EXHIBIT 16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. RIPPLE LABS, INC., BRADLEY GARLINGHOUSE, and CHRISTIAN A. LARSEN Defendants.	Case No. 1:20-cv-10832(AT)(SN)

AMICUS CURIAE BRIEF OF PARADIGM OPERATIONS LP

JENNER & BLOCK LLP

Kayvan B. Sadeghi
Shailee Diwanji Sharma
1155 Avenue of the Americas
New York, NY 10036
Tel: (212) 891-1600
Fax: (212) 891-1699
ksadeghi@jenner.com
ssharma@jenner.com

Michelle S. Kallen*
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Tel: (202) 639-6000
Fax: (202) 639-6066
mkallen@jenner.com

COHEN WILSON LLP

Lewis Rinaudo Cohen*
Gregory Strong*
331 Park Avenue South
New York, NY 10010
Tel: (212) 984-6845
lewis.cohen@dlxlaw.com
greg.strong@dlxlaw.com

PARADIGM OPERATIONS LP

Rodrigo Seira*
548 Market Street
San Francisco, CA 94104
Tel: (415) 986-9283
rodrigo@paradigm.xyz

**pro hac vice motions forthcoming*

Attorneys for *Amicus Curiae* Paradigm Operations LP

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Critical Distinction Between Investment *Transactions* or *Schemes*, and Underlying *Assets*, Will Define the Impact of This Case on International Markets 3

II. A Comprehensive Review of Federal Appellate Law Confirms that the *Howey* Test Cannot Be Used to Classify Crypto Assets, Themselves, as "Securities". 6

A. Evaluating Fundraising Schemes as "Investment Contracts" Under *Howey* Is Not Novel, Whether They Involve a Crypto Asset or Any Other Asset. 7

B. *Howey* Cannot Be Used to Classify Underlying Assets as Securities, Especially When Exchanged in Secondary Market Transactions. 8

C. No Federal Appellate Court Has Found an Investment Contract to Exist Without a Legal Relationship to the Issuer. 10

III. Extending *Howey* to Classify Crypto Assets Themselves as "Securities" Would Bypass the Role of Congress and Violate the Major Questions Doctrine. 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.,
141 S. Ct. 2485 (2021) 13

Balestra v. ATBCOIN LLC,
380 F. Supp. 3d 340 (S.D.N.Y. 2019) 4

Bamert v. Pulte Home Corp.,
445 F. App'x 256 (11th Cir. 2011) 8

Davis v. Rio Rancho Ests., Inc.,
401 F. Supp. 1045 (S.D.N.Y. 1975) 11

Hart v. Pulte Homes of Michigan Corp.,
735 F.2d 1001 (6th Cir. 1984) 11

Hocking v. Dubois,
839 F.2d 560 (9th Cir.), *withdrawn*, 863 F.2d 654 (1988) 9

Hocking v. Dubois,
885 F.2d 1449 (9th Cir. 1989) (*en banc*) 9, 10

In the Matter of Bloom Protocol, LLC,
Release No. 11089, 2022 WL 3273493 (Aug. 9, 2022) 7

In the Matter of Munchee Inc.,
Release No. 33-10445, 2017 WL 10605969 (Dec. 11, 2017) 7

In the Matter of Zachary Coburn,
Release No. 34-84553, 2018 WL 5840155 (Nov. 8, 2018) 8

Jobanputra v. Kim,
No. 21 Civ. 7071 (ER), 2022 WL 4538201 (S.D.N.Y. Sept. 28, 2022) 4

Landreth Timber Co. v. Landreth,
471 U.S. 681 (1985) 12, 13

Miller v. Cent. Chinchilla Grp., Inc.,
494 F.2d 414 (8th Cir. 1974) 8

Newmyer v. Philatelic Leasing, Ltd.,
888 F.2d 385 (6th Cir. 1989) 8

Rodriguez v. Banco Cent.,
990 F.2d 7 (1st Cir. 1993) 8

SEC v. AriseBank,
No. 3-18-cv-186-M, 2018 WL 623772 (N.D. Tex. Jan. 25, 2018) 7

SEC v. ETS Payphones, Inc.,
408 F.3d 727 (11th Cir. 2005) 8

SEC v. Kik Interactive Inc.,
492 F. Supp. 3d 169 (S.D.N.Y. 2020) ..... passim

SEC v. LBRY, Inc.,
No. 21-cv-00260-PB (D.N.H. Nov. 7, 2022) 6, 7

SEC v. PlexCorps,
No. 17-cv-7007, 2017 WL 5988934 (E.D.N.Y. Dec. 1, 2017) 7

SEC v. Telegram Grp. Inc.,
448 F. Supp. 3d 352 (S.D.N.Y. 2020) 4, 5, 7

SEC v. Telegram Grp. Inc.,
2020 WL 1547383 (S.D.N.Y. Apr. 1, 2020) 5

SEC v. W.J. Howey Co.,
328 U.S. 293 (1946) ..... passim

SEC v. Wahi,
No. 22-cv-1009 (W.D. Wash. July 21, 2022) 8

Shaw v. Hiawatha Inc,
884 F.2d 582 (9th Cir. 1989) 12

Smith v. Gross,
604 F.2d 639 (9th Cir. 1979) 8

United Hous. Found., Inc. v. Forman,
421 U.S. 837 (1975) 7

Warfield v. Alaniz,
569 F.3d 1015 (9th Cir. 2009) 6

West Virginia v. EPA,
142 S. Ct. 2587 (2022) 3, 13, 15

STATUTES

15 U.S.C. § 78m 11

BILLS AND ORDERS

Digital Commodities Consumer Protection Act of 2022, S. 4760, 117th Cong. (2022) 14

Digital Commodities Exchange Act of 2022, H.R. 7614, 117th Cong. (2022) 14

Exec. Order No. 14,067, 87 Fed. Reg. 14143 (March 14, 2022) 14

Lummis-Gillibrand Responsible Financial Innovation Act, S. 4356, 117th Cong. (2022) 14

OTHER AUTHORITIES

Andrew Perrin, *16% of Americans Say They Have Ever Invested In, Traded or Used Cryptocurrency*, Pew Research Cntr (Nov. 11, 2021) 14

Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part III: Hearing Before H. Comm. On Financial Services, 117th Cong. 11 (2021) (statement of Hon. Gary Gensler, Chairman, SEC). 14

Lewis Cohen *et al*., *The Ineluctable Modality of Securities Law: Why Fungible Crypto Assets Are Not Securities* (Nov. 10, 2022) ..... passim

Lydia Beyoud, *SEC's Gensler Steps Up Push to Get Crypto Exchanges to Register with Regulator*, Bloomberg (July 28, 2022) 4

Oversight of the SEC's Division of Enforcement: Hearing Before Subcomm. On Investor Protection, Entrepreneurship, and Capital Markets of the H. Comm. on Financial Services, 117th Cong. (2022) (statement of Gurbir S. Grewal, Director, SEC Division of Enforcement) 4

Statement of Commissioner Caroline D. Pham on SEC v. Wahi, Commodity Futures Trading Commission (July 21, 2022), https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement072122 8

William Hinman, Director, Div. Corp. Fin., SEC, Remarks at the Yahoo Finance All Markets Summit: Digital Asset Transactions: When Howey Met Gary (June 14, 2018) 12

INTERESTS OF AMICUS CURIAE

Paradigm is an investment firm that backs innovative crypto/web3 companies and protocols. To help these projects achieve their full potential, Paradigm offers them a range of services, from the technical to the operational. Issues placed before this Court have the potential to dramatically impact the design and operation of crypto/web3 companies. Paradigm seeks leave to participate in this case because it is concerned that a decision casually adopting language advocated by the Securities and Exchange Commission ("SEC"), without appreciating its impact, could have sweeping and unintended effects on Paradigm and many others who seek to utilize new technology in a way that could benefit millions of users in the United States and around the world.

SUMMARY OF ARGUMENT

A subtle distinction of monumental importance lurks beneath the surface of this case and threatens to displace Congress's role in deciding how crypto assets will be regulated.

On the surface, this case is about whether certain *offers* and *sales* of XRP tokens were securities offerings. But the SEC's rhetoric goes further than its claims require or the law supports. It asserts that XRP *tokens*, and by extension many other crypto assets, are themselves securities.

The SEC's apparent attempt to conflate an investment scheme with the crypto asset sold in that scheme is unsupported by legal precedent and fundamentally inconsistent with existing securities laws. To this end, a comprehensive study conducted by one of the firms on this brief reviewed every single relevant federal appellate case to have applied the *Howey* test. This study confirmed that no federal appellate court has held that an asset that is the object of an investment contract transaction is itself a security, nor that a subsequent transfer of that asset would be a securities transaction (nor has the SEC cited any such authority). *See* Lewis Cohen *et al*., *The*

Ineluctable Modality of Securities Law: Why Fungible Crypto Assets Are Not Securities, ("*Why Fungible Crypto Assets Are Not Securities*") (Nov. 10, 2022), attached as Exhibit 1.

The distinction between offer and sale *transactions* and the underlying *crypto assets* is critical. The SEC regulates a variety of fundraising schemes, and courts have evaluated those schemes for decades using the test set forth in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) ("*Howey*"). That is not new. But the SEC's effort to graft that same *Howey* analysis onto XRP tokens themselves is radically new, and it is the foundation upon which the SEC seeks to claim sweeping new authority to regulate not just investment offerings (its proper statutory role), but virtually the entire secondary market for crypto assets.

The SEC's objective may be understandable, but its approach is not founded in existing law. A comprehensive analysis of federal appellate law reveals that no authority exists to support the SEC's attempt to transmute the *Howey* analysis of an investment contract transaction into a conclusion about the underlying asset. In every application of *Howey* where an investment contract was found, there was some identifiable *legal relationship* between an ostensible "issuer" and the "investor" providing investment capital.

Put another way, the SEC's effort to construe XRP tokens as securities—even though XRP tokens create no legal relationship between the owner and Ripple Labs or any person or entity—invents a new form of "issuer-independent security" untethered from the powers conferred by Congress. For instance, Ripple Labs could go bankrupt and emerge with new legal entities without impacting the owners of XRP tokens. This is unlike any other type of security known to our securities laws, and instead resembles a commodity.

The SEC's attempt to obtain new authority through the courts is regulatory overreach. The SEC believes that *someone* should regulate crypto assets, and by branding the assets

themselves "securities" it is attempting to bypass Congress and bring crypto asset markets under its authority. That is precisely what the Supreme Court cautioned against last term in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). It is not the proper place of the SEC, nor the courts, to usurp the role of Congress and choose a regulator for crypto assets by straining *Howey* to conflate fundraising transactions with the underlying assets outside the bounds of appellate authority. Nor is it necessary to do so to resolve the claims before this Court.

Whatever decision the Court makes with respect to Defendants' *offers* and *sales* of XRP tokens, it should decline to pass judgment on the status of XRP tokens themselves. When facing matters of this significance, outside the bounds of any appellate precedent or statutory guidance, and with the regulation of an entire market at stake, the power rests with Congress.

ARGUMENT

I. THE CRITICAL DISTINCTION BETWEEN INVESTMENT *TRANSACTIONS* OR *SCHEMES*, AND UNDERLYING *ASSETS*, WILL DEFINE THE IMPACT OF THIS CASE ON INTERNATIONAL MARKETS.

The SEC seeks to hold Defendants liable for their offers and sales of XRP, which does not require reaching any conclusion as to the nature of the XRP token itself. As the SEC expressly argues, an investment contract can be structured around any ordinary asset. SEC Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. ("SEC Opp'n Br.") 39–40, ECF No. 674.

Nevertheless, the SEC repeatedly refers to the XRP token itself as a security, in hopes that the Court might characterize it as such. The first line of the SEC's Complaint states that "Defendants sold over 14.6 billion units of *a digital asset security called 'XRP'* . . . ." First Am. Compl. ¶ 1, ECF No. 46. In opposition to Defendants' motion for summary judgment, the SEC buries this crucial position in a footnote, explaining that it believes "XRP transactions between two public investors" in a secondary market would be exempt from registration "*despite such transactions involving securities*." SEC Opp'n Br. 45 n. 25 (emphasis added). The same

footnote later asserts that secondary market investors exchanging nothing but the XRP token are "buying and selling *Ripple's* investment contracts from each other." *Id.* (emphasis in original).[1]

The SEC downplays the significance of its position and conceals what is really at stake, by asserting that secondary market transactions between two public investors would be exempt from registration. That is not the point. The SEC has made clear its ambition to regulate crypto asset secondary markets, with enforcement against intermediaries as a top priority.[2] Congress has not granted that wish. The SEC's unfounded position that crypto assets themselves are securities, slipped into a footnote, could provide the SEC the keys to the kingdom.

Given the central importance of this point to the SEC's regulatory ambition, it is particularly concerning that the SEC misstates the holding of *SEC v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352 (S.D.N.Y. 2020) ("*Telegram*"), to suggest that that court supported its position that crypto assets themselves are investment contracts. In its opposition brief, the SEC states that "[c]ourts apply these same principles to hold that crypto assets similar to XRP are investment contracts." SEC Opp'n Br. 49 (citing *Telegram* as the primary support). The *Telegram* court *twice rejected* the position that the Gram token itself was the security at issue:

---

[1] The only authority the SEC cites in that footnote is *Jobanputra v. Kim*, No. 21 Civ. 7071 (ER), 2022 WL 4538201 (S.D.N.Y. Sep. 28, 2022), for the proposition that "crypto assets 'sold . . . in the general market' may be securities." SEC Opp'n Br. 45 n. 25; *see also Jobanputra*, 2022 WL 4538201, at *8 n. 8. *Jobanputra* did not substantively address the question and instead denied a motion to dismiss, holding that it was plausibly alleged that crypto assets were securities, because it viewed two other opinions as having treated other crypto assets as securities. *See Jobanputra*, 2022 WL 4538201, at *8 n. 8. On inspection, neither of those two opinions supports the SEC's position. The first, *Balestra v. ATBCOIN LLC*, 380 F. Supp. 3d 340 (S.D.N.Y. 2019), similarly held only that the token's status was plausibly alleged for purposes of a motion to dismiss. The second, *SEC v. Kik Interactive Inc.*, 492 F. Supp. 3d 169 (S.D.N.Y. 2020) ("*Kik*"), is addressed further below. In short, none of these cases provide analytical support for the SEC's novel position conflating the offering with the underlying asset itself.

[2] *See, e.g.*, Lydia Beyoud, *SEC's Gensler Steps Up Push to Get Crypto Exchanges to Register with Regulator*, Bloomberg (July 28, 2022), https://www.bloomberg.com/news/articles/2022-07-28/sec-chair-gensler-hardens-line-on-crypto-exchange-registration; *see also Oversight of the SEC's Division of Enforcement: Hearing Before Subcomm. On Investor Protection, Entrepreneurship, and Capital Markets of the H. Comm. on Financial Services*, 117th Cong. (2022) (statement of Gurbir S. Grewal, Director, SEC Division of Enforcement), https://www.sec.gov/news/statement/grewal-statement-house-testimony-071922. *See also* Brief for Amici Curiae Investor Choice Advocates Network & Philip Goldstein in Supp. of Defs.' Mot. for Summ. J. ("ICAN Br.") 1–15, ECF No. 683.

> While helpful as a shorthand reference, the security in this case is not simply the Gram, which is little more than alphanumeric cryptographic sequence. . . . This case presents a "scheme" to be evaluated under Howey that consists of the full set of contracts, expectations, and understandings centered on the sales and distribution of the Gram. Howey requires an examination of the entirety of the parties' understandings and expectations.

448 F. Supp. 3d at 379. On a motion for clarification, the court sharpened the point:

> But focusing upon the Initial Purchasers and their Gram Purchase Agreements misses *one of the central points* of the Court's Opinion and Order, specifically, that the "security" was neither the Gram Purchase Agreement *nor the Gram* but the entire scheme that comprised the Gram Purchase Agreements and the accompanying understandings and undertakings made by Telegram, including the expectation and intention that the Initial Purchasers would distribute Grams into a secondary public market.

No. 19-cv-9439 (PKC), 2020 WL 1547383, at *1 (S.D.N.Y. Apr. 1, 2020) (emphasis added).

The *Telegram* court rightly focused on the facts and circumstances of the offering scheme, not the Gram token itself, and found that the SEC had shown a substantial likelihood of success in proving that the overall scheme, including "the Gram Purchase Agreements, Telegram's implied undertakings, and its understandings with the Initial Purchasers, including the intended and expected resale of Grams into a public market, amount to the distribution of securities, thereby requiring compliance with section 5." 448 F. Supp. 3d at 381.

Two other courts, however, failed to address the nuanced distinction between the offering transaction and the crypto asset, and instead adopted language advocated by the SEC to construe a crypto asset itself as a security, with no critical analysis. In *Kik*, the court addressed an offering similar to the one in *Telegram* and similarly held that the sales of Kin tokens were investment contract transactions. Some dicta in *Kik* references the Kin token as a security, but it does so without providing any reasoning or legal support for projecting the analysis of the transaction onto the Kin token itself. 492 F. Supp. 3d at 177–82. Most recently, on November 7, 2022, another court ruled that crypto asset sales violated Section 5. *See* Memorandum and Order

at 18, *SEC v. LBRY, Inc.*, No. 21-cv-00260-PB (D.N.H. Nov. 7, 2022), ECF No. 86 ("*LBRY* Slip Op.").[3] Once again, the opinion appears to adopt the SEC's view that the token itself was a security, without any legal analysis or support for that proposition. *See id.*

By construing the underlying crypto assets as securities, the *Kik* and *LBRY* courts strayed outside the bounds of all existing appellate precedent or statutory guidance. While one of those cases evaded appellate review and the other may also, the spotlight on this case weighs strongly in favor of conducting a more rigorous analysis of this critically important distinction here. There is no need to cross the line into opining on the nature of the XRP token itself. Failure to respect that outer limit of existing precedent and statutory guidance would be an unforced error, opening any decision to potential reversal of an otherwise defensible holding, for needlessly running afoul of the major questions doctrine.

II. A COMPREHENSIVE REVIEW OF FEDERAL APPELLATE LAW CONFIRMS THAT THE *HOWEY* TEST CANNOT BE USED TO CLASSIFY CRYPTO ASSETS, THEMSELVES, AS "SECURITIES".

A comprehensive review of federal appellate jurisprudence confirms that the *Howey* test does not support a determination that the object of an investment contract—here the XRP token—is a security. Thus, for a secondary transaction in a crypto asset to be a securities transaction, either (i) the asset itself would need to convey a bundle of rights and obligations sufficient to be considered a "security," or (ii) a new investment contract transaction would need to be formed based on the specific circumstances of that transaction.

This conclusion is supported by a review of 253 federal appellate court decisions and 13 Supreme Court decisions, which represent all relevant appellate cases identified as applying the

[3] The only authority *LBRY* offers is *Warfield v. Alaniz,* 569 F.3d 1015, 1021 (9th Cir. 2009), for the unrelated proposition that a court should focus on what was promised and not the subjective intent of the purchasers. *See LBRY* Slip Op. at 18. *Warfield* has no bearing on the distinction between the offering and an underlying asset.

Howey test, either with reference to *Howey* or to *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975). *See Why Fungible Crypto Assets Are Not Securities*, Schedules 1–3. The SEC has cited no contrary authority to support treating the object sold in an investment contract transaction as a security in itself. This is because no such authority exists.

A. Evaluating Fundraising Schemes as "Investment Contracts" Under *Howey* Is Not Novel, Whether They Involve a Crypto Asset or Any Other Asset.

The *Howey* test evaluates whether a "contract, transaction, or scheme"—not an asset—is an investment contract, considering whether the circumstances as a whole involve: (1) an investment of money (2) in a common enterprise (3) with an expectation of profits to come (4) solely from the efforts of the promoter or a third party. 328 U.S. at 298–99.

Since 1946, federal courts have found all manner of arrangements involving ostensibly commercial transactions to nevertheless be investment contracts. *See Why Fungible Crypto Assets Are Not Securities* at Schedule 1 (collecting examples of cases involving whiskey warehouse receipts, beavers, cattle embryos, and chinchillas, among others). The same logic has been applied to transactions and schemes involving crypto assets. *See, e.g.*, *Telegram*, 448 F. Supp. 3d at 381. While the application of *Howey* to crypto assets is recent, the SEC's litigated cases involving crypto assets have hewed more closely to precedent by focusing on claims against a purported issuer and the circumstances of the offering.[4] Those claims asserting that an

[4] *See, e.g.*, *Kik*, 492 F. Supp. 3d at 177–82; *LBRY* Slip Op. at 6; *In the Matter of Munchee Inc.,* Release No. 33-10445, 2017 WL 10605969 (Dec. 11, 2017); *In the Matter of Bloom Protocol, LLC*, Release No. 11089, 2022 WL 3273493 (Aug. 9, 2022); Complaint, *SEC v. PlexCorps*, No. 17-cv-7007, 2017 WL 5988934 (E.D.N.Y. Dec. 1, 2017) (alleging misrepresentations about the size and scale of PlexCorps' operations, the use of funds raised in an ICO, and the amount of funds raised in the ICO); Complaint, *SEC v. AriseBank*, No. 3-18-cv-186-M, 2018 WL 623772 (N.D. Tex. Jan. 25, 2018) (alleging "many" materially false statements and omissions in connection with an ICO transaction). The SEC has previously asserted claims premised on tokens being securities in settled actions where its assertions will not be tested. *See, e.g.*, *In the Matter of Zachary Coburn,* Release No. 34-84553, 2018 WL 5840155 (Nov. 8, 2018) (claiming that EtherDelta "operated as a market place for bringing together orders of multiple buyers and sellers in [digital assets] that included securities"). The SEC recently filed its first case directly placing at issue whether tokens in secondary market transactions are securities transactions. *See* Complaint, *SEC v. Wahi,* No. 22-cv-1009 (W.D. Wash. July 21, 2022) (alleging that secondary transactions constituted insider trading under the securities laws). That complaint has not yet been tested and has received much criticism. *See, e.g., Statement of Commissioner Caroline D.*

offering of crypto assets constitutes an investment contract, however, do not justify extrapolating from that conclusion to construe the crypto asset itself as a security.

B. *Howey* Cannot Be Used to Classify Underlying Assets as Securities, Especially When Exchanged in Secondary Market Transactions.

While many appellate cases apply *Howey* to the purported *sale* of an underlying asset which functions as the object of an investment scheme, these cases uniformly highlight a critical distinction between the documents, marketing materials, or oral statements that create the required "common enterprise" at the center of a *Howey* analysis and the "object" being sold pursuant to the purported investment scheme. *See Why Fungible Crypto Assets Are Not Securities* at 55–58 (collecting cases).[5] In those transactions, a sales agreement was almost always accompanied by the seller or an affiliated entity performing post-purchase functions (such as picking, bundling and selling oranges; husbanding cattle and their embryos; or maturing whiskey in casks). *See id.* And, in each of those cases, the investment package (*i.e.*, the set of formal or informal agreements or understandings between the seller and the purchaser) is clearly distinguishable from the object of the scheme itself (*i.e.*, the orange groves, cattle, or beavers).

Moreover, there is no suggestion in any of the appellate cases that the transfer of the underlying object to another "investor" *without an assignment or transfer of the surrounding*

Pham on SEC v. Wahi, Commodity Futures Trading Commission (July 21, 2022), https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement072122.

[5] *E.g.*, *SEC v. ETS Payphones, Inc.*, 408 F.3d 727 (11th Cir. 2005) (sale and leaseback of payphones); *Miller v. Cent. Chinchilla Grp., Inc.*, 494 F.2d 414 (8th Cir. 1974) (sale and management agreements with respect to chinchillas); *Smith v. Gross*, 604 F.2d 639 (9th Cir. 1979) (earthworms); *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385 (6th Cir. 1989) (printing plates for foreign postage stamps); *Rodriguez v. Banco Cent.*, 990 F.2d 7 (1st Cir. 1993) (finding that "a security *might* exist if the defendants had promised, along with the land sales, to develop [a thriving residential] community themselves," but that "[a] simple sale of land, whether for investment or use, is not a 'security'"); *Bamert v. Pulte Home Corp.*, 445 F. App'x 256 (11th Cir. 2011) (rejecting the plaintiffs contention that purchase agreements for at least one Orlando condominium unit were investment contracts because the plaintiffs were under no contractual obligation to join an offered rental pool or otherwise contract with the defendant's proposed rental agent, but finding that the plaintiff had sufficiently alleged the possible existence of an investment contract in considering exclusive rental agreements, if the rental agents were found to be affiliates of the condominium seller).

promises or rights, would result in another securities transaction. There is no appellate case which suggests that the object of an investment scheme is a "security."

Of the hundreds of federal appellate and Supreme Court decisions applying the *Howey* analysis, *none* directly deals with secondary transactions in those assets and only one analyzed a transaction under *Howey* that did not directly involve as a party the entity that would purportedly be the "issuer" of the alleged investment scheme. In that one case, *Hocking v. Dubois*, 885 F.2d 1449 (9th Cir. 1989) (*en banc*) ("*Hocking II*"), the circumstances of the secondary transaction provided independent grounds for conducting an investment contract analysis.[6]

The procedural history of the *Hocking* case demonstrates the difficulty of applying *Howey* to secondary market transactions, and the impossibility of expecting secondary market participants to do so under penalty of strict liability under federal securities laws. The District Court held that Hocking's arrangement did not constitute an investment contract. *See Hocking v. Dubois*, 839 F.2d 560, 562 (9th Cir.) (describing trial court opinion), *withdrawn*, 863 F.2d 654 (1988). The Ninth Circuit reversed, finding that an "offering of a condominium with [a rental pool agreement] *automatically* makes the [transaction an investment contract]."' *Id.* at 565.

After a rehearing *en banc*, the outcome was reversed again, to hold that the arrangement did not automatically constitute an investment contract transaction. *Hocking II*, 885 F.2d at 1462. The full court held that just because the purchase of an asset *could* have been based on an expectation of profit, did not support a holding that all transactions were *automatically* securities transactions.

---

[6] Hocking, an individual investor, purchased a rentable condominium unit in a secondary transaction through the encouragement of his real estate broker, then entered into a rental pool agreement with a company acting as the rental pool operator for the resort. Hocking later brought a lawsuit against the real estate broker, claiming that the combination of the condominium purchase and the rental pool agreement constituted an unregistered securities transaction. *See Hocking II*, 885 F.2d at 1452–53.

On rehearing *en banc*, the *Hocking* majority reasoned:

> We agree with defendants and *amici* that the three-judge panel may have written too broadly its conclusion that so long as a rental pool 'option' exists, all secondary market sales necessarily involve a security. Such a *per se* rule would be ill-suited to the *examination of the economic reality of each transaction required by Howey*.

Hocking II, 885 F.2d at 1462 (emphasis added).

C. No Federal Appellate Court Has Found an Investment Contract to Exist Without a Legal Relationship to the Issuer.

Unlike all forms of securities recognized in our federal securities laws, XRP tokens do not bestow on the holder any legal relationship to Ripple Labs or any other issuer, and when traded in a secondary market they do not transfer any legal relationship to an issuer from the seller to the purchaser. That distinction between XRP tokens and securities, is critical.

Every item on the enumerated list of instruments that comprise the definition of a security under federal securities laws reflects the presence of a *legal relationship* established between an identifiable legal entity that acts as the *issuer* of the security and the *owners* of that security. *See Why Fungible Crypto Assets Are Not Securities* at 62–63 (addressing each of the enumerated list of instruments in the definition of "security" to show they each involve a legal relationship with an issuer). The inclusion of the term "investment contract" is no exception. Every federal appellate court finding an "investment contract" to exist under the *Howey* is consistent with this trend, and no such case has suggested that an investment contract can exist in the absence of any legal relationship. *See id.*, Schedules 1–3.

Under current law, there is simply no such thing as an "issuer-independent security"—a security that exists independently of any legal relationship to an identifiable entity considered its "issuer." Throughout the federal securities laws it is assumed that all securities will have an "issuer"—an identifiable person or entity against whom a securityholder's rights can be exercised. When a security has been issued, many different obligations and potential liabilities

are imposed on the issuer of that security, including the responsibility for filing periodic reports where the security or issuer has registered with the SEC. 15 U.S.C. § 78m.

The survey of appellate jurisprudence presented in Annex A to *Why Fungible Crypto Assets Are Not Securities* demonstrates that a traditional written contract is present in virtually every instance where an investment contract has been found by an appellate court. In those few appellate cases in which an investment contract was found without a written instrument between the parties, however, the elements necessary to find an implied-in-fact contract were present.[7]

No appellate decision holds or suggests that the ownership of an ordinary asset, without some ongoing business relationship to the issuer of the investment contract, would suffice to establish a "common enterprise" required for an investment contract. Of the 266 decisions surveyed, approximately 62 had more than a cursory reference to the concept of "common enterprise." *Why Fungible Crypto Assets Are Not Securities* at 48. Of those, 37 decisions either found that an investment contract transaction or scheme was present or remanded for further fact finding. *Id.* In each of these decisions, the one constant was that commonality was based on a

[7] The SEC argues that "an ongoing contractual obligation" is not an essential element of an investment contract, but it fails to cite any binding or persuasive authority. *See* SEC Opp'n Br. 49 (citing *Kik,* 492 F. Supp. 3d at 178). The *Kik* court did make that assertion, but oddly based it on two cases that held the opposite. *See Kik,* 492 F. Supp. 3d at 178 (citing *Davis v. Rio Rancho Ests., Inc.*, 401 F. Supp. 1045, 1049–50 (S.D.N.Y. 1975); *Hart v. Pulte Homes of Michigan Corp*., 735 F.2d 1001, 1005 (6th Cir. 1984)). *Davis* held that there was no investment contract despite an expectation of future efforts of the seller, *because there was no ongoing contractual relationship*. The plaintiff had purchased near-worthless desert land, sold to purchasers with the expectations that the developer would take active steps to create a community. The court held there was no investment contract despite that expectation of future efforts. Central to the court's analysis was the fact that "[t]here was no management contract between plaintiff and defendants, nor were defendants obligated by the Purchase Agreement to perform any such services" and, "[i]n the absence of a 'common enterprise' between the parties, the expectation of a profit on resale is insufficient to transform what is essentially a sale of real property into the sale of an investment contract[.]" *Davis,* 401 F. Supp. at 1050. *Hart* similarly concluded that there was no common enterprise because the expectations were not substantiated by a contractual relationship. *See Hart*, 735 F.2d at 1004 ("Even assuming that individual purchasers were assured of development, nothing in the pleadings suggests that the fortunes of individual purchasers were 'inextricably intertwined' *by contractual or financial arrangements*.") (emphasis added).
.

direct business relationship between the issuer and the participant.[8] No such relationship exists between someone who obtained XRP tokens in the secondary market and Ripple Labs or any other person or entity, and the same holds true for many crypto assets.

The SEC's proposed creation of a security with no legal relationship to an issuer cannot be reconciled with existing law. Among other problems, the inherently transitory nature of *Howey*'s facts-and-circumstances analysis means that the outcome today may be different tomorrow. The SEC staff sought to address this transitory problem in a 2018 speech by Director Hinman, which gave rise to the awkward concept that a crypto asset once classified as a security might morph into a non-security.[9] But this novel morphing concept cannot be implemented in secondary markets. If a crypto asset can morph from a security to a non-security based on extrinsic factors (such as the disappearance of the founding team), then it can just as easily morph back into a security (upon their return, or the ascendance of a new leader, or some other set of promises or assurances). The securities laws drafted by Congress cannot accommodate crypto assets morphing in and out of transitory "security" status, untethered from any legal relationship to any issuer. In a similar context, the Supreme Court rejected an analogous "morphing" concept, because:

> coverage by the Acts would in most cases be unknown and unknowable to the parties at the time the stock was sold. These uncertainties attending the applicability of the Acts would hardly be in the best interests of either party to a transaction. *Cf. Marine Bank v. Weaver*, 455 U.S. [551,] 559, n. 9 (rejecting the argument

[8] A good example of this is *Shaw v. Hiawatha Inc.*, in which the plaintiffs alleged that the defendants' agents told them that they "would be in business together" coupled with a letter from an officer of the defendant stating that he was looking forward to a "long and profitable relationship" with the defendants. 884 F.2d 582 (9th Cir. 1989).

[9] *See* William Hinman, Director, Div. Corp. Fin., SEC, Remarks at the Yahoo Finance All Markets Summit: Digital Asset Transactions: When Howey Met Gary (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418 ("And putting aside the fundraising that accompanied the creation of Ether, based on my understanding of the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions.")

> that the certificate of deposit at issue there was transformed, chameleon-like, into a "security" once it was pledged).

Landreth Timber Co. v. Landreth, 471 U.S. 681, 696 (1985) (emphasis added). Under current law, the only rational approach is to regulate each *offering* according to its facts and circumstances, recognizing that the crypto asset underlying the offering is not itself a security.

III. EXTENDING *HOWEY* TO CLASSIFY CRYPTO ASSETS THEMSELVES AS "SECURITIES" WOULD BYPASS THE ROLE OF CONGRESS AND VIOLATE THE MAJOR QUESTIONS DOCTRINE.

Courts "expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (internal quotation marks omitted). Under the "major questions doctrine," courts are "reluctant to read into ambiguous statutory text the delegation claimed to be lurking there" in "extraordinary cases . . . in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia*, 142 S. Ct. at 2608–09 (internal quotation marks and citations omitted). In such cases "both separation of powers principles and a practical understanding of legislative intent" require an agency to point to "clear congressional authorization for the power it claims." *Id.* at 2609 (internal quotation marks and citation omitted).

Regulation of the new class of crypto assets is matter of great economic and political significance. In May 2021, SEC Chair Gary Gensler stated that the market for crypto assets was $2 trillion, and in November 2021, Pew Research Center estimated last year that 16% of Americans have invested in, traded, or used cryptocurrency.[10] That does not mean that all

[10] *See Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part III: Hearing Before H. Comm. On Financial Services,* 117th Cong. 11 (2021) (statement of Hon. Gary Gensler, Chairman, SEC); Andrew Perrin, *16% of Americans Say They Have Ever Invested In, Traded or Used Cryptocurrency*, Pew

application of securities laws to crypto assets implicates the major questions doctrine. Applying *Howey* to fundraising schemes involving crypto assets fits within the SEC's existing authority, just as *Howey* has applied to fundraising transactions involving innumerable other assets.

The SEC runs afoul of the major questions doctrine, however, by attempting to mutate analysis of the *transaction* into a conclusion about the *asset* itself. *See* SEC Opp'n Br. 45 n. 25. It is in that leap that the SEC departs from the authority granted by Congress and all appellate precedent. As demonstrated above, that novel argument would not only grant authority over the crypto asset secondary market not authorized by Congress, but create the first class of issuer-independent securities—a concept entirely foreign to the laws enacted by Congress.

To be sure, secondary markets for digital assets raise important investor protection and other policy concerns. But that is all the more reason for judicial restraint. Congress is well aware of these concerns and is in the process of performing its role of considering legislation to address them.[11] Three such bills were introduced this year and remain pending. *See* Lummis-Gillibrand Responsible Financial Innovation Act, S. 4356, 117th Cong. (2022); Digital Commodities Consumer Protection Act of 2022, S. 4760, 117th Cong. (2022); Digital Commodities Exchange Act of 2022, H.R. 7614, 117th Cong. (2022). In addition, the Executive Branch is coordinating a "whole of government" approach to crypto assets. Exec. Order No. 14,067, 87 Fed. Reg. 14143 (March 14, 2022). This is not an issue for the SEC to decide, or for a court to decide through an unprecedented interpretation of *Howey*.

Research Cntr (Nov. 11, 2021), https://www.pewresearch.org/fact-tank/2021/11/11/16-of-americans-say-they-have-ever-invested-in-traded-or-used-cryptocurrency/.

[11] For a more complete recitation of the proceedings before Congress, *see* Br. for Amicus Curiae Investor Choice Advocs. Network & Philip Goldstein in Supp. of Defs.' Mot. for Summ. J. 7–11, ECF No. 683.

As the Supreme Court explained just this past term, we "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *West Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted). Under the SEC's approach, the agency would jump ahead of Congress. Amicus asks this Court to resist the impulse to allow a regulatory agency to expand its authority under a framework that was designed for an entirely different context. *Id.* ("Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices.") (internal quotation marks, citation, and alteration omitted).

"Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line." *Id.* (internal quotation marks and citation omitted). Blockchain technology heralds a new era of programmable assets that does not fit neatly into existing legal classifications. As Congress finalizes legislation governing this novel industry, this Court should reject the SEC's effort to supersede Congress by reading into the Securities Act powers that are simply not there.

CONCLUSION

For the reasons discussed above, this Court should decline to adopt the SEC's unsupported position that the XRP token itself is a security, or that any secondary market transactions in that token are securities transactions by virtue of the facts and circumstances presented in this case.

Dated: November 11, 2022

Respectfully submitted,

JENNER & BLOCK LLP

By: /s/ Kayvan B. Sadeghi

Kayvan B. Sadeghi
Shailee Diwanji Sharma
1155 Avenue of the Americas
New York, NY 10036
Tel.: (212) 891-1600
Fax: (212) 891-1699
ksadeghi@jenner.com
ssharma@jenner.com

Michelle S. Kallen (*pro hac vice motion forthcoming*)
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Tel: (202) 639-6000
Fax: (202) 639-6066
mkallen@jenner.com

Lewis Rinaudo Cohen (*pro hac vice motion forthcoming*)
Gregory Strong (*pro hac vice motion forthcoming*)
COHEN WILSON LLP
331 Park Avenue South
New York, NY 10010
Tel.: (212) 984-6845
lewis.cohen@dlxlaw.com
greg.strong@dlxlaw.com

Rodrigo Seira (*pro hac vice motion forthcoming*)
PARADIGM OPERATIONS LP
548 Market Street
San Francisco, CA 94104
Tel: (415) 986-9283
rodrigo@paradigm.xyz

Attorneys for *Amicus Curiae* Paradigm Operations LP

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was filed on November 11 2022, with the Clerk of the Court by using the CM/ECF system, which will effect electronic service on all parties and attorneys registered to receive notifications via the CM/ECF system.

Dated: November 11, 2022

By: /s/ Kayvan B. Sadeghi
Kayvan B. Sadeghi

EXHIBIT 17

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. RIPPLE LABS INC., BRADLEY GARLINGHOUSE, and CHRISTIAN A. LARSEN, Defendants.	20 Civ. 10832 (AT) (SN)

BRIEF OF *AMICUS CURIAE*, XRP HOLDERS, IN OPPOSITION OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES……iii

PRELIMINARY STATEMENT……1

I. RELEVANT FACTS PRIOR TO THE SEC ALLEGING XRP IS A SECURITY……...3

A. Decentralized Cryptocurrencies - Like Bitcoin And XRP - Do Not Satisfy Howey……3

B. SEC Confirms Sufficiently Decentralized Digital Assets Are Not Securities……6

C. SEC's Other External Conduct Also Strongly Suggests XRP Is Not A Security……6

II. UNPRECEDENTED ALLEGATIONS CAUSE UNPRECEDENTED LITIGTION……...8

A. Amici's Writ of Mandamus……8

B. Amici's Motion To Intervene……9

C. The SEC Responds that All XRP, Including Amici's XRP, Are Securities……9

III. AMICI CURIAE'S INTEREST……10

A. Amici's Interest……10

B. Section 4 Exemptions Do Not Protect Amici's Interests……...10

C. Exemptions Are Amici's Burden……...11

IV. LEGAL STANDARDS AND LAW TO BE APPLIED……11

A. Summary Judgment……11

B. The "Character in Commerce" Test……11

C. The Howey Test……12

V. ARGUMENT……...12

A. The Token Itself Is Never The Security……12

B. The SEC Claims XRP Itself Is A Security……14

C. SEC Offers No Precedent Supporting Its Theory And Abandons Its Expert……16

D. XRP's Utility And Non-Investment Use Is A Material Fact In Dispute……17

E. The SEC Has Failed To Establish Or Even Identify A Common Enterprise…….21

F. The SEC Cannot Prove Howey's Third Prong……22

VI. VICTIMS OF REGULATORY OVEREACH……28

VII. CONCLUSION……30

TABLE OF AUTHORITIES

Cases **Page(s)**

SEC v. Telegram Grp. Inc.,
448 F. Supp. 3d 352 (S.D.N.Y. 2020) 3, 6, 12, 13, 19, 25, 26

Deaton v. Roisman,
No. 1:21-cv-00001-WES-PAS (D.R.I. Jan. 1, 2021) ……8, 9, 29

SEC v. C.M. Joiner Leasing Corp.,
320 U.S. 344 (1943) ……..……10, 11, 25, 27

SEC v. Cavanagh,
155 F.3d 129 (2d Cir. 1998) ……...……...11

Giannullo v. City of New York,
322 F.3d 139 (2nd Cir. 2003) ……..…….11

Glen-Arden Commodities, Inc. v. Costantino,
493 F.2d 1027 (2d Cir. 1974) ……..……....11,14

United Hous. Found, Inc. v. Forman,
421 U.S. 837 (1975) ……...……..…12, 19, 22

SEC v. W.J. Howey Co.,
328 U.S. 293 (1946) 12, 13, 27

Revak v. SEC Realty Corp.,
18 F.3d 81 (2d Cir. 1994) ……..……12, 28

SEC v. Telegram Grp. Inc.,
No. 19-cv-9439 (PKC), 2020 WL 1547383 (S.D.N.Y. Apr. 1, 2020) 12, 13

Miller v. Cent. Chinchilla Grp., Inc.,
494 F.2d 414 (8th Cir. 1974) ……...…….14

Kemmerer v. Weaver,
445 F.2d 76 (7th Cir. 1971) ……..……...14

SEC v. Shavers,
No. 4:13-cv-00416, 2013 WL 4028182 (E.D. Tex., Aug. 6, 2013) ……..……...14

SEC v. Aqua-Sonic Prods. Corp.,
524 F. Supp. 866 (S.D.N.Y. 1981) ……..……....15, 23, 25

Bobrowski v. Red Door Grp., Inc.,
No. CV 09-02077-PHX-FJM, 2011 WL 3875424 (D. Ariz) Aug. 31, 2011) 22

SEC v. Kik Interactive Inc.,
492 F. Supp. 3d 169 (S.D.N.Y. 2020) ……..……...25

Statutes

15 U.S.C. § 77d(a)(1)-(2) ……..……...11

Regulations

Fed. R. Civ. P. 56(a)…….…..…11

Other Authorities

Selected SEC Accomplishments: May 2017 – December 2020. U.S. Securities and Exchange Commission. Available at https://www.sec.gov/selected-sec-accomplishments-may-2017-2020…….....4

Attachment A: Statement of facts and violations. U.S. Financial Crimes Service Network. Available at https://www.fincen.gov/sites/default/files/shared/Ripple_Facts.pdf……4

GAO Virtual Currencies Report: Emerging Regulatory, Law Enforcement, and Consumer Protection Challenges. U.S. Government Accountability Office. Available at https://www.gao.gov/assets/gao-14-496.pdf…….....….4, 5, 18, 28

Coinflip, Inc. et al, CFTC Docket No. 15-29, *Order Instituting Proceedings Pursuant To Sections 6(C) And 6(D) Of The Commodity Exchange Act, Making Findings And Imposing Remedial Sanctions*. U.S. Commodity Futures Trading Commission. Available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliprorder09172015.pdf…….....……..5

2019 Annual Report. U.S. Financial Stability Oversight Council. Available at https://home.treasury.gov/system/files/261/FSOC2019AnnualReport.pdf…….....….5, 28

Bailard, Inc. Code of Ethics. U.S. Securities and Exchange Commission. Available at https://www.sec.gov/Archives/edgar/data/1048702/000119312521047532/d119950dex9928p7.htm…….....5, 6

Framework for "Investment Contract" Analysis of Digital Assets. U.S. Securities and Exchange Commission. Available at https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets ....…….....……6, 13, 21, 28

Hinman, W. (2018) *Digital Asset Transactions: When Howey Met Gary (Plastic)*. U.S. Securities and Exchange Commission. Available at https://www.sec.gov/news/speech/speech-hinman-061418 ……6, 13, 28

Securities Purchase Agreement By and Between MoneyGram International, Inc. and Ripple Labs Inc. U.S. Securities and Exchange Commission. Available at https://www.sec.gov/Archives/edgar/data/1273931/000119312519174813/d766773dex101.htm…….....……7

MoneyGram Announces Strategic Partnership with Ripple. U.S. Securities and Exchange Commission. Available at https://www.sec.gov/Archives/edgar/data/1273931/000119312519174813/d766773dex991.htm…….....…….7

SEC Office of Investor Education and Advocacy Email correspondence……...8

Mar. 7, 2019, Ltr. from Chairman J. Clayton to Congressman Ted Budd. Coin Center. https://www.coincenter.org/app/uploads/2020/05/clayton-token-response.pdf 13

Press Rel. No. 33-5347. *Guidelines As To The Applicability of the Federal Securities Laws To Offers And Sales Of Condominiums Or Units In A Real Estate Development* (Jan. 4, 1973). U.S. Securities and Exchange Commission. Available at https://www.sec.gov/rules/interp/1973/33-5347.pdf ……14

Gensler Remarks. SEC Emblem. (2021, August 3) available at https://www.sec.gov/news/speech/gensler-aspen-security-forum-2021-08-03 ……..….30

Other Materials

Duggan, W. (n.d.). *The History of Bitcoin, the First Cryptocurrency*. U.S. News. Available at https://money.usnews.com/investing/articles/the-history-of-bitcoin…….....…3

Former SEC Commissioner Grundfest's Dec. 17, 2020 Ltr. to SEC Chairman Clayton. Available at CryptoLaw. https://www.crypto-law.us/wp-content/uploads/2021/12/FOIA-12092020-Grundfest-Ltr-to-SEC-Commsnrs-Copy.pdf …….....4, 8, 29

McKenzie, W. (2018) *Ethereum, the ICO craze of 2017 and the Platform Wars*. Medium. Available at https://medium.com/@williammckenzie1997/ethereum-the-ico-craze-of-2017-and-the-platform-wars-d3c79fc2cf93…….....……4

Peterson Institute for International Economics. (2018) *The Impact of Blockchain Technology on Finance*. YouTube. Available at https://www.youtube.com/watch?v=v0zAadukczY …...5

Ripple (XRP) overtakes Ethereum as second largest cryptocurrency on CEO's bullish bet. Forbes. Available at https://www.forbes.com/sites/billybambrough/2018/09/26/ripple-

xrp-overtakes-ethereum-as-second-largest-cryptocurrency-on-ceos-bullish-bet/?sh=52bedbaa1c22 ……..…..6

Cryptocurrency Market Capitalizations. CoinMarketCap. Available at https://web.archive.org/web/20180103125710/https:/coinmarketcap.com/…….....…6

Lewitinn, L. (2019) *Coinbase announces acceptance of XRP, ripple ensues*. Modern Consensus. Available at https://modernconsensus.com/cryptocurrencies/xrp/coinbase-pro-xrp-trading-ripple/…….....……7

MGI February 24, 2020 Earnings Report. MoneyGram International, Inc. Available at https://ir.moneygram.com/node/20741/html…….....……..7

Wang, N. (2021) *Gensler Says Most Crypto Trading Platforms Need to Register With SEC*. CoinDesk. Available at https://www.coindesk.com/policy/2021/09/13/gensler-says-most-crypto-trading-platforms-need-to-register-with-sec/…….....…….11

Beyoud, L. (2022) *SEC's Gensler Steps Up Push to Get Crypto Exchanges to Register With Regulator*. Bloomberg. Available at https://www.bloomberg.com/news/articles/2022-07-28/sec-chair-gensler-hardens-line-on-crypto-exchange-registration?leadSource=uverify%20wall…….....….11

Price, M. (2022) *Crypto intermediaries should register with U.S. SEC, agency chair says*. Thomson Reuters. Available at https://www.reuters.com/technology/crypto-intermediaries-should-register-with-us-sec-agency-chair-says-2022-09-08/……..…..11

Hadjiloizou, L. (2020) *The XRP TipBot lives on through Uphold*. XRP Arcade. Available at https://www.xrparcade.com/news/the-xrp-tipbot-lives-on-through-uphold/….....18

Khatri, Y. (2021) *Time Magazine now accepts bitcoin and other cryptocurrencies for digital subscriptions*. The Block. Available at https://www.theblock.co/linked/102166/time-magazine-bitcoin-digital-subscription-payments…….....….18

XRP directory - Top companies accepting XRP. Cryptwerk. Available at https://cryptwerk.com/pay-with/xrp/…….....18

GlobaliD. (2021) *Introducing the XRP MasterCard® Debit Card*. Medium. Available at https://medium.com/global-id/introducing-the-xrp-mastercard-debit-card-827c0b37445b….....18

Pirus, B. (2020) *Uphold's New Debit Card Lets You Pay With Bitcoin, XRP and Gold*. Cointelegraph. Available at https://cointelegraph.com/news/upholds-new-debit-card-lets-you-pay-with-bitcoin-xrp-and-gold…….....……19

FTX Partners With Visa To Offer XRP And BTC To Millions Of Users. ProCoinNews. Available at https://procoinnews.com/ftx-partners-with-visa-to-offer-xrp-and-btc-to-millions-of-users/……19

Weeks, R. (2020) *Andreesen Horowitz-backed Deel launches crypto payroll tool*. The Block. Available at https://www.theblock.co/linked/84255/andreesen-horowitz-backed-deel-launches-crypto-payroll-tool……20

BigCommerce Support - Connecting with BitPay. BigCommerce. Available at https://support.bigcommerce.com/articles/Public/Connecting-with-BitPay…….....20

Thinking Crypto. (2021) *Hester Peirce Interview - The SEC & US Crypto Regulations, Bitcoin ETF, Gary Gensler, Ripple*. YouTube. Available at https://www.youtube.com/watch?v=_qihfMbIk_g……..……..22

Coinbase advertisement promoting the utility of XRP for international transfers……24

Alexandre, A. (2019) *Coinbase Expands Into Cross-Border Payments*. Cointelegraph. Available at https://cointelegraph.com/news/coinbase-expands-into-cross-border-payments…...…24

Haselton, T. (2018) *How to buy XRP, one of the hottest bitcoin competitors*. CNBC. Available at https://www.cnbc.com/2018/01/02/how-to-buy-ripple.html…….....…….24

Khanzadaev, G. (2022) *XRP Can Now Be Easily Bought in Europe Straight from Bank Account, Here's How*. U.Today. Available at https://u.today/xrp-can-now-be-easily-bought-in-europe-straight-from-bank-account-heres-how…….....……24

XRPL Use Cases - Powering Innovation Technology. XRPL.org. Available at https://xrpl.org/uses.html…….....26

Binance Rewards - Calculate your crypto earnings. Binance. Available at https://www.binance.com/en/earn/xrp…….....27

Get a Loan Backed by Your XRP. CoinLoan. Available at https://coinloan.io/crypto-backed-loans/xrp-loan/….....27

Ponnezhath, M., & Wilson, T. (2022) *Major crypto lender Celsius files for bankruptcy*. Thomson Reuters. Available at https://www.reuters.com/technology/crypto-lender-celsius-files-bankruptcy-2022-07-14/….....…27

Gary Gensler, *Ethics and Governance in the Blockchain Era, Gary Gensler, MIT, April 23, 2018* https://www.youtube.com/watch?v=Bx4Q19xA7Oc….....…30

XRPL services. XRPL Services. Available at https://xrpl.services/xrpl-statistics….....…….30

PRELIMINARY STATEMENT

Amici curiae respectfully submit this brief in opposition of the Securities Exchange Commission's (SEC) motion for summary judgment that "a purchase of XRP is an investment in a common enterprise with other XRP holders and with Ripple." ECF 640 at 2. Had the SEC limited its allegations to specific XRP transactions by the Defendants, amici would not have engaged in the extensive litigation that transpired because of those sweeping allegations. From the Complaint to the motion for summary judgment, including all pleadings and arguments asserted in-between, the SEC asks this Court to conclude that XRP is always a security, and therefore that every offer, sale, or transaction involving XRP is subject to registration under Section 5 of the Securities Act of 1933 or must qualify for a Section 4 exemption. *Hr'g Tr.* 44:7-16 (Mar. 19, 2021) (SEC Attorney stating that not all sales of XRP are necessarily Section 5 violations because some sales may qualify under Section 4 exemptions); *also* ECF 556 at n.2 (stating "Section 4 could exempt investors in the market from registration."). More alarming, the SEC asks this Court to grant summary judgment in favor of the SEC, effectively giving the SEC jurisdiction over non-parties to this litigation, consisting of an entire digital asset ecosystem. Incredibly, the SEC asks this Court to effectively grant it carte blanche jurisdiction over the entire cryptocurrency market after proving nothing more than a Defendant sold an asset and undertook efforts to promote that asset. ECF 640 at 49 ("Defendants do not dispute that they offered and sold XRP in exchange for 'money', which suffices to establish the 'investment of money' aspect of the *Howey* test. Defendants' statements and efforts as to XRP…establish the other aspects of the Howey test as a matter of law.") (citations omitted). Respectfully, that is not how the *Howey* test is applied, nor is it an example of how the law functions. Simply put, the allegations contained in the Amended Complaint are quite possibly the most overbroad far-

reaching claims ever made in an SEC enforcement action. ECF 46 ¶ 1 ("a digital asset security called XRP"); ¶ 291 ("Because XRP is fungible"); ¶ 293 ("The nature of XRP itself made it the common thread among Ripple, its management, and all other XRP holders"); ¶ 353 ("The very nature of XRP"). Frankly, the SEC's unconstrained allegations are likely what caused this Court to grant amicus status in the first place. ECF No. 372 at 5 ("Even if the allegations in the complaint are as far-reaching as [amici] contend").

Since filing the original Complaint (ECF 4), the SEC had multiple opportunities to back-off the extraordinary and unprovable allegations necessitating amici's involvement. Truth be told, had the SEC limited its theory to specific transactions offered by the Defendants, amici may not have been granted amicus status. ECF 86 at 3 (Defendants contending that if the SEC clarified that "the SEC does not seek to establish that XRP is, *per se*, an investment contract, [it] would minimize any interest [amici] have in the outcome of this litigation."); *Id*. at 4 (Defendants stating "[i]f the SEC confirms…that it will not seek to establish that secondary market XRP transactions violate the Securities Act… [amici's] need for participation…may be limited.").

Clearly, the SEC's goal here, and true intention, is to expand its regulatory reach beyond specific sales offered by Ripple and regulate the secondary market. ECF 153 at 24 ("The XRP traded, **even in the secondary market**, is the embodiment of those facts, circumstances, promises, and expectations and today *represents* that investment contract.") (emphasis added). When amici attempted to intervene (ECF 122), the SEC's response confirmed what the Court, itself, quickly recognized: that under the SEC's all-encompassing theory, "every individual in the world who is selling XRP [is] committing a Section 5 violation." *Hr'g Tr.* 44:7-9 (Mar. 19, 2021) (Netburn, J.). Amici curiae respectfully submit this brief because if the SEC is successful in its claims against XRP, the SEC would have the authority to regulate a vast number of non-

parties, including digital asset exchanges, developers, vendors, and ordinary users and holders of XRP, including amici. This would dramatically affect the entire secondary market for XRP and possibly, the entire cryptocurrency market. While the SEC uses this enforcement action as a *test case* for expanding its jurisdictional reach, millions of innocent holders suffer the harm.

I. RELEVANT FACTS PRIOR TO THE SEC ALLEGING XRP IS A SECURITY

A. Decentralized Cryptocurrencies - Like Bitcoin And XRP - Do Not Satisfy Howey.

> Cryptocurrencies (sometimes called tokens or digital assets) are a lawful means of storing or **transferring value** and may fluctuate in value **as any commodity would**. In the abstract, an investment of money in a cryptocurrency utilized by **members of a decentralized community connected via blockchain technology**, which itself is **administered by this community of users** rather than by a common enterprise, is not likely to be deemed a security under the familiar test laid out in *S.E.C. v. W.J. Howey.*

SEC v. Telegram Grp., Inc., 448 F. Supp. 3d 352, 358 (S.D.N.Y. 2020) (emphasis added). When Judge Castel wrote the above passage, he perfectly summarized the application of securities laws to cryptocurrencies and blockchain technologies, like XRP and the XRP Ledger (XRPL). In fact, one would think Judge Castel had XRP in mind because his description and analysis is remarkably accurate. Although XRP has been around for a decade, it was not the world's first cryptocurrency. Bitcoin, created in 2009, was the world's first blockchain cryptocurrency. *See The History of Bitcoin, the First Cryptocurrency*, Deaton Decl. Ex. A. Three years later, three Bitcoin developers set out to build a better Bitcoin and thus, developed XRP and the XRPL. ECF 643 at 4. A blockchain's job is to validate the authenticity of a transfer of a unit of cryptocurrency. 448 F. Supp. 3d at n.2. A blockchain network, like Bitcoin and the XRPL, is an open source, widely distributed, secure ledger of transactions. *Id*. Each blockchain produces a native cryptocurrency. *Id*. The Bitcoin Network produces Bitcoin; the Ethereum Network, Ether; and the XRPL, XRP. Prior to filing this case on former Chairman Clayton's last full day in

charge,[1] he lauded the enforcement actions brought against companies and individuals participating in the offer and sale of securities involving digital assets. *See Selected SEC Accomplishments*: *May 2017 – December 2020*, Deaton Decl. Ex. C ("The SEC brought 57 cases involving ICOs, blockchain or distributed ledger technology, and/or digital assets since the July 2017 issuance of [The DAO Report] regarding the offers and sales of digital assets."). These 57 cases "involved efforts to defraud investors through the use of digital asset securities as well as violations of the registration provisions of the federal securities laws in the offer and sale of digital asset securities." *Id*. This period of time, 2017 to 2020, has been described as the "ICO Craze," wherein dozens of digital assets were introduced to the *Howey* test via an enforcement action. *See Ethereum, the ICO craze of 2017…,* Deaton Decl. Ex. D. Notably, these enforcement actions were being filed while XRP was one of the most known and visible digital assets in the world. By 2015, XRP was so well known and visible, it became the *first* digital asset regulated in the U.S. when FinCEN declared XRP "virtual currency." *See FinCEN Ripple Facts,* Deaton Decl. Ex. E at 1 (stipulating that "Ripple Labs facilitated transfers of virtual currency"). According to the terms, "XRP [was] the second-largest cryptocurrency by market capitalization, after Bitcoin." *Id.* FinCEN, however, was not the first agency to classify XRP as a virtual currency. A year earlier, the Government Accountability Office ("GAO") issued a report highlighting XRP as a "virtual currency" utilized in "a decentralized payment system." *See GAO***,** *Virtual Currencies Report,* 10-12 (**May 2014)**, ("*GAO Report*"), Deaton Decl. Ex. F ("One of the

[1] *See* Former SEC Commissioner Grundfest's Dec. 17, 2020 Ltr. to SEC Chairman Clayton ("*Grundfest Letter*") Deaton Decl. Ex. B (stating no exigency exists for filing this case; warning it will cause "substantial harm to innocent holders of XRP"; that the SEC "has offered no material distinction between Ether and XRP"; that "XRP and Ether should be treated similarly"; and stating that the "mass exodus" immediately following the filing of this case by "every senior staffer" responsible for bringing the case "calls into question the exercise of Commission discretion."

more prominent examples is XRP, which is used within a decentralized payment system called Ripple. Ripple allows users to make peer-to-peer transfers in any currency."). Also in 2015, the Commodity Futures Trading Commission (CFTC), declared: "Virtual Currencies Such as Bitcoin are Commodities." *See Coinflip, Inc. et al*, CFTC Docket No. 15-29, Deaton Decl. Ex. G ("Bitcoin and other virtual currencies are… properly defined as commodities.").

Before becoming Chairman and expanding the SEC's power beyond constitutional norms, Gary Gensler agreed with the *GAO Report* and described XRP as a "*bridge currency*." *See* Gary Gensler comments *at Peterson Institute for International Economics.* ECF 124-2 at 1:30:10. By 2019, XRP had become so well-known to the U.S. Government, it was highlighted again, except this time in the Financial Stability Oversight Council's (FSOC) 2019 Annual Report to the U.S. Treasury. *See 2019 FSOC Annual Report.* Deaton Decl. Ex. H. at 96 ("The market capitalization of digital assets, such as Bitcoin, Ethereum, XRP, and Litecoin, has increased in recent years"). Ironically, former Chairman Clayton is a signatory on the FSOC 2019 Report. *Id.* at 1. Because XRP was never offered in an ICO, was created 5 years *before* the ICO Craze, declared a virtual currency and commodity by the U.S. Government, it is not surprising that XRP was not one of the 57 cryptocurrencies introduced to *Howey* via an SEC enforcement action. XRP was not involved in any of those prosecutions because, for almost a decade before former Chairman Clayton disregarded the *Grundfest Letter*, market participants *generally accepted* that three cryptocurrencies were *not* securities: Bitcoin, Ether, and XRP. *See e.g.* Bailard, Inc.[2] *Code of Ethics*, **January 4, 2021,** at 2-3, Deaton Decl. Ex. I, ("Bailard has decided to allow investments

[2] Bailard Inc., because it is an SEC registered investment adviser and serves as a sub-adviser to certain registered investment companies, is required by the SEC to adopt a code of ethics. *See* Rule 204A-1, Investment Advisers Act of 1940; and Rule 17j-1, Investment Company Act of 1940.

in three cryptocurrencies – Bitcoin, Ethereum, and XRP – that are generally accepted to be currencies and not currently subject to regulation by the SEC.").

B. SEC Confirms Sufficiently Decentralized Digital Assets Are Not Securities.

It is well-established that the SEC "does not contend that Bitcoins transferred on the Bitcoin blockchain are securities." *Telegram,* 448 F. Supp. 3d. at 358. On June 14, 2018, it was also established that the SEC does not consider Ether *and other* equally sufficiently decentralized networks, securities. *See* William Hinman, *Digital Asset Transformations: When Howey Met Gary (Plastic)* ("Hinman Speech"), ECF 124-3 ("[B]ased on my understanding of the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions…there may be other sufficiently decentralized networks and systems where regulating the tokens or coins that function on them as securities may not be required."). After the Hinman Speech, the SEC's next form of guidance also strongly suggested XRP was not a security. *See Framework for "Investment Contract" Analysis of Digital Assets*, ("*Framework*"), ECF 429-4 (stating *Howey* is unlikely met when "a virtual currency…can immediately be used to make payments…or acts as a substitute for real (or fiat) currency.").

C. SEC's Other External Conduct Also Strongly Suggests XRP Is Not A Security.

Until January 16, 2018, "the SEC had no trading policy regarding digital assets." ECF 354 at 1. Around this time, XRP had regained the title of second largest cryptocurrency in the world. *See Ripple (XRP) Overtakes Ethereum…*, Deaton Decl. Ex. J. In fact, Bitcoin, Ether and XRP combined, represented well over 60% of the *entire* cryptocurrency market capitalization. *CoinMarketCap Archive*, Deaton Decl. Ex. K. These "Top 3" digital assets were generally accepted to be currencies, not subject to regulation by the SEC. *See* Ex. I. From amici's perspective, one of the most significant events related to XRP is when XRP was listed and began

trading on the Coinbase platform on February 26, 2019. *See Coinbase announces acceptance of XRP*, Deaton Decl. Ex. L. Although Rule 56.1 statements and exhibits are under seal, publicly available information shows in January 2019, Coinbase met with the SEC and informed the SEC of Coinbase's determination that XRP was not a security and intended to list XRP immediately, unless the SEC disagreed. *See* Ripple Labs Answer, ECF 51 at 98 (discussing the Coinbase meeting with the SEC but identifying Coinbase as "Platform A"); *and* ECF 643 at n.46 (identifying Platform A referenced in the Complaint as Coinbase). The SEC offered no disagreement because Coinbase listed XRP the next month and arguably began promoting XRP and XRP's unique utility on a much greater scale than the Defendants ever did. *See infra* at 24.

In June 2019, a Securities Purchase Agreement between MoneyGram International ("MGI") and Ripple was filed with the SEC. *See Securities Purchase Agreement*, Deaton Decl. Ex. M. This SEC form indicated that Ripple acquired an ownership stake in MGI. *Id.* More significantly, MGI notified the SEC, that "[t]his agreement will enable MoneyGram to utilize Ripple's xRapid product (XRP) in foreign exchange settlement as part of MoneyGram's cross-border payment process." *See MGI Announces Strategic Partnership with Ripple*, Deaton Decl. Ex. N. Hence, the SEC was well aware Ripple would be utilizing XRP to compensate MGI, who would then sell that same XRP into the secondary market to retail holders, like amici. *See* MGI February 24, *2020 Earnings Report*, Deaton Decl. Ex. O ("Revenue excludes $8.9 million of benefit from Ripple, which will be accounted for as a contra expense rather than revenue **based on a recent consultation with the SEC**.") (emphasis added). From amici's perspective, similar to the Coinbase listing, the MGI deal and its use of XRP, was very significant. If it was clear that XRP was a security, the SEC would have never allowed these so-called unregistered securities to flood the public market. Yet, at summary judgment, the SEC's theory is that all XRP sales - past,

present, and future - regardless of the seller - Ripple, Coinbase, MGI, or Amici - are securities. A truly remarkable claim.

Until filing this case, the SEC *always* provided exactly the same answer for Bitcoin, Ether and XRP, never making a material distinction between them. In October 2020, the SEC informed the public, that it had not determined XRP to be a security and that it may never do so. *OIEA Emails,* Deaton Decl. Ex. P. In other words, two months before this case was filed, and prior to the "mass exodus of every senior staffer responsible for [this] major enforcement decision", XRP was treated no differently than Bitcoin and Ether. *Id*., *Grundfest Letter* at 2.

II. UNPRECEDENTED ALLEGATIONS CAUSE UNPRECEDENTED LITIGTION

A. Amici's Writ of Mandamus. Although the SEC purportedly filed this case to protect amici and other XRP Holders, the SEC has opposed amici at every turn. ECF 85, 153, 556. It even attacked amici's counsel - twice. ECF 153 at n.2, 556. The SEC has only itself to blame for amici's involvement, including the involvement of other amici curiae. ECF 649, 660, 661, 681-1, 683, 684. Candidly, the SEC's legal theory regarding XRP is likely the most overbroad far-reaching claim ever made in a non-fraud enforcement action. Simply put, since *Howey*, there has not been a single case where an investment contract has been found and there exists no privity whatsoever between the buyer and the promoter. Yet, according to the SEC, every purchase of XRP "is an investment in a common enterprise with other XRP holders and with Ripple." ECF 640 at 2. The SEC's theory first appeared in the original Complaint (ECF 4), filed on December 22, 2020. Almost immediately, on January 1, 2021, amici filed a Writ of Mandamus requesting the SEC "amend its complaint against Ripple to exclude the claim that the XRP owned by [amici] constitute securities." Pet. for Writ of Mandamus ¶ 89, ECF 1 at 26, *Deaton v. Roisman*, Case No. 1:21-cv-00001-WES-PSS (D.R.I. Jan. 1, 2021) ("Writ"). At its core, the Writ

challenged the SEC's good faith basis alleging that XRP is a security *per se*. ECF 4 ¶ 1 ("a digital asset security called XRP"); ¶ 267 ("The nature of XRP itself"); ¶ 327 ("The very nature of XRP"). After being served with amici's Writ, the SEC *doubled down* on its theory and filed the Amended Complaint ("AC"), re-asserting the same allegations. ECF 46 (¶ ¶ 1; 293; 353). The Court itself probed the SEC regarding its implausible theory. *Hr'g Tr*. 44:7-9 (Mar. 19, 2021) ("Presumably under this theory then, every individual in the world who is selling XRP would be committing a Section 5 violation based on what you just said."). The SEC could have "confirm[ed] that its suit is not intended to affect the secondary retail market for XRP in the United States." ECF 86 at 4. Instead, the SEC acknowledged that its theory on XRP *may not be validated* by this Court. *See* Writ at 12 (The "[SDNY] supplies the exclusive method for ***testing*** the validity of the Commission's complaint") (emphasis added).

B. Amici's Motion To Intervene. The SEC was provided yet another opportunity to clarify its theory. In fact, defense counsel's response to amici's motion letter (ECF 75) stated: "**The SEC Must Clarify Its Theory**." ECF 86 at 3 (original emphasis). In short, "[i]f the SEC [had] confirm[ed]…it [would] not seek to establish that secondary market XRP transactions violate the Securities Act…[amici's] need for participation…may be limited." *Id*. at 4.

C. The SEC Responds That All XRP, Including Amici's XRP, Are Securities. In response to amici's Motion to Intervene (ECF 122) and Defendants' letter (ECF 86), the SEC *tripled down* on its implausible theory and remarkably declared: "The XRP traded, **even in the secondary market**, is the embodiment of those facts, circumstances, promises, and expectations and **today represents that investment contract**." ECF 153 at 24 (emphasis added). In part, because of that remarkable declaration, this Court granted amicus status. ECF 372. When it granted amicus status to six individual XRP holders, this Court acknowledged that never before

had there been a case where thousands of individual asset holders[3] petitioned a Court, requesting an order for the SEC to sue and name them as defendants in a pending action. *Id.* at 5

III. AMICI CURIAE'S INTEREST

A. Amici's Interest. This Court already determined six individual XRP holders, representing a broader public interest, "shall be permitted to act as amici curiae in this action." *Id*. at 11. This Court "contemplate[d] that such assistance [would] be most beneficial during briefing on dispositive motions." *Id.* Thus, this Court found that amici hold a significant interest in the outcome of this case. *Id.* In fact, this Court "views the amici briefs as desirable because [amici] represent third parties whose particular interests may be affected by the Court's ruling and whose particular interests are echoed in broader public interests." *Id*. at 10.

B. Section 4 Exemptions Do Not Protect Amici's Interests. When the Court probed the SEC over its theory that every individual in the world selling XRP is violating the law, the SEC did not dispute the premise of the Court's question. *Hr'g Tr.* 44:7-24 (Mar. 19, 2021) ("That's not quite correct, your Honor…Section 4 specifically exempts these transactions that the court put in the hypothetical of all these other people [i.e. amici] buying and selling XRP in the market."). Section 4 exemptions *only* apply to a security subject to registration under Section 5. *SEC v. C.M. Joiner Leasing Corp.,* 320 U.S. 344 (1943) at n.3 ("They had to be securities to be exempt securities under the Act." (citing 15 U.S.C. Sec.77c)). In short, the SEC confirmed

[3] XRP Holders are a putative class, from the United States and 143 countries from around the world, of users, investors, holders, developers, content providers and small businesses who acquired and utilize XRP and the XRP Ledger, most of whom were completely unaware of Ripple or its executives when acquiring XRP. ECF 665-1-26. When amici filed ECF 123, over 12,600 XRP Holders requested to join. ECF 123 at n.1. All parties opposed class-certification and due to concerns of delay, the Court instead, granted amicus status to six individual XRP holders. ECF 372 at n.1. Today, the putative class stands at 74,502 XRP holders. Although the public interest in this case cannot be overstated, amici continue to act in their individual capacities.

that - regardless of the seller or circumstances surrounding the sale - *XRP is always a security*, including the XRP owned by amici - a claim stretching *Howey* beyond recognition.

C. Exemptions Are Amici's Burden. If XRP are securities "the burden shifts to [amici] to show that the securities [are] exempt from the registration requirement." *S.E.C. v. Cavanagh*, 155 F.3d 129, 133 (2d Cir. 1998). Section 4(a)(1) exempts "transactions by any person other than an issuer, underwriter, or dealer," while 4(a)(2) exempts "transactions by an issuer not involving a public offering." 15 U.S.C. § 77d(a)(1)-(2). Section 2(a)(11) defines "underwriter" as "any person who has purchased from an issuer with a view to . . . the distribution of any security." *Id.* Thus, any holder with an intent to sell, could be deemed an issuer or underwriter. *Id.* Exchanges, like Coinbase, by definition, constitute an issuer, underwriter or dealer, which likely explains why the SEC is pursuing its breathtakingly overbroad theory in this case - clearly a ***test*** case - attempting to expand the SEC's jurisdictional reach into a new emerging asset class. *See Gensler Comments Insisting Crypto Platforms Register with the SEC*, Deaton Decl. Ex. Q, R, S.

IV. LEGAL STANDARDS AND LAW TO BE APPLIED

A. Summary Judgment. The SEC's motion for summary judgment must be denied because the SEC has failed to show that no genuine issue of material fact exists. Fed. R. Civ. P. 56(a). All reasonable inferences must be drawn in the Defendants' favor. *Giannullo v. City of New York*, 322 F.3d 139, 140-41 (2nd Cir. 2003).

B. The "Character in Commerce" Test. Considering the inherent characteristics of the underlying asset (XRP) is critical *before* conducting a *Howey* analysis. *Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1034 (2d Cir. 1974). "The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect." 320 U.S. at 352-53. The bottom line is

that "[w]hen a purchaser is motivated by a desire to use or consume the item purchased…the securities laws do not apply." *United Hous. Found, Inc. v. Forman*, 421 U.S. 837, 852 (1975).

C. The Howey Test. An investment contract is "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." 328 U.S. at 298-99. Thus, the three *Howey* factors are "(i) an investment of money (ii) in a common enterprise (iii) with profits to be derived solely from the efforts of others." *Revak v. SEC Realty Corp.*, 18 F.3d 81, 87 (2d Cir. 1994).

V. ARGUMENT

A. The Token Itself Is Never The Security. Fellow Amicus Digital Chamber of Commerce ("DCC") avowed that "there is no precedent that analyzes whether an underlying asset of an investment contract is itself a security." ECF 649 at 3. The reason there is no precedent, is because the underlying asset, *in an investment contract,* is *never* the security. *Howey*, 328 U.S. at 301 ("If that test be satisfied, it is immaterial… whether there is a sale of property with or without intrinsic value."); *Telegram,* 448 F. Supp. 3d at 379 ("the security…is not simply the Gram, which is little more than alphanumeric cryptographic sequence."). The same *must* be said about XRP. ECF 640 at 10 ("Stripped down, XRP is just computer code."). Claiming the token itself is the security is akin to calling the oranges, in *Howey,* the securities. In *Telegram*, the Court made it clear that the central issue in *Howey* and *Telegram* was not the underlying product, agreement, or the underlying asset. *Id*. The Court confirmed that the underlying asset (whether oranges or digital tokens) are not themselves investment contracts. *Id*. Any doubt or confusion regarding whether the Court considered the token itself a security was laid to rest when Judge Castel issued a second ruling in *Telegram*. 2020 WL 1547383 at *1 (clarifying that the central point of the Court's holding was that "the 'security' was **neither the**

Gram Purchase Agreement *nor the Gram*.") (emphasis added). In *Telegram*, there existed *actual written contracts* between the promoter and the investors, yet the underlying written contract, itself, was not the security. *Id.* Considering *Telegram* involved a pure ICO, with a blockchain yet to be built, if there ever existed a case where the token itself constituted the security, it would be *Telegram*. However, the Court made it crystal clear that the underlying asset, in an investment contract, is not the security. *Id.* In addition to disregarding precedent spanning from 1946 (*Howey*) to 2020 (*Telegram)*, the SEC's farfetched XRP theory also contradicts the SEC's own guidance. The most litigated piece of evidence in this case, the Hinman Speech, is instructive. Director Hinman unequivocally stated: "the token – or coin or whatever the digital information packet is called – **all by itself** is not a security, just as the orange groves in *Howey* were not." *Hinman Speech* (emphasis added). Director Hinman also noted "the digital asset itself is simply code." *Id*. Director Hinman emphasized "that the analysis of whether something is a security is not static and does not strictly inhere to the instrument." *Id.* Just like any other commodity, "investment contracts can be made out of virtually any asset (including virtual assets)." *Id*. Former Chairman Clayton agreed. *See Mar. 7, 2019 Ltr. from Chairman J. Clayton to Congressman Ted Budd,* ECF 124-5 ("I agree that the analysis of whether a digital asset is offered or sold as a security is not static and **does not strictly inhere to the instrument**.") (emphasis added). Even more significant, the SEC's 2019 *Framework* stated that a virtual currency being utilized in payments – the very thing XRP was designed to do - is unlikely to satisfy *Howey.* ECF 429-4.

The Hinman Speech and the *Framework* made perfect sense considering 76 years of caselaw has shown that practically any asset or commodity can be offered as a security, whether that asset be orange groves, whiskey, chinchillas, condos, beavers, or Bitcoin. *See Howey*, 328 U.S.

293 (1946); *Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1034 (2d Cir. 1974); *Miller v. Cent. Chinchilla Grp., Inc*., 494 F.2d 414 (8th Cir. 1974); SEC Rel. No. 33-5347 (Jan. 4, 1973); *Kemmerer et al. v. Weaver et al*., 445 F.2d 76 (7th Cir. 1971); and *SEC v. Shavers*, 4:13-cv-00416, 2013 WL 4028182, Aug. 6, 2013, respectively. When an asset is offered and sold as an investment contract, therefore a security, it does not transform the underlying asset itself into a security. Oranges remain oranges and XRP remains XRP – digital code. Therefore, even if Ripple offered XRP as a security - *related to specific transactions* – XRP would still remain exactly what multiple government agencies classified it as, in 2014, 2015, and 2019 - a decentralized virtual currency.

B. The SEC Claims XRP Itself Is A Security. From the filing of the original complaint (ECF 4) to the motion for summary judgment (ECF 640, 674), and filings in-between (ECFs 153, 556), the SEC has consistently argued XRP itself is a security. Although the SEC admits that "*Howey* requires courts to look at the economic reality **of a transaction**" (ECF 640 at 2) (emphasis added), and, that the SEC must prove *specific transactions* offered by Ripple violated Section 5 of the Securities Act, the SEC *is not pursuing specific transactions*. Instead, it is asking the Court to rule that every XRP transaction is either a section 5 violation or qualifies for an exemption under Section 4. ECF 556 at Fn.2. The SEC asks this Court to validate its shorthand and analytically lazy contention that Ripple has engaged in the functional equivalent of a nine year-long, on-going, 24/7 ICO, and that each and every sale of XRP, from anywhere in the world, offered by anyone, including amici, was, is, always has been, and always will be, the offer and sale, of a security. ECF 640 at 49-50 ("a purchase of XRP **was** an investment of money into a common enterprise with other XRP investors and with Defendants.") (emphasis added); *Id.* at 2 ("a purchase of XRP **is** an investment in a common enterprise with other XRP holders and with

Ripple.") (emphasis added); *also,* ECF 153 at 24 ("The XRP traded, **even in the secondary market**…**today *represents*** that investment contract.") (emphasis added). The SEC's XRP theory is so farfetched, it travels through space and time, into the future, capturing all possible future sales, even in far-away lands. ECF 46 ¶ 391 ("Even if some country were to recognize XRP as fiat "currency" **at some point in the future**, that would result from Defendants' significant entrepreneurial and managerial efforts to date (**and likely in the future**), **on which public investors expecting profit relied when making an investment** of money into Defendants' common enterprise.") (emphasis added). The scope of the SEC's *Howey* argument has become so stretched that it is truly indefinable, in space, or in time. As discussed, *infra* at 23-24, the SEC asks this Court to assume private statements made by Ripple employees many years ago, to a handful of individuals, equals evidence that Ripple offered XRP to the world. The SEC is not allowed to shortcut the *Howey* analysis by alleging each and every sale of XRP from the beginning of time until the end of the world, meets all three *Howey* prongs, and therefore, doesn't have to offer specific transactional evidence. The *Howey* test must be applied to each transaction and "examined as of the time that the transaction took place." *S.E.C. v. Aqua–Sonic Prods. Corp.*, 524 F. Supp. 866, 876 (S.D.N.Y. 1981). Instead, the SEC argues: "[t]he XRP traded, even in the secondary market, is the embodiment of those facts, circumstances, promises, and expectations, and today represents that investment contract." ECF 153 at 24. Notably missing at the end of that sentence is a single cite to any precedent or authority supporting such an inimitable claim. *Id*. Amici, and likely the SEC itself, have no idea what that sentence means under the law. The SEC's theory is the equivalent of arguing individual *oranges* were not only oranges, but also *represented* the investment contract with the W.J. Howey Company. The SEC's theory would be a bit amusing, if innocent holders weren't being severely harmed.

C. SEC Offers No Precedent Supporting Its Theory And Abandons Its Expert. The SEC has offered no precedent supporting its representation theory. Because no precedent exists, the SEC's original intent was to rely on the rank speculation of an alleged expert ("Expert One"), who failed to interview a single XRP holder before forming his opinions. ECF 555 at n.1 The SEC intended to rely on Expert One to try and prove today's XRP, traded in the secondary market, *represents* an investment contract with Ripple. ECF 153 at 24. After significant litigation regarding Expert One (ECF 489, 555, 556, 567, 572), including the SEC's request for the Court to bar the undersigned from continued participation (ECF 556 at 4), the SEC chose not to rely on the opinions of Expert One. The SEC's reversal speaks volumes. According to the Court's scheduling Order (ECF 620), Rule 56.1 statements, exhibits and supporting documents remain sealed. The evidence available to amici, however, reveals why the SEC chose not to rely on this alleged expert –which serves as *a fatal blow to the SEC's case*. The SEC offers no evidence related to knowledge or conduct attributable to amici or any XRP holders. *See* ECF 556-8 at 4, line 24 (SEC expert testifying that he "didn't interview [XRP] purchasers"); *Id*. at lines 17-18 (SEC expert admitting that he "would need to do a lot more work analysis" upon learning that XRP holders, like amici, "acquired XRP because it was a top 10 cryptocurrency by market cap and listed at a lower price compared to others, not because of anything that Ripple said or did"); *Id.* at 5, lines 20-23 (SEC expert admitting that he "**might have come to a different conclusion**" upon learning that XRP holders acquired XRP for noninvestment purposes, such as to pay for goods and services or to use as a substitute for fiat currency); *see also* XRP Purchaser affidavits (ECF 665-1-26). The AC has entire sections dedicated to XRP holders/purchasers. *See e.g.,* ECF 46 at 50-51. Yet, at summary judgment, the SEC avoids any evidence regarding XRP purchasers. It avoids such evidence because it destroys the false narrative being presented by the SEC.

D. XRP's Utility And Non-Investment Use Is A Material Fact In Dispute. Instead of satisfying *Howey's* three prongs, the SEC asks this Court to declare, *as a matter of law*, all *Howey* prongs satisfied because Ripple sold XRP, for investment, to certain individuals (likely accredited investors) and undertook efforts to promote XRP. ECF 640 at 49 ("Defendants' statements and efforts as to XRP… establish the other aspects of the Howey test as a matter of law.") (citations omitted). The SEC literally asks this Court to skip over conducting an analysis of the second and third prongs of the *Howey* test – a truly remarkable ask. Even worse, the SEC, has failed to meet its burden regarding *Howey's* first prong. Throughout this case, the SEC has failed to take into account the non-investment use of XRP. ECF 46 at 63 (**"No Significant Non-Investment 'Use' for XRP Exists"**) (original emphasis). No single statement offered by the SEC could be further from the truth. While the SEC remains in a stage of perpetual denial, the rest of the world, including the Court, accepts XRP's unique utility. ECF 673 at n.50 (Japan, Switzerland, Singapore, the United Arab Emirates (UAE), and the United Kingdom (U.K.) have all declared XRP a currency - not a security.); *also*, *Hrg Tr*. at 11:4-7 (Mar. 19, 2021) ("My understanding of XRP is that not only does it have a sort of currency value, but it also has a utility, and that utility distinguishes it, I think, from Bitcoin and Ether.") (Netburn, J.). Disturbingly, despite the overwhelming and indisputable evidence to the contrary, the SEC disputes XRP's utility. *Id.* at 51:15-16 ("Now, the court referenced a utility for XRP. We dispute whether that utility actually exists, your Honor."). The *truth* is that amici, and millions like amici, use XRP for non-investment purposes. ECF 655-1-26. By asking this Court to find, as a matter of law, that all past, present and future sales of XRP are securities, the SEC wants this Court to ignore the millions of times XRP is used each day, as well as ignore all the non-investment acquisition of XRP. The SEC asks this Court to disregard companies like TapJets

(ECF 661), I-Remit (ECF 660) and SpendTheBits (ECF 684); and, of course, ignore the nearly three thousand XRP Purchaser affidavits. ECF 655-1-26. Since the 2014 *GAO Report*, the SEC has known that XRP is utilized "within a decentralized payment system" allowing "users to make peer-to-peer transfers." *GAO Report*. XRP holders have been utilizing this peer-to-peer decentralized payment system ever since. *See The XRP TipBot Lives,* Deaton Decl. Ex. T. (Describing the XRP TipBot as a "multi-platform application that monitors social media posts on Twitter, Reddit, or Discord, and allows one person to send another person XRP…The XRP TipBot has also been used for good, helping many charities."). According to the SEC's outlandish theory, those who received XRP as tips, for providing social media content, and the charities accepting XRP, are all holding unregistered securities and if they intend to sale the XRP they receive, they may need to prove a Section 4 exemption. Thousands of vendors, like Time Magazine, accept XRP as a form of payment or medium of exchange. *See Time Magazine Accepts Bitcoin and Other Crypto*, Deaton Decl. Ex. U ("Time will accept all cryptocurrencies currently supported by Crypto.com Pay [including] bitcoin, ether, dogecoin, XRP and Litecoin"); *Pay with XRP*, Deaton Decl. Ex. V (listing 1,500 plus companies, stores, services **accepting XRP as a payment** and helping XRP Holders, "[f]ind where to spend [their] XRP."); *see also* ECF 684 (showing how XRP is utilized to spend Bitcoin). Incredibly, the SEC writes: "And Ripple specifically *did not target* those who might view XRP as a currency." ECF 640 at 57 (original emphasis). The SEC emphasizes the fact that "Garlinghouse explained in multiple public interviews: '[T]hese aren't currencies…I can't buy coffee with XRP.'" *Id*. Yet, it is an indisputable fact that amici and millions like them, acquire and use XRP as a form of currency, including *to buy coffee*. *See Introducing The XRP Mastercard Debit Card,* Deaton Decl. Ex. W. (explaining the XRP Card is the first ever decentralized community-linked debit card of its kind,

available exclusively to members of the XRP community and accepted wherever Mastercard is accepted, while earning up to 5% cash back in XRP rewards); *Uphold XRP Debit Card*, Deaton Decl. Ex. X. (explaining that the XRP Uphold Debit Card will be accepted globally wherever Mastercard is accepted); *also*, *FTX Partners with Visa to offer XRP And BTC to Millions of Users*, Deaton Decl. Ex. Y ("This means that digital assets like XRP and Bitcoin are now available to Visa's large customer base to conduct transactions without having to convert crypto to fiat or actually having to withdraw the crypto from the exchange. As a result, this is a significant milestone that will boost the adoption of **crypto assets like XRP to be used for every-day transactions**.") (emphasis added). XRP debit cards, provided by MasterCard and Visa would not exist if XRP wasn't considered a currency or medium of exchange. To be granted summary judgment, the SEC must prove no dispute exists regarding the non-investment use of XRP. *Forman*, 421 U.S. at 852. *Telegram*, again, is instructive. To prove non-consumptive intent, in *Telegram*, the SEC relied on the **same expert** it has abandoned in this case. 448 F. Supp. 3d at 373. Judge Castel held that "a rational economic actor would not agree to freeze millions of dollars for up to 18 months…if the purchaser's intent was to obtain a substitute for fiat currency." *Id.* (*citing Expert One's Report* ¶ *5*). In this case, the SEC offers no similar evidence proving non-consumptive intent. Defendants, on the other hand, submitted affidavits of XRP holders from the U.S. and abroad. ECF 655-1-26. *All* of the nearly three thousand XRP holders, represented in the affidavits, acquired XRP in the secondary market - not from Ripple or its executives. *Id.* The affidavits provide this Court with a complete picture of the truth and utterly destroys the false narrative promulgated by the SEC. *Id.* The SEC previously provided this Court with copies of unsigned affidavits, along with declarations and exhibits associated with the affidavits. *See* ECF 556-1, 556-10. The XRP purchaser affidavits establish

critical points for the Court's consideration regarding: (i) whether securities laws even apply to XRP transactions; and (ii) if certain XRP transactions fall within the scope of securities laws, the affidavits provide important factors to consider when conducting a *Howey* analysis.

The affidavits show, in addition to acquiring XRP for investment purposes, many holders acquired XRP for non-investment reasons. ECF 655-1-26. XRP was acquired for use as a form of currency utilized to pay for goods and services. *Id*. For example, XRP has been used for payroll in the U.S. and abroad. *See Crypto Payroll Tool,* Deaton Decl. Ex. Z (reporting how Deel, a company partnered with Coinbase, launched a crypto-payroll service allowing international workers to be paid in Bitcoin, Ether, *and XRP*). The XRP holder affidavits include people who, prior to this lawsuit, received their paycheck in XRP. As an example, a company called BitPay, launched a massive crypto payments service for businesses in 225 countries allowing people to be paid in certain cryptocurrencies including Bitcoin, Ether, **XRP**, Litecoin, Bitcoin Cash and others. *See Connecting with Bitpay*, Deaton Decl. Ex. AA. Because of the grossly overbroad allegations asserted by the SEC, Bitpay today, only offers XRP payments outside of the United States. *Id.* In short, some international XRP holders, represented in the XRP purchaser affidavits (ECF 655-1-26), withdraw their paychecks in XRP because XRP is utilized as a substitute for fiat currency. *Id*. Included in the purchaser affidavits (ECF 655-1-26), are international XRP holders, being paid in XRP, living in Japan, Switzerland, Singapore, the United Arab Emirates (UAE), and the United Kingdom (U.K.). *Id*. In every one of those countries, XRP was evaluated by foreign regulators and declared a currency - not a security. ECF 673 at n.50. Yet, according to the SEC, these workers receiving XRP for pay, living in a country where their regulator designated XRP a non-security, is in a common enterprise with Ripple and all other XRP holders in the world, and must prove to the SEC that a Section 4 exemption

applies, if they use their XRP in the U.S. The SEC's argument is truly irrational. The XRP purchaser affidavits also include holders who acquired XRP to establish a trust-line on the XRPL, to send value, utilizing XRP as a bridge currency and to access the XRPL's decentralized exchange (DEX), as described in the SpendTheBits brief. ECF 684 at 3-6. Simply put, the non-investment acquisition of XRP creates a material issue of fact.

E. The SEC Has Failed To Establish Or Even Identify A Common Enterprise. The Defendants' opposition brief discusses how the SEC has shifted its theory regarding the common enterprise XRP holders allegedly "bought into." ECF 675 at 19-21. In sum, the SEC has struggled to pinpoint a viable common enterprise in this case. The SEC's struggle is understandable considering the SEC has admitted that it ignores *Howey's* pesky second prong when applied to digital assets. *See Framework* at n.10 ("The Commission, on the other hand, does not require vertical or horizontal commonality *per se*, nor does it view a 'common enterprise' as a distinct element of the term 'investment contract.'"). Whenever the SEC struggles to reconcile its own position (which is often), it always falls back on "the token itself" as its catchall answer. Discussed earlier, the SEC's theory is that "XRP traded, even in the secondary market…represents [the] investment contract." ECF 153 at 24. Incredibly, the SEC not only argues that XRP represents the investment contract, but that it also represents the common enterprise. ECF 640 at 17 ("The escrow account's purpose was to remind investors of the common enterprise XRP represented."); *Id*. at 63 ("Ripple offered and sold XRP, for money, as a common enterprise"). According to the SEC, since it represents both the common enterprise and investment contract, any purchase of XRP automatically satisfies all prongs of *Howey*. ECF 640 at 49. The SEC's obsession with focusing on the token, and not on the circumstances surrounding the offering as a whole, allows the SEC to sidestep a legitimate *Howey* analysis. The

SEC's unconstitutional shortcut was criticized by Commissioner Hester Peirce. *See* Mar. 9, 2021 Hester Peirce Interview, *Thinking Crypto* ECF 124-8 at 18:58 ("We tend at the SEC **to talk about the token itself as a security** and that's really a shorthand…**what we've done now** is said that orange groves are kind of like the security.") (emphasis added). Focusing on the token itself, the SEC argues XRP meets the second and third prongs of *Howey* "as a matter of law." ECF 640 at 49. The SEC's argument takes unconstitutional bootstrapping to the highest level. The SEC is forced to argue XRP is the common enterprise because its expert "pivoted, pointing instead [of Ripple] to an amorphous 'XRP 'ecosystem' as the supposed common enterprise." ECF 675 at 20. Considering the SEC is no longer relying on its expert, it cannot satisfy *Howey's* second prong. The Defendants, on the other hand, have provided affidavits which establish that the majority of first-time purchasers, who acquired XRP as an investment, were unaware of a company named Ripple, selling software to banks. ECF 655-1-26. XRP investors affirm that they "did not believe they were acquiring a legal or financial interest in Ripple when acquiring XRP." *Id*.

The SEC conflates common enterprise with common interest. ECF 640 at 15. It asks the Court to substitute the latter for the former. The word "align(ed)" appears 22 times in the SEC's brief. ECF 640 at 2, 14-19, 24, 39, 50, 52-53, 61-62. But an alignment of interests is not enough to satisfy the common enterprise factor. *Bobrowski v. Red Door Grp., Inc*., 2011 WL 3875424, at *1 (D. Ariz. Aug. 31, 2011). If the Court were to adopt the SEC's argument, the SEC could substitute any cryptocurrency for XRP, and the same argument would apply. Then again, maybe that is the SEC's ultimate goal here because clearly, enforcing U.S. securities' laws, are not.

F. The SEC Cannot Prove Howey's Third Prong. To meet *Howey's* third prong, the SEC must prove XRP holders, like amici, had a reasonable expectation of profits derived from Ripple's efforts**.** 421 U.S. at 852. The evidence currently available in the public record, proves

the SEC cannot satisfy *Howey's* third prong. *See* ECF 556-8 at 6-7 (SEC expert admitting he "did not interview specific XRP purchasers or **attempt to validate" XRP holder's reliance on Ripple**) (emphasis added). Without evidence or an expert to establish a link between Ripple's efforts and the acquisition of XRP, the SEC cannot prevail at summary judgment. Although the SEC admits that "*Howey* requires courts to look at the economic reality of a transaction" (ECF 640 at 2), it does not attempt to establish each *Howey* factor with respect to any particular transactions. The failure to do so proves fatal to their motion for summary judgment because each transaction "must be examined as of the time that the transaction took place." *Aqua–Sonic Prods. Corp.*, 524 F. Supp. at 876. More troubling, is that the SEC references statements made by the Defendants almost a decade ago and then pretends that those statements led or induced present day XRP purchasers to acquire XRP in the secondary market. The SEC literally offers Tweets from April 2013, by Ripple, promoting Ripple and XRP price increases. ECF 640 at 12. However, not one of amici's six-individual XRP holders were on Twitter in 2013. The SEC refers to three documents from 2013 and 2014 as evidence of an aggressive marketing campaign promoting Ripple and XRP. *Id*. One example, involves the Gateways brochure that was sent to "at least 100 people." *Id.* The SEC has failed to demonstrate whether *those* 100 or so individuals, *who actually received the Gateways brochure,* were led to expect profits from Ripple's efforts, let alone prove anything related to present day holders. The SEC writes: "[i]n February 2017, Larsen and Miguel Vias…encouraged *an XRP investor* to think of XRP's potential appreciation over the long-term, including based on Ripple's entrepreneurial efforts." *Id.* at 20. Arguably, because there is at least some level of privity, communication and contact between Ripple and those identified in these isolated examples, the SEC could attempt to establish each *Howey* factor with respect to these specific transactions. The SEC does not! Instead, the SEC offers this decade

old marketing material in support of its request to classify every sale of XRP, past, present and future, as an investment contract with Ripple. There is no evidence that the information Ripple provided, many years ago, ever reached XRP holders, who then considered Ripple, or its management team, before acquiring XRP in the secondary market. From amici's perspective, companies, unrelated to Ripple, promoted XRP much more significantly. *See Coinbase Ad* Deaton Decl. Ex. BB (advertising the ability to "[s]end money across borders virtually instantly using XRP or USDC" and allowing **users** to experience "[n]o fees to send or receive XRP or USDC to another Coinbase account"). In the secondary market, it was Coinbase, and others, who exploited XRP's independent utility, attracting customers by offering them the ability to "[s]end money internationally for free." *Id.* Coinbase, **not Ripple**, promoted that it was expanding **Coinbase's business** into cross-border payments. *See Coinbase Expands into Cross Border Payments Using XRP & USDC,* Deaton Decl. Ex. CC. The SEC also references how Ripple undertook efforts to inform the public how to acquire XRP. ECF 640 at 33 ("Ripple listed on its website crypto trading platforms that traded XRP."). The SEC, however, offers no evidence that such efforts by Ripple led to a single transaction. The SEC asks this Court to *assume* a causal connection even though XRP was one of the Top 3 most popular digital assets in the world, and financial news outlets were encouraging and showing investors and users how to acquire XRP. *See* CNBC's *How to buy XRP, one of the hottest bitcoin competitors,* Deaton Decl. Ex. DD (walking viewers through the process of how to acquire XRP **by first acquiring Bitcoin or Ether**); *see also*, *XRP Can Now Be Easily Bought in Europe Straight From Bank Account*, Deaton Decl. Ex. EE (explaining how in the Netherlands XRP can be easily bought straight from a person's bank account.). Even assuming that the Court accepts the marketing efforts by Ripple as statements or promises intended to induce XRP holders to purchase XRP, there is no evidence

regarding the reasonable perspective of XRP purchasers who acquired XRP in the secondary market. The SEC writes: "*Howey* is an objective test" and "[c]ourts evaluate the 'entirety of the parties' understandings and expectations'" ECF 640 at 5. Yet, the SEC offers no evidence of the "understandings and expectations" of amici and all other XRP holders. Again, each *Howey* factor must be satisfied for each transaction and each transaction "must be examined as of the time that the transaction took place." 524 F. Supp. at 876. If underlying contracts, like the ones in *Kik or Telegram*, or some written communication constituting an offer**,** like in *Joiner*, existed between Ripple and specific XRP purchasers, thus establishing some level of contact or privity between them, then *maybe* the SEC could rely solely on Ripple's statements and efforts when applying an objective standard. But before this Court can evaluate the entirety of the parties' understandings and expectations, it requires some level of privity to exist between Ripple and the purchaser. Amici's extensive research has not found a single case where an investment contract was found absent some level of privity or contact between the promoter and the buyer. In sum, the SEC cannot offer this Court a single citation in 76 years of caselaw, handed down from the Supreme Court, or any federal appellate court within the U.S., where an investment contract was found when there existed absolutely no contact or privity between the promoter/seller and the purchaser. In fact, *every single case* the SEC cites in its motion papers (ECF 640, 674), involves actual contracts, express or implied, written or oral, between the promoter and the purchaser. Yet, even in cases where there were actual contracts between the promotor and the purchaser, the SEC often relies on expert testimony to provide a causal link, establishing the purchaser's reasonable expectation of profits derived from the promoter's statements and efforts. For example, in *Telegram*, to establish a reasonable expectation of profits derived from the promoter, the SEC relied on the *same expert* it discarded in this case. 448 F. Supp. 3d at fn.11 (**Citing**

Expert One's report at ¶ 28 establishing that the Gram token purchasers expected profits derived from Telegram's efforts because no consumptive intent or use existed).

In sum, the SEC has failed to show that XRP purchasers relied on Ripple's efforts. If anything, the SEC's own argument proves the exact opposite to be true. According to the SEC, Ripple failed to find a "use for XRP until the ODL product, which did not occur until 2018." ECF 674 at 45. Even worse, Ripple "did not sell XRP for its purported 'use' to any ODL customer until mid-2020." *Id*. According to the SEC, in 2012 "no use case existed" for XRP. ECF 46 ¶ 396. Thus, it took Ripple over 6 years to find a "use" for XRP and 8 years to make its first sale of XRP for "its purported use." ECF 674 at 45. No XRP holder could have a reasonable expectation of profits based on those efforts. The SEC's argument here, demonstrates a fundamental misunderstanding of how an open permission-less decentralized distributed ledger blockchain technology operates and functions. While Ripple was spending years attempting to disrupt an entrenched half-century old legacy banking system, XRP holders, comprising of users, developers, vendors, merchants, content distributors, and small businesses, like TapJets (ECF 661) and SpendTheBits (ECF 684) were developing independent use cases for XRP. *See e.g., XRPL Uses*, Deaton Decl. Ex. FF (listing companies and developers "around the world that leverage the XRP Ledger to solve interesting problems across a variety of industries and use cases."). The XRP purchaser affidavits demonstrate that XRP holders "do not need to rely on the efforts of Ripple to generate a profit or to receive any financial benefit." ECF 655-1-26. XRP holders explain how they receive a financial benefit - independent of Ripple - by owning XRP itself. *Id.* XRP holders explain how they "utilize [their] XRP as collateral to obtain financing" for a fiat loan or they "stake (i.e., loan) [their] XRP on digital trading platforms (i.e., Nexo, Celsius, Bitrue, and/or other trading platforms)." *Id*. XRP holders explain that by "staking/loaning [their]

XRP on these platforms, [they're] able to earn interest and/or receive additional compensation." *Id*. In short, the token itself generates a benefit to the holders by loaning or collateralizing their XRP. *Id*.; *see also, Binance Earn,* Deaton Decl. Ex. GG (offering 1-4% APR for staking XRP); *also*, *CoinLoan,* Deaton Decl. Ex. HH (stating "Get a loan backed by your XRP" at "4.9% annually"). The ability to loan or collateralize XRP requires denial of the SEC's summary judgment because the Supreme Court made clear that when a buyer "(has) been left to (its) own devices for realizing upon (its) rights" there is no investment contract. 320 U.S. 344 at 348. The SEC fails to understand, that if Ripple ceased to exist, XRP, XRP holders, and companies, like SpendTheBits (ECF 684) could flourish. In fact, if Ripple's XRP escrow were burned or confiscated, basic supply and demand economics suggests a price increase for XRP (assuming half of the existing supply were destroyed). In short, individual holders and businesses within the XRP ecosystem, could benefit in Ripple's demise. *See* ECF 684 ("[I]f STB were to scale, it could, in theory, become a competitor to Ripple's ODL system"). Amici are confident in stating, that such a scenario, certainly does not "fit" into the common enterprise or joint venture scheme the *Howey* Court envisioned capturing when determining an investment contract. *See Howey*, 328 U.S. at 300 ("The *Howey* test asks whether the transaction involves "all the elements of a profit-seeking business venture."). The indisputable *truth* is that XRP holders are not in a common enterprise with Ripple or each other. Some XRP holders loan out their XRP, while others do not. Thus, some XRP holders, who choose to stake/loan or collateralize their XRP, benefit financially while Ripple or other XRP holders do not. The opposite is also true. Recently, a company called Celsius, filed for bankruptcy. *See Celsius files for bankruptcy*, Deaton Decl. Ex. II. XRP holders who loaned Celsius their XRP, suffered financial losses Ripple and other XRP holders did not. The Celsius bankruptcy example destroys any claim of horizontal

commonality. *Revak,* 18 F.3d at 88 ("[t]he rents and expenses attributable to each unit were not shared…but were instead the sole responsibility of the unit owner."). XRP holders, like amici, maintain sole responsibility and can "make profits or sustain losses independent of the fortunes of other purchasers." *Id.*

VI. VICTIMS OF REGULATORY OVEREACH

As noted by Judge Netburn, XRP "has a utility, and that utility distinguishes it…from Bitcoin and Ether." *Hrg Tr*. at 11:4-7 (Mar. 19, 2021). XRP's unique utility is what attracted amici and millions of others to acquire XRP, not Ripple. Since "Howey is an objective test" (ECF 640 at 5), objectively speaking, XRP holders relied more on the statements regarding XRP, made by federal agencies, including the SEC, than by Ripple. To summarize: six years *before* this lawsuit was filed, the 2014 *GAO* Report classified XRP as a "virtual currency" utilized in "a decentralized payment system"; the 2015 FinCEN settlement declared XRP "virtual currency", forcing Ripple to comply with banking laws, not securities laws - making XRP *the first regulated cryptocurrency* in the U.S.; in 2015, the CFTC stated Bitcoin and *other* virtual currencies were properly classified *as commodities;* in 2018, during the time period XRP was either the second or third largest crypto in the world, the Hinman Speech gave Bitcoin, and more significantly, Ether, a regulatory free pass, but suggested that there were *other* cryptocurrencies not considered securities; in 2019, the FSOC Report highlighted *only* Bitcoin, Ethereum, XRP, and Litecoin and was signed by then-Chairman Clayton; also in 2019, SEC disclosure forms acknowledged that XRP was being utilized by MGI; and, the 2019's *Framework,* made it clear that a virtual currency that can "be used to make payments" (the use case that makes XRP the most popular crypto) (ECF 661 at 5) – "is unlikely to satisfy *Howey."* ECF 429-4. Considering these indisputable facts, it is difficult to comprehend, after seven and half years of XRP being publicly

traded, why the Grundfest warning was completely disregarded. The SEC was well aware that the mere filing of this case would cause "multi-billion losses to innocent third parties." *Grundfest Letter* at 2. His warning was more than accurate because the damages were "more than **$15 billion**, and the disruption of numerous innovative applications of XRP" resulted. ECF 86 at 2; *see also,* ECF 684 at 2. Buried underneath the $15 billion in losses are *real people* who have been severely harmed (ECF 665-1-26), not by market volatility, but because, at best, the SEC fundamentally misunderstands the underlying technology, or at worst, has been "deliberately misleading so as to arrogate for the SEC optionality as this litigation progresse[d]." ECF 86 at 2. Considering how this case was filed, coupled with unprovable allegations, "raises fundamental fairness questions about the exercise of Commission discretion." *Grundfest Letter* at 2. Ex. B; *see also* ECF 186 at 6, 567 at 4, n.2. There is no doubt that many acquired XRP for consumption. ECF 655-1-26. There is no doubt, XRP was also acquired for investment, usually in conjunction with Bitcoin and Ether. *Id.* XRP holders who did invest, however, didn't because of Ripple. But because of the sweeping allegations, thousands of innocent holders' life savings and retirement accounts are frozen, unable to convert their XRP into Bitcoin, Ether or USD. *Id.* Until this Court issues a ruling, these XRP holders are unable to access their funds, including if they experience a life-altering event. *Id*. In the meantime, blockchain innovation has halted at the American border. *Id*.; ECF 684 at 2. In truth, the SEC is using this case as a quasi-declaratory judgment to *test* an implausible theory, developed after conducting its own failed *Howey* analysis. *See* Writ at 12 ("The [SDNY] supplies the exclusive method for *testing the validity* of the Commission's complaint against Ripple."), *compared with,* ECF 413 at 8 (enforcement lawyers conducted an XRP *Howey* memorandum, dated June 13, 2018, but "did not present a recommendation to the SEC."). Hence, it becomes undeniable, that this case serves as a *test case* to expand the SEC's

jurisdictional reach into a burgeoning asset class, riddled in confusion and regulatory uncertainty - much of it caused by the SEC itself. It is undeniable because in 2018 (before becoming Chairman), Gary Gensler cautioned that the digital asset markets lacked regulatory clarity and that "**even for Ripple**, needs for there to be clarity in the market." *See Gensler Blockchain Interview*, Deaton Decl. Ex. JJ. But today, as Chair, he claims that "rules related to crypto assets are well-settled" and "[t]he test to determine whether a crypto asset is a security is clear." *See Gensler Remarks*, Deaton Decl. Ex. KK. The only thing clear, is that the SEC has asserted allegations it cannot prove. There are 4,343,575 XRP accounts, along with 7,723,297 Trust-Lines connected to the XRPL. *XRPL Stats*, Deaton Decl. Ex. LL. In other words, there are millions of XRP holders being held hostage as collateral damage while the SEC engages in a jurisdictional power grab. Those innocent holders have been abandoned by the SEC "adopting its litigation positions to further its desired goal, and not out of a faithful allegiance to the law." ECF 531 at 6.

On behalf of the six individual XRP holders, in their individual capacities, as well as the millions of XRP holders, whose interests are embodied in the interests of amici curiae, we extend deep and sincere gratitude to the Court for allowing and considering amici curiae's perspective during this litigation and at summary judgment. After two long years of tedious and distressing litigation, a decentralized community of users, investors, developers, and small businesses, anxiously await Your Honor's decision.

VII. CONCLUSION

Amici curiae respectfully request this Honorable Court deny the SEC's motion for summary judgment because genuine issues of material facts exist. Respectfully, the Court should grant the Defendants' motion for summary judgment because *no reasonable jury* could decide in favor of the SEC's exceedingly overbroad theory.

Respectfully Submitted,

John E. Deaton (*admitted pro hac vice*)
Deaton Law Firm LLC
450 North Broadway
East Providence, RI 02914
Tel.: +1 (401) 351-6400
Email: all-deaton@deatonlawfirm.com

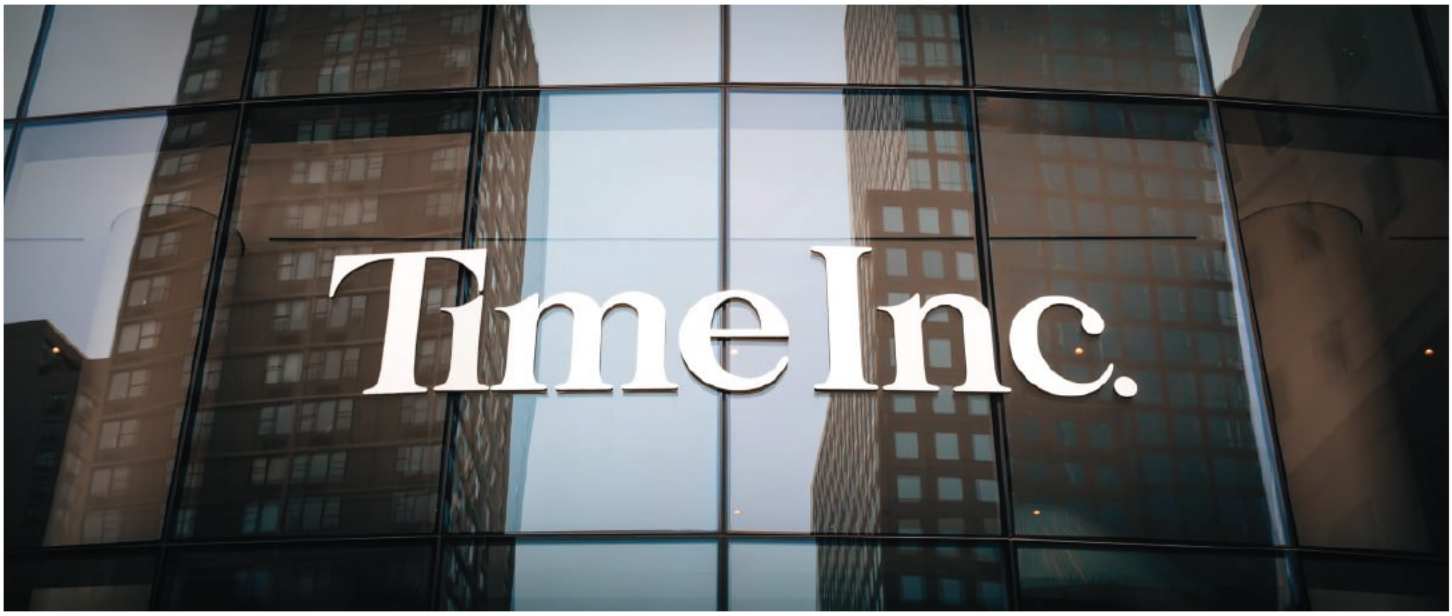
Attorney for Amicus Curiae, XRP Holders

Exhibit U

BITCOIN • APRIL 19, 2021, 12:49PM EDT

Time Magazine now accepts bitcoin and other cryptocurrencies for digital subscriptions

by Yogita Khatri



Drop of Light/ Shutterstock

The 98-year old publication Time Magazine now accepts bitcoin and other cryptocurrencies for digital subscription payments.

Announcing the news on Monday, Time said it has partnered with Crypto.com for the feature, which is currently only available in the U.S. and Canada. Global access is expected to be rolled out "in the next several months."

Time will accept all cryptocurrencies currently supported by Crypto.com Pay, a Crypto.com spokesperson told The Block. These include bitcoin, ether, dogecoin, XRP and litecoin, as well as DeFi tokens Uniswap, Aave, Balancer, and Compound.

Subscribers who pay with Crypto.com's native token CRO will get rewards of up to 10%, said Time.

Time will keep accepted cryptocurrencies from subscribers. "Cryptocurrency payments for digital

The publication is also partnering with crypto asset manager Grayscale on a new video series on the crypto space. Time will receive payment in the form of bitcoin and then hold the funds on its balance sheet, according to Grayscale CEO Michael Sonnenshein.

ABOUT AUTHOR

Yogita is a senior reporter at The Block and covers all things crypto. Before joining The Block, Yogita worked for CoinDesk and The Economic Times. She can be reached at ykhatri@theblock.co. Follow her on Twitter @Yogita_Khatri5.

MORE BY YOGITA KHATRI

EXHIBIT 18

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	
vs.	)	Case No. 1:20-cv-10832
RIPPLE LABS, INC., et al.,	)	
Defendants.	)	

BRIEF OF *AMICUS CURIAE* OF VERI DAO, LLC IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

KENNYHERTZ PERRY, LLC

/s/ Benjamin Tompkins
Benjamin Tompkins (pro hac vice application forthcoming)
Jeffrey Donoho (pro hac vice application forthcoming)
Kennyhertz Perry, LLC
2000 Shawnee Mission Parkway, Ste. 210
Mission Woods, KS 66205
Phone: 816-527-9447
Fax: 855-844-2914
ben@kennyhertzperry.com
jeff@kennyhertzperry.com

Attorneys for Veri DAO, LLC

TABLE OF CONTENTS

TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
I. CORPORATE DISCLOSURE STATEMENT 1
II. IDENTITY AND INTERESTS OF THE *AMICUS CURIAE* 1
A. Introduction to Veri DAO and the SEC's 2019 litigation 1
B. The utility and value of the VERI Tokens and concerns with the legal and regulatory uncertainty created by the SEC's action against the VERI Central Persons 3
C. In deciding this case, the Court should consider the implications of any decision on the downstream holders of tokens alleged to be securities by the SEC 5
III. ARGUMENT 7
IV. CONCLUSION 10

TABLE OF AUTHORITIES

Cases

SEC v. W.J. Howey Co.

328 U.S. 293 (1946) …… 2,8

Sec. & Exch. Comm'n v. Genovese

2021 WL 1164654, Case No. 17-cv-05821-LGS (S.D.N.Y. Mar. 26, 2021) …….8

SEC v. Reginald Middleton

Case No. 1:19-cv-04625-CBA-RER (E.D.N.Y. Aug. 12, 2019) ……1

Veritaseum Capital LLC v. Coinbase Global Inc.

Case No. 1:22-cv-01253-UNA (D.D.C. 2022) ……...4

Statutes, Regulations, and Rules

Securities Act of 1933, 15 U.S.C. § 77 *et seq*

15 U.S.C. § 77b(a)(1) ……..2

15 U.S.C. § 77d(a)(1) ……. 8

15 U.S.C. § 77b(4), (11) and (12) ……...8

W.S. 17-31-101……1

17 C.F.R. § 230.144(b)(1) …….10

Administrative Materials

www.sec.gov/about.shtml.....…….……..7

www.verifairfund.com/documents……..7

Veri DAO, LLC ("**Veri DAO**") respectfully submits this *amicus curiae* brief in support of the Motion for Summary Judgment (Doc. 643) filed by Defendants Ripple Labs, Inc., Bradley Garlinghouse, and Christian A. Larsen (collectively "**Ripple**").

I. CORPORATE DISCLOSURE STATEMENT

Veri DAO has no parent corporation, and no publicly held corporation owns 10% or more of Veri DAO.

II. IDENTITY AND INTERESTS OF THE *AMICUS CURIAE*

A. Introduction to Veri DAO and the SEC's 2019 litigation

Veri DAO is a Wyoming limited liability company and decentralized autonomous organization formed pursuant to W.S. 17-31-101 *et seq.* Veri DAO is a diverse community composed of media personalities, small business owners, engineers, entrepreneurs, retirees, and coders who are passionate about the potential of peer-to-peer capital markets and the disintermediating of financial systems for the benefit of inventors and innovators. *See* Declaration of Lloyd G. Cupp ("Cupp Decl.") at ¶ 4. The individuals involved in Veri DAO originally convened in 2019 during the fallout of the Securities Exchange Commission's ("**SEC**") action against Reginald Middleton, Veritaseum, Inc., and Veritaseum, LLC (collectively the "**VERI Central Persons**") in relation to the Veritaseum digital assets (collectively the "**VERI Tokens**"). Cupp. Decl. at ¶ 5; *see also SEC v. Reginald Middleton, et al.*, Case No. 1:19-cv-04625-CBA-RER (E.D.N.Y. Aug. 12, 2019) (the "**Veritaseum Lawsuit**").[1]

The VERI Central Persons conducted an initial sale and distribution in April and May of 2017 of the VERI Tokens. Cupp. Decl. at ¶ 7. The VERI Token is not a network (blockchain); it is a token on the Ethereum blockchain. *Id.* at ¶¶ 8-9. Prior to the Veritaseum Lawsuit, the VERI

[1] There is a similarity in the SEC attorneys who brought this lawsuit against the VERI Central Persons and the SEC attorneys litigating against Ripple in the present matter.

Tokens were intended to serve as a utility token in order to: (i) gain access to the Veritaseum platform, and (ii) function as pre-paid licensing for patented software services from the Veritaseum platform (much like a subscription service from other technology companies). *Id*. at ¶ 10.

On August 12, 2019, the SEC brought the Veritaseum Lawsuit against the VERI Central Persons claiming that the VERI Tokens were "securities" sold: (i) as unregistered and (ii) by fraud and deceit of the VERI Central Persons. *See* Complaint in the Veritaseum Lawsuit, Doc. 1, at ⁋ 12. In the complaint for the Veritaseum Lawsuit, the SEC did not identify the VERI Tokens as being any particular type of "security" under the laundry list definition of "security" in the Securities Act of 1933 (the "**Act**"). *See id.; see also* 15 U.S.C. § 77b(a)(1).[2] However, without mentioning the exact term "investment contract," the SEC seemingly implied a belief that the VERI Tokens were "investment contracts" by stating in its complaint that the "VERI purchasers would have reasonably expected to profit from [the VERI Central Persons'] efforts" and "[the VERI Central Persons] continued to convey that the economic substance of purchasing a VERI token was the making of an investment in a common enterprise with a reasonable expectation of profits". *See* Complaint in Veritaseum Lawsuit, Doc. 1 at ⁋⁋ 52, 57. These statements by the SEC roughly tracked the familiar language in the landmark decision *SEC v. W.J. Howey Co.* and its progeny regarding the definition of "investment contracts" as securities under the Act. *See SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946); *see also* Doc. 643 (discussing *Howey* and its progeny on pages 13-28).

On November 1, 2019, the VERI Central Persons, without admitting or denying any of

[2] Such laundry list definition includes the term "investment contract" which the SEC asserts against XRP in the present lawsuit. In the Veritaseum Lawsuit, the SEC did not specifically state in its complaint that the VERI Tokens were "investment contracts".

the factual allegations made against them in the SEC's complaint, entered into a consent judgment with the SEC to resolve the action. *See* Final Judgment in the Veritaseum Lawsuit, Doc. 61. No members of Veri DAO were named as defendants or were subject to the terms of the Final Judgment in the Veritaseum Lawsuit. Cupp. Decl. at ¶ 14. Therefore, while such action was mutually and fully resolved between the SEC and the VERI Central Persons, no formal determination was made as to whether the VERI Tokens were indeed "investment contracts" or some other type of "security" under the Act. This inconclusive result left the downstream, unaffiliated, and secondary holders of VERI Tokens with no confidence or guidance on what they possessed and what they could legally do with it. *Id*. at ¶ 15. Currently, there are approximately 2.15 million VERI Tokens held in more than 24,000 wallets.[3] *Id*. at ¶ 12. Furthermore, as a result of the SEC action, transactions must take place either via peer-to-peer transactions or on foreign exchanges. *Id*. at ¶ 26.[4] Veri DAO is not aware of any domestic exchanges that permit transactions in the VERI Tokens. *Id*. This is problematic to holders of the VERI Tokens because individual token holders must utilize their own efforts and pursue their own use of their tokens in order to produce profit or value. There is no common enterprise that holders of the VERI Tokens can rely on to produce profit or value.

B. The utility and value of the VERI Tokens and concerns with the legal and regulatory uncertainty created by the SEC's action against the VERI Central Persons

The utility of the VERI Token has been relatively unknown since the Veritaseum Lawsuit.

[3] Over 97 million VERI Tokens were frozen as a result of the resolution of the Veritaseum Lawsuit between the SEC and the VERI Central Persons. Cupp Decl. at ¶ 27. There are no other VERI Tokens being produced. *Id.* at ¶ 28.

[4] For these extraterritorial transactions, the United States securities laws are subject to appropriate territorial limits. Doc. 643 at 61-74; 681-1 at 26-30. Veri DAO will not repeat these arguments.

The VERI Central Persons have made public statements that the VERI Tokens may be given future utility, as originally intended by the VERI Central Persons before the SEC's Veritaseum Lawsuit, to operate as a discount mechanism for the licensure of intellectual property held by Veritaseum Capital, LLC. Since the resolution of the SEC's Veritaseum Lawsuit, Reginald Middleton was awarded Japanese and United States patents and some of these patents were licensed to Veritaseum Capital, LLC. *See, e.g.,* U.S. Patent No. 11,196,566 (the "**566 Patent**"); *see also Veritaseum Capital LLC v. Coinbase Global Inc.*, Case No. 1:22-cv-01253-UNA (D.D.C. 2022) (the "**Patent Infringement Lawsuit**"), at Ex. 1. The 566 Patent is entitled "Devices, Systems, and Methods for Facilitating Low Trust and Zero Trust Value Transfers." Indeed, to protect the 566 patent, Veritaseum Capital LLC filed the Patent Infringement Lawsuit against Coinbase Global Inc. (commonly known as "**Coinbase**") on September 22, 2022.[5] In the Patent Infringement Lawsuit against Coinbase, Veritaseum Capital, LLC pleads that the 566 Patent:

> provides a computing device, system, and method in which a transaction (i.e. crypto payment, trading, staking, etc.) between a first client device and a second client device can be processed via a transfer mechanism which includes a decentralized digital currency. The decentralized digital currency includes a distributed ledger that enables processing the transaction between the first client device and the second client device without the need for a trusted central authority.

See Complaint in Patent Infringement Lawsuit, Doc. 1 at ¶ 19 (the complaint also includes a reference to awarded Japanese patent JP6813477). Thus, while there is no right to share in any profits generated by the 566 Patent (or the Japanese patent) by the holders of VERI Tokens, there is intended to be apparent utility in holding VERI Tokens and there is presumably corresponding value in trading the same.

---

[5] Veritaseum Capital LLC is separate and unaffiliated from Veri DAO. Cupp Decl. at ¶ 29. There is no common ownership between Veritaseum Capital LLC and Veri DAO. *Id.* at ¶ 30. Veri DAO has no interest or any license in any patent being litigated in the Coinbase action. *Id.* at ¶ 31.

In an effort to use VERI Tokens responsibly and legally, members of Veri DAO attempted to obtain more information through Freedom of Information Act ("**FOIA**") requests[6] and the formal submission of request for a No-Action Letter from the SEC. Cupp Decl. at ¶¶ 16-18. The latter effort involved the request of a No-Action Letter from the SEC regarding, among other items: (1) the use of the VERI Tokens in their possession, as non-issuer holders, for "peer to peer" digital asset transfers, and (2) the sale and trade of VERI Tokens in their possession as non-issuer holders. *Id*. at ¶ 20. In a proper analysis of these two requests, it would have been necessary to first determine whether the VERI Tokens were indeed "investment contracts" or another type of "security" and second whether there was an available exemption for unaffiliated, non-issuer holders. However, despite this good faith effort to obtain much needed clarity after the resolution of the action against the VERI Central Persons, the SEC refused to provide a No-Action Letter, and instead, provided an informal admonition, during a telephone conference, that the VERI Tokens would be treated as securities and refused to comment on the application of any exemptions. *Id*. at ¶¶ 21-23. This refusal to provide clarity has frozen much of the use and trade of VERI Tokens held by unaffiliated, non-issuers to this date. *Id*. at ¶ 24. This is also consistent with the actions referenced by Ripple in its summary judgment opposition where others sent similar analyses to the SEC explaining why XRP was not an investment contract. Doc. 675, Ripple Opp. at 47-49.

C. In deciding this case, the Court should consider the implications of any decision on the downstream holders of tokens alleged to be securities by the SEC

Veri DAO wishes to submit this *amicus curiae* brief to provide a concrete, real world example of the "chilling effect" on market participants discussed in the abstract sense by the

[6] The FOIA requests failed to elicit any information. Cupp Decl. at ¶ 17.

Chamber of Digital Commerce and the Blockchain Association in their *amicus curiae* briefs submitted to this Court. Docs. 649 and 681-1. In addition, Veri DAO's *amicus curiae* brief addresses the SEC's narrow position as stated in Footnote 10 of Ripple's Memorandum of Law in Support of Their Motion for Summary Judgment. Doc. 643, Page 14. In that Footnote 10, Ripple references statements made by SEC's counsel that "its theory extends to every single buyer and seller of XRP in the secondary market." Whether this is an accurate summation of the SEC's position or not[7], the mere mention of this potential position underscores the crippling position that has faced holders of VERI Tokens since the VERI Central Persons were taken down by the SEC. Like the many unaffiliated, non-issuer holders of XRP may soon experience themselves, non-issuer holders of the VERI Tokens have lived under a cloud of regulatory ambiguity for years. This regulatory cloud and the attempts by the SEC to exceed its regulatory authority is artfully discussed in the *amicus* brief submitted by Investor Choice Advocates Network and Phillip Goldstein. *See* Doc. 684; *see also* Doc. 681-1, Pages 8-9 & 20 (citing recent SEC actions taken and arguing there was no fair notice provided to the Ripple Defendants).

Moreover, while Veri DAO agrees with the arguments furthered by Ripple regarding the lack of "investment contract" attributes of XRP and finds similarities between those arguments and the attributes of the VERI Tokens, Veri DAO will not restate any of those arguments. *See also* Doc. 681-1, Pages 10-20 (Blockchain Association also discussing why *Howey* does not apply to this and other cryptocurrencies). Veri DAO's limited purpose, with this *amicus curiae* brief, is to provide a concrete, real life example of the consequences of the SEC's ambiguous positions. If the VERI Tokens were considered a security, which is denied, and if holders of the VERI Tokens were considered "investors", which is denied as an improper descriptor, then the SEC's

[7] *See* Doc. 674 (SEC Opp.) at 45-46 n. 25.

Veritaseum Lawsuit against the VERI Central Persons, coupled with the SEC's refusal to provide clarity to unaffiliated, non-issuer holders, has caused harm to "investors" of the VERI Tokens. This result conflicts with the SEC's simple mission statement "to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation." *See www.sec.gov/about.shtml.*[8]

Veri DAO is interested in the present litigation between the SEC and Ripple because the VERI Token, out of the over 20,000 estimated and existing cryptocurrencies in circulation, is one of a few cryptocurrencies that suffered a similar fate as that pursued by the SEC against Ripple and XRP. Veri DAO's familiarity and lived experience with the fallout should be helpful to the Court in determining this matter of great interest to the general public. Any rulings by this Court short of finding that XRP is not a security will have a similar deleterious effect on unaffiliated holders of other cryptocurrencies like the VERI Tokens. As such Veri DAO also agrees with the Blockchain Association in that any ruling, if adverse to the Ripple Defendants, should be limited to the facts and circumstances of the Defendants.

III. ARGUMENT

As noted in the preceding section, Veri DAO endorses and agrees with the arguments furthered by Ripple in its Motion for Summary Judgment and by the Digital Chamber of Commerce and Blockchain Association regarding secondary holders. Furthermore, as stated above, like XRP, the VERI token should not be considered an investment contract. An

[8] While the SEC established a Veritaseum Fair Fund for purchasers of the VERI Token, the claims submission process closed on November 1, 2021, involves more than current holders of VERI Tokens, and has yet to distribute any funds (despite suggesting that funds would be distributed within 165 days from February 17, 2021 – the day which the claims process was approved). *See* Veritaseum Lawsuit, Docs. 82, 88 and 89 (recent status reports filed including one filed on October 28, 2022); *see also* www.verifairfund.com/documents. Moreover, submission of a claim did not require turning over VERI Tokens which could be retained by claimants but subject to the regulatory uncertainty outlined herein.

"investment contract" is "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." *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). Unlike *Howey* and its progeny, the purchase of a VERI Token: (i) does not involve a contract between a promoter and investor; (ii) there is no obligation to do anything post-sale by the VERI Central Persons; and (iii) there is no right to share in the profits earned by the VERI Central Persons. *Id.* at 295-300; *see also* Doc. 643-15-28 (discussing requirements of Howey and then further discussing why it does not apply XRP in the pages that follow).

Moreover, to the extent that the SEC does extend its theory beyond the sales of the issuer and its affiliates, the Court should reject such broad application. Section 4(a)(1) of the Act exempts the application of Section 5 of the Act (which governs the prohibition of the sale of unregistered securities) from "transactions by any person other than an issuer, underwriter, or dealer". 15 U.S.C. § 77d(a)(1). The terms "issuer," "underwriter" and "dealer" are all limited in scope and specifically defined by the Act. 15 U.S.C. § 77b(4), (11) and (12). Furthermore, "Rule 144 provides a safe harbor from th[e] fact intensive definition of underwriter, excluding from underwriter status any person who meets its five conditions". *Sec. & Exch. Comm'n v. Genovese*, 2021 WL 1164654, at *3, Case No. 17-cv-05821-LGS (S.D.N.Y. Mar. 26, 2021) (citing 17 C.F.R. § 230.144). Thus, if the SEC's position truly extends "to every single buyer and seller of XRP [like the VERI Tokens] in the secondary market," this position conflicts with the limitations of

the Act and its supporting rules.[9] The Court should not enter any rulings to that effect.[10]

Furthermore, if digital assets (like XRP and VERI Tokens) were generally treated as commodities and subject to the purview of the Commodities Futures Trading Commission ("CFTC"), as mentioned by several of the referenced pieces of legislation in the *amicus curiae* brief of Phillip Goldstein and the Investor Choice Advocates Network ("**ICAN**") (Doc. 666-1), downstream holders of the digital assets would have greater confidence that they could engage in the trade of their digital assets without fear of engaging in a sale subject to rescission and penalties due to registration issues. *See also* Doc. 675, Ripple's Opp. at 46-51 (explaining the positions of DOJ, FINCEN and the CFTC prior to the SEC's entry into the regulatory field).

Unlike securities, commodities are (inherently) not required to be registered. Thus, holders of commodities (unless engaging in a very specific role on the limited list of roles that require registration with the CFTC) can trade their commodities without fear of regulatory

---

[9] In its most recently filed opposition and as cited above, the SEC asserts that "XRP transactions between two public investors not involving Ripple's affiliates, dealers or underwriters would be exempt from Section 5's registration requirements, despite such transactions involving securities." Doc. 674 at 45, n.25. The SEC also states that it does not allege that investor-to-investor transactions involve a situation where either is "entering into an investment contract" and that those transactions would be exempt from registration. *Id*. In Veri DAO's case, the SEC was not willing to say anything to it in seeking a No Action Letter and the SEC has taken a different position in at least one hearing in this case. Regardless, the SEC's footnote assumes that XRP is a security and that *Howey* applies to XRP (at least as it pertains to Ripple). Furthermore, as noted by the SEC, there is an issue regarding whether a token can become so decentralized that it "no longer represents the investment contracts offered and sold." *Id*. Given the SEC's judgment against VERI Central Persons, the VERI Tokens in circulation are decentralized and are utilized by people in the secondary market separate from any initial offering. Yet, the SEC was still unwilling to provide a No Action Letter to that effect. This unwillingness to provide guidance is consistent with the broader position advanced by the Blockchain Association that "[m]arket participants across the industry already struggle to see through the fog as to how securities laws apply to digital assets due to the SEC's pattern of 'regulation by enforcement' and its history of inconsistent, incomplete and confusing public statements." Doc. 681-1 at 3.

[10] Some of these arguments were also advanced by the individual Ripple Defendants in the recently filed Ripple opposition. Doc. 675 at 75.

reprisal.[11] Even for non-issuers and non-affiliates, the characterization of an item as a "security" invokes regulatory considerations when such non-issuers and non-affiliates engage in a transfer of such item. *See* 17 C.F.R. § 230.144(b)(1) (setting forth the safe harbor provisions for transfers of restricted securities by "non-affiliates", which include holding periods of 6 or 12 months by the "non-affiliate"). Having to grapple with these considerations that are unique to "securities" can severely chill the downstream transfer of digital assets. This is especially troubling where, like in the case of the VERI Tokens and XRP, the downstream holders of the digital assets do not share in any profits earned by the central persons and therefore can only obtain profit and value from their individual efforts. If the SEC is allowed control over this expansive space, the many downstream holders of XRP may soon find themselves in a similar situation as the downstream holders of the VERI Token—searching for answers on how to seek tangible benefits from their digital asset holdings.

As noted in Ripple's Motion for Summary Judgment, its opposition to the SEC's motion and the *amicus curiae* briefs, the Court should reject the "regulatory land grab" by the SEC. *See, e.g.,* Doc. 643 at 3.

IV. CONCLUSION

For all the foregoing reasons, the Court should grant Ripple's motion for summary judgment and deny the SEC's cross-motion for summary judgment. The Court should also avoid any rulings that endorse an extension of the prohibitions of unregistered sales beyond the clear and limited dictates of the Act.

[11] Veri DAO provides this analysis to suggest reasons why the Court should not endorse the SEC's advance into the land of digital assets. However, Veri DAO agrees with the *amicus curiae* brief of Phillip Goldstein and ICAN in that neither the courts nor regulatory bodies should expand agency control over an issue of deep economic and political significance; such "major questions" should be deferred to Congress.

Respectfully submitted,

KENNYHERTZ PERRY, LLC

*/s/ Benjamin Tompkins*____
Benjamin Tompkins
Jeffrey Donoho
Kennyhertz Perry, LLC
2000 Shawnee Mission Parkway, Ste. 210
Mission Woods, KS 66205
Phone: 816-527-9447
Fax: 855-844-2914
ben@kennyhertzperry.com
jeff@kennyhertzperry.com

Attorneys for Amicus Curiae Veri DAO, LLC

EXHIBIT 19

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X Docket No.: 1:20-cv-10832-AT-SN

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

RIPPLE LABS, INC., BRADLEY GARLINGHOUSE, and CHRISTIAN A. LARSEN,

Defendants.

----------X

BRIEF OF AMICUS CURIAE REAPER FINANCIAL, LLC IN SUPPORT OF DEFENDANT RIPPLE LABS, INC.

Frederick A. Rispoli
HODL LAW CALI, APC
27762 Antonio Parkway
Suite L-1, No. 232
Ladera Ranch, CA 92694
fred@hodllaw.org
Telephone: (602) 284-5520

Counsel for Reaper Financial, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTEREST OF AMICUS CURIAE. 1

II. RELEVANT FACTUAL BACKGROUND. 2

III. ARGUMENT. 5

IV. CONCLUSION. 8

TABLE OF AUTHORITIES

Page

Cases

In re: Celsius Network LLC,
Case No. 22-10964 (Bankr. S.D.N.Y. Oct. 17, 2022) 4-5

SEC v. C.M. Joiner Leason Corp.,
320 U.S. 344 (1943) 6

SEC v. LBRY, Inc.,
2022 WL 1674471 (S.D.N.Y. Nov. 7, 2022) 5-6

SEC v. Telegram Group Inc.,
448 F. Supp. 3d 352 (S.D.N.Y. 2020) 5, 6

SEC v. Telegram Group Inc.,
2020 WL 1547383 (S.D.N.Y. Apr. 1, 2020) 5

United Housing Foundation, Inc. v. Forman,
421 U.S. 837 (1975) 6

Other Materials

"Tokens," XRPLedger.org, *available at* https://xrpl.org/tokens.html 2

"Issue a Fungible Token," XRPLedger.org, *available at* https://xrpl.org/issue-a-fungible-token.html 2

"Non-Fungible Tokens Overview," XRPLedger.org, *available at* https://xrpl.org/non-fungible-tokens.html 4

"Transaction Cost," XRPLedger.org, *available at* https://xrpl.org/transaction-cost.html 6

I. INTEREST OF AMICUS CURIAE.[1]

Reaper Financial, LLC's ("Reaper Financial") use of the XRP Ledger ("XRPL") has not been addressed by the parties or by current and proposed amici. As explained further below, Reaper Financial utilizes its own digital currency unit, RPR, that is: (i) overlayed upon the XRPL; (ii) has a use case entirely separate from Ripple Labs or amici in that it is a project based on token voting to eliminate the circulating supply of other tokens, including XRP itself; and (iii) uses XRP in fractional amounts in connection with the 'transactional cost' for using the XRPL. A finding by the Court that the XRPL and XRP are inherently securities would severely impair Reaper Financial's ability (as well as other similarly situated projects) to survive. Although Reaper Financial's interests overlap with those of other entities granted amici status by the Court, its use case of the XRPL and XRP are at the same time novel and distinct such that its interests are not adequately addressed by Defendants or amici.

Reaper Financial is greatly concerned with the SEC's apparent, years-long position that, in addition to XRP, the software code that comprises the XRPL is itself a security/investment contract. *See, e.g.*, ECF No. 153 at 24 ("The XRP traded, even in the secondary market, is the embodiment of those facts, circumstances, promises, expectations and today represents an investment contract"); ECF No. 674 at 28 ("the fortunes of XRP investors rise and fall with those of Ripple"); *id.* at 31 ("the XRP Ledger was but the first step of broader set of suites, products, and uses that Ripple promised to develop"). The SEC's argument, taken to its logical conclusion, goes even further than XRP token holders that merely buy, sell or trade XRP—it would negatively affect companies such as Reaper Financial that tangentially use XRP via transaction costs when utilizing the XRPL. In other words, by simply using the XRPL as a mechanism to transfer value

[1] The Court granted Reaper Financial permission to file its amicus brief on November 14, 2022. *See* ECF No. 704.

of any type, Reaper Financial—according to the SEC's litigation theory in this case—is by definition engaging in the sale of unregistered securities. But such an argument would necessarily render other electronic ledgers, such as Microsoft Excel or Google Sheets, securities *per se* as these users similarly rely on these programs' software code to properly use their spreadsheet functionality. This overly broad, all-encompassing standard sought by the SEC should not be allowed.

II. RELEVANT FACTUAL BACKGROUND.

The XRPL is software code that acts as a mechanism to verify transactions and maintain transactional history. Germane to Reaper Financial, "assets other than XRP can be represented in the XRP Ledger as **tokens**." *See* "Tokens," XRPLedger.org, *available at* https://xrpl.org/tokens.html (last accessed on Nov. 9, 2022) (emphasis in original). Types of tokens issued upon the XRPL vary widely and can include stablecoins backed by tangible assets, fiat digital tokens, and community credits. *Id.* Any project wishing to issue tokens on the XRPL requires funded XRPL accounts and a certain amount of XRP. *See* "Issue a Fungible Token," XRPLedger.org, *available at* https://xrpl.org/issue-a-fungible-token.html (last accessed Nov. 9, 2022).

Reaper Financial is an Austin, Texas-based limited liability company founded in December 2021 by Patrick L. Riley, its Chief Executive Officer and current U.S. Army Combat Medic. **Exhibit 1**, Declaration of Patrick L. Riley (11/9/22) ("Riley Decl.") ¶¶ 1-2. Reaper Financial's primary mission is to act as a reaper of assets by purchasing and subsequently destroying them. *Id*. at ¶ 3. The company began its mission by focusing on reaping excess and unvalued digital assets issued on various blockchain ledgers. *Id*. at ¶ 4. The goal is to prevent violent market swings by removing the excess and unvalued assets. *Id*. Digital assets are targeted for destruction through a decentralized voting mechanism that occurs on the XRPL. *Id*. at ¶ 5. The future goal of Reaper Financial is to allow reaping for any type of asset through decentralized voting, be it an auto loan,

student loan, or mortgage. *Id*. at ¶ 6. Reaper Financial achieves its mission through RPR, its native digital token. *Id.* at ¶ 7. RPR is a fungible digital token created by Reaper Financial on the XRPL, meaning RPR requires the use of the XRPL to function. *Id.* Reaper Financial has no professional relationship with Ripple Labs nor its employees. *Id.* ¶ 8. Ripple Labs did not market the XRPL or use of XRP to Reaper Financial. *Id.* Nor did any marketing efforts of Ripple Labs or its employees play any role in Reaper Financial selecting the XRPL for the company's decentralized voting mechanism. *Id*. Reaper Financial utilized the XRPL because, as compared to other blockchain mechanisms, the XRPL is more decentralized in nature, has the lowest transaction fees, and has the fastest transaction speed. *Id.* at ¶ 9.

Reaper Financial achieves its business objective of reaping assets through RPR where owners of RPR vote on which asset each owner chooses to eliminate through each holder's RPR voting share. *Id.* at ¶ 10. The value of RPR is used to purchase and destroy the assets which were voted for destruction. *Id*. at ¶ 11. These votes are called "Reapings" and occur bi-weekly. *Id.* at ¶ 12. With respect to digital assets, RPR owners that choose to vote in Reapings choose which asset they seek to destroy aka "burn," thereby permanently destroying those tokens. *Id.* at ¶ 13. The assets to be burned are purchased at market value so that holders of that asset class are not harmed by Reapings. *Id.* at ¶ 14. To date, Reaper Financial has purchased and permanently destroyed through Reapings over 500,000 XRP-worth of other XRPL, ERC-20, and XinFin tokens throughout twenty-three Reapings to date. *Id.* at ¶ 15. As the RPR ecosystem develops, Reapings will also begin burning XRP itself. *Id.* Reaper Financial does not require Ripple Labs or any other blockchain products' permission to purchase and destroy these digital tokens. *Id.* at ¶ 16.

RPR was created on the XRPL and is not a separate blockchain. *Id.* at ¶ 17. The functionality of RPR is matched to that of XRP in speed, transaction fees, and validation to

decentralized XRP validators. *Id.* RPR would not function without the XRPL's decentralized network. *Id.* RPR was created on the XRPL by use of another third-party application, called Xumm, for a fee of 100 XRP. *Id.* at ¶ 18. This fee is then "burnt" by sending XRP to a "blackholed" wallet address, which is publicly viewable at: rrnpnAny58ak5Q6po8KQyZXnkHMAhyjhYx. *Id.* A blackholed wallet is a digital wallet where assets may be sent *but cannot be withdrawn*, hence "burning" them. *Id.* In return the RPR token is issued to an XRP wallet address in the self-custodial Xumm wallet. *Id.* The creation of the wallets and RPR both require the forfeiture or burning of XRP as a mechanism of their utility. *Id.*

Every time an RPR holder votes to burn/destroy another digital currency unit or debtor account, the RPR Network—because it is hosted on the XRPL—must utilize minute fractions of XRP for each vote. *Id.* at ¶ 19. These votes are recorded and read from memoranda posted to the XRPL. *Id.* For example, when RPR holders vote in a Reaping, they must sign a transaction to vote, which typically costs 0.000012 XRP. *Id.* at ¶ 20. The Reaping of October 22, 2022, consisted of approximately 30,000 transactions, thereby utilizing approximately 0.36 XRP. *Id.*

Lastly, though not the primary function of Reaper Financial, the company also creates collectible non-fungible tokens ("NFTs") on the XRPL. *Id.* at ¶ 21.[2] The company created these NFTs in coordination with artists for a variety of reasons, including membership for future events and as digital artwork. *Id.* As these NFTs are minted through the utility of the XRPL, they are also effectively XRP-based tokens while representing a subjective value as art. *Id.* at ¶ 22.[3]

[2] "[NFT]s serve to encode ownership of unique physical, non-physical, or purely digital goods, such as works of art or in-game items." *See* "Non-Fungible Tokens Overview," XRPLedger.org, *available at* https://xrpl.org/non-fungible-tokens.html (last accessed Nov. 9, 2022).

[3] Illustrative examples of Reaper NFTs are included within ¶ 21 of the Riley Decl.

III. ARGUMENT.

"Many, or [perhaps] most, cases involving cryptocurrency may raise legal issues for which there are no controlling legal precedents in this Circuit or elsewhere in the United States or in other countries in which cases arise." *In re: Celsius Network LLC, et al.,* Case No. 22-10964 (Bankr. S.D.N.Y. Oct. 17, 2022), ECF No. 1073 at *1 (Chief Judge Glenn advising parties he may consider as "persuasive" the recommendations on cryptocurrency law by United Kingdom's Law Commission). The parties, amici, and requested amici have thoroughly addressed the case law—or rather the dearth of it—in their respective briefings. Succinctly put, neither Congress nor the SEC have articulated any meaningful statute, regulation or rule regarding the nascent cryptocurrency industry.

At the same time, no party has yet substantively addressed the legal implications of the SEC's argument in the context of other (non-XRP) tokens issued on the XRPL. Like amici I-Remit, TapJets and SpendTheBits, Reaper Financial has no "common enterprise" with Ripple Labs or its employees. Although these five companies do utilize the XRPL (along with countless other network users), there is no case law supporting the allegation this common usage transforms the XRPL into an investment contract any more than Microsoft Excel or Google Sheets are transformed into investment contracts solely because these software programs share millions of users. With respect to cryptocurrency tokens, although case law is minimal, there has not been a case to hold the digital asset tokens *per se* are securities. *See, e.g.*, *SEC v. Telegram Grp., Inc.*, 448 F. Supp. 3d 352, 379 (S.D.N.Y. 2020) ("While helpful as a shorthand reference, the security in this case **is not simply the Gram [cryptocurrency]**, which is little more than alphanumeric cryptographic sequence") (emphasis added); *see also SEC v. Telegram grp. Inc.*, 2020 WL 1547383 (S.D.N.Y. Apr. 1, 2020) at *1 (court clarifying the "one of the central points" of its order was "that the 'security' was neither the Gram Purchase Agreement nor the Gram but the entire

scheme . . . made by Telegram"); *see also SEC v. LBRY, Inc.*, 2022 WL 16744741 (D.N.H. Nov. 7, 2022) at *8 (granting summary judgment to SEC on "whether [defendant] **offered** LBC as a security" and not deciding whether digital currency token itself—LBC—was a security *per se*) (emphasis added).

Reaper Financial's use of the XRPL and XRP in the secondary market has no relation to any alleged 'scheme' of Ripple Labs, nor does such use satisfy the "character in commerce" test. *See SEC v. C.M. Joiner Leason Corp.*, 320 U.S. 344, 352-53 (1943) ("The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect"). *See also United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852-53 (1975) (stating "the securities laws do not apply" where "a purchaser is motivated by a desire to use or consume the item purchased"); *id.* at 851-52 (holding courts "must examine the substance—the economic realities of the transaction—rather than the names that may have been employed by the parties").

For Reaper Financial and RPR holders to vote in Reapings, they must execute a transaction on the XRPL to exercise their vote. *See* **Ex. 1**, Riley Decl. ¶ 20. *See also Telegram*, 448 F. Supp. 3d at 360 n.3 (district court recognizing that cryptocurrency units "can be used to . . . offer voting or governance rights within the blockchain"). "To protect the XRP Ledger from being disrupted by spam and denial-of-service attacks, each transaction must destroy a small amount of XRP. This *transaction cost* is designed to increase along with the load on the network, making it very expensive to deliberately or inadvertently overload the network." "Transaction Cost," XRPLedger.org, *available at* https://xrpl.org/transaction-cost.html (last accessed Nov. 9, 2022) (emphasis in original). "The transaction cost is not paid to any party: **the XRP is irrevocably destroyed**." *Id.* (emphasis added). Thus, the very nature of the XRPL *requires* XRP to be burned

as a transaction cost in order to execute that transaction.

Currently, the transactional cost to vote in a Reaping is roughly equivalent to $0.0000055344 (valuing 1 XRP at $0.46). *See* **Ex. 1**, Riley Decl. ¶ 20. The approximately 30,000 transactions that occurred during the Reaping on October 22, 2022 cost a combined total of 0.36 XRP, which would be equivalent to $0.1656 with 1 XRP valued at $0.46. *Id.* In practical terms, the SEC would apparently seek to require Reaper Financial and similarly situated projects that build on the XRPL with digital currency units *other than* XRP to abide by the securities reporting requirements for tens of thousands of transactions that—in the above example—burn XRP at a cumulative US dollar cost of *less than two US dimes*. This simply is not the purpose of the Exchange Act; was not remotely contemplated by the Exchange Act (or its Blue Sky predecessors); and is not even feasible given the number of daily transactions on the XRPL and their pseudonymity.

Additionally, it does not appear that any party's briefing has addressed the concept that not only is XRP itself burned as a transaction cost in each transaction on the XRPL, but also that parties entirely unconnected to Ripple Labs can unilaterally destroy XRP as an inherent right to being an XRP owner. One of many unique aspects of blockchain technology, such as the XRPL, is that the software permits the creation of blackholed wallets from which XRP can never be recovered once sent. *See id.* at ¶ 18. In the context of traditional securities, such as shares of a company, Ripple Labs could—pursuant to securities reporting requirements—buy back its shares from the marketplace and absorb them, reducing the number of outstanding shares (commonly called a "share buyback"). But no investor in Ripple Labs may do the same. At best, a retail investor could maintain shares in Ripple Labs and hold those shares until death, but even then such shares would pass to the owner's heirs, by intestacy or escheat to the state. In contrast, Ripple Labs

has no control or ability to prevent Reaper Financial from reducing the circulating supply of XRP by destroying it. The closest analog would be to owners of US dollars burning those dollars. And even the SEC likely will not argue that setting fire to US dollars somehow constitute securities transactions.

Lastly, although not primary to Reaper Financial's business, like other individuals and entities Reaper Financial has created NFTs on the XRPL for a variety of reasons, including as membership for future events and for digital art creation. *See id.* at ¶ 21. Creating NFTs on the XRPL is similar to creating a token such as RPR on the network. Yet whereas RPR is fungible, NFTs are unique. Again, Ripple Labs has no control over how Reaper Financial chooses to create NFTs on the XRPL and Reaper Financial has no expectation that any NFT it creates will increase in value due to the efforts of Ripple Labs. Buying a Ford Mustang does not constitute ownership of Ford Motor Company and, again, it is unlikely the SEC would argue otherwise.

IV. CONCLUSION.

For the reasons set forth above, Reaper Financial requests the Court grant Defendants' Motion for Summary Judgment.

Dated: November 15, 2022

Respectfully submitted,

HODL LAW CALI, APC

By: /s/ *Frederick A. Rispoli*

Frederick A. Rispoli
Pro Hac Vice application pending
fred@hodllaw.org
27762 Antonio Parkway
Suite L-1, No. 232
Ladera Ranch, CA 92694
Telephone: (602) 284-5520

Counsel for Reaper Financial, LLC

EXHIBIT 20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. RIPPLE LABS INC., BRADLEY GARLINGHOUSE, and CHRISTIAN A. LARSEN, Defendants.	Case No. 20-CV-10832 (AT) (SN)

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

Robert L. Boone
Tiffany J. Smith*
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Avenue
New York, NY 10007
Tel.: (212) 230-8800
Fax: (212) 230-8888

Kelly P. Dunbar*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, DC 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363

Counsel for Crypto Council for Innovation

**Not admitted in S.D.N.Y.*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE SEC'S ENFORCEMENT APPROACH TO DIGITAL ASSETS DEPRIVES STAKEHOLDERS OF FAIR NOTICE AND RISKS CHILLING INVESTMENT AND INNOVATION IN EMERGING DIGITAL TECHNOLOGIES. 4

A. Blackletter Principles of Administrative Law Require Fair Notice, Particularly When It Comes To Regulation Of New, Evolving Technologies. 4

B. The SEC's Actions Here Reflect An Approach To Digital Assets That Is Contrary To The Goal Of Predictability And Principles Of Fair Notice. 5

C. The SEC's Approach Risks Chilling Innovation And Investment. 10

D. Rulemaking, Not Enforcement, Is The Proper Path Forward. 14

II. THE CONSEQUENCES OF A RULING IN FAVOR OF THE SEC HERE UNDERSCORE THE SERIOUS PROBLEMS WITH THE SEC'S APPROACH TO ENFORCEMENT. 17

A. The Existing Securities Regulatory Regime Cannot Mechanically Be Applied To Digital Assets Such As XRP. 18

B. Holders Of Other Digital Assets, As Well As The U.S. Crypto Industry At Large, Could Be Harmed By A Decision That Ripple Offered And Sold XRP As An Investment Contract. 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

CASES

Animal Legal Defense Fund, Inc. v. Vilsack,
237 F. Supp. 3d 15 (D.D.C. 2017) 14

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 4, 5

Cunney v. Board of Trustees of Village of Grand View,
660 F.3d 612 (2d Cir. 2011) 4

District of Columbia v. USDA,
496 F. Supp. 3d 213 (D.D.C. 2020) 15

Estate of Landers v. Leavitt,
545 F.3d 98 (2d Cir. 2008) 14

FBME Bank Ltd. v. Lew,
209 F. Supp. 3d 299 (D.D.C. 2016) 15

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) (*Fox I*) 5

FCC v. Fox Television Stations, Inc.,
567 U.S. 239 (2012) (*Fox II*) 4

NLRB v. Majestic Weaving Co.,
355 F.2d 854 (2d Cir. 1966) 5

Pinter v. Dahl,
486 U.S. 622 (1988) 21

SEC v. W.J. Howey Co.,
328 U.S. 293 (1946) 2

TSC Industries, Inc. v. Northway, Inc.,
426 U.S. 438 (1976) 19

Upton v. SEC,
75 F.3d 92 (2d Cir. 1996) 5

Weyerhaeuser Co. v. Costle,
590 F.2d 1011 (D.C. Cir. 1978) 15

STATUTES AND REGULATIONS

15 U.S.C. § 77d 19

15 U.S.C. § 77e 2, 19, 21

15 U.S.C. § 77g 19

15 U.S.C. § 77l 21

15 U.S.C. § 77r 23

15 U.S.C. § 78cc 22

15 U.S.C. § 78f 22

15 U.S.C. § 78l 20, 24

15 U.S.C. § 78o 22

17 C.F.R. Part 229 20

17 C.F.R. § 230.144 21

17 C.F.R. § 240.15c2-11 25

17 C.F.R. § 240.15c3-1 25

17 C.F.R. § 240.15c3-3 25

Executive Order on Ensuring Responsible Development of Digital Assets, White House (March 9, 2022), https://tinyurl.com/3yvwyebb 13, 27

Amendments Regarding the Definition of "Exchange" and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities, 87 Fed. Reg. 15,496 (Mar. 18, 2022) 10

Custody of Digital Asset Securities by Special Purpose Broker-Dealers, 86 Fed. Reg. 11,627 (Apr. 27, 2021) 25

Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer, 87 Fed. Reg. 23,054 (Apr. 18, 2022) 10

OTHER AUTHORITIES

American CryptoFed DAO, Filings, https://tinyurl.com/2p8anac8 23

Carrier EQ, LLC (f/k/a Airfox), Form 8-K (June 30, 2021), https://tinyurl.com/5n8bpbme 23

Caselli & Somekh, *Access to Banking and the Role of Inequality and the Financial Crisis*, 21 B.E. J. Econ. Analysis & Pol'y, 1373 (2021) 12

Chacon, *Gladius Network Shuts Down As ICO Investors Cry Foul*, Decrypt (Nov. 25, 2019), https://tinyurl.com/54jb6477 23

CoinMarketCap.com, XRP, https://tinyurl.com/37nf6rhh (last visited Oct. 31, 2022) 26

Corso, *SEC's Gensler Suggests Crypto Rules Could Be Years Away*, Law360 (Sept. 15, 2022), https://tinyurl.com/36anp54p 20

Crenshaw, *Digital Asset Securities—Common Goals and a Bridge to Better Outcomes*, SEC (Oct. 12, 2021), https://tinyurl.com/5x2umycv 9

De, *SEC's Gensler Holds Firm That Existing Laws Make Sense for Crypto*, CoinDesk (Sept. 13, 2022), https://tinyurl.com/43jvjwy5 17

Electric Capital, *U.S. Share of Web3 Developers is Shrinking* (April 2022), https://tinyurl.com/2p9868um 27

Engler, *Coinbase Enables Mexican Users to Easily Cash Out of Crypto Sent to Them*, CoinDesk (Feb. 15, 2022), https://tinyurl.com/yj5a3mkb 13

Gensler, *Kennedy and Crypto*, SEC (Sept. 8, 2022), https://tinyurl.com/4525j4rk 9, 19

Gensler, *Testimony at Hearing Before the Subcommittee on Financial Services and General Government U.S. House Appropriations Committee*, SEC (May 17, 2022), https://tinyurl.com/2s3jm9f4 17

Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, SEC (June 14, 2018), https://tinyurl.com/4u883y85 ..... 6, 21

Hinman, *Statement on "Framework for 'Investment Contract' Analysis of Digital Assets*," SEC (Apr. 3, 2019), https://tinyurl.com/mps5rvnn 7

Kiernan & Ge Huang, *Ether's New 'Staking' Model Could Draw SEC Attention*, Wall St. J. (Sept. 15, 2022), https://tinyurl.com/2ve4w2f7 8

Lee, *Send Lawyers, Guns and Money: (Over-) Zealous Representation by Corporate Lawyers*, SEC (Mar. 4, 2022), https://tinyurl.com/5d4km3bz 12

Letter from Chairman Jay Clayton to Hon. Ted Budd (Mar. 7, 2019), https://tinyurl.com/3fdb3dkv 7

Letter from Chamber of Digital Commerce to President's Working Group on Financial Markets (Oct. 18, 2021), https://tinyurl.com/ycku55za 13

Letter from Coinbase to Sec. Vanessa A. Countryman, SEC, Re Coinbase Global, Inc., Petition for Rulemaking-Digital Asset Securities Regulation (July 21, 2022), https://tinyurl.com/3ujpsehs 18

Monster Products, Inc., Filings, https://tinyurl.com/2wmz8sux 23

Njanja, *Cryptocurrency Payments Key to Lowering Cross-Border Remittance Charges and Boosting Microwork Uptake in Africa, Study Shows*, TechCrunch (Feb. 23, 2022), https://tinyurl.com/55w2899z 13

Paragon Coin, Paragon Coin Update, https://tinyurl.com/3spu3rt6 23

Peirce, *On the Spot: Remarks at "Regulatory Transparency Project Conference on Regulating the New Crypto Ecosystem: Necessary Regulation or Crippling Future Innovation?"* (June 14, 2022), https://tinyurl.com/2s3eptjj 11

Peirce & Roisman, Statement, *In the Matter of Coinschedule*, SEC (July 24, 2021), https://tinyurl.com/4jxa6na7 11

Pimentel, *Ukraine Makes Crypto's Case in Washington*, Protocol (Mar. 18, 2022), https://tinyurl.com/4s8hekum 13

Prentice, *U.S. SEC's Enforcement Cop Says Crypto Amnesty Is Not On The Table*, Reuters (Feb. 28, 2022), https://tinyurl.com/2p9emjp3 12

Wagner, *CFTC Chair Says Ether Is a Commodity, Hints That SEC Disagrees*, Blockworks (Oct. 24, 2022), https://tinyurl.com/bdd2878w 8, 11

The Alliance, Crypto Council for Innovation, https://tinyurl.com/bde699am (last visited Oct. 31, 2022) 1

BitLicense FAQs, N.Y. Dep't of Fin. Servs., https://tinyurl.com/4y7up38e 26

Complaint, *CFTC v. Ooki DAO*, Civil Action No. 3:22-cv-05416 (N.D. Cal. Sept. 22, 2022). 11

CFTC Orders Bitcoin Options Trading Platform Operator and its CEO to Cease Illegally Offering Bitcoin Options and to Cease Operating a Facility for Trading or Processing of Swaps without Registering, Release No. 7231-15, CFTC (Sept. 17, 2015), https://tinyurl.com/a2v3uavk 11

ErisX Pioneers First U.S. Based Ether Futures Contract, Cboe Digital Insights (May 11, 2020), https://tinyurl.com/4a76e7sj 12

Framework for 'Investment Contract' Analysis of Digital Assets, SEC, https://tinyurl.com/26cxh4hj (last modified Apr. 3, 2019). 7

In Case You Missed It: Chairman Tarbert Comments on Cryptocurrency Regulation at Yahoo! Finance All Markets Summit, Release No. 8051-19, CFTC (Oct. 10, 2019), https://tinyurl.com/mrxt978r 8, 11

In the Matter of Coinschedule, Exchange Act Release No. 10956 (July 24, 2021), https://tinyurl.com/262neysm 10

In re Poloniex, LLC, Exchange Act Release No. 92607 (Aug. 9, 2021), https://tinyurl.com/2ekdcthd 10

Oversight of the U.S. Sec. & Exch. Comm'n: Hearing Before the S. Comm on Banking, 117th Cong. (Sept. 15, 2022).....9

SEC Chair Gary Gensler Discusses Potential Crypto Regulation And Stablecoins, CNBC (June 27, 2022), https://tinyurl.com/b4s6fe23 8

Virtual Currencies: The Oversight Role of the U.S. Sec. & Exch. Comm'n and the U.S. Commodity Futures Trading Comm'n: Hearing Before the S. Comm. on Banking, 115th Cong. (Feb. 6, 2018).....6

INTEREST OF *AMICUS CURIAE*

The Crypto Council for Innovation ("CCI") is an alliance of industry leaders with a mission to communicate the opportunities presented by crypto (i.e., digital assets) and demonstrate its transformational promise.[1] CCI members span the digital assets ecosystem; its membership includes nine of the leading global companies and investors operating in the industry. *See The Alliance*, Crypto Council for Innovation, https://tinyurl.com/bde699am (last visited Oct. 31, 2022). CCI's members share the goal of encouraging the responsible global regulation of crypto to unlock economic potential, improve lives, foster financial inclusion, protect national security, and disrupt illicit activity. CCI believes that achieving these goals requires informed, evidence-based policy decisions realized through collaborative engagement.

CCI therefore has a strong interest in the resolution of this action. This suit against Ripple Labs, Inc. ("Ripple") by the U.S. Securities and Exchange Commission ("SEC" or "Commission") is part of a series of enforcement efforts that the Commission has taken against market participants in the digital asset ecosystem. As outlined below, this regulation-by-enforcement approach departs from the principle of meaningful public participation in agency decision-making, deprives market participants of fair notice as to what conduct is permissible, and risks curtailing innovation and investment in this cutting-edge sector of the economy.

As a coalition of industry leaders with substantial expertise in the crypto space, CCI has a vital perspective to offer on these issues—issues that are profoundly important not only for digital asset holders, but also for the developers, operators, and investors that are building the crypto ecosystem. Unless these stakeholders can rely on clear, consistent guidance and work within a regulatory framework that makes compliance possible, crypto, and the growing industry

[1] No counsel for a party authored this brief in whole or in part and no person other than CCI or its counsel made a monetary contribution to its preparation or submission.

underlying it, will not achieve its full potential in the United States. This context surrounding the SEC's approach to digital assets, and the potential ramifications of a holding that Ripple violated Section 5 of the Securities Act of 1933 (the "Securities Act") by offering and selling XRP as an investment contract in an unregistered securities offering, should inform the Court's analysis of the legal questions presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The implications of this case could reverberate throughout the digital asset ecosystem. As the Court is aware, the SEC alleges that Ripple violated Section 5 of the Securities Act when it offered and sold or otherwise distributed XRP, the native currency of the XRP ledger. The SEC's core theory is that, under *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946), Ripple was selling an "investment contract" involving XRP in an unregistered securities offering without qualifying for an exemption from registration, *see* 15 U.S.C. § 77e. The statutory question underlying the SEC's suit is of momentous importance to the digital asset industry, as it could decide, or at least affect, the statutory classification of all manner of digital assets.

Ripple has and will ably brief the statutory question. CCI writes separately as an amicus to bring to the Court's attention two important points from the industry's perspective:

First, this suit against Ripple is part of a larger pattern of enforcement actions against firms involved in the digital asset ecosystem. To date, the SEC has largely chosen enforcement over rulemaking as the way to regulate this evolving ecosystem. While CCI agrees that enforcement actions are necessary and important tools to root out fraud and other misconduct—which exist in the traditional financial markets as well—CCI is concerned by certain actions that have targeted alleged failures to register novel products under the federal securities laws notwithstanding the absence of a clear path to registration. These actions have become more common even as market participants are seeking a path to compliance. The Commission's

enforcement-centered approach has generated considerable uncertainty and risks reversing the gains that digital asset technologies have made possible, upsetting the reliance interests of market participants in the crypto space. Sound regulation of this nascent marketplace should be accomplished through the rulemaking processes set forth under the Administrative Procedure Act ("APA"). Rulemaking has the virtues of ensuring fair notice, encouraging deliberation, inviting stakeholder input, and ensuring that federal agencies fully grasp the consequences—positive and negative, intended and incidental—of regulation. Once the Commission has promulgated clear rules, it can more efficiently focus its enforcement resources on identifying and pursuing bad actors.

Second, a decision for the SEC could bless an impermissible extension of the Commission's jurisdiction beyond that provided by Congress, resulting in significant burdens on market participants. The existing framework for securities regulation is simply not designed to enable effective compliance for digital asset market participants. Important questions remain unanswered surrounding how issuers, asset holders, and intermediaries can fulfill traditional securities registration and disclosure requirements or meet statutory exemptions from those requirements, and how digital asset intermediaries can operate within the parameters imposed upon traditional securities intermediaries. This is another reason that the SEC and other federal agencies should address the regulation of digital assets and digital asset market participants in rulemakings, not through enforcement actions.

Indeed, as CCI explains, a holding for the SEC here could disrupt the responsible growth of crypto and web3 in the United States, as well as ongoing state efforts to protect digital asset holders through considered regulation. Such a decision also would risk pushing development of these promising new technologies offshore, harming U.S. digital asset holders and dealing a

substantial blow to this promising industry. All of this counsels in favor of caution and responsible regulation developed through rulemaking, not enforcement.

ARGUMENT

I. THE SEC'S ENFORCEMENT APPROACH TO DIGITAL ASSETS DEPRIVES STAKEHOLDERS OF FAIR NOTICE AND RISKS CHILLING INVESTMENT AND INNOVATION IN EMERGING DIGITAL TECHNOLOGIES.

In CCI's view, it is important for the Court to understand this enforcement action against Ripple in the broader context of the SEC's regulation-by-enforcement approach to digital assets and the ways that this approach both countermands basic principles of fair notice governing administrative action and threatens innovation and investment.

A. Blackletter Principles of Administrative Law Require Fair Notice, Particularly When It Comes To Regulation Of New, Evolving Technologies.

The SEC's enforcement-first approach to the regulation of digital assets is in tension with basic tenets of administrative law, which are meant to ensure that the public has a meaningful opportunity to engage in policymaking and that federal agencies make clear in advance what actions they deem unlawful. This requirement is grounded in the "fundamental principle in our legal system … that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (*Fox II*). In assessing fair notice, courts consider not only the statutory text but "the interpretation of the statute given by those charged with enforcing it." *Cunney v. Board of Trs. of Vill. of Grand View*, 660 F.3d 612, 622 (2d Cir. 2011) (quotation omitted). Lack of fair notice is thus of particular concern when an agency changes its interpretation of a statute, *Fox II*, 567 U.S. at 254, or when "an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012). These unannounced departures create "the kind of 'unfair surprise' against which [Supreme

Court] cases have long warned." *Id.* at 156. This principle, of course, applies fully to SEC enforcement actions; as the Second Circuit has explained, courts "cannot defer to the Commission's interpretation of its rules if doing so would penalize an individual who has not received fair notice of a regulatory violation." *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996).

Agencies, including the SEC, therefore are expected to provide notice—and a detailed justification—before taking action that upsets the reliance interests of regulated entities. When, for example, an agency changes course after "its prior policy has engendered serious reliance interests that must be taken into account," the agency "must" provide a reasoned explanation for the shift. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*Fox I*) (emphasis added). By refusing to stick to clear rules of the road, agencies run the risk of penalizing regulated entities "for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established." *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966).

B. The SEC's Actions Here Reflect An Approach To Digital Assets That Is Contrary To The Goal Of Predictability And Principles Of Fair Notice.

As Ripple explains, market participants have not received fair notice of their obligations under the securities laws; instead, they have faced uncertainty as a result of "vague and ever-shifting guidance." Defs.' Opp. to Plf.'s Mot. for Summary Judgment, ECF No. 675, at 43 ("Ripple Opp."). This enforcement action is part of that pattern and marks an unfortunate departure from the SEC's fruitful past efforts to engage with industry stakeholders. In past years, statements by SEC staff gave market actors some indication of how the Commission would analyze whether a particular digital asset constituted a security. But as detailed below, in more recent statements, SEC officials have implied that they may take a different view of the

factors that determine whether a given digital asset should be treated as a security. This has raised questions as to whether—or to what extent—the Commission has retreated from earlier staff guidance, without explaining its basis for doing so or taking into account the reliance interests at stake.

The SEC's approach creates costly confusion for market participants, as it appears at odds with the public guidance that Commission staff provided in previous years. In a 2018 speech, the SEC's then-Director of Corporation Finance William Hinman presented his view of "the application of the federal securities laws to digital asset transactions." Dir. William Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, SEC (June 14, 2018), https://tinyurl.com/4u883y85. Most notably, he cited Bitcoin and Ether as examples of "assets [that] may not represent an investment contract." *Id.* (stating, "when I look at Bitcoin today, I do not see a central third party whose efforts are a key determining factor in the enterprise"—a necessary element of the *Howey* test); *id.* ("[P]utting aside the fundraising that accompanied the creation of Ether, based on my understanding of the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions."). Director Hinman pointed to the fact that those digital assets operated on decentralized networks where "the efforts of [promoters] are no longer a key factor for determining the enterprise's success," highlighting his belief that "a token once offered in a security offering can, depending on the circumstances, later be offered in a non-securities transaction." *Id.* He further noted that digital assets sold for use or consumption often do not meet the definition of "security." *Id.*

Director Hinman's guidance was affirmed by then-SEC Chairman Jay Clayton, who previously expressed his belief that "every [initial coin offering he had] seen is a security," *Virtual Currencies: The Oversight Role of the U.S. Sec. & Exch. Comm'n and the U.S. Commodity Futures Trading Comm'n: Hearing Before the S. Comm. on Banking*, 115th Cong.

(Feb. 6, 2018) (statement of Jay Clayton), yet agreed with Hinman that the designation of a digital asset "may change over time" such that "a digital asset transaction may no longer represent an investment contract," *see* Letter from Chairman Jay Clayton to Hon. Ted Budd (Mar. 7, 2019), https://tinyurl.com/3fdb3dkv. The Commission staff then developed a *Framework for 'Investment Contract' Analysis of Digital Assets* consistent with Director Hinman's remarks, which the Division of Corporation Finance published in April 2019. *Framework for 'Investment Contract' Analysis of Digital Assets*, SEC, https://tinyurl.com/26cxh4hj (last modified Apr. 3, 2019). In a statement, the Division described the *Framework* as "an analytical tool to help market participants assess whether the federal securities laws apply to the offer, sale, or resale of a particular digital asset." Dir. William Hinman, *Statement on "Framework for 'Investment Contract' Analysis of Digital Assets*," SEC (Apr. 3, 2019), https://tinyurl.com/mps5rvnn.

Market participants, eager for guidance as to their obligations under the securities laws, relied on these statements. *See* Ripple Opp. 48-52. For example, Director Hinman's speech identified criteria that informed his analysis of whether a digital asset constituted a security; he "pointed to [B]itcoin and [E]ther as examples of cryptocurrencies that were decentralized and fully functioning and therefore 'not securities transactions.'" *Id.* at 48. The *Framework for 'Investment Contract' Analysis of Digital Assets* that followed provided some additional clarity, as it "confirmed specific factors that market participants should look to in determining whether a digital asset was a security." *Id.* at 50. This guidance shaped the approach that "sophisticated market participants" took toward digital assets such as XRP. *Id.* The SEC, however, now appears to distance itself from these statements, injecting further uncertainty into the regulatory landscape.

Recent statements about prominent digital assets are illustrative. Despite Director Hinman's earlier speech proclaiming that Ether was not a security, in a recent interview, Bitcoin was "the only" digital asset that Chair Gary Gensler would identify as a non-security. *SEC Chair Gary Gensler Discusses Potential Crypto Regulation And Stablecoins*, CNBC (June 27, 2022), https://tinyurl.com/b4s6fe23. Although Chair Gensler's view marked a change from the prior view of SEC officials (such as the former Director of the Division of Corporation Finance), on which many market participants relied, no detailed analysis from the Commission or its staff has followed. Instead, after the Ethereum network transitioned from a Bitcoin-style proof-of-work to proof-of-stake consensus mechanism, Chair Gensler stated that a proof-of-stake consensus mechanism should be considered an indicium of an investment contract under *Howey* because it involves the "efforts of others," suggesting but not explicitly stating that Ether may be best viewed as a security. *See* Paul Kiernan & Vicky Ge Huang, *Ether's New 'Staking' Model Could Draw SEC Attention*, Wall St. J. (Sept. 15, 2022), https://tinyurl.com/2ve4w2f7.

Despite the change in view about the status of Ether by SEC officials, Commodity Futures Trading Commission ("CFTC") officials have been consistent in their view that Ether is a commodity. The Chairman of the CFTC expressed that view as early as 2019. *In Case You Missed It: Chairman Tarbert Comments on Cryptocurrency Regulation at Yahoo! Finance All Markets Summit,* Release No. 8051-19, CFTC (Oct. 10, 2019), https://tinyurl.com/mrxt978r. Most recently, subsequent to the transition of the Ethereum network discussed above, CFTC Chair Benham reaffirmed his view that Ether is a commodity and suggested that there may be disagreement among regulators as to the status of Ether. Casey Wagner, *CFTC Chair Says Ether Is a Commodity, Hints That SEC Disagrees*, Blockworks (Oct. 24, 2022), https://tinyurl.com/bdd2878w. This disagreement causes industry confusion and further supports the contention that rulemaking, and not enforcement, is the best path forward.

And while SEC officials have consistently indicated that they do not view Bitcoin as a security, it is not clear what has led to this conclusion. As an example, under recent questioning before the Senate Banking Committee, when Chair Gensler was asked to explain why Bitcoin is not viewed as security, he did not specify precisely what led him to conclude that Bitcoin is not a security. Instead, he suggested that Bitcoin did not meet the "common enterprise" element of the *Howey* test because it lacked "a group of developers in the middle" for the investing public to look to, while caveating that "there are many factors" informing the analysis, and "it's not one spectrum of centralization vs. decentralization." *See Oversight of the U.S. Sec. & Exch. Comm'n: Hearing Before the S. Comm on Banking*, 117th Cong. (Sept. 15, 2022) (statement of Chair Gensler).

Amid this uncertainty, the SEC has not provided further clarity as to the classification of digital assets. The 2019 Framework is the last guidance the Commission staff has provided to help market participants assess whether the federal securities laws apply to the offer, sale, or resale of a particular digital asset, and the digital asset ecosystem has undergone significant changes in the intervening years. Certain Commissioners have indicated that no further guidance is forthcoming. Chair Gensler has stated that "the Commission has spoken with a pretty clear voice," and opined that, "[w]ithout prejudging any one token, most crypto tokens are investment contracts under the *Howey* Test." *See* Chair Gary Gensler, *Kennedy and Crypto*, SEC (Sept. 8, 2022), https://tinyurl.com/4525j4rk. Similarly, Commissioner Caroline A. Crenshaw has stated that the industry should not expect the SEC to provide "blanket definitions" or "proactively label all the specific projects, assets, and activities that are within [the Commission's] jurisdiction." Comm'r Caroline A. Crenshaw, *Digital Asset Securities—Common Goals and a Bridge to Better Outcomes*, SEC (Oct. 12, 2021), https://tinyurl.com/5x2umycv. And, unfortunately, recent SEC proposals that are likely to affect digital assets provide no guidance as to how market participants

can or should comply with regulatory requirements that were not designed with digital assets in mind. *See, e.g.*, *Amendments Regarding the Definition of "Exchange" and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities*, 87 Fed. Reg. 15,496 (Mar. 18, 2022); *Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer*, 87 Fed. Reg. 23,054 (Apr. 18, 2022).

Against this backdrop, the SEC's pattern of enforcement actions has not provided necessary guidance to market participants. *See* Ripple Opp. 56. The Commission's "'enforcement actions related to virtual currencies'" offer "'data points [that] are not definitive by any stretch,'" *id.* at 56 n.45, compounding the confusion created by public statements. For example, many enforcement actions do not offer meaningful insights into the SEC's analysis of whether a particular digital asset is a security. *See, e.g.*, *In the Matter of Coinschedule*, Exchange Act Release No. 10956 (July 24, 2021), https://tinyurl.com/262neysm ("The digital tokens publicized by Coinschedule included those that were offered and sold as investment contracts, which are securities …."); *In re Poloniex, LLC*, Exchange Act Release No. 92607 (Aug. 9, 2021), https://tinyurl.com/2ekdcthd (platform "displayed a limit order book that matched the orders of multiple buyers and sellers in digital assets, including digital assets that were investment contracts under [*Howey*], and therefore securities."). Other actions elide complicated questions that deserve public input or focus on actors other than the asset's purported issuer, shedding little light on how the entities most eager to comply with the securities laws may effectively do so. To be sure, SEC actions that target fraud and bad actors in the crypto space are commendable, but they offer little industrywide guidance for actors seeking to conform their conduct to the law.

C. The SEC's Approach Risks Chilling Innovation And Investment.

There can be no debate that the SEC's regulation-by-enforcement approach has created uncertainty that risks chilling innovation and investment. Even certain SEC Commissioners have recognized—and called out—the resulting regulatory "void." Comm'rs Hester M. Peirce & Elad L. Roisman, Statement, *In the Matter of Coinschedule*, SEC (July 24, 2021), https://tinyurl.com/4jxa6na7. Commissioner Peirce has gone so far as to say that the SEC has "refuse[d] over the past four years to engage productively with crypto users and developers," and that "[i]t is time for the [SEC] to embark on a more productive path to crypto regulation." Comm'r Hester M. Peirce, *On the Spot: Remarks at "Regulatory Transparency Project Conference on Regulating the New Crypto Ecosystem: Necessary Regulation or Crippling Future Innovation?"* (June 14, 2022), https://tinyurl.com/2s3eptjj.

By contrast, other agencies have engaged with market participants in the crypto space by treating certain digital assets as non-securities, adopting a view in tension—if not conflict—with the SEC's. For example, the CFTC ruled that "Bitcoin and other virtual currencies are properly defined as commodities." *CFTC Orders Bitcoin Options Trading Platform Operator and its CEO to Cease Illegally Offering Bitcoin Options and to Cease Operating a Facility for Trading or Processing of Swaps without Registering*, Release No. 7231-15, CFTC (Sept. 17, 2015), https://tinyurl.com/a2v3uavk; *see also* Ripple Opp. 46. As noted above, the CFTC Chairman stated in 2019 that Ether is a commodity falling under the CFTC's jurisdiction, Release No. 8051-19, and reiterated that view in recent days, *see* Wagner, *CFTC Chair Says Ether Is a Commodity, Hints That SEC Disagrees*. The CFTC also has brought at least one enforcement action in which it asserted that Ether is a virtual currency under CFTC jurisdiction. *See* Complaint, *CFTC v. Ooki DAO*, Civil Action No. 3:22-cv-05416 (N.D. Cal. Sept. 22, 2022). CFTC registrants, like LedgerX, CME, and ErisX, thus have been permitted to list and clear

certain Bitcoin and Ether derivatives. *See, e.g.*, *ErisX Pioneers First U.S. Based Ether Futures Contract*, Cboe Digital Insights (May 11, 2020), https://tinyurl.com/4a76e7sj.

Faced with the resulting uncertainty, market participants must devote significant resources to assessing whether they are engaging in activities with respect to digital assets that the SEC will view as "investment contracts" and therefore securities under *Howey*. They may even need to undertake costly protective actions, such as registration and disclosure, which could be difficult or impossible in the context of decentralized systems. These costs are amplified by the harsh stance that the SEC has signaled toward members of the public who fail to predict the trajectory of the Commission's enforcement efforts. SEC Director of Enforcement Gurbir Grewal, for example, has warned that the Commission will not "offer amnesty to cryptocurrency companies that self-report violations of securities laws," despite the SEC's refusal to offer clear guidance as to what the securities laws require in this space. Chris Prentice, *U.S. SEC's Enforcement Cop Says Crypto Amnesty Is Not On The Table*, Reuters (Feb. 28, 2022), https://tinyurl.com/2p9emjp3. And earlier this year, then-Commissioner Lee criticized "an entirely new, multi-trillion dollar industry [that has] develop[ed] around cryptocurrency and digital assets that largely defies existing laws and regulations." Comm'r Allison Herren Lee, *Send Lawyers, Guns and Money: (Over-) Zealous Representation by Corporate Lawyers*, SEC (Mar. 4, 2022), https://tinyurl.com/5d4km3bz.

This atmosphere endangers the cutting-edge innovations that the growth of digital assets has produced, developments that have brought along immense benefits for businesses and everyday customers alike. Digital assets have enabled the rise of the ownership-based digital economy, a new framework that empowers individual consumers rather than the traditional intermediaries that have so often profited at their expense. *See, e.g.*, Mauro Caselli & Babak Somekh, *Access to Banking and the Role of Inequality and the Financial Crisis*, 21 B.E. J. Econ.

Analysis & Pol'y, 1373, 1374 (2021). Thanks to the blockchain technology underlying digital assets, consumers no longer have to trust these intermediaries with their data or their money; instead, digital asset users can record ownership and verify peer-to-peer transactions in a secure, transparent, and efficient manner. Eliminating those middlemen and expanding consumer choices has unlocked new banking and lending options for underserved communities.

Recent innovations in payment technologies underscore crypto's vast potential. By harnessing the power of digital assets, organizations have been able to deliver much-needed aid in times of crisis, such as the war in Ukraine. *See* Benjamin Pimentel, *Ukraine Makes Crypto's Case in Washington*, Protocol (Mar. 18, 2022), https://tinyurl.com/4s8hekum. And digital assets like XRP have proven transformative in the world of cross-border payments, slashing fees and expanding access across the globe by introducing more efficient payment systems. *See* Annie Njanja, *Cryptocurrency Payments Key to Lowering Cross-Border Remittance Charges and Boosting Microwork Uptake in Africa, Study Shows*, TechCrunch (Feb. 23, 2022), https://tinyurl.com/55w2899z; Andres Engler, *Coinbase Enables Mexican Users to Easily Cash Out of Crypto Sent to Them*, CoinDesk (Feb. 15, 2022), https://tinyurl.com/yj5a3mkb.

But these innovations, and the investment that makes them possible, cannot be sustained without a predictable regulatory framework governing digital assets. If regulators continue to rely on enforcement instead of rulemaking, U.S. consumers likely will pay the price. Investment and innovation will be driven offshore, to competing economies that are laying the groundwork for digital assets—and their users—to thrive. *See* Letter from Chamber of Digital Commerce to President's Working Group on Financial Markets (Oct. 18, 2021), https://tinyurl.com/ycku55za. Policymakers will not be able to serve as effective partners in the effort to educate consumers about the opportunities and risks presented by digital assets. And the role of the United States as a beacon for innovation and entrepreneurial spirit will be diminished. All of this runs counter to

the goals set forth in President Biden's recent Executive Order, including that the United States "remain[] at the forefront of responsible development and design of digital assets and the technology that underpins new forms of payments and capital flows in the international financial system." Executive Order on Ensuring Responsible Development of Digital Assets, White House (Mar. 9, 2022), https://tinyurl.com/3yvwyebb ("Executive Order").

D. Rulemaking, Not Enforcement, Is The Proper Path Forward.

None of the above is meant to say that regulators should not implement properly tailored rules or guidelines to address digital assets consistent with regulators' expertise and statutory authority. The cutting-edge developments surrounding digital assets raise a number of public policy questions, including how best to protect investors and everyday users, police fraud, increase transparency, and ensure that underserved communities can access the benefits created by these technologies. CCI strongly believes that this moment demands a clear and consistent regulatory approach informed by a genuine understanding of the challenges presented by digital assets and the promise that they hold. It is for that reason that notice-and-comment rulemaking, rather than enforcement or litigation actions, is the proper path forward for appropriate regulation. As Congress intended in enacting the APA, notice-and-comment rulemaking would ensure public and stakeholder input as well as agency deliberation on issues that could have serious consequences (intended and unintended), as described further below in Part II.

The SEC's enforcement-first approach departs from the principle that "[t]he law generally seeks to encourage public participation in agency decisionmaking." *Estate of Landers v. Leavitt*, 545 F.3d 98, 110 (2d Cir. 2008). Public participation is indeed a fundamental goal of the APA. "Because nearly every agency decision—including those made by the agency in individual adjudications—implicates public policy, broad participation in agency proceedings … is often necessary." *Animal Legal Def. Fund, Inc. v. Vilsack*, 237 F. Supp. 3d 15, 22 (D.D.C.

2017). The notice-and-comment rulemaking process serves this "'central purpose' … to 'subject agency decisionmaking to public input and to obligate the agency to consider and respond to the material comments and concerns that are voiced.'" *District of Columbia v. USDA*, 496 F. Supp. 3d 213, 228 (D.D.C. 2020); *see also FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 312 (D.D.C. 2016) (discussing "the goals of transparency and public participation that underlie the notice-and-comment process"); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978) (similar). Where, as here, an agency claims jurisdiction to regulate emerging technologies without seeking public comment as to the scope of its authority and potential consequences, it runs the danger of overreaching its statutory authority through a "regulatory land grab." Defs.' Memo. of Law in Support of Their Mot. for Summary Judgment, ECF No. 643, at 4 ("Ripple MSJ") (explaining that the SEC risks exceeding its authority through this enforcement action because other regulators such as the Department of Treasury and the CFTC regulate XRP as a non-security); *see also* Ripple Opp. 46 (actions of other regulators "reinforced" the "widely held belief that XRP was not a security").

A regulation-by-enforcement approach is no substitute for the development of serious policy proposals to address the complexities of the digital asset environment, particularly when it comes to the rise of decentralized systems. Digital assets have enabled the rise of decentralized finance, an alternative to traditional centralized models that rely on intermediaries to facilitate transactions. Decentralization, in turn, continues to power promising innovations in security, transparency, and efficiency—not just in finance but in the broader economy and the digital world. Existing compliance regimes do not afford these decentralized systems an opportunity to participate because they cannot comply with traditional requirements, such as registration and

disclosure designed for a centralized financial system.[2] Rather than help decentralized systems find a workable path toward compliance, regulators instead have pointed to existing financial regulations designed for centralized intermediaries—regulations that contain requirements difficult or impossible for these market participants to comply with and that fail to address the complexities of decentralized finance systems. In addition, many of these laws are unsuitable for decentralized finance, as the risks they were meant to address are eliminated by the underlying technology. An approach that does not take account of these differences thus harms market participants acting in good faith to try to comply with traditional requirements.

These complexities illustrate why regulators cannot assume that the digital assets underlying these systems are securities and pursue enforcement actions on that basis. To the extent that the digital assets traded on decentralized systems are securities, thus giving the SEC jurisdiction, the Commission should articulate an approach tailored to this unique marketplace, including user-protection measures that account for the opportunities and risks presented by digital assets. For example, the SEC could encourage code audits and auditor independence standards; issue guidance as to the steps that decentralized protocols can take to effectively reduce risk to digital asset holders, including collateralization, safety modules, and self-insurance; and incentivize both initial disclosure of risk factors by systems before they become decentralized and ongoing disclosure by decentralized systems on an automatic basis. And the

[2] Systems operating in the crypto space may fall along a spectrum of decentralization. To evaluate whether a system is truly decentralized, CCI believes that regulators should look to (1) whether the system relies on open-source code, including the front-end code; (2) whether the system is built on a blockchain consisting of many nodes managed by unrelated parties; (3) whether the system is subject to diverse and diffuse governance; (4) whether the system operates largely independently of its initial development team; and (5) whether the funds exchanged by the system's users remain in the control of a large number of users, rather than in a centralized account.

Commission should provide a meaningful opportunity for public input on these measures through notice-and-comment rulemaking.

Clear rules of the road announced via regulation will allow market participants acting in good faith to thrive, preserving the SEC's limited enforcement resources for bad actors. *See* Chair Gary Gensler, *Testimony at Hearing Before the Subcommittee on Financial Services and General Government U.S. House Appropriations Committee*, SEC (May 17, 2022), https://tinyurl.com/2s3jm9f4 (describing the challenges created by the SEC's limited enforcement resources). Rulemaking would conserve resources by putting market actors on notice and allow the SEC to pursue its investor protection mandate more effectively.

II. THE CONSEQUENCES OF A RULING IN FAVOR OF THE SEC HERE UNDERSCORE THE SERIOUS PROBLEMS WITH THE SEC'S APPROACH TO ENFORCEMENT.

This litigation vividly illustrates CCI's concerns with the SEC's approach to digital assets—and why the Commission should proceed in a comprehensive, deliberate manner rather than by its current enforcement-centered approach. Despite Chair Gensler's repeated invitations for crypto firms to "come in and register" their products and services, in the view of CCI's members, the SEC has not adopted regulations that consider the unique attributes of digital asset technologies, nor has the Commission paved the way for firms seeking to register to do so under existing regulations. *See infra* note 3; Nikhilesh De, *SEC's Gensler Holds Firm That Existing Laws Make Sense for Crypto*, CoinDesk (Sept. 13, 2022), https://tinyurl.com/43jvjwy5.

Instead, in CCI's view, the SEC seeks to enforce registration, disclosure, and other regulatory requirements that are poorly suited to digital assets like XRP. In doing so, the SEC risks extending its authority to assets that may not necessarily fit within the SEC's jurisdiction as a securities regulator or within its existing rulebook. This extension of authority over digital assets has significant collateral consequences on digital asset market participants, who may find

themselves subject to requirements under the federal securities laws that are triggered once an underlying asset is categorized as a security but with no way to achieve compliance with those requirements.

To address these concerns, the SEC should engage in notice-and-comment rulemaking in order to give the public and stakeholders an opportunity to participate in its policymaking and to provide much-needed clarity as to how actors can comply with the applicable federal laws.

A. The Existing Securities Regulatory Regime Cannot Mechanically Be Applied To Digital Assets Such As XRP.

An enforcement-first approach to digital assets creates serious complications because the existing U.S. securities regulatory framework was not designed to support digital assets like XRP. That is why industry stakeholders have petitioned the Commission to promulgate new rules that address the complex and novel issues raised by its efforts to regulate certain digital assets as securities. These industry stakeholders have highlighted areas where the traditional securities regulatory framework may not be compatible with digital assets. *See, e.g.*, Letter from Coinbase to Sec. Vanessa A. Countryman, SEC, Re Coinbase Global, Inc., Petition for Rulemaking-Digital Asset Securities Regulation (July 21, 2022), https://tinyurl.com/3ujpsehs. Despite industry efforts to draw attention to the mismatch between the existing regulatory regime and market system for securities and the innovative attributes of digital assets, the SEC has yet to clarify how market participants can comply with existing regulatory requirements. As a result, there is no viable path to achieve compliance.

First, new or amended rules are needed because there is no clear path under the traditional securities regulatory framework to permit the legal offer and sale of digital asset securities at the federal level. Existing disclosure and registration requirements present particular challenges. Under Section 5 of the Securities Act, no person, whether the "issuer" or a

seller in the secondary market, can offer or sell a security without an effective registration statement or an applicable exemption from registration. *See* 15 U.S.C. §§ 77d, 77e. But market participants hoping to sell digital assets cannot realistically follow either path.

To register a security, a market participant must file a registration statement containing certain disclosures. *See* 15 U.S.C. § 77g. Existing disclosure requirements are tailored to traditional securities and company issuers—they are likely unworkable as applied to digital assets and the potentially relevant participants on a digital asset network, which are often diffuse and decentralized groups or individuals. The historical focus of securities disclosure requirements has been to provide investors with "material" information (*i.e.*, information for which "there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision). *TSC Indus., Inc. v. Northway, Inc*., 426 U.S. 438, 449 (1976). But what is "material" in the context of digital assets differs from traditional securities. For example, purchasers of digital assets likely seek information about the risk of a network attack, the type of governance rights embedded in assets, which party has the ability to change the code underlying the assets or the network, and other features that do not exist with the traditional securities markets. And while important, this information is likely to be publicly available, making additional disclosures on these topics unnecessarily burdensome. Other information typically disclosed about issuers in the context of traditional securities may be less relevant with respect to digital assets, to the extent it can be ascertained at all when there is not an obvious "issuer" involved in ongoing operations relating to the digital asset.

Chair Gensler has recognized that "it may be appropriate to be flexible in applying existing disclosure requirements [to digital assets]," highlighting that the Commission's approach to "asset-backed securities disclosure differs from that for equities" because different types of information are relevant to investors in that asset class. Chair Gary Gensler, *Kennedy*

and Crypto. Yet, to our knowledge, the Commission has not provided that flexibility, and Chair Gensler has suggested that crypto disclosure rulemaking remains a distant goal. *See* Jessica Corso, *SEC's Gensler Suggests Crypto Rules Could Be Years Away*, Law360 (Sept. 15, 2022), https://tinyurl.com/36anp54p (in discussing the application of disclosure requirements to digital assets, Gensler noted that "[t]he SEC in the asset-backed securities market took 10 or 11 years [to develop a rulemaking package]…."). Chair Gensler has acknowledged that in other contexts where rulemaking was far off, the Commission provided "exemptive orders or relief to individual issuers," yet the Commission's focus with crypto has trended towards enforcement rather than relief. *Id.* Without further guidance from Congress or the SEC on how to comply with these disclosure requirements, or modifications to the existing disclosure regime, those seeking to register digital asset securities offerings may be trapped in limbo.

What is more, the disclosures applicable to the offer and sale of securities differ depending on the type of asset; equity securities and debt securities may, for example, have different disclosure requirements. Many digital assets, such as XRP, do not fit cleanly within the category of debt or equity—using XRP as an example, XRP neither represents an amount promised by Ripple to an XRP holder (like debt) nor does it provide an XRP holder a stake in Ripple's assets or operations (like equity). Consequently, it is unclear which disclosure regime would apply. It is further unclear whether many purported digital asset issuers would be able to make the disclosures necessary to register digital assets under either regime. For example, registration under the Securities Act and Exchange Act of 1934 (the "Exchange Act") requires disclosures regarding the issuer's structure, financials, and management, as well as significant asset holders, that may not be feasible for purported digital asset issuers, which may be diffuse in structure with no meaningful financials or management of which to speak. *See, e.g.*, 17 C.F.R. Part 229; 15 U.S.C. § 78l(b).

Despite the lack of clarity regarding how—or if—digital assets could be registered under the Securities Act, once a digital asset is categorized as a security, and assuming it remains a security and the issuer of the security—to the extent one is identifiable—does not register it, existing holders of that digital asset would be obliged to comply with an exemption from registration in order to dispose of that asset. *See, e.g.*, Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)* (suggesting that a digital asset offered and sold as a security may change such that it is no longer offered and sold as a security). This requirement would result in asset holders becoming subject to the requirements of an exemptive regime that imposes significant costs and limitations on resale (to the extent an exemption would be available at all). For example, the safe harbor of Exchange Act Rule 144 requires a holding period after acquisition and prior to disposing of a restricted security to ensure compliance with an exemption from registration. *See* 17 C.F.R. § 230.144. Several exemptions also are conditioned upon the availability of certain information with respect to the issuer of the security, but this information may not even be available when it comes to digital assets; if it is available, it may be wholly irrelevant. Therefore, if future offers and sales of XRP are considered to be unregistered securities transactions, it is unclear whether holders of XRP—or other similarly situated digital assets—could meet the requirements under the Securities Act or any exemption therefrom to dispose of their digital assets.

This uncertainty presents a significant challenge under the securities regulation regime because the offer or sale of securities without registration or an exemption from registration are violations of Section 5 and Section 12 of the Securities Act—violations that could subject offerors and sellers to rescission of the transaction as well as other sanctions. 15 U.S.C. § 77e; *id.* § 77l. These sanctions apply not only to actual sellers but also to intermediaries involved in soliciting purchasers on their behalf. *See Pinter v. Dahl*, 486 U.S. 622 (1988). SEC registrants

may be subject to additional penalties for facilitating unregistered digital asset securities transactions without an available exemption. For example, a broker-dealer assisting a digital asset security holder with a sale in violation of Section 5 potentially could be viewed as aiding and abetting a Section 5 violation of the seller or committing its own primary violations of the federal securities laws or the rules of an applicable self-regulatory organization.

Unregistered digital asset intermediaries similarly may find themselves subject to the federal securities laws. A determination that a digital asset is a security could subject unregistered intermediaries to potential liability under the broker-dealer and exchange registration provisions of the Exchange Act, which require registration to facilitate transactions in securities. *See* 15 U.S.C. § 78f; *id.* § 78o. Moreover, Section 29(b) of the Exchange Act provides that any contract made in violation of the statute (such as one improperly facilitated by an unregistered entity) is voidable, which could create additional risk of rescission for digital asset security transactions that did not comply with the federal securities laws, including those relating to secondary market transactions and intermediaries. 15 U.S.C. § 78cc(b). Under normal circumstances, this would be an ordinary consequence of unregistered securities activity; however, in this case, Ripple's fair notice argument bears equal weight with respect to these intermediaries, which may have taken the Commission's prior guidance on digital assets and subsequent inaction to mean that XRP was among those digital assets that are not securities. Even if these entities desired to register with the SEC, without further guidance to address the important open questions we explain herein, it is unclear how digital asset trading platforms could comply with existing regulatory frameworks designed for traditional securities intermediaries.

Applying the existing securities regulatory framework to digital assets also runs the risk of subjecting market participants to onerous and duplicative requirements. For example, the

Securities Act generally preempts state law registration and qualification requirements, but only for certain categories of securities, including securities that are listed on a national securities exchange or are offered or sold pursuant to certain exemptions from registration under the Securities Act. 15 U.S.C. § 77r(b). Absent the availability of registration under the Exchange Act or an exemption from registration under the Securities Act, state law registration and qualification regimes would apply to these transactions. These state requirements may be duplicative of federal requirements, depending on the jurisdiction, and therefore may impose a heavy burden on those seeking to engage in asset sales, particularly when multiple state "blue sky" regimes with potentially different requirements are implicated. Inevitably, the imposition of state securities law requirements would add to the costs and complexities of seeking to dispose of digital asset securities and would establish another layer of uncertainty and potential risk of sanctions for market participants.

These examples are just some of the complex questions raised by digital assets, and they demonstrate that it is unclear how digital asset market participants can comply with the existing securities regulatory regime. As a result, few actors have successfully registered a digital asset security, and many have failed in their attempts to do so.[3] The inability of the existing framework to accommodate digital assets illustrates the perils of the SEC's enforcement

[3] *See, e.g.*, American CryptoFed DAO, Filings, https://tinyurl.com/2p8anac8 (SEC staff rejecting S-1 filing for "serious deficiencies" relating to requirements to comply with the form, resulting in withdrawal); Monster Products, Inc., Filings, https://tinyurl.com/2wmz8sux (same). *See also* Carrier EQ, LLC (f/k/a Airfox), Form 8-K (June 30, 2021), https://tinyurl.com/5n8bpbme (noting the issuer would discontinue the development of AirTokens because "[c]urrent laws and regulatory regimes do not provide for the Company to utilize the AirTokens as envisioned by the Company…."); Paragon Coin, Paragon Coin Update, https://tinyurl.com/3spu3rt6 (explaining that the issuer was filing for bankruptcy after its "plans were impossible to achieve due to several legal mistakes"); Jamie Chacon, *Gladius Network Shuts Down As ICO Investors Cry Foul*, Decrypt (Nov. 25, 2019), https://tinyurl.com/54jb6477 (issuer shutting down after settling an SEC enforcement action that required the issuer to register).

approach and highlights why the SEC should proceed through a more deliberative, comprehensive rulemaking approach.

Second, even if the open questions regarding the registration of digital asset securities are resolved, it is not apparent how traditional securities intermediaries, such as broker-dealers and national securities exchanges, would be able to facilitate digital asset transactions under the existing securities regulatory framework. Securities market infrastructure does not support blockchain transactions, which are a significant source of utility for XRP and other digital assets. Blockchains can provide for near-instant settlement for peer-to-peer transactions (as opposed to the T+2 settlement cycle commonly associated with securities); initiate cross-border transactions with minimal time and resource costs (whereas securities infrastructure typically does not offer direct cross-border transactions); and interface with third-party software applications (which do not exist in the traditional securities market). If digital assets are not permitted to trade on the blockchain, these benefits cannot be realized. Moreover, broker-dealers and national securities exchanges are subject to separate regulatory requirements that are not compatible with transacting in digital assets like XRP. Because these requirements are tailored to traditional securities and the existing infrastructure for handling securities transactions, they do not take into account digital assets and their unique characteristics.

This means that, even if Ripple could comply with the requirements for registration of XRP on a national securities exchange, it may not be possible to trade XRP or other digital assets alongside traditional securities. *See* 15 U.S.C. § 78l. The existing securities trading and market structure simply was not created with digital assets in mind—traditional securities trading operates through a system of clearing agencies, exchanges, and broker-dealers while blockchain transactions require none of this infrastructure. In fact, part of the inherent utility of XRP and other digital assets is their ability to interface with a blockchain without a third-party

intermediary. Therefore, it is unclear how blockchains or blockchain-based assets would be incorporated into the National Market System, which includes, for example, facilities to enable custody, clearance and settlement, establishment of a national best bid/offer, dissemination of consolidated quotations, and configuration of trade reporting.

Differences between traditional assets and digital assets appear to challenge regulators in developing a framework to permit traditional securities intermediaries to facilitate digital asset transactions. These intermediaries face requirements that, like the securities registration regime, implicate disclosures that would not be suitable for many digital assets. *See, e.g.*, 17 C.F.R. § 240.15c2-11 (requiring certain current information about an issuer to be publicly available prior to a broker-dealer publishing or submitting a quotation for publication). They also face other requirements that similarly are not tailored to digital assets. *See, e.g.*, *id.* § 240.15c3-1 (establishing capital requirements and haircuts for broker-dealers); *id.* § 240.15c3-3 (establishing the requirement to obtain possession or control of customer securities). CCI is unaware of instances where regulators have reconciled the complexities introduced by digital assets when attempting to integrate them with traditional securities. For example, the SEC's special purpose broker-dealer regime does not provide for interfacing between non-security digital assets and digital asset securities or account for differences in clearance and settlement by blockchain, both essential elements of digital asset transactions. *See Custody of Digital Asset Securities by Special Purpose Broker-Dealers*, 86 Fed. Reg. 11,627 (Apr. 27, 2021).

Third, a decision that Ripple offered and sold XRP as an investment contract could destabilize existing frameworks developed to facilitate the custody and transfer of digital assets. Outside of the federal securities framework, several states permit certain activities with respect to digital assets, including XRP. For example, the New York Department of Financial Services has published a "greenlist" identifying digital assets, including XRP, that are approved for custody

and others that also are approved for listing by a trading platform. *See BitLicense FAQs*, N.Y. Dep't of Fin. Servs., https://tinyurl.com/4y7up38e. If Ripple's offers and sales of XRP are labeled investment contracts, it would inject uncertainty into whether states, such as New York, would continue to allow licensed custodians to maintain custody of XRP and other similar assets.

If custodians are unable to continue providing their services with respect to a given digital asset, it is unclear what impact this could have on holders of that asset. However, we expect any impact would be negative, disrupting asset holders' ability to maintain custody of and transact in that asset. For example, at the time the SEC filed its complaint against Ripple, XRP was the third-largest cryptocurrency (behind Bitcoin and Ether), with a market capitalization of around $50-60 billion. Ripple MSJ at 8-9. The price of XRP declined by approximately 70% in the days following the filing of the initial complaint because many U.S.-based service providers, like crypto trading platforms, stopped supporting XRP. *See id.* The current market capitalization for XRP is under $24 billion. *See* CoinMarketCap.com, XRP, https://tinyurl.com/37nf6rhh (last visited Oct. 31, 2022).

B. Holders Of Other Digital Assets, As Well As The U.S. Crypto Industry At Large, Could Be Harmed By A Decision That Ripple Offered And Sold XRP As An Investment Contract.

While the Court's decision may provide clarity with respect to whether Ripple offered or sold XRP as an investment contract during the relevant period, a decision in favor of the SEC could compound the uncertainty faced by the broader crypto market regarding the application of *Howey* to digital assets. *See* Br. of Amicus Curiae The Chamber of Digital Commerce, ECF No. 649, at 7-12 (Sept. 21, 2022) (highlighting the SEC's elision of important temporal distinctions inherent in *Howey*'s potential application to XRP secondary market transactions). In the absence of further guidance from the SEC, a simple finding that Ripple offered and sold XRP as an

investment contract could deepen that uncertainty as market participants would be left to guess if this finding impacts the status of other digital assets, and if so, how such digital assets may be impacted. This uncertainty could result in developers in the emerging crypto and web3 industry taking their innovations elsewhere.

In particular, this could lead to crypto and web3 companies leaving the United States to operate their businesses offshore, where more crypto-friendly regulatory regimes exist. This burgeoning industry could find a home elsewhere—for example, XRP is not regulated as a security in the United Kingdom, Switzerland, Singapore, Japan, or the UAE. Lack of engagement with the crypto and web3 industry already is impacting the United States' ability to compete in the international market for human capital. In 2021, the United States made up only 29% of self-reported market share for web3 developers; down from 47% in 2015. *See* Electric Capital, *U.S. Share of Web3 Developers is Shrinking* (April 2022), https://tinyurl.com/2p9868um. An exodus of developer talent could have a chilling effect on innovation in the United States and inhibit the growth of an important emergent industry. Stunting the growth of this industry would be contrary to the stated goals of this Administration, which has expressed the desire to support responsible innovation in digital assets and reinforce the United States' leadership in the global financial system and in technological and economic competitiveness. *See* Executive Order.

* * *

In short, the consequences of forcing digital assets into a securities framework that was not designed for such assets will be significant. Resolution of these complicated questions of fact, law, and policy should be determined by the full SEC in the course of a rulemaking, based on a robust administrative record resulting from public and stakeholder input and resulting in a regulatory framework that provides clear rules of the road for all. These questions are not

appropriately resolved in one-off enforcement actions. CCI respectfully submits that these considerations should inform this Court's assessment of the SEC's claims here.

CONCLUSION

For the reasons above and as set forth by Ripple, the Court should deny Plaintiff's Motion for Summary Judgment and grant Defendants' Motion for Summary Judgment.

Dated: October 31, 2022

Respectfully submitted,

/s/ Robert L. Boone
Robert L. Boone
Tiffany J. Smith*
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Avenue
New York, NY 10007
Tel.: (212) 230-8800
Fax: (212) 230-8888
robert.boone@wilmerhale.com
tiffany.smith@wilmerhale.com

Kelly P. Dunbar*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, DC 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
kelly.dunbar@wilmerhale.com

Counsel for Crypto Council for Innovation

**Not admitted in S.D.N.Y.*