities laws").

Coinbase's Petition argues that the rules around digital assets are unclear, and that the SEC must engage in rulemaking to set forth its position on whether and how existing securities laws apply to digital assets, and to establish a feasible path for compliance. LEJILEX is Exhibit A for that proposition.

For LEJILEX, the rules are so unclear, and the dangers of being investigated and sued so apparent, that LEJILEX is in limbo.[18] It wants to launch its trading platform and has been working to be ready to do so. But in the wake of the SEC's aforementioned wave of lawsuits filed against somewhat similar exchanges alleging trading of unregistered securities, LEJILEX cannot launch its exchange without fear of being sued by the SEC. The impact to LEJILEX is devastating. Its entire business remains on hold, unable to operate without fear of facing a lethally costly enforcement action on day one.

LEJILEX is not alone. Other companies share similar fears. Some simply move out of the United States, costing America jobs, innovation, and a network of technological development. And others just never get started, hampering America's technological leadership in this vital area.

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[18] Even an investigation by the SEC's enforcement staff can be crippling. Compliance with SEC Staff subpoenas in such investigations can cost tens or even hundreds of thousands of dollars. For early-stage companies, every dollar is precious runway toward later profitability. Every subpoena the SEC Staff sends to an American company is one less hire an American company can make.

III. New Rules Are Vital for Future Development of the American Economy

In October 2008, the pseudonymous Satoshi Nakamoto introduced bitcoin to the world,[19] unleashing a revolution in the way we conceive of digital transactions – programmable value on a blockchain. The 2020s are a tipping point of mainstream adoption of blockchain technologies, and the digital tokens that operate on them.[20] But America has risen to this situation in the past.

Almost exactly a century before Nakamoto's invention, in October 1908, Ford introduced the Model T to the world. That car (and its competitors) tipped the automobile into mainstream adoption in the 1920s.[21] It would have been unfathomable for governments at the time to have simply declared that the rules of the road that had worked for ninety years should remain unchanged into the future, or that the new automobiles simply needed to comply with the then-existing law. Those laws and rules were built for horses and buggies, for speeds far below what automobiles could achieve, for "vehicles" that ran on oats, not gasoline. If the

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19 *See* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, https://bitcoin.org/bitcoin.pdf.

20 *See* Tom Akana and Geng Li, *Cryptocurrency Ownership: Insights from the CFI COVID-19 Survey of Consumers*, Federal Reserve Bank of Philadelphia Consumer Finance Institute, at 1 (April 2023), https://www.philadelphiafed.org/-/media/frbp/assets/consumer-finance/briefs/cryptocurrency-ownership-covid-survey-brief.pdf (24.6 percent of respondents reported that they or someone in their immediate family currently owned cryptocurrency).

21 *See The Model T*, Ford, https://corporate.ford.com/articles/history/the-model-t.html.

government had simply insisted on keeping the old rules, the historically unprecedented development of the American economy in the twentieth century would have been irreparably hampered.

Now, a century after governments started promulgating new rules for that technological shift, and in the face of an innovation potentially as revolutionary as the automobile, the SEC is insisting that the rules we have used for ninety years are simple, clear, and sufficient for digital assets.[22] That position is as wrong in 2024 about digital assets as it would have been in 1924 about automobiles. The SEC's failure to engage in the rulemaking process, and its insistence on the current unworkable rules, is a failure to acknowledge the sea change of the digital century.

The future history of digital assets is yet to be written. There's no way to know yet where these roads will lead. But without sensible rulemaking, the technologists, innovators, and job creators of the twenty-first century are trying to drive state-of-the-art automobiles with traffic laws designed for horses and buggies.

All we want are clear rules of the road. LEJILEX agrees with Coinbase that the SEC should be required to provide them.

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[22] *See, e.g.*, Gary Gensler, *Testimony by Chair Gensler Before the U.S. House of Representatives Committee on Financial Services* (Sept. 28, 2023), https://corpgov.law.harvard.edu/2023/09/28/testimony-by-chair-gensler-before-the-u-s-house-of-representatives-committee-on-financial-services/ ("Given that most crypto tokens are subject to the securities laws, it follows that most crypto intermediaries have to comply with securities laws as well. These laws have been on the books for decades.").

CONCLUSION

For the foregoing reasons, *Amicus Curiae* LEJILEX respectfully requests that the Court grant the relief sought by Coinbase.

Dated: March 18, 2024

Respectfully submitted,

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1. This brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B)(i), the typeface requirements set forth in Fed. R. App. P. 32(a)(5), and type style requirements set forth in Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2021 in 14-point Times New Roman font and contains 3,927 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: March 18, 2024

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on this 18th day of March 2024, the foregoing Brief was filed through CM/ECF system, and served on all counsel of record through the CM/ECF system.

Dated: March 18, 2024

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