

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

BEBA LLC and DEFI EDUCATION FUND,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION;
and GARY GENSLER, Commissioner of the
Securities and Exchange Commission, in his official
capacity,

Defendants.

No. 6:24-cv-00153-ADA-DTG

**BRIEF FOR *AMICUS CURIAE* COINBASE, INC.
IN SUPPORT OF PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

CORPORATE DISCLOSURE STATEMENT

Counsel for Coinbase, Inc. certifies that Coinbase, Inc., is wholly owned by Coinbase Global, Inc., which is a publicly held corporation. Coinbase Global, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of Coinbase Global, Inc.'s stock.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*¹

Coinbase, Inc., which operates a digital-asset trading platform, is the largest digital-asset company in the United States. Founded in 2012, its mission is to create a more open, inclusive, and efficient financial system by leveraging digital assets and blockchain technology. Brian Armstrong, *Coinbase Is a Mission Focused Company*, Coinbase Blog (Sept. 27, 2020), <https://ti.nyurl.com/3x63ajk7>. That mission has been a massive success. Digital assets provide a financial lifeline to millions of unbanked individuals and reduce the costs of cross-border remittances to developing countries. *E.g.*, ECF 24 (“Complaint”) ¶¶ 60-62.

In the past few years, however, the SEC has unleashed an arbitrary regulation-by-enforcement campaign on digital assets. The plaintiffs here—Beba and the DeFi Education Fund—are two of the many victims of the SEC’s onslaught. Coinbase is another. Three years ago, it became a public company through an offering allowed by the SEC. At the time, SEC never asserted that any digital assets listed on Coinbase’s platform were securities. Coinbase is not registered with the SEC today because Coinbase still does not list securities; the digital assets on Coinbase’s platform are instead commodities, akin to gold or diamonds. But because Coinbase and many others in the digital-asset industry would like to be able to offer digital-asset securities, Coinbase has actively engaged with the SEC for years about (among other things) the need for the SEC to explain through notice-and-comment rulemaking its views about how the securities laws apply to digital assets.

Instead of engaging with Coinbase and others on that issue, the SEC has turned sharply against them. It has adopted an untenably sweeping, yet unpublished and indeterminate, view of its jurisdiction. But the SEC has refused to explain through rulemaking *which* digital assets it now

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* made any monetary contribution to its preparation or submission.

believes are subject to the securities laws, *why* it changed its mind, and *how* digital-asset firms can comply with inapt, decades-old rules. Instead, the SEC acts as if it has already published rules, by launching a barrage of enforcement suits that presuppose its revisionist view of the securities laws.

The upshot is that the digital-asset industry is caught in a Catch-22 of the SEC's making: The SEC sues digital-asset developers and exchanges seeking punitive, retroactive penalties for their purported failure to "come in and register." But the agency simultaneously refuses to explain on the record, through a rulemaking, how the compliance it demands is even possible. The SEC has even openly denied that it has an obligation to make compliance with its rules feasible at all. The dilemma is intractable for Coinbase and the plaintiffs here alike, as the SEC has indiscriminately targeted digital-asset firms for enforcement regardless of their size or business model.

Granting declaratory relief in this case would be a critical step on the path out of this morass. By proclaiming what the SEC refuses to admit—that digital assets are generally not "investment contracts" under the securities laws—this Court can help relieve the pressure of the agency's unlawful enforcement threats that have loomed over the digital-asset industry for the past two years.

ARGUMENT

I. The SEC's Sharp And Unexplained Reversal In Its Interpretation Of The Securities Laws Has Put The Digital-Asset Industry In A Catch-22

The SEC has put Coinbase and the entire digital-asset industry in an impossible position. It has launched an aggressive and accelerating campaign of enforcement suits, prosecuting firms that offer or develop digital assets for purportedly failing to comply with the SEC's existing rules. Yet the SEC has obdurately refused to engage in notice-and-comment rulemaking to explain *when* it thinks those rules apply and *how* digital-asset firms possibly can comply with them.

For years, the SEC adhered to the well-founded position that it had at most limited authority over digital assets. Complaint ¶¶ 131-35. In 2018, the SEC's then-Director of Corporation

Finance publicly stated that a digital asset “all by itself is *not* a security.”² And in May 2021, the SEC Chair testified before Congress that “the exchanges trading in these crypto assets do not have a regulatory framework either at the SEC, or our sister agency, the Commodity Futures Trading Commission” and that “only Congress ... could really address” that issue.³ The SEC’s actions evidenced the same understanding. In April 2021, for example, the SEC cleared the way for Coinbase to become a public company after reviewing and commenting on Coinbase’s business model. The SEC allowed Coinbase’s public listing as consistent with “the public interest and the protection of investors,” 15 U.S.C. § 77h(a), without suggesting that Coinbase’s business model violated the securities laws, that Coinbase unlawfully listed unregistered securities, or that Coinbase must register as a national securities exchange or an alternative trading system.⁴

Over the past two years, however, the SEC’s views have shifted dramatically. In December 2022, the SEC Chair claimed that the agency *does* “have enough authority ... in this space” to require digital-asset firms “to come into compliance” with SEC registration requirements.⁵ He now regularly asserts that the “vast majority” of digital assets *are* securities, that there is a “clear way” for digital-asset firms to register, and that digital-asset firms must “come in and register” or face “enforcement actions.”⁶ True to those threats, the SEC has launched a wave of enforcement actions—including against Coinbase—premised on that new position. Complaint ¶¶ 140-42.

² William Hinman, Dir., Div. of Corp. Fin., SEC, *Digital Asset Transactions: When Howey Met Gary (Plastic)* (June 14, 2018), <https://tinyurl.com/5n94tj64> (emphasis added).

³ *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).

⁴ SEC, *Correspondence Related to Draft Registration Statement 4* (Dec. 7, 2020), <https://tinyurl.com/5n6f375n>.

⁵ *SEC’s Gensler: The ‘Runway Is Getting Shorter’ for Non-Compliant Crypto Firms*, Yahoo (Dec. 7, 2022), <https://tinyurl.com/538un3xt>.

⁶ E.g., Gary Gensler, SEC Chair, *Partners of Honest Business and Prosecutors of Dishonesty* (Oct. 25, 2023), <https://tinyurl.com/ayp4tkwp>; First on CNBC: CNBC Transcript: *SEC Chair Gary Gensler Speaks with CNBC’s ‘Squawk Box’ Today*, CNBC (Feb. 10, 2023), <https://tinyurl.com/3z38uavc>; *SEC’s Gensler: The ‘Runway Is Getting Shorter’*, *supra* note 5.

In doing so, the SEC is acting as if it has already promulgated a rule codifying the Chair's positions. But the SEC has steadfastly refused to engage in rulemaking. And it has never coherently explained in a regulation the scope of the newfound authority it now purports to wield. The agency has not even explained which digital assets it believes to be subject to the securities laws. Indeed, it recently told the Third Circuit that "there's not an answer to" whether Bitcoin and Ether—two of the most longstanding, prominent, and decentralized digital assets—are "subject to the federal securities laws." Oral Arg. Tr. at 32:9-12, *Coinbase v. SEC*, No. 23-3202 (3d Cir. Oct. 7, 2024), ECF 59. That contradicts the agency's actions—including its approvals of Bitcoin and Ether ETFs—and its Chair's public pronouncements. *See, e.g.*, Complaint ¶ 138 (SEC Chair stating that all digital assets "other than bitcoin" "are securities"). Even if the SEC maintains its prior stance that Bitcoin and Ether are *not* securities, it has offered no rational justification for treating Bitcoin and Ether differently from any of the digital assets the SEC has asserted *are* securities.

Nor has the SEC explained how it reads the securities laws to encompass digital assets when many traditional assets—including real estate, commodities, and trading cards—have never been subject to SEC jurisdiction, even though they possess attributes the SEC appears to regard as indicative of a security. Instead, as one court recently recognized in rejecting the SEC's novel view, the agency has spoken "out of both sides of its mouth" and has "le[ft] th[at] Court, the industry, and future buyers and sellers with no clear differentiating principle between tokens in the marketplace that are securities and tokens that aren't."⁷ In response, the SEC changed its position *again*, expressing its "regre[t]" for the "confusion" it created.⁸ "Confusion" is an understatement, as even a small sampling of the SEC's contradictory positions over the past couple of years reveals:

⁷ *SEC v. Binance Holdings Ltd.*, 2024 WL 3225974, at *21 n.15, 22 (D.D.C. June 28, 2024).

⁸ SEC Mem. in Support of Mot. for Leave to Amend Compl. at 24 n.6, *Binance*, No. 1:23-cv-01599 (D.D.C. Sept. 12, 2024), ECF 273-1.

Issue	Examples Of The SEC's Conflicting Statements				
Is a digital asset a security?	No (2018): A digital asset “all by itself is <i>not</i> a security.” ⁹	Yes (2021): A digital asset “embodi[es]” and “represents th[e] investment contract.” ¹⁰	No (2024): A digital asset is just “computer code.” ¹¹	Yes (2024, five days later): The digital asset itself “represents the investment contract.” ¹²	No (2024, eight months later): The digital asset “itself” is “not” “the security.” ¹³
Is Bitcoin a security?	No (2023): “[T]he SEC has never claimed [Bitcoin] is a security.” ¹⁴		Maybe (2024): “[T]here’s not an answer.” ¹⁵	No (2024, four days later): “[T]hat’s not a security.” ¹⁶	
Can the SEC regulate digital asset exchanges?	No (2021): “Right now, there is not a market regulator [for] ... crypto exchanges.” ¹⁷		Yes (2022): “Congress gave us a broad framework ... to regulate exchanges.” ¹⁸		
Is existing law clear?	No (2020): There is “no certainty” about whether digital assets are securities. ¹⁹		Yes (2023): “We have a clear regulatory framework built up over 90 years.” ²⁰		

The SEC also has failed to explain how digital-asset firms *could* comply with the agency’s existing rules, which were designed decades ago for legacy financial instruments that look nothing like digital assets. The SEC’s digital-asset-related enforcement actions are ostensibly premised on the proposition that digital-asset firms can “come in and register” with the agency. Yet, as

⁹ Hinman, *When Howey Met Gary*, *supra* note 2 (emphasis added).

¹⁰ Opp. to Mot. to Intervene at 24, *SEC v. Ripple Labs, Inc.*, No. 1:20-cv-10832 (S.D.N.Y. May 3, 2021), ECF 153 (emphasis omitted).

¹¹ Tr. at 18:23, *SEC v. Payward, Inc.*, No. 3:23-cv-06003 (N.D. Cal. Feb. 22, 2024), ECF 26-1.

¹² Tr. at 92:14-15, *Payward*, No. 3:23-cv-06003 (N.D. Cal. Feb. 22, 2024), ECF 26-2.

¹³ *Supra* note 8.

¹⁴ SEC Opp. Mot. to Dismiss at 49, *Binance*, No. 1:23-cv-01599 (D.D.C. Nov. 7, 2023), ECF 172.

¹⁵ Oral Arg. Tr. at 32:7-14, *Coinbase*, No. 23-3202 (3d Cir. Oct. 7, 2024), ECF 59.

¹⁶ Amitoj Singh, *SEC’s Gensler Won’t Reveal His View on Trump’s Bitcoin Reserve, Reiterates Bitcoin Isn’t a Security*, CoinDesk (Sept. 27, 2024), <https://tinyurl.com/2rwsckyu>.

¹⁷ Gensler, *Game Stopped?*, *supra* note 3.

¹⁸ Gary Gensler, SEC Chair, *Prepared Remarks of Gary Gensler on Crypto Markets Penn Law Capital Markets Association Annual Conference* (Apr. 4, 2022), <https://tinyurl.com/bd767cuv>.

¹⁹ SEC, *Correspondence Related to Draft Registration Statement*, *supra* note 4.

²⁰ *Oversight of the Securities and Exchange Commission* at 4:12:30-58, 118th Cong., 1st Sess. (Apr. 18, 2023), <https://tinyurl.com/3pf7d9xu>.

Coinbase and others have repeatedly shown the SEC, digital-asset firms simply cannot comply with the SEC's existing rules. *See, e.g.*, Coinbase, Petition for Rulemaking, SEC File No. 4-789 (July 21, 2022), <https://tinyurl.com/4mt2evcz> (“Coinbase Petition”).

At the most basic level, if many digital assets had to be registered as securities, they simply could not function. All digital-asset transactions would have to be routed through a broker-dealer on a registered exchange, subjecting them to clearing and settlement rules that would not permit the real-time uses for which the assets are designed. Coinbase Petition at 8. Digital-asset firms also are unable to comply with registration and disclosure requirements designed for legacy financial instruments managed by centralized companies, rather than for digital assets operating on decentralized blockchains. *Id.* at 12-14, 18; *see also* Coinbase, Supplemental Comment Letter, SEC File No. 4-789, at 3 (Dec. 6, 2022), <https://tinyurl.com/36zmapuw>. And those problems are just the tip of the iceberg. *See* Coinbase Petition at 23-27 (discussing additional problems); *see also* Coinbase Opening Br. 40-46, *Coinbase*, No. 23-3202 (3d Cir. Mar. 11, 2024), ECF 16 (same).

Instead of confronting these glaring workability problems, the SEC refuses to respond—let alone engage in the rulemaking necessary to adapt its rules for digital assets, as it has done for other industries.²¹ As a result, the SEC has purposely put digital-asset firms in a Catch-22: They are told to comply with inapt, inapplicable existing rules designed for legacy financial instruments, which would render many digital assets useless; yet companies face punitive, retroactive SEC enforcement actions for failing to achieve the impossible. All the while, the SEC refuses to conduct the rulemaking needed to make compliance possible. The ultimate goal is to drive the industry out of business by demanding compliance the agency knows is infeasible, and then aggressively pursuing companies that fail to achieve the impossible for their supposed disregard for the law.

²¹ *E.g.*, Mark T. Uyeda, Comm'r, SEC, *Statement on the Registration for Index-Linked Annuities and Registered Market-Value Adjustment Annuities* (July 1, 2024), <https://tinyurl.com/njb5p3z6>.

II. The SEC Has Unlawfully Refused To Provide Needed Clarity Through Rulemaking

Coinbase's experience epitomizes the industry's predicament. In July 2022, to break the SEC-created regulatory logjam, Coinbase petitioned the SEC for rulemaking. *See* Coinbase Petition, *supra*. To be clear, Coinbase strongly disagrees that the SEC has the statutory authority it now claims over most digital assets. But if the SEC seeks to assert that authority, the APA and basic principles of fair notice require it to articulate and explain its revised view in advance through rulemaking, resulting in rules subject to judicial review *before* the SEC enforces that new view.

Coinbase's petition identified critical issues that the SEC needs (but refuses) to address through rulemaking. It stressed the SEC's "[I]ack of clarity regarding how to determine whether a digital asset is a security," and urged the SEC to "defin[e] a digital asset security through rulemaking." Coinbase Petition at 5, 7-12. The petition also detailed many ways that existing regulations are "fundamentally incompatible with the operation of digital asset[s]," rendering those rules unworkable for digital assets and making compliance impossible. *Id.* at 5; *see id.* at 6-8, 12-13, 15-18, 20-27. Coinbase's petition garnered widespread support from more than 1,000 stakeholders, including the U.S. Chamber of Commerce's Center for Capital Markets Competitiveness. *See* J.A. Vol. 2 at JA59, *Coinbase*, No. 23-3202 (3d Cir. Mar. 11, 2024), ECF 17.

Yet the SEC stood silent. In April 2023, after ten months without word from the SEC, Coinbase sought mandamus from the Third Circuit to compel the SEC to act on the long-pending rulemaking petition. *In re Coinbase, Inc.*, No. 23-1779 (3d Cir. Apr. 26, 2023), ECF 1-1. By withholding a formal denial of the petition, Coinbase explained, the SEC was frustrating judicial review through an impermissible pocket veto. *See id.* at 17-22. And although the SEC's briefing asserted that it had not made up its mind on Coinbase's rulemaking petition, the SEC commenced an enforcement action against Coinbase weeks later, alleging that Coinbase was failing to comply with the very securities regulations that Coinbase's rulemaking petition (and mandamus action)

explained do not work for digital assets. *See SEC v. Coinbase, Inc.*, No. 1:23-cv-04738 (S.D.N.Y. filed June 6, 2023), ECF 1. Mere hours after the SEC filed its suit, the Third Circuit *sua sponte* ordered the SEC to explain its refusal to respond to Coinbase’s rulemaking petition.

Only months later, in December 2023, did the SEC finally act on Coinbase’s petition. But its response did not begin to engage with the serious issues Coinbase had raised. The SEC issued a terse, two-page letter denying Coinbase’s rulemaking petition with virtually no rationale. *See* Coinbase Pet. Review Ex. A, *Coinbase*, No. 23-3202 (3d Cir. Dec. 15, 2023), ECF 1-1. In response to Coinbase’s workability concerns, the SEC offered a single sentence of ipse dixit: “The Commission disagrees with the Petition’s assertion that application of existing securities statutes and regulations to crypto asset securities, issuers of those securities, and intermediaries in the trading, settlement, and custody of those securities is unworkable.” *Id.* at 2. The SEC did not explain *why* it disagreed—flouting the core APA principle that agency action must be “reasonable and reasonably explained.” *Ohio v. EPA*, 144 S. Ct. 2040, 2053 (2024) (citation omitted).

Coinbase promptly sued the SEC in the Third Circuit again to challenge its unexplained denial of Coinbase’s rulemaking petition. *See Coinbase, Inc. v. SEC*, No. 23-3202 (3d Cir.). That litigation is ongoing. In its response brief in that case, the SEC *still* made no effort to explain how its rules could work for digital-asset firms. Instead, the agency has taken the remarkable position that it *doesn’t matter* whether “this new industry *can* comply with the existing regulatory framework.” SEC Br. 2, *Coinbase*, No. 23-3202 (3d Cir. May 10, 2024), ECF 39 (quotation marks omitted). In other words, the SEC believes it can enforce its wavering views of purported legal requirements it knows firms cannot satisfy and thereby shutter an industry the agency disfavors—contravening the settled rule that “[i]mpossible requirements imposed by an agency are perforce unreasonable.” *All. for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991).

The SEC’s stunning response eliminates any doubt about the SEC’s endgame. It believes workability is not required and prefers to bludgeon digital-asset companies with enforcement suits one-by-one—while preventing those firms from complying with inapt rules—because it wants the digital-asset industry to die. As two SEC Commissioners have noted, its actions are naked efforts to “block access to crypto as an asset class” and secure the “extinction of [this] new technology.”²²

III. The SEC Seeks To Leverage Its Catch-22 To Shut Down The Digital-Asset Industry

Despite the SEC’s refusal to articulate through rulemaking which digital *assets* it believes are subject to the securities laws, and despite its inconsistent, incoherent positions on that issue, one thing is clear: Its Catch-22 has ensnared digital-asset *firms* of all stripes. Plaintiff Beba, which created and seeks to distribute a digital asset, is right to fear an (unlawful) SEC enforcement action.

Statements by the Chair standing alone justify Beba’s fear of enforcement. In recent years, he has repeatedly proclaimed that all or nearly all firms that issue or facilitate trading of digital assets are violating the securities laws. Consider just these examples:

- February 2023: “Everything other than bitcoin” is a security.²³
- June 2023: “[T]he vast majority of crypto tokens meet the investment contract test.... Thus, crypto security issuers need to register the offer and sale of their investment contracts with the SEC or meet the requirements for an exemption.”²⁴
- June 2024: “This is a field that’s sort of built up on a business model that’s a non-compliant model.”²⁵

²² Mark T. Uyeda, Comm’r, SEC, *Statement on Proposed Rule Regarding the Safeguarding of Advisory Client Assets* (Feb. 15, 2023), <https://tinyurl.com/2ztdcxx5>; Hester M. Peirce, Comm’r, SEC, *Rendering Innovation Kaput: Statement on Amending the Definition of Exchange* (Apr. 14, 2023), <https://tinyurl.com/4v7hvwae>.

²³ Ankush Khardori, *Can Gary Gensler Survive Crypto Winter?*, N.Y. Mag. (Feb. 23, 2023), <https://tinyurl.com/yefsavft>.

²⁴ Carl Ayers, *SEC Chairman Gensler Makes Case Cryptocurrencies Are Securities*, Regulatory Compliance Watch (June 8, 2023), <https://tinyurl.com/5bbv647x>.

²⁵ *SEC’s Gensler on May 2024 Agenda* at 15:06, Bloomberg Invest (June 25, 2024), <https://tinyurl.com/yc547m9m>.

The SEC’s bite matches the Chair’s bark. Since last summer, it has been on an indiscriminate enforcement crusade. It has filed a barrage of lawsuits against digital-asset trading platforms, including Coinbase, Binance, and Kraken.²⁶ The SEC sued Coinbase despite having cleared the way for Coinbase to become a publicly traded company, even though Coinbase’s business model has not materially changed. *See supra* at 3. It has brought suits against developers of digital assets and infrastructure.²⁷ More recently, the SEC issued Wells Notices to a developer of a decentralized exchange and an NFT trading platform.²⁸ No business model, in short, is safe.

The SEC shows no signs of slowing its fusillade. Its Chair’s position is that “the vast majority of crypto tokens meet the investment contract test” and that “crypto security issuers need to register.”²⁹ If a firm distributes any digital asset—as Beba alleges it has done and seeks to do, Complaint ¶¶ 65-67—it faces a serious risk of facing an enforcement suit seeking punitive, retroactive penalties. The only way to escape that threat is to cease doing business in the U.S. altogether.

Under these circumstances, digital-asset firms are entitled to preemptive declaratory relief. This Court should put a stop to the SEC’s unlawful campaign of regulation by enforcement and provide the clarity that the SEC has obstinately withheld from the digital-asset industry.

CONCLUSION

The Court should deny defendants’ motion to dismiss.

²⁶ *See, e.g., SEC v. Binance Holdings Ltd.*, No. 1:23-cv-01599 (D.D.C. filed June 5, 2023); *SEC v. Coinbase, Inc.*, No. 1:23-cv-04738 (S.D.N.Y. filed June 6, 2023); *SEC v. Payward, Inc.*, No. 3:23-cv-06003 (N.D. Cal. filed Nov. 20, 2023).

²⁷ *SEC v. Consensus Software Inc.*, No. 1:24-cv-04578 (E.D.N.Y. filed June 28, 2024); *SEC v. Hydrogen*, No. 1:22-cv-08284 (S.D.N.Y. filed Sept. 28, 2022).

²⁸ Cheyenne Ligon, *DeFi Exchange Uniswap Receives Enforcement Notice from the SEC*, CoinDesk (Apr. 10, 2024), <https://tinyurl.com/27brbcy2>; MacKenzie Sigalos, *OpenSea Receives Wells Notice from SEC, Regulator Says NFTs Are Securities*, CNBC (Aug. 28, 2024), <https://tinyurl.com/34xn4vad>.

²⁹ Ayers, *SEC Chairman Gensler Makes Case Cryptocurrencies Are Securities*, *supra* note 24.

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2024, I electronically filed the foregoing with the Clerk of the Court for the U.S. District Court for the Western District of Texas by using the CM/ECF system, which will serve a copy of same on all counsel of record.

/s/ Stephen J. Hammer
Stephen J. Hammer