No. 23-3202

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COINBASE, INC.,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of the Securities and Exchange Commission

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BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one and the mandamus-stage litigation that preceded it, that raise issues of concern to the business community. The Chamber's members have a strong interest in regulatory clarity, and many of its members are companies subject to U.S. securities laws that may be adversely affected by the Securities and Exchange Commission's refusal to clarify the regulatory framework for digital assets through rulemaking.

INTRODUCTION

The Securities and Exchange Commission's approach to regulating digital assets flies in the face of its "mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation." 15 U.S.C. § 78qq(a)(2)(A). On the one hand, the Commission has proclaimed itself the primary regulator of this $2 trillion-plus industry. On the other, it has refused to give any concrete clarification about the contours of its (highly questionable) claim of authority, even as to the threshold question of which digital assets it considers "securities" under federal law.

The SEC has refused to exercise its claimed authority through rulemaking, as required by its enabling statutes. Instead, avoiding the scrutiny of notice-and-comment followed by judicial review, it has pursued only one-off enforcement actions, supplemented by public speeches and other statements that one commissioner described as "confusing, unhelpful, and inconsistent."[1] That approach has, unsurprisingly, yielded mass confusion—amounting to a campaign to "punish[] digital-asset firms for allegedly not adhering to the law when they do not know if it will apply to them,"[2] while denying investors the benefit of defined, court-reviewed *ex ante* rules

[1] Hester M. Peirce, *On the Spot: Remarks at "Regulatory Transparency Project Conference on Regulating the New Crypto Ecosystem: Necessary Regulation or Crippling Future Innovation?"*, SEC (June 14, 2022), https://bit.ly/3VFVpVc.

[2] *Oversight of the Securities and Exchange Commission: Hearing Before the H. Fin. Servs. Comm.*, 118th Cong. 1 (2023), https://bit.ly/4cmNx2C (statement of Rep. Patrick McHenry, Chairman, H. Fin. Servs. Comm.).

tailored to the digital-asset context. Such caprice cannot be squared with the letter or spirit of the Administrative Procedure Act.

Seeking to improve this untenable situation, Coinbase petitioned the SEC in July 2022 to initiate a rulemaking regarding digital-asset securities.[3] It urged the Commission to answer basic questions, such as its position as to "which digital assets are securities"?[4] More than 1,700 commenters, including the Chamber, echoed Coinbase's call.[5]

The SEC did not act on Coinbase's petition until December 2023. The Commission made its intentions clear far earlier—with its Chairman repeatedly exhorting that existing securities rules are unambiguous as applied to digital assets.[6] Yet the SEC dithered in formally responding until Coinbase sought to force action through mandamus litigation.[7] Only then did the SEC issue a denial, supported by a terse one-

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[3] Letter from Paul Grewal, Chief Legal Officer, Coinbase Global, Inc., to Vanessa A. Countryman, Secretary, SEC (July 21, 2022), https://bit.ly/41eh7R8.

[4] *Id.*

[5] *See* Paul Grewal, *Coinbase Takes Another Formal Step to Seek Regulatory Clarity from SEC for the Crypto Industry*, Coinbase (Apr. 24, 2023), https://bit.ly/3NVtezw; Letter from Tom Quaadman, Executive Vice President, Center for Markets Competitiveness, U.S. Chamber of Commerce, to Vanessa A. Countryman, Secretary, SEC (Jan. 19, 2023), https://bit.ly/42xFElr.

[6] *See, e.g.*, Ari Levy & MacKenzie Sigalos, *SEC's Gensler Says 'The Law Is Clear' for Crypto Exchanges and that They Must Comply with Regulators*, CNBC (Apr. 27, 2023), https://bit.ly/3VANo3X.

[7] Several amici, including the Chamber, vigorously supported Coinbase's mandamus petition. *See* Chamber Amicus Br., *In re: Coinbase Inc.*, No. 23-1779 (3d Cir. May 9, 2023), ECF No. 11.

paragraph justification.[8] The Commission first noted, without explanation, that it "disagree[d]" with Coinbase's view that the rote application of existing regulations to digital assets is "unworkable."[9] The SEC then asserted, again without explanation, that it was exercising "discretion" over its regulatory agenda based on "data and information" about its digital-asset-related "undertakings," which would be "constrain[ed]" if it were to engage in rulemaking.[10]

This Court should grant Coinbase's petition challenging this rulemaking denial. The SEC's belated, conclusory denial is a textbook example of agency action that is arbitrary, capricious, and an abuse of discretion—in other words, action that must be set aside under the APA. Whatever discretion agencies ordinarily possess, a refusal to undertake rulemaking cannot stand if it is "plainly misguided." *Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979). That precisely characterizes the SEC's choice here. The Commission's refusal to set clear rules of the road causes substantial economic harm to investors and the digital-asset economy at large, and it flouts bedrock tenets of due process and administrative law. The SEC's denial of rulemaking fails even to grapple with these important issues, which on proper consideration should require the Commission to initiate a rulemaking proceeding.

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[8] Letter from Vanessa A. Countryman, Secretary, SEC, to Paul Grewal, Chief Legal Officer, Coinbase Global, Inc. (Dec. 15, 2023), https://bit.ly/48H6pXa.

[9] *Id.*

[10] *Id.*

ARGUMENT

Agency denials of a petition for rulemaking, like other agency actions, must be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *EPIC v. U.S. DHS*, 653 F.3d 1, 5 (D.C. Cir. 2011) (quoting 5 U.S.C. § 706(2)(A)). That is the case when an agency's denial is "plainly misguided," *Geller*, 610 F.2d at 979, or otherwise fails to reflect "reasoned decisionmaking," *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008). For example, the denial of a rulemaking petition cannot stand when the agency closes its eyes to substantial changes in the underlying facts. *See WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981); *Geller*, 610 F.2d at 979. Neither may an agency commit "plain errors of law." *State Farm Mut. Auto. Ins. Co. v. DOT*, 680 F.2d 206, 221 (D.C. Cir. 1982), *vacated on other grounds*, 463 U.S. 29 (1983).

Here, the SEC's denial suffers from both these fatal defects, in ways that are causing significant harm to the business community and broader American economy. *First*, the SEC ignores the regulatory uncertainty wrought by its enforcement-first approach to digital assets, which leaves regulated parties struggling to determine how they can comply with regulations, if they can at all. And *second*, the SEC's evasion of rulemaking contravenes its obligations under the Due Process Clause and the APA, denying American businesses and the public the rights they are due. These considerations should independently compel rulemaking, or at minimum require

serious analysis of the conclusory denial the SEC gave. The Court should grant the petition for review.

I. THE SEC IGNORES THE REGULATORY UNCERTAINTY IT IS CAUSING.

A. The SEC's Actions Have Destabilized The Regulatory Environment For Digital Assets.

The SEC's refusal to engage in rulemaking stands in stark contrast to ordinary agency practice, wherein agencies set out the rules of the road by promulgating rules of general applicability. As the Supreme Court recognized in one of its seminal decisions on administrative law, "[t]he function of filling in the interstices of the [securities laws] should be performed, as much as possible, through th[e] quasi-legislative promulgation of rules." *SEC v. Chenery*, 332 U.S. 194, 202 (1947). This longstanding preference for rulemaking has important benefits: It forces agencies to put to paper their regulatory plans, and it provides for fixed, prospective effective dates that ensure parties can bring their conduct into conformance with the law rather than be held liable later for violating duties they did not know existed. *See id.*; *see also De Niz Robles v. Lynch*, 803 F.3d 1165, 1173 (10th Cir. 2015) (Gorsuch, J.) ("rulemaking offers more notice (due process) and better protects against invidious discrimination (equal protection)").

The clarity afforded by rulemaking is especially important for emerging industries. Unlike established players, entrepreneurs and customers who seek to harness new concepts and technologies cannot simply follow a well-trodden regulatory path. Instead, they must consider questions about how existing rules apply in novel contexts, to say

nothing of how well or poorly those rules fit. Without the clear agency guidance provided by rulemaking, regulated parties and the public can be left fumbling in the dark.

So it has gone for the digital-asset industry. As the comments in support of Coinbase's petition explain, and as even the SEC has acknowledged, digital assets entail a wide array of "unique or novel instruments or arrangements."[11] Yet the Commission has made no effort to clarify the industry's crucial questions, leaving participants and the public ignorant about even such fundamental matters as which kinds of tokens the SEC considers securities falling under its regulatory supervision.

For example, take ether—the world's second most popular digital asset. Ether has been around for almost a decade, has a market capitalization exceeding $400 billion, and is a fundamental building block in the industry.[12] Yet despite its ubiquity, regulators *still* cannot agree on what ether is. The Commodity Futures Trading Commission's consistent position has been that ether is a CFTC-regulated "commodity."[13] But while

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[11] *Framework for 'Investment Contract' Analysis of Digital Assets*, SEC (last updated Mar. 8, 2023), https://bit.ly/3VI9ph7.

[12] Jon Evans, *Vapor No More: Ethereum Has Launched*, TechCrunch (Aug. 1, 2015), https://bit.ly/3NQDUPX; *Today's Cryptocurrency Prices by Market Cap*, CoinMarketCap, https://bit.ly/3IFcoSs (last visited Mar. 18, 2024). *See generally* Alyssa Hertig, *What Is Ether?*, CoinDesk, (last updated Aug. 19, 2022), https://bit.ly/3MgZJY5.

[13] *See, e.g.*, Release No. 8051-19, *In Case You Missed It: Chairman Tarbert Comments on Cryptocurrency Regulation at Yahoo! Finance All Markets Summit*, CFTC (Oct. 10, 2019), https://bit.ly/44E8geD; Andrew Throuvalas, *CFTC Chair Says Ethereum Is a Commodity—Despite Gensler's 'Bitcoin Only' Position*, Decrypt (Mar. 8, 2023), https://bit.ly/3M2fdyR.

the SEC once seemed to agree,[14] its Chairman has since suggested that ether actually is a "security," and thus under SEC jurisdiction.[15] And even more recently, this same Chairman zagged again—refusing to clarify ether's status when questioned at a congressional hearing, and intoning only that "[i]t depends on the facts and the law."[16] The SEC's decade-long inability to state *which* law even applies has created needless and disruptive uncertainty.

Ether is far from an isolated example. For instance, while the CFTC recognizes that stablecoins—digital assets designed to maintain a stable value like cash—are commodities under its jurisdiction, the SEC has in a recent enforcement action asserted a competing claim of jurisdiction.[17] The result is a regulatory environment that one judge described as "highly uncertain," with a future trajectory that is "virtually

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[14] *See, e.g.*, William Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, SEC (June 14, 2018), https://bit.ly/3HKviGV; Letter from Division of Corporation Finance, Office of Finance, SEC, to Brian Armstrong, Chief Executive Officer, Coinbase Global, Inc. (Dec. 7, 2020), https://bit.ly/3M7RFso.

[15] *See, e.g.*, Ankush Khardori, *Can Gary Gensler Survive Crypto Winter? D.C.'s Top Financial Cop on Bankman-Fried Blowback*, N.Y. Mag (Feb. 23, 2023), https://bit.ly/3HPkDdU; Cheyenne Ligon, *SEC Chairman Gensler Suggests Again That Proof-of-Stake Tokens Are Securities: Report*, CoinDesk (last updated Mar. 16, 2023), https://bit.ly/3VDGzyi.

[16] Nikhilesh De, *SEC Chair Gensler Declines to Say If Ether Is a Security in Contentious Congressional Hearing*, CoinDesk (Apr. 19, 2023), https://bit.ly/41bIzPE (quoting *Hearing, supra* note 2, at 6 (statement of Gary Gensler, Chairman, SEC)).

[17] *Compare, e.g.*, Dave Michaels, *Stablecoins Like USDC Are Commodities, CFTC Chair Says*, Wall Street J. (Mar. 8, 2023), https://bit.ly/58WJ9, *with* Compl. ¶¶ 315–24, *SEC v. Binance*, No. 1:23-cv-1599 (D.D.C. June 5, 2023), ECF No. 1.

unknowable." *In re Voyager Digit. Holdings, Inc.*, 649 B.R. 111, 119 (Bankr. S.D.N.Y. 2023).

Without any rulemaking guidance, regulated parties have little to go off in guessing their compliance responsibilities—even as to which agency has jurisdiction to impose these compliance responsibilities. They must rely on scattershot views that the SEC has dribbled out *seriatim*, reading general pronouncements in informal speeches against fact-specific, one-off enforcement actions.[18] So observers must attempt to reconcile the SEC's bold and sometimes contradictory public posturing (such as its Chairman's claim that *almost all* digital assets are securities[19]) with the more fact-specific positions the agency has taken or declined to take in particular proceedings (such as in refusing to explain *whether* or *why* particular assets are securities[20]), before even getting to the question marks when drilling down on the SEC's positions. Moreover, the SEC resolves most enforcement actions through settlement, thus avoiding judicial scrutiny, while the few courts that have weighed in have issued conflicting opinions.[21] *Compare, e.g.*, *SEC v. Ripple Labs, Inc.*, __ F. Supp. 3d __, 2023 WL 4507900, at *11 (S.D.N.Y. July

[18] *See generally* Carol R. Goforth, *Regulation by Enforcement: Problems with the SEC's Approach to Cryptoasset Regulation*, 82 Md. L. Rev. 107 (2022).

[19] Khardori, *supra* note 15.

[20] *See, e.g.*, *Voyager*, 649 B.R. at 120–22; Paul Grewal, *The SEC Has Told Us It Wants to Sue Us Over Lend. We Don't Know Why*, Coinbase (Sept. 7, 2021), https://bit.ly/42yoBQg.

[21] Goforth, *supra* note 18, at 146–47.

13, 2023) (finding digital assets' regulatory status to vary based on the method of sale), *with SEC v. Terraform Labs Pte. Ltd.*, __ F. Supp. 3d __, 2023 WL 4858299, at *15 (S.D.N.Y. July 31, 2023) (rejecting the approach taken by *Ripple* in the same judicial district, just 18 days earlier).

In the face of all this confusion, including open conflict with another federal agency, the SEC's refrain that existing regulations are sufficient as applied to digital assets cannot be considered "reasoned decisionmaking." *Defs. of Wildlife*, 532 F.3d at 919. The SEC has recognized, as it must, the novel technological innovations that digital assets present, but it nonetheless attempts to fit a square peg into a round hole in referring regulated parties and the public to existing regulations without elaboration. The APA, which does not permit agencies to cling to existing regulations in the face of changed "factual predicate[s]," requires more. *WWHT*, 656 F.2d at 819; *cf. NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974) ("there may be situations where [an agency's] reliance on adjudication [over rulemaking] would amount to an abuse of discretion").

B. Regulatory Uncertainty Chills Economic Growth And Innovation.

Regulatory uncertainty inevitably produces significant and deleterious consequences. As courts have long understood, legal uncertainty deters productive conduct and stifles innovation. "[V]ague laws … operate to inhibit protected [conduct] by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976)

(cleaned up). Quite understandably, very few people want to "bet the farm" and put themselves at risk of substantial liability. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007).

That is particularly true in the business community. As the SEC has elsewhere acknowledged, and as the Chamber emphatically underscores based on its members' experiences, "[c]ompanies and investors alike … benefit from clear rules of the road."[22] The digital-asset context is no exception: The SEC's failure to provide clarity for this important new industry offers a case study in the dangers of refusing to adapt regulation to new circumstances.

Regulatory uncertainty makes it "difficult" for businesses "to operate for fear of an enforcement action."[23] Companies must guess at whether "they are in compliance with applicable … laws, or need to be in compliance with them at all."[24] And notwithstanding companies' good-faith efforts at compliance, it is often "difficult in many cases to determine with confidence" how the SEC's views translate to new factual contexts.[25] Take the experience of Coinbase, for example. Coinbase dedicated

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[22] Gary Gensler, *Testimony Before the United States House of Representatives Committee on Financial Services*, SEC (Oct. 5, 2021), https://bit.ly/42qEmII.

[23] Center for Capital Markets Competitiveness, *Growth Engine*, U.S. Chamber of Commerce, at 74 (Nov. 16, 2020), https://bit.ly/3NKoVXO.

[24] *Id.*

[25] Center for Capital Markets Competitiveness, *Digital Assets: A Framework for Regulation to Maintain the United States' Status as an Innovation Leader*, U.S. Chamber of Commerce, at 56 (Jan. 2021), https://bit.ly/3M3h8mU.

considerable sums of time and money towards compliance, yet the SEC reneged on an agreement to "provide feedback" on its compliance plans in favor of pursuing an enforcement action against the company.[26]

This uncertainty leaves companies bearing "unacceptable risk[s]," given the high stakes associated with enforcement scrutiny.[27] Many securities violations are strict-liability offenses that come with substantial penalties.[28] So companies may find themselves with a choice between engaging in costly litigation defenses[29] or agreeing to onerous settlements. In one recent action, for instance, the SEC punished an asserted violation of its registration requirements by not only ordering $30 million in penalties,[30] but enjoining the company at issue "from ever offering a staking service in the United States, registered or not."[31] And firms have no way to meaningfully assure themselves that they can avoid the SEC's ire: The agency's *seriatim* approach means that the absence

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[26] Paul Grewal, *We Asked the SEC for Reasonable Crypto Rules for Americans. We Got Legal Threats Instead*, Coinbase (Mar. 22, 2023), https://bit.ly/3uZ6cRu; *SEC v. Coinbase*, No. 1:23-cv-4738 (S.D.N.Y.).

[27] *Digital Assets* Report, *supra* note 25, at 10.

[28] *Id.* at 54.

[29] *See, e.g.*, Jordan Major, *Ripple Has Spent 'Over $100 Million on Legal Fees Fighting SEC', the CEO Says*, Finbold (July 16, 2022), https://bit.ly/41afSCB.

[30] Press Release, *Kraken to Discontinue Unregistered Offer and Sale of Crypto Asset Staking-As-A-Service Program and Pay $30 Million to Settle SEC Charges*, SEC (Feb. 9, 2023), https://bit.ly/416L8Cw.

[31] Hester M. Peirce, *Kraken Down: Statement on* SEC v. Payward Ventures, Inc., et al., SEC (Feb. 9, 2023), https://bit.ly/3M3rUJI.

of enforcement precedent says little about whether the agency will take a particular action in the future.[32]

Inevitably, the result is to chill growth and innovation. Many companies are forced to forgo lawful activity to avoid the risk of enforcement action—especially in cases where compliance may be difficult or even technologically infeasible.[33] Other companies must take even more drastic steps, such as considering the possibility of relocating or refocusing abroad, abandoning U.S. operations in favor of countries with more favorable regulatory environments, or even exiting a sector entirely.[34]

This chilling effect also extends to would-be investors. The digital-asset industry grew quickly before the SEC began rattling its saber—reaching a trillion dollars in market capitalization by early 2021.[35] But the current Commission-fostered uncertainty has lowered the industry's growth ceiling by discouraging further investment in digital-

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[32] For example, the SEC targeted a "stablecoin" product for the first time in 2023, after long ignoring such products in its enforcement actions. *See* Goforth, *supra* note 18, at 137–43.

[33] Hester M. Peirce, *Rendering Innovation Kaput: Statement on Amending the Definition of Exchange*, SEC (Apr. 14, 2023), https://bit.ly/41cTbxB.

[34] *See, e.g.*, Jeff Wilser, *US Crypto Firms Eye Overseas Move Amid Regulatory Uncertainty*, CoinDesk (last updated Mar. 30, 2023), https://bit.ly/41aFnE0; Kevin Helms, *Crypto Exchange Bittrex Shuts Down US Operations Due to Regulatory Uncertainty*, Bitcoin.com News (Apr. 2, 2023), https://bit.ly/3NLsPQ9; Olga Kharif, *SoFi Is Exiting Crypto With Banking Regulators Stepping Up Scrutiny* (Nov. 29, 2023), https://bit.ly/3Ip50tE.

[35] Karen Brettell & Gertrude Chavez-Dreyfuss, *Crypto Market Cap Surges Above $1 Trillion for First Time*, Reuters (last updated Jan. 7, 2021), https://bit.ly/3B6omAc.

asset endeavors and inhibiting broader adoption of digital-asset products.[36] For example, a recent survey of traditional hedge funds found that almost 70% were not investing in digital assets, while almost a quarter of the firms that did invest suggested that they might reconsider their investments in the light of the American regulatory climate.[37] That hesitance is inevitable: The specter of uncertain enforcement scrutiny inevitably makes companies a riskier, less attractive investment.[38]

Moreover, the consequences of regulatory uncertainty do not just injure businesses or investors—they undermine broader American economic and strategic interests. "[W]ith less innovation, investors have fewer opportunities for growing their retirement savings, and fewer jobs are created to drive the economy and promote growth."[39] Americans lose out on the practical benefits that products can provide, such as, in the case of the digital-asset industry, making the financial system more inclusive for the previously unbanked.[40] And continued uncertainty has implications for our

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[36] Michael McSweeney, *Regulatory Uncertainty Keeps Traditional Asset Managers Out of the Crypto Space, Survey Takers Say*, The Block (May 31, 2020), https://bit.ly/3M27eli; Mengqi Sun, *Regulatory Uncertainty Is a Barrier for Wider Bitcoin Adoption*, Wall Street J. (Apr. 6, 2022), https://bit.ly/44BNdJt.

[37] *Rebuilding Confidence in Crypto: 5th Annual Global Crypto Hedge Fund Report*, PwC, at 4, 40 (2023), https://bit.ly/3TpqKvF.

[38] *See, e.g.*, Ari Levy, *Crypto Tokens Plunged This Week After Gensler Stepped Up SEC Crackdown*, CNBC (last updated June 12, 2023), https://bit.ly/48Py3Bf.

[39] *Digital Assets* Report, *supra* note 25, at 47–48.

[40] *Id.* at 49.

nation's geopolitical interests and the continued primacy of the dollar, given the increasing relevance of digital assets to international monetary policy.[41]

These effects will only be amplified if the SEC's regulatory uncertainty is allowed to persist. In other areas, the agency has at least attempted rulemaking, even if its proposals have been deeply flawed.[42] But botched rulemakings can still be checked through judicial review, as the Fifth Circuit recently did in vacating an SEC regulation. *See Chamber of Com. v. U.S. SEC*, 88 F.4th 1115, 1118 (5th Cir. 2023). The Commission's current approach to digital assets offers no such safeguard. And if the SEC is permitted to continue unchecked, then inevitably it or other agencies will replicate the SEC's arbitrary campaign of regulation-by-enforcement in other contexts—to the detriment of businesses, consumers, and the American economy *writ large*.

II. THE SEC'S AVOIDANCE OF RULEMAKING ABRIDGES REGULATED PARTIES' RIGHT TO FAIR NOTICE AND THE PUBLIC'S RIGHT TO NOTICE AND COMMENT.

The SEC's denial of rulemaking must be set aside for a second reason too: It cannot be squared with the Due Process Clause or basic principles of administrative law. The SEC's unwillingness to announce the rules of the road *ex ante*, combined with

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[41] *Id.* at 48.

[42] *See Examining the SEC's Agenda: Unintended Consequences for U.S. Capital Markets and Investors: Hearing Before the H. Fin. Servs. Comm.*, 118th Cong. (2023), https://bit.ly/3To7Vb7 (statement of Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce) (collecting examples).

its use of enforcement actions to impose or threaten liability *ex post*, conflicts with basic principles of fair notice and the right to notice and comment. And the SEC's denial of Coinbase's rulemaking petition only ensures that these violations will continue.

The SEC's approach contravenes the "fundamental principle in our legal system" that companies have a right to fair notice of their regulatory obligations. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Under the Due Process Clause, "[e]ntities regulated by administrative agencies have a … right to fair notice of regulators' requirements." *Fortyune v. City of Lomita*, 766 F.3d 1098, 1105 (9th Cir. 2014). The APA further codifies this right by "incorporat[ing] basic principles of fair notice and equal treatment" in its mandate that agencies act reasonably. *Balt. Gas & Elec. Co. v. FERC*, 954 F.3d 279, 286 (D.C. Cir. 2020); *see also Alaska Pro. Hunters Ass'n v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) ("Those regulated by an administrative agency are entitled to 'know the rules by which the game will be played.'"). Thus, an agency cannot sanction regulated parties unless there is "ascertainable certainty" about "the standards with which the agency expects them to conform." *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1043 (D.C. Cir. 2017) (cleaned up); *accord United States v. Harra*, 985 F.3d 196, 213 (3d Cir. 2021). That standard is not met where, as here, regulated parties have advanced reasonable (and correct) arguments about the scope of the agency's ill-defined jurisdiction and even "the agency itself struggles to provide a definitive reading of the regulatory requirements." *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000); *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1333–34 (D.C. Cir. 1995).

In the face of such "considerable uncertainty," *SNR Wireless LicenseCo*, 868 F.3d at 1044, the principle of fair notice establishes that rulemaking is the proper channel for agency action. *See Cmty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 511 (1983) (given notice problems, "rulemaking is generally a 'better, fairer, and more effective' method of implementing a new industry-wide policy"). After all, rulemaking is how agencies set generally applicable policies that will govern prospectively, whereas enforcement actions seek to sanction particular parties for conduct that has already occurred. *PBW Stock Exch., Inc. v. SEC*, 485 F.2d 718, 722 (3d Cir. 1973). This Court has accordingly recognized as "logical" and "persuasive" a judicial preference for "rule-making over adjudication for the formulation of new policy." *Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 1250, 1265 (3d Cir. 1974) (citing cases). And this systematic approach is particularly important where multiple agencies have competing claims to regulatory jurisdiction. *See Chao v. Cmty. Trust Co.*, 474 F.3d 75, 85 (3d Cir. 2007) (denying agencies *Chevron* deference when there is a "possibility of multiple conflicting regulatory interpretations … by the various agencies with overlapping rulemaking deference").

The digital-asset industry *writ large* does not present one of the "limited circumstances" in which the Supreme Court has conceded that "adjudication would be preferable to rulemaking." *Patel v. INS*, 638 F.2d 1199, 1204 (9th Cir. 1980) (citing *SEC v. Chenery*, 332 U.S. 194). The SEC has been filing digital-asset-related enforcement

actions for 10 years now,[43] so it cannot claim that the need for regulatory clarity in this sphere is "not reasonably foresee[able]" or that it lacks "sufficient experience" to provide more than a "tentative judgment." *Chenery*, 332 U.S. at 202. And even if specific issues within the industry are too "specialized and varying in nature" to allow for general rulemaking, it defies credulity to say that *all* problems related to digital assets are so indeterminate, up to and including the threshold jurisdictional question of which digital assets are securities. *Id.* at 203. That is especially so when the SEC's (implausible) position is that digital assets do *not* present regulatory ambiguities.[44] There are no special characteristics of the digital-asset industry that relieve the SEC of its statutory and constitutional duty to regulate with clarity.

Moreover, the SEC's evasion of its rulemaking procedures does not affect regulated parties alone; it deprives investors and the entire public of the right to be heard under the APA. One of the core requirements of the APA is that, before an agency issues a new rule, it must publish a notice of proposed rulemaking in the Federal Register and invite public comment from all interested persons. 5 U.S.C. § 553(b)–(c). This process is important to uphold "democratic values served by public participation," *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 951 (D.C. Cir. 1987) (Starr, J., concurring in part and dissenting in part), as well as to improve the quality of agency decision-making,

[43] *See Crypto Assets and Cyber Enforcement Actions*, SEC, https://bit.ly/419sABv (last updated Mar. 6, 2024).

[44] Levy & Sigalos, *supra* note 6.

Azar v. Allina Health Servs., 139 S. Ct. 1804, 1816 (2019). Particularly in an innovation-focused sector, this latter benefit is "especially valuable" because agency decisions "can impact millions of people and billions of dollars in ways that are not always easy for regulators to anticipate." *Id.*

Accordingly, the APA framework contains numerous checks to ensure that agencies do not give the notice-and-comment process short shrift. The Act allows agencies to skip over the process only in "rare" circumstances, *NRDC, Inc. v. U.S. EPA*, 683 F.2d 752, 764 (3d Cir. 1982) (citation omitted), such as in "emergency situations" of "life-saving importance," *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (citation omitted). Otherwise, agencies must not only invite public input, but also respond to all significant comments and seek additional comment if their plans evolve too far from the original proposal. *Nazareth Hosp. v. Sec'y U.S. Dep't of HHS*, 747 F.3d 172, 185 (3d Cir. 2014); *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 249–50 (3d Cir. 2010). And courts have not hesitated to reject agency actions that circumvent notice-and-comment procedures. *See Allina Health Servs.*, 139 S. Ct. at 1812 ("Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements."); *see also, e.g.*, *Mendoza v. Perez*, 754 F.3d 1002, 1025 (D.C. Cir. 2014); *Fina Oil & Chem. Co. v. Norton*, 332 F.3d 672, 676 (D.C. Cir. 2003); *NRDC*, 683 F.2d at 768.

By proceeding through enforcement, the SEC has denied the public any opportunity to comment on its invocation of Depression-era laws to assert jurisdiction

over a multi-trillion-dollar industry predicated on an entirely new technological innovation. Notice-and-comment would provide both regulated parties and investors an avenue to highlight important regulatory ambiguities, better inform the SEC about considerations specific to digital assets, and pursue regulations tailored to investor-protection needs in the digital-asset context. Yet despite purporting to seek "engagement with market participants," the SEC has disregarded more than 1,700 commenters' warnings about the untenability of the status quo to double-down on its enforcement-only approach.[45] That choice is arbitrary, capricious, and an abuse of discretion.

CONCLUSION

The SEC's refusal to initiate a rulemaking proceeding as to digital assets cannot be squared with the facts of the regulatory landscape or its legal obligations under the Due Process Clause and APA, issues that the SEC does not even grapple with in its cursory denial order. This Court should grant the petition for review.

[45] Letter from Vanessa A. Countryman, *supra* note 8.

March 18, 2024

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. Pursuant to Third Circuit L.A.R. 28.3(d), at least one of the attorneys whose names appear on this motion, including the undersigned, is a member in good standing of the bar of this Court.
2. This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,898 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced 14-point serif font (Garamond), using Microsoft Word.
3. Pursuant to Third Circuit L.A.R. 31.1(c), the text of the electronic version of this document is identical to the text of the paper copies filed with the Court.
4. Pursuant to Third Circuit L.A.R. 31.1(c), CrowdStrike Falcon Identity Protection, Version 7.6, has been run on this electronic file and no virus was detected.

Dated: March 18, 2024

s/ Eric Tung
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CERTIFICATE OF SERVICE

I hereby certify that, on March 18, 2024, I filed the foregoing using this Court's CM/ECF system, which effected service on all parties.

Dated: March 18, 2024

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