UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

BEBA LLC, DEFI EDUCATION FUND, Plaintiffs, v. SECURITIES AND EXCHANGE COMMISSION; and GARY GENSLER, Commissioner of the Securities and Exchange Commission, in his official capacity, Defendants.	Case No. 6:24-cv-153-ADA-DTG Judge Alan D. Albright

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

After Gary Gensler became its Chair in 2021, the Securities and Exchange Commission began a regulatory assault on the digital asset industry. The SEC decided that the vast majority of digital assets, which were long understood to not be "securities," now are securities. It thereby announced authority over—and declared illegal—countless transactions in this two-trillion-dollar industry. The SEC's new policy vastly exceeds its statutory authority to regulate "securities"—a point that the SEC does not even contest in this motion. And it adopted this policy without complying with the notice-and-comment requirement of the Administrative Procedure Act. Instead, it brought dozens of enforcement actions against digital asset industry participants, alleging the same theory of liability against all of them: If a digital asset is involved in a transaction, then the transaction is presumptively a securities transaction. The SEC brought enforcement actions against everyone—companies that created and distributed digital assets, the major exchanges that allow trading of digital assets, and even small companies that merely incorporated digital assets into their business plans. The SEC's new policy now threatens entities that use digital assets with crippling consequences, preventing them from carrying out plans that the law allows.

This lawsuit presents two claims against the SEC. The first is brought by Beba, a Waco apparel company that created a new digital asset token. The problem for Beba is that the SEC views Beba's planned distribution of its digital asset token as an "unregistered securities offering" and has brought enforcement actions against other companies that have done the same thing. So Beba's plans are squarely in the crosshairs of the SEC's policy. Beba therefore invokes the Declaratory Judgment Act, which permits parties like Beba to get a declaration of their rights before they trigger an action against them. The second claim is brought by Beba and the DeFi Education Fund, a non-profit policy and advocacy organization, and challenges the SEC's new policy under the APA. The APA required that the SEC's policy go through notice and comment and fall within its statutory authority, but the SEC's policy did neither.

In the hopes that its new policy can continue to evade scrutiny, the SEC filed a motion to dismiss, making a series of jurisdictional arguments that courts have long rejected. This Court should reject them too. Beba can get a declaratory judgment because it has already acted, the SEC has brought actions against similar entities, the SEC does not disavow enforcement against Beba, and prospective relief is allowed under both 5 U.S.C. §702 and the ultra vires doctrine. As for the APA claim, both Beba and DEF have standing because, in addition to the threat of enforcement that Beba faces, DEF and Beba are suffering financial harm. And their facial challenge to an already-in-effect-and-enforced policy is paradigmatically ripe. While the SEC tries to contest (with no evidence) that it enacted the challenged policy in the first place, Beba and DEF plausibly alleged otherwise. More than plausibly: The SEC brags about its new and expansive view of its authority and the enforcement actions that it has brought against the biggest players in the industry. It cannot be the case that an agency can clandestinely adopt a new rule, illegally bypass the procedures for rulemaking, enforce that rule numerous times, cast a pall over an entire industry, and then get every pre-enforcement challenge dismissed at the pleading stage by denying (with no evidence, before discovery, and without an administrative record) that the policy exists. The SEC's policy is real, devastating, and subject to judicial review.

If the SEC wants to threaten lawful businesses with enforcement and run roughshod over a major industry that its political leaders dislike, it should have to defend that policy on the merits, in the open. Its motion to dismiss should be denied.

BACKGROUND

Digital Assets. Digital assets, also called cryptocurrency, became popular with the creation of Bitcoin in 2008 and Ethereum in 2015. Am. Compl. (Doc. 24) ¶¶40-41. Since then, thousands of lesser-known digital assets have been created and are freely available to exchange online. Anyone can create a new one using easily accessible computer code. ¶44. When a new digital asset is created, the creator can distribute the new asset to wallet "addresses" of other users. ¶45. And when someone acquires a new digital asset, the new owner can freely use or exchange it. ¶47. Someone acquiring a

digital asset does not automatically, or ordinarily, enter into any ongoing relationship—contractual, statutory or otherwise—with the seller or creator of that digital asset. ¶52.

The digital asset industry is substantial—with 52 million Americans participating, and over two *trillion* dollars in market capitalization. ¶¶51-58. Digital assets have many advantages: they allow people without access to banks to participate in the financial system, facilitate charitable contributions around the world, and enable a more efficient and user-friendly global economy. ¶¶60-62. Digital assets have been especially embraced in Texas. ¶¶63-64; *see* Pollard, *Tex. Republicans Want to Make the State the Center of the Cryptocurrency Universe*, Texas Trib. (Oct. 28, 2021), perma.cc/EC6U-NVRP.

Beba's Airdrop. Beba is a Waco company that sells high-end products—duffels, backpacks, and wallets—handmade by local craftspeople in Kenya. Am. Compl. ¶¶30-34; *About Us*, Beba, beba-collection.com/pages/about-us. Like many businesses, Beba uses digital assets. Beba's founders saw the promise of digital assets because they grew up in Africa and witnessed the deficiencies of the traditional financial system, especially for poor people who can't get bank accounts and in corrupt places where traditional economic means can't be relied on. Am. Compl. ¶¶35-37. Digital assets help solve these problems because they're available to anyone and use transparent and reliable transactions. *Id.* Beba has a history of using digital assets: it previously released a series of digital assets in the form of non-fungible tokens, or "NFTs." *Id.*; *see also Beba Collection*, Beba, art.bebacollection.com; Am. Compl. ¶50 (collecting examples of digital asset creation by other businesses).

Beba created a new digital asset called the "BEBA token." ¶¶3-5, 66-88. Beba initially distributed the BEBA token through an "airdrop" (and plans to keep doing so). ¶¶4-5, 66-88. An airdrop is a common means of distributing a new asset to preexisting users by sending a token—for free—to users' existing public wallets. The recipients need not proactively do anything to receive or accept such a token, and they may not even be expecting the airdrop. Airdrops are free giveaways. *Id.* Beba created 100,000 BEBA tokens. ¶66. BEBA token holders are entitled to purchase one of an exclusive line of

Beba duffel bags, called the Ndovu Duffel, at a discounted price. ¶68. The Ndovu Duffel will be available for $190—but only to those who hold 200 BEBA tokens. *Id.* The BEBA token can also be freely traded. ¶70. Beba expects a strong secondary market to emerge for its BEBA tokens, given the track record of other similar tokens, if it's allowed to go through with its plans. ¶¶74-76. BEBA tokens are not registered as securities with the SEC.

Beba already made its first airdrop. It wants to do a second airdrop of the token, but cannot because the SEC deems that action unlawful. ¶¶67-87. In its first airdrop, Beba distributed BEBA tokens for free to two sets of people who did not ask for the token, were not aware they would receive the token, and did not do anything to obtain the token. ¶¶79-82. In its second airdrop, Beba plans to distribute the tokens for free to three sets of people: those who received the first airdrop; those who complete a specific transaction to unlock the tokens and pay a general transaction fee to the network (but not to Beba); and those who follow Beba on social media and follow specific promotional steps. ¶¶84-86. Beba will also hold back some tokens, which will increase in value if the airdrop succeeds. ¶88. As described below, the SEC takes the position that Beba's airdrop is an unlawful securities transaction. Beba is ready to airdrop its token to all three groups of recipients now, and will do so once a court gives it relief from the SEC's position. ¶87.

The SEC's New Policy. Under federal law, it is unlawful to deal in unregistered "securities." But Congress defined "securities" narrowly. Securities are formal financial instruments like "stock[s]" and "bond[s]." 15 U.S.C. §77b(a)(1). Importantly, securities include "investment contract[s]." *Id.* But the Supreme Court defines investment contracts as only those agreements where the buyer enters into a contract or scheme in which there is (1) an investment of money (2) in a common enterprise (3) with a reasonable expectation of profit derived from the efforts of others. *See SEC v. W.J. Howey*, 328 U.S. 293, 301 (1946). Most economic transactions, including most made for investment purposes, do *not* meet this stringent test and therefore are not investment contracts or any other form of securities. *See*

Am. Compl. ¶93 (collecting cases). The SEC has no plenary power to regulate commercial transactions, investments, or distributions of new assets. Its domain is limited to "securities," properly defined.

For some time, the SEC correctly believed that it lacked plenary power over digital assets. Before Gensler took over, the SEC's position was that a digital asset "all by itself is not a security." ¶7, 131 (quoting Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, SEC.gov (June 14, 2018), perma.cc/TD7R-7C7S). It explained that "[w]hether a particular digital asset at the time of its offer or sale satisfies the *Howey* test depends on the specific facts and circumstances" of the transaction, just like with any other asset. ¶130 (quoting *Framework for "Investment Contract" Analysis of Digital Assets*, SEC.gov (Apr. 3, 2019), perma.cc/9SNP-KN3A ("Framework")). The implications of this approach were important. "When the tokens are not being sold as investment contracts," explained a Commissioner, "they are not securities at all." ¶132 (quoting Peirce, *Regulation: A View from Inside the Machine* (Feb. 8, 2019), perma.cc/V6N9-8ZJK). Official SEC publications confirmed the SEC's approach. ¶134 (citing *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act: The DAO*, SEC.gov (July 25, 2017), perma.cc/V8HV-7VZ8). Now-Chair Gensler, then a professor, agreed. He explained that "3/4 of the [digital asset] market is non-securities." ¶135 (quoting Gensler, *Lecture Transcript: Blockchain and Money: Session 17: Secondary Markets and Crypto-Exchanges*, MIT (Fall 2018), perma.cc/BYW8-4PVF). Even after he took over, Gensler agreed that the SEC would "need additional Congressional authorities" to exercise authority over major sectors of the digital asset industry. ¶110 (quoting Gensler, *Remarks Before the Aspen Security Forum*, SEC.gov (Aug. 3, 2021), perma.cc/2UPR-WNA9).

But Congress did not want to give the SEC plenary power over digital assets, ¶¶166-70, so Gensler's SEC decided to go it alone. Behind closed doors, the SEC adopted a new policy toward digital assets. ¶¶129-70. After "Gensler's appointment as Chair in 2021, the SEC has adopted a de

facto rule, without notice or comment, that the vast majority of digital assets are securities." ¶8 (cleaned up). The SEC's aggressive new policy "holds that virtually all new digital asset tokens are securities." ¶147. It thereby renders most digital asset transactions illegal.[1]

The SEC did not announce its new policy through a notice of proposed rulemaking. *Cf.* 5 U.S.C. §553. As one Commissioner reflected, "[a] notice-and-comment process [would have] allow[ed] broad public and internal participation in developing a sound regulatory system." Am. Compl. ¶163 (quoting Peirce, *Outdated: Remarks Before the Digital Assets at Duke Conference*, SEC.gov (Jan. 20, 2023), perma.cc/6PU7-HQXM (cleaned up)). But notice-and-comment also would have forced the SEC "to admit that [it] likely need[s] more, or at least more clearly delineated, statutory authority." ¶160 (quoting Peirce, *Outdated*, *supra*).

So instead, the SEC revealed its new policy through a series of public statements and enforcement actions. Chair Gensler announced in 2022 that the "vast majority" of digital assets themselves "are securities." Am. Compl. ¶137 (quoting Gensler, *Speech: Kennedy and Crypto*, SEC.gov (Sept. 8, 2022), perma.cc/E3D5-QUBH). Now, Gensler told the public, "pretty much every sort of crypto transaction already falls under the SEC's jurisdiction." ¶8 (quoting Khardori, *Can Gary Gensler Survive Crypto Winter?*, N.Y. Mag. (Feb. 23, 2023), perma.cc/7ZDZ-VN68). Now, all digital assets "other than bitcoin … at the core … are securities." ¶138 (quoting Khardori, *supra*). The SEC now "repeat[s] the mantra that all, or virtually all, tokens are securities." ¶139 (quoting *Peirce*, *Outdated*, *supra*).

[1] Now that its new policy is getting challenged in litigation, and judges have doubted that digital assets themselves are securities, the SEC has tried to backtrack in one case with a footnote saying it does not view digital assets themselves as securities, but rather views transactions involving digital assets as investment contracts (which, in turn, are securities). *See* Mot. to Am. Compl. at 24 n.6, *SEC v. Binance*, No. 1:23-cv-1599 (D.D.C. Sept. 12, 2024), ECF No. 273-1. The SEC does not make that argument here, and it would not work at this stage because this Court must accept Plaintiffs' allegations about the SEC's policy as true. But the difference is immaterial because the result is the same: transactions are now presumptively illegal when they involve digital assets.

The SEC's enforcement actions left no doubt that the SEC had adopted a new policy. The SEC loaded up its "Crypto Assets and Cyber" enforcement unit in early 2022. ¶109 (citing *SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit*, SEC.gov (May 3, 2022), perma.cc/YAQ9-U2DV). "We have 1,300 people in our enforcement division," Gensler boasted, and "a robust enforcement history in the crypto space." ¶122 (quoting *SEC's Gensler: The 'Runway Is Getting Shorter' for Non-Compliant Crypto Firms*, Yahoo! News (Dec. 7, 2022), perma.cc/4YHE-XFAY). He told the digital-asset industry to "come into compliance" with its new policy. *Id.* Then, the SEC started bringing actions—against big and small companies, a wide range of tokens, and a wide variety of activities—all on the premise that digital assets themselves are presumptively securities, the position it used to disavow. *See* ¶¶10-12, 116-22, 140-42. In 2023 alone, the SEC filed enforcement actions against the three major digital-asset trading platforms that it had long believed were beyond its reach.[2] In these enforcement actions, the SEC described digital assets themselves as investment contracts. ¶108.[3] As one Commissioner summarized its thinking, the "the [SEC's] approach to this analysis for cryptocurrencies and digital assets has been that *any* item sold whose value is based on the efforts of others is a security." ¶150 (quoting *SEC Comm'r Uyeda Remarks to the Council of Inst'l Investors*, SEC.gov (Mar. 5, 2024), perma.cc/D2EJ-2MQJ (emphasis added)). And this "scorched earth" approach has stifled innovation

[2] *See* Compl., *SEC v. Coinbase*, No. 1:23-cv-4738 (S.D.N.Y. June 6, 2023), ECF No. 1; Compl., *SEC v. Binance*, No. 1:23-cv-01599 (D.D.C. Jun. 5, 2023), ECF No. 1; Compl., *SEC v. Payward*, No. 3:23-cv-06003 (N.D. Cal. Nov. 20, 2023), ECF No. 1.

[3] *See, e.g.*, Compl., at 33-80, *SEC v. Coinbase, Inc.*, No. 1:23-cv-4738 (S.D.N.Y. filed June 6, 2023), ECF No. 1 (alleging that 13 tokens were securities based on facts such as creators' blog posts detailing availability of tokens, descriptions of the company's development, and generic statements about the tokens' value); *accord* Order, *In re Shapeshift*, No. 3-21891, at 2 (S.E.C. Mar. 4, 2024), perma.cc/C4JN-MUGA (concluding "ShapeShift platform allowed customers to effect exchanges of at least 79 crypto assets… that were offered and sold as securities" without naming or analyzing a single digital asset).

and put industry participants out of business or forced them offshore, devastating a promising American industry. ¶149 (quoting *Peirce, Overdue: Statement of Dissent on LBRY*, SEC.gov (Oct. 27, 2023), perma.cc/KM65-3PGS).

The SEC has taken a uniquely harsh stance against entities like Beba who airdrop digital tokens. ¶114. Under its policy, even *free* airdrops of digital assets violate the ban on offering or selling unregistered securities. *See* 15 U.S.C. §77e. The SEC has brought enforcement actions against companies that create new tokens and distribute them via airdrop—even when they do so for free, and even when they do so to groups of recipients who pay transaction fees or take promotional steps like Beba's. Am. Compl. ¶¶116-123 (collecting cases); *see, e.g.*, Compl., *SEC v. Hydrogen*, No. 1:22-cv-08284 (S.D.N.Y. Sep. 28, 2022), ECF No. 3. Even though an investment contract requires an "investment of money," *Howey*, 328 U.S. at 301, the SEC's policy deems that requirement satisfied when token recipients, for example, "like" or otherwise engage with social-media posts that benefit the distributor. Am. Compl. ¶¶114-15; *E.g.*, Compl., *SEC v. Sun*, No. 1:23-cv-02433 ¶109-33 (S.D.N.Y. Mar. 22, 2023), ECF No. 1; *accord* Compl., *Hydrogen*, 1:22-cv-08284 (S.D.N.Y. Sept. 29, 2022), ECF No. 3. The SEC believes that "the lack of monetary consideration for digital assets, such as those distributed via a so-called 'air drop,' does not mean that the investment of money prong is not satisfied; therefore, an airdrop may constitute a sale or distribution of securities." ¶115 (quoting *Framework*, *supra*). Its enforcement actions against airdroppers have resulted in large sanctions, a dire warning to companies like Beba. *See, e.g.*, Judgment, *SEC v. Hydrogen*, No. 1:22-cv-08284 (S.D.N.Y. Apr. 20, 2023), ECF No. 20 ($2.8 million judgment against airdropper).

The SEC's new stance—and penchant for going after smaller targets, like Beba—has not gone unnoticed. Am. Compl. ¶123; *See, e.g.*, Compl., *SEC v. Wahi*, No. 2:22-cv-1009 (W.D. Wash.), ECF No. 1. Commissioners have highlighted its behavior. ¶123 (quoting Peirce, *Overdue: Statement of Dissent on LBRY*, *supra*). Members of Congress have called out the SEC's lawless approach. ¶¶169-70; *see also*

Letter from Reps. Emmer & McHenry to Chair Gensler (Sept. 17, 2024), perma.cc/ZWM8-YFQA (expressing concerns about SEC regulation of free airdrops). And courts have called it a "gross abuse of the power entrusted to [the SEC] by Congress" that has risen to the level of "pervasive misconduct" and that "demonstrates a pattern of organizational bad faith [that] broadly implicates the Commission itself." ¶123 (quoting *SEC v. Dig. Licensing*, 2024 WL 1157832, at *32, *17 n. 284 (D. Utah Mar. 18)).

This Lawsuit. This suit presents two claims. Beba brings a Declaratory Judgment Act claim. The DJA "afford[s] one threatened with liability an early adjudication without waiting until [its] adversary should see fit to begin an action." *Rowan Cos. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989) (cleaned up); *see* 28 U.S.C. §2201(a). Beba seeks the right to proceed with its planned airdrop, which the SEC wrongly deems an unlawful offer or sale of securities. ¶¶186-99; *see SEC v. Ripple Labs*, 697 F. Supp. 3d 126, 135 (S.D.N.Y. 2023). Beba and DEF also bring a claim under the Administrative Procedure Act, challenging the SEC's new policy under which the vast majority of digital assets are securities. ¶¶200-08. DEF is a nonprofit that advocates for the rights of participants in the decentralized finance ecosystem—a sector of the digital-asset space. The SEC's new policy is a substantive rule that was enacted without notice and comment, exceeds its statutory authority, and abuses its discretion, so Beba and DEF ask for it to be set aside as unlawful. *Id.* The policy has harmed both Beba and DEF because it has threatened Beba with enforcement, ¶178, cost DEF and Beba millions of dollars in economic harms by targeting their digital assets, ¶¶177-83, and forced DEF to divert resources to counteract its negative effects, ¶182.

The SEC moves to dismiss on jurisdictional grounds only. As to both claims, it argues standing, ripeness, and sovereign immunity. *See* SEC Br. (Doc. 30-1) at 5-30.

ARGUMENT

A plaintiff need only support jurisdiction with "the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. DOW*, 504 U.S. 555, 561 (1992). So at the motion to dismiss stage, the court accepts Plaintiffs' allegations "as true," makes all inferences in favor of

jurisdiction, views the facts "in the light most favorable to the plaintiff," and asks whether they give rise to a "plausible" basis for jurisdiction. *Barilla v. Houston*, 13 F.4th 427, 431 (5th Cir. 2021). And because the SEC moves to dismiss on jurisdictional grounds only, the Court "accept[s] as valid the merits" of Plaintiffs' claims. *FEC v. Cruz*, 596 U.S. 289, 298 (2022). So here, the Court "assume[s]" that the SEC is exceeding its statutory authority and cannot qualify for an exception to notice and comment. *Id.* This Court has jurisdiction over both the DJA and APA claims.

I. Plaintiffs plausibly alleged jurisdiction for the Declaratory Judgment Act claim.

Beba's situation is why the Declaratory Judgment Act exists. It plans an airdrop that it believes is legal, but it cannot proceed because the SEC is bringing enforcement actions against entities for that precise conduct. Beba has provided all of the details about its plan and stands ready and able to execute it. "[W]here threatened action by government is concerned, [courts] do not require a plaintiff to expose himself to liability before bringing suit." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). Instead, the DJA "allow[s] prospective defendants to sue to establish their nonliability." *Beacon Theatres v. Westover*, 359 U.S. 500, 504 (1959). This Court has jurisdiction because Beba faces a credible threat of enforcement now, cannot take any further steps without risking an enforcement action, and brings a prospective claim not barred by sovereign immunity.

A. Plaintiffs plausibly alleged Beba's standing.

Beba has standing to bring its DJA claim because the SEC's claimed enforcement authority encompasses Beba's planned airdrop. The "gist of the question of standing" is simply whether the plaintiff has "a personal stake in the outcome of the controversy" to ensure "concrete adverseness." *Contender Farms v. DOA*, 779 F.3d 258, 264 (5th Cir. 2015) (cleaned up). A plaintiff has that when it faces an "injury in fact" that is "traceable" to the defendant and "likely to be redressed" by a decision in its favor. *Spokeo v. Robins*, 578 U.S. 330, 338 (2016). As relevant here, a plaintiff bringing a "pre-enforcement challenge" establishes an "injury in fact" when it alleges that it intends to "engage in a course of conduct" arguably protected by law and arguably "proscribed" by the challenged law, for

which it faces a "credible threat" of enforcement. *Book People v. Wong*, 91 F.4th 318, 329-30 (5th Cir. 2024) (citing *SBA List v. Driehaus*, 573 U.S. 149 (2014)).

For the DJA claim, the only dispute is over whether Plaintiffs plausibly alleged that Beba faces a "credible threat" of enforcement. *Driehaus*, 573 U.S. at 159; *see* SEC Br. 29-30. This Court must accept as true, and the SEC doesn't contest, that Beba wishes to "engage in a course of conduct" arguably protected by law. Beba intends to airdrop its BEBA token, Am. Compl. ¶¶83-88, and that conduct is "'arguably' proscribed." *Contender Farms*, 779 F.3d at 268. In fact, the SEC does not dispute that, on its view of the law, Beba's conduct *is* "proscribed." *Driehaus*, 573 U.S. at 159.

The credible-threat bar is low, especially in securities cases. *KBR v. Chevedden*, 478 F. App'x 213, 215 (5th Cir. 2012) (unpublished). To show a "credible threat" of enforcement, a plaintiff need only show "that a prosecution is remotely possible." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979). A "credible threat" is present when the defendants "have not explicitly disavowed enforcing [the challenged statute] in the future," even when they "have not enforced or threatened to enforce this statute against plaintiffs or any other [similarly situated] party." *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 696 (6th Cir. 2015) (citing *Babbitt*, 442 U.S. at 302). Someone arguably subject to a law faces a credible threat of enforcement unless an "undeviating policy of nullification" has rendered the law "dead words of the written text." *Poe v. Ullman*, 367 U.S. 497, 502 (1961).

Plaintiffs' amended complaint easily clears the credible-threat bar. Beba plans to airdrop the BEBA token to three groups: unsoliciting recipients, recipients who take simple and specific promotional steps, and recipients who pay a specific transaction fee. Am. Compl. ¶¶83-88. The SEC has made clear its willingness to bring enforcement actions against airdrops in these same circumstances. *See* Am. Compl. ¶¶105-28; *see, e.g.*, Compl., *SEC v. Hydrogen*, No. 1:22-cv-08284 (S.D.N.Y Sep. 28, 2022), ECF No. 3. It has brought enforcement actions against companies that create new tokens and distribute them via airdrop—even when they do so for free, and even when they do so to groups of

recipients who pay transaction fees or take promotional steps just like Beba's. Am. Compl. ¶¶116-123 (collecting cases). The SEC does not attempt to distinguish Beba's airdrop from its past enforcement actions against entities like Hydro, Tomahawk, and Tron for their similar airdrops of similar digital-asset tokens on similar terms. *Id.* Many of these enforcement actions against airdroppers like Beba have resulted in sanctions. *See, e.g.*, Judgment, *SEC v. Hydrogen*, No. 1:22-cv-08284 (S.D.N.Y. Apr. 20, 2023), ECF No. 20 ($2.8 million judgment against airdropper). The SEC nowhere says that Beba has nothing to fear and nowhere promises that it will not bring enforcement actions against its free air-drops. The SEC *cannot* disclaim enforcement because doing so would contradict its policy that the "vast majority" of digital assets like BEBA "are securities," which makes their unregistered distribution without registration subject to enforcement. Am. Compl. ¶8 (quoting Gensler, *Speech: Kennedy and Crypto*, *supra*). Because Beba disagrees, it is entitled to DJA review.

The SEC primarily says that Beba must wait until the SEC takes specific enforcement steps against Beba, like "correspondence" or an "investigation." SEC Br. at 4, 27-30. But that "reading of a credible threat of enforcement is much too narrow." *Braidwood Mgmt. v. EEOC*, 70 F.4th 914, 931 (5th Cir. 2023). A plaintiff faces a credible threat even when "the statute had never been applied" to anyone, let alone to the plaintiff. *Seals v. McBee*, 898 F.3d 587, 592 (5th Cir. 2018). A plaintiff "readily establish[es] a credible threat" if the agency has taken steps against "one" other party ever. *Braidwood*, 70 F.4th at 927. As long as the agency "refuses to declare affirmatively that it will not enforce," then the plaintiff faces a credible threat. *Id.* It does not matter if the agency "has not to date evaluated" whether to take any steps against the plaintiffs. *Franciscan All. v. Becerra*, 47 F.4th 368, 376 (5th Cir. 2022). In fact, "the probability of enforcement is not relevant." *Int'l Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 818 (5th Cir. 1979). All that matters is that the plaintiff is arguably subject to the statute and the agency has not disavowed enforcement, both of which are uncontested here. After all, "the point of a declaratory judgment" is "to settle 'actual controversies' *before* they ripen into violations of law."

Braidwood, 70 F.4th at 926 (emphasis added). Since an agency cannot take enforcement steps before the plaintiff has violated the law, the SEC's theory would mean that there could never be a DJA pre-enforcement claim, which is clearly not the law.

The SEC makes two more standing arguments, but Fifth Circuit precedent rejects them both. First, Beba can, of course, show a credible threat by highlighting how the agency has interpreted the relevant law in other actions. *Cf.* SEC Br. at 30. In *Braidwood*, the Fifth Circuit held that a plaintiff had standing based on the agency's interpretation of a statute in another action. 70 F.4th at 927. Though the agency gave reasons why it was unlikely to enforce against the plaintiffs, the other action "shows that the [agency] may actively enforce [the statute] in situations like plaintiffs'." *Id.* Even the out-of-circuit case that the SEC cites held that a plaintiff had standing based on "interpretations chosen by the [agency]" in other actions. *Teva Pharms. v. Sebelius*, 595 F.3d 1303, 1308-14 (D.C. Cir. 2010)).

Second, the "as-applied" nature of Beba's challenge does not affect its standing. *Cf.* SEC Br. 30. If a plaintiff "satisfies the [credible threat of enforcement] requirements outlined above, the facial-versus-as-applied distinction does not affect [the] standing inquiry." *Barilla*, 13 F.4th at 432 n.3. Courts routinely find that a plaintiff has standing to bring an as-applied challenge based on a credible threat of enforcement. *E.g.*, *Braidwood*, 70 F.4th at 928-29; *Steffel v. Thompson*, 415 U.S. 452, 473-75 (1974)). Like in *Braidwood*, the SEC has not provided "a single additional fact that would be required to adjudicate the present action." *Id.* at 929. Instead, it cites only dictum that the Fifth Circuit itself called "not helpful" because the case involved a facial challenge. SEC Br. 30 (citing *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 659 (5th Cir. 2006)). If anything, courts *disfavor* facial challenges to statutes because they invite broader relief and speculation about circumstances not before the court. *See Steffel*, 415 U.S. at 474; *Hersh v. United States*, 553 F.3d 743, 762 (5th Cir. 2008).

B. The DJA claim is ripe.

Beba's claim is ripe for the same reasons. "It remains unclear whether [a court] can reject a claim as unripe once plaintiffs have established Article III standing." *Braidwood*, 70 F.4th at 930 n.28. In pre-enforcement cases, "standing and ripeness boil down to the same question." *Medimmune*, 549 U.S. at 128 n.8. "Ripeness," like standing, just requires that an injury "be 'sufficiently likely to happen to justify judicial intervention.'" *Gulfport Energy v. FERC*, 41 F.4th 667, 679 (5th Cir. 2022). Because Babe faces a credible threat, that standard is met.

To the extent it requires independent analysis, "[t]he ripeness inquiry hinges on two factors": the "fitness of the issues for judicial decision" and the presence of some "hardship" from "withholding court consideration." *Id.* Beba plausibly alleges both.

Fitness. A claim is fit for judicial decision if it can be adjudicated without future factual development. *Braidwood*, 70 F.4th at 931. Where an agency has already "brought a successful suit against another [regulated entity] for the same [practices]," the claim is fit for judicial decision. *Id.* at 931. And when a plaintiff plans some activity over which it believes the agency "lack[s] statutory jurisdiction," a claim over that statutory authority is "fit for… review." *Gulfport Energy*, 41 F.4th at 679; *accord Contender Farms*, 779 F.3d at 267-68.

Beba's claims are fit for review. Beba has alleged every fact about its planned distribution of tokens, and it will not take any further steps until it receives a judicial resolution. Beba has already created the BEBA token and has identified its airdrop plan in complete detail. Am. Compl. ¶¶65-88. Beba will require nothing more of token recipients and will promise them nothing more. It stands ready and able to execute this plan and will execute as soon as it has a judgment in its favor. ¶87. On Beba's view of the law—which the Court adopts in deciding ripeness, *Contender Farms*, 779 F.3d at 267—it has alleged every fact required for the adjudication of its claim.

Though the SEC denigrates Beba's plans as "hypothetical" and "fuzzily defined," SEC Br. 27, it has not identified "a single additional fact" needed. *Braidwood*, 70 F.4th at 929. Courts routinely adjudicate pre-enforcement challenges based on future business plans impeded by the challenged policy, even though of course those business plans are always subject to change. *See, e.g., Crown Castle Fiber v. Pasadena*, 76 F.4th 425, 437 (5th Cir. 2023) ("no further factual development" needed about business's general plan to develop a communications network in the region). And the SEC's argument refuses to honor the pleading standard, where allegations can be general and inferences cannot be drawn against the plaintiff. *Gen. Land Off. v. Biden*, 71 F.4th 264, 272 (5th Cir. 2023); *Barilla*, 13 F.4th at 431. Plus, Beba's claim raises "predominantly questions of statutory interpretation," *Walmart v. DOJ*, 21 F.4th 300, 311 (5th Cir. 2021), because it involves the application of 15 U.S.C. §77b(a)(1)'s definition of "investment contract" to its undisputed airdrop plan. No further factual development is even *possible* because there are no further steps that Beba can take without risking liability. "[W]here threatened action by government is concerned, [courts] do not require a plaintiff to expose himself to liability before bringing suit." *MedImmune*, 549 U.S. at 128-29.

The SEC's three remaining fitness arguments are foreclosed by precedent. First, like with standing, courts routinely find "as-applied" challenges ripe in these circumstances—where no more facts could develop without triggering the threat of enforcement that the plaintiff wants to avoid. *See, e.g., Braidwood*, 70 F.4th at 928-32. Second, the SEC is wrong that its position must be "unequivocally expressed" before a challenge can be ripe. SEC Br. at 27. The cases say the opposite. *E.g.*, *Contender Farms*, 779 F.3d at 268 (sufficient if the "alleged future conduct was 'arguably' proscribed"); *Franciscan All.*, 47 F.4th at 376 (sufficient if the agency has "indecision" about its position). The SEC's cited case held the challenge unripe in part because the government unequivocally *rejected* the position that the plaintiffs feared, far from a case where the agency is actively enforcing that position against similar entities. *Walmart*, 21 F.4th at 312. And third, a judgment in Beba's favor *would* resolve Beba's "entire"

claim—whether its airdrop violates 15 U.S.C. §77e's ban on distributing unregistered securities. *Cf.* SEC Br. 27. The SEC's cited cases involve plaintiffs who asked courts to resolve free-floating nondispositive issues, like whether their activities were "interstate commerce," *PSCU v. Wycoff*, 344 U.S. 237, 244 (1952), or which procedural rules would apply to a future claim, *Calderon v. Ashmus*, 523 U.S. 740, 742-46 (1998). But a win for Beba here means that its airdrop is not banned by 15 U.S.C. §77e, a final, definitive, and preclusive judgment against the SEC.

Hardship. Withholding judicial resolution will cause Beba "hardship." *Gulfport Energy*, 41 F.4th at 679. "'If a threatened injury is sufficiently imminent to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied." *Mccall v. Dretke*, 390 F.3d 358, 362 (5th Cir. 2004) (cleaned up). Beba plausibly alleged hardship for the same reasons it plausibly alleged standing. In the pre-enforcement context, delay causes a plaintiff hardship when it wishes to engage in planned activities but is refraining from doing so based on a "genuine threat of enforcement." *MedImmune*, 549 U.S. at 129. Beba is refraining from pursuing its planned airdrop out of fear of enforcement until it receives a judicial resolution. Am. Compl. ¶87. And it is losing revenue and growth. ¶¶88, 177-85.

The SEC attacks the whole idea of pre-enforcement review when it again says that Beba must wait until it "is *charged* with violations of the federal securities laws." SEC Br. 29 (emphasis added). The "declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity,'" so these claims are necessarily ripe before enforcement. *MedImmune*, 549 U.S. at 129. In the SEC's cited cases, the plaintiff either did not face a credible threat of enforcement (not true here), *see Hodl Law v. SEC*, 2024 WL 3898607 (9th Cir. Aug. 22), or the declaratory plaintiff was already involved in another case involving the same issues (also not true here), *see Walmart*, 21 F.4th at 311-13; *AT&T Corp. v. FCC*, 349 F.3d 692, 702 (D.C. Cir. 2003). These cases do not overrule the bedrock principle that courts

may not require, that the plaintiff "bet the farm … by taking the violative action" before suing. *MedImmune*, 549 U.S. at 129.[4]

C. Sovereign immunity does not bar the DJA claim.

Under the "presumption in favor of judicial review of administrative action," *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 348 (1984), sovereign immunity does not bar Beba's DJA claim. The APA waives the agency's sovereign immunity. And Gensler has no sovereign immunity.

Waiver. Section 702 of the APA broadly waives sovereign immunity for any nonmonetary suit against federal agencies and their officers. 5 U.S.C. §702. "The APA's waiver of sovereign immunity applies to *any suit* whether under the APA or not." *Chamber of Com. v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996) (emphasis added). A plaintiff need only allege an "agency action" that "adversely affected" it. *Apter v. HHS*, 80 F.4th 579, 589 (5th Cir. 2023). Qualifying agency actions include the "whole *or part*," 5 U.S.C. §551(13) (emphasis added), of any "manner in which an agency may exercise its power," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). It need not be final. 5 U.S.C. §702; *contra* SEC Br. 25-26. The action need not "mark the end of the agency's decisional process," and can be "nonbinding." *Apter*, 80 F.4th at 591 Even agency social-media posts count. *Id.* at 586-90.[5]

Here, Beba alleges at least four agency actions that have contributed to its injury, any one of which suffices to trigger the APA's waiver of sovereign immunity. First, Beba alleges that the SEC adopted its new policy governing digital assets with all the force of a final rule. *See infra* II.C. Second,

[4] The SEC also invokes other ripeness factors, like whether an agency action is "sufficiently final," SEC Br. 25, but the Fifth Circuit has recently clarified that "those factors collapse into fitness and hardship, so [courts] need not address them separately." *Gulfport Energy*, 41 F.4th at 679 n.25. To be clear, DJA claims are ripe regardless of whether they allege a final agency action. *See Braidwood*, 70 F.4th at 930. "Final agency action" is required by statute for APA claims, but not DJA claims. *Apter v. HHS*, 80 F.4th 579, 593 (5th Cir. 2023); *see* 5 U.S.C. §704 (requiring "final agency action"); 28 U.S.C. §2201 (not). Anyway, Plaintiffs allege four agency actions that are "sufficiently" final. *See* I.C, *infra*.

[5] Courts disagree on whether any "agency action" at all is required to invoke Section 702's waiver. *See Texas v. DHS*, 88 F.4th 1127, 1134 (5th Cir. 2023), *vacated*, 144 S. Ct. 715 (2024). Though it should make no difference here, Beba reserves the right to argue on appeal that no agency action should be required to invoke the APA's waiver of sovereign immunity.

like in *Apter*, Beba identifies multiple public announcements that were made by Gensler and posted on the SEC's website announcing that entities like Beba would be subject to enforcement actions. *See* Am. Compl. ¶¶8, 105, 123, 127; *Speech: Kennedy and Crypto*, *supra* ("Offers and sales of these thousands of crypto security tokens are covered under the securities laws."); *Testimony of Chair Gary Gensler Before the U.S. House of Representatives Comm. on Fin. Servs.*, SEC.gov (Apr. 18, 2023), perma.cc/BM82-W6MX ("the vast majority of crypto tokens are securities"). Although the SEC tries to distance itself from its Chair, SEC Br. 8-9, Gensler agrees that "*the Commission* has spoken with a pretty clear voice" that "most crypto tokens are investment contracts." *Speech: Kennedy and Crypto*, *supra* (emphasis added). Third, Beba identifies a series of "order[s]" and "sanction[s]," 5 U.S.C. §551(13), against similar entities for distributing tokens by free airdrops, any one of which qualifies as agency action. Am. Compl. ¶¶114-21.[6] And fourth, Beba identifies the SEC's publication of its "Framework for 'Investment Contract' Analysis of Digital Assets," which formally announced that "the lack of monetary consideration for digital assets, such as those distributed via a so-called 'air drop,' does not mean that the investment of money prong is not satisfied; therefore, an airdrop may constitute a sale or distribution of securities." ¶¶115-16; *Framework*, *supra*.

Beba was "adversely affected" by these actions. 5 U.S.C. §702. A plaintiff is adversely affected whenever it satisfies the "zone of interests" test. *Apter*, 80 F.4th at 589-90. "The zone-of-interests test 'is not especially demanding,'" especially for suits against agencies. *Id.* at 592. If the plaintiff has a "cause of action," it automatically satisfies the zone-of-interests test. *Lexmark Int'l, v. Static Control Components*, 572 U.S. 118, 127 (2014). "Any doubt goes to the plaintiff." *Id.* at 130. "Review is foreclosed 'only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'"

[6] *See, e.g., SEC v. Sun*, No. 1:23-cv-02433 (S.D.N.Y); *SEC v. Hydrogen*, 1:22-cv-08284 (S.D.N.Y); Order, *In re Tomahawk,* No. 10530 (S.E.C. Aug. 14, 2018), perma.cc/8B4Z-G4PH.

Apter, 80 F.4th at 592. Here, nobody disputes that Beba has a "cause of action." Beba invokes the traditional equitable cause of action against Gensler to challenge unlawful executive actions. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). And because it proceeds under the DJA, Beba can succeed by showing that the SEC has a cause of action against Beba. *Braidwood*, 70 F.4th at 932-33; *see Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1179 (5th Cir. 1984) ("[T]he underlying cause of action which is thus actually litigated is the declaratory defendant's"). The SEC does. *See* 15 U.S.C. §77a et seq.

Finally, the "discretionary function" exception to Section 702, *see* SEC Br. 15-16, has no place here. The APA exempts from review actions "committed to agency discretion by law." 5 U.S.C. §701(a)(2). Courts "have read the §701(a)(2) exception for action committed to agency discretion 'quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Commerce v. New York*, 588 U.S. 752, 772 (2019). Discretionary-function exceptions paradigmatically do *not* apply "when governmental agents exceed the scope of their authority as designated by statute." *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987). In other words, the SEC has no discretion to exceed its statutory authority. Beba alleges that the agency has done exactly that. Am. Compl. ¶¶186-99. Beba does not seek to control any decisions *within* the SEC authority, like the prosecutorial discretion cases that the SEC cites. *See* SEC Br. 16. The SEC's argument would ban all suits by the public seeking a declaration of rights before taking actions that could trigger enforcement actions, but those suits are heartland uses of the DJA. *E.g.*, *Braidwood*, 70 F.4th at 927.

Gensler. When a plaintiff seeks prospective relief against an individual officer who exceeded his statutory authority, sovereign immunity does not apply. "[S]uits for specific relief against officers of the sovereign," like Gensler, "are not suits against the sovereign." *Larson v. Domestic & Foreign Com.*

Corp., 337 U.S. 682, 689 (1949); *accord Reich*, 74 F.3d at 1329. Sometimes called the "'ultra vires exception to sovereign immunity,'" this doctrine "'provides that 'where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions,'" so they "'may be made the object of specific relief.'" *Apter*, 80 F.4th at 587; *accord Dalton v. Specter*, 511 U.S. 462, 472 (1994). If "[t]he officer is not doing the business which the sovereign has empowered him to do," then he "of course" does not have the sovereign's immunity. *Larson*, 337 U.S. at 689. This ultra-vires doctrine long predated Section 702 and does not require showing any agency action at all. *See Larson*, 337 U.S. at 689; *Reich*, 74 F.3d at 1324-29.

Even putting aside Section 702's waiver of sovereign immunity, Beba's claim can proceed because Gensler has no immunity in the first place. Gensler is an "executive officer," *Dalton*, 511 U.S. at 472, because he is Chair of the SEC, Am. Compl. ¶25. Beba alleges that his actions are "beyond his statutory powers," *Dalton*, 511 U.S. at 472, because neither the BEBA token nor the airdrops are securities, Am. Compl. ¶¶186-99. And Beba seeks a declaration and injunction against Gensler stopping him from enforcing against Beba's airdrop. *See* Am. Compl. at 63. Beba's claim against Gensler is therefore "not [a] sui[t] against the sovereign," *Larson*, 337 U.S. at 689, so Gensler "may be made the object of [the] specific relief" that Beba seeks. *Apter*, 80 F.4th at 587.

The SEC's three responses are non-sequiturs. First, the SEC questions the "vitality" of the ultra vires doctrine. SEC Br. 16. But while *Apter* explains that the doctrine is less relevant because §702 provides an *easier* path around sovereign immunity in cases involving agency action, *Apter* does not mean that the doctrine is no longer available. 80 F.4th at 593. The ultra vires doctrine is alive and well, as endless cases affirm.[7] Second, the SEC says that the ultra vires doctrine imposes a heightened

[7] *See Int'l Primate Prot. League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 85-86 (1991); *Armstrong*, 575 U.S. at 327; *accord Reich*, 74 F.3d at 1338-39 (contracting directive ultra vires); *Make the Road N.Y. v. Pompeo*, 475 F. Supp. 3d 232, 267 (S.D.N.Y 2020) (immigration proclamation ultra vires); *Texas v. Biden*, 694 F. Supp. 3d 851, 869 (S.D. Tex. 2023) (wage directive ultra vires).

merits standard, so Beba can't proceed under it. SEC Br. 16-17. Although here the major-questions doctrine displaces that standard, *see Texas v. NRC*, 78 F.4th 827, 844 (5th Cir. 2023), Beba alleges that the SEC clearly exceeded its statutory authority, which the Court must assume is true for purposes of jurisdiction. *See* Am. Compl. ¶¶97-104, 186-99. Finally, the SEC suggests in a footnote that Beba lacks *standing* to sue Gensler because he's part of a five-member Commission. *See* SEC Br. 17 n.6. It cites no case in support of this argument. *See id.* Any order against Gensler would bind the full Commission. *See* Fed. R. Civ. P. 65(d)(2)(C).[8] Plaintiffs challenging a law may seek injunctive relief against a single chair of a commission, like Gensler, as long as that chair "by virtue of his office, has some connection with the enforcement of the act." *Book People v. Wong*, 692 F. Supp. 3d 660, 684-85 (W.D. Tex. 2023), *aff'd in relevant part*, 91 F.4th at 332. More than some connection, Gensler has the powers necessary to enforce against Beba—including making SEC rules and regulations, initiating enforcement actions, subpoenaing witnesses and evidence, appointing and supervising SEC personnel, and expending SEC funds. *See* Am. Compl. ¶25 (collecting authorities); *see also* ¶¶105-27.

II. Plaintiffs plausibly alleged jurisdiction for the Administrative Procedure Act claim.

Beba's and DEF's APA claim arises from the new policy that the SEC adopted after Gensler took over as chair in 2021. Under the previous policy, a digital-asset transaction could be an investment contract only in the sense that a transaction involving *any* asset could—meaning, the transaction included a contractual agreement to invest money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others. *See Framework*, *supra*. Just like an orange or a baseball card all by itself was not a security, the old policy held that a digital asset token "all by itself is not a security." Am. Compl. ¶131 (quoting Hinman, *Digital Asset Transactions*, supra). As Gensler himself put it when this policy was in effect, and before he was Chair, "3/4 of the [digital asset] market is non-

[8] *See also, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 105 F.4th 802, 809 (5th Cir. 2024) (ruling for challenger in lawsuit against SEC and Gensler but not other Commissioners); *ISS v. SEC*, 2024 WL 756783, at *16 (D.D.C. Feb. 23) (same).

securities." ¶135 (quoting Gensler, *Lecture Transcript*, *supra*). Now, the SEC presumes that digital asset tokens themselves *are* securities. Am. Compl. ¶¶105, 117, 147 (citing Gensler, *Speech: Kennedy and Crypto*, *supra;* Khardori, *supra*). And because those assets are not registered with the SEC, they cannot be distributed or exchanged. 15 U.S.C. §§77a et. seq; 77b et seq.

The SEC's new policy lacks statutory authority and was adopted without the notice-and-comment procedures mandated by the APA, and this Court has jurisdiction to review it. Plaintiffs plausibly alleged that the SEC's policy injures Beba and DEF by creating a threat of enforcement and imposing millions of dollars in economic losses. Their claims are ripe because they facially challenge an already-in-effect policy. And the SEC is not subject to sovereign immunity because the new policy is a final agency action subject to ordinary APA review.

A. Plaintiffs plausibly alleged Beba's and DEF's standing.

Beba and DEF allege three independent injuries caused by the SEC's challenged policy: a credible threat of enforcement against Beba, economic harms to both, and a diversion of resources for DEF. These allegations must be accepted as factually true, and any one for either plaintiff is sufficient for standing. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023) ("If at least one plaintiff has standing, the suit may proceed.").

Threatened Enforcement. The SEC's challenged policy creates a credible threat of enforcement against Beba, for the same reason that Beba has standing to bring its DJA claim. *See supra* I.A. For APA purposes, there is "little question" that a plaintiff has standing if its transactions are the "object" of an agency action. *Lujan*, 504 U.S. at 561-62. Under the SEC's policy, airdrops like Beba's are unlawful and targeted for enforcement. Am. Compl. ¶¶105-70. The new policy also creates a separate credible threat by directly regulating Beba's other digital-asset transactions aside from airdrops. ¶¶75-77, 178; *see Braidwood*, 70 F.4th at 927-31. Under the new policy that digital assets themselves are

securities, ¶¶8, 105, 117, 147, these transactions are all presumptively unlawful and directly regulated, so Beba faces a credible threat for them too. *Braidwood*, 70 F.4th at 927-31.

Economic Harm. "Economic harm—like damage to one's business interest—is a quintessential Article III injury." *Book People*, 91 F.4th at 331-32. Someone "likely to suffer economic injury as a result of [a challenged action] that changes market conditions satisfies [the] standing test." *Clinton v. N.Y.C.*, 524 U.S. 417, 433 (1998). "Economic injury is what it sounds like: financial harm." *NICA v. Becerra*, 116 F.4th 488, 497 (5th Cir. 2024). In the "'familiar circumstances' where government regulation of a third-party business causes 'downstream ... economic injuries to others in the chain,'" it "satisf[ies] the requirements of standing." *Id.* at 501-02; *accord Book People*, 91 F.4th at 332.

The SEC's challenged policy causes DEF and Beba multiple independent economic injuries. It has cost DEF millions of dollars in "financial harm." *NICA*, 116 F.4th at 497. Most clearly, DEF has always owned Uniswap, or "UNI," tokens. Am. Compl. ¶183. UNI is a digital asset token associated with the Uniswap Protocol. *Id.* Pursuant to its new policy that most digital asset tokens are securities—the "allegedly unlawful conduct" here, *Collins v. Yellen*, 594 U.S. 220, 222 (2021)—the SEC issued an enforcement notice announcing planned legal action including "an allegation that [UNI's developer] engaged in an unregistered offer and sale of UNI tokens." ¶183. Immediately, because the SEC labeled UNI unregistered securities, "UNI token value dropped over 33%." *Id.* The resulting damages to DEF are in the "millions of dollars." *Id.* And if UNI tokens are cleared from the new policy's accusation of illegality, their value will at least partially recover. ¶¶184-85. Likewise, Beba has standing because the SEC's new policy "diminishes the value of BEBA tokens" by rendering them presumptively illegal to trade. ¶178. The SEC's policy is especially harmful to token issuers like Beba because its enforcement actions have targeted the exchanges that trade the tokens, not the token issuers who are best positioned to know and explain why they are not securities. ¶113 The SEC's policy "chill[s] secondary market activity and foreclose[es] avenues by which BEBA tokens would

otherwise be available." *Id.* It also reduces Beba's sales of the Ndovu duffel, which depend on a market for BEBA tokens. *Id.* And Beba has refrained from carrying out its planned business activities of distributing tokens because of the SEC's policy, which alone gives it standing. ¶¶77, 87, 178.

Though the SEC questions Article III causation for these injuries, SEC Br. 20-24, that standard is easily satisfied. "Article III 'requires no more than de facto causality.'" *Commerce*, 588 U.S. at 768. A plaintiff need only allege that the challenged action "likely will cause" or "has caused" the injury. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 384-85 (2024). "Proximate causation is not a requirement." *Lexmark*, 572 U.S. at 134 n.6. Any "predictable chain of events leading from the government action to the asserted injury" satisfies causation. *All. for Hippocratic Med.*, 602 U.S. at 384-85. For example, the Fifth Circuit held that a healthcare plaintiff satisfied the causation requirement where it alleged that its members would lose money because (1) their drugs "will be selected" for a program requiring it to negotiate drug prices on unfavorable terms, (2) that selection will "inevitably lead to a lower market price for that drug" because of the unfavorable terms of that program, and (3) "lower drug prices [would] reduce [their] revenue." *NICA*, 116 F.4th at 498. Because these predicted steps were grounded in "basic economic rationality," they established likely economic harm that gave the plaintiff standing. *Id.* at 500; *see also, e.g.*, *Career Colleges & Sch. of Tex. v. DOE*, 98 F.4th 220, 234-35 (5th Cir. 2024) (colleges satisfied causation where student-loan regulation would likely increase loan discharges, likely causing recoupment actions that would likely increase financial burdens).

The causal chain as to DEF is straightforward. The SEC's policy newly categorizes the UNI token as a security, so UNI value plummeted. Am. Compl. ¶183. When the SEC expressed that view in its enforcement notice, "Uniswap's native token, UNI, dropped 9.5% immediately," Ligon, *DeFi Exchange Uniswap Receives Enforcement Notice From the SEC*, CoinDesk (Apr. 10, 2024), perma.cc/7XTC-B9NF; *see* Am. Compl. ¶183. The SEC does not even suggest another theory to explain this cause and effect. Though Plaintiffs' allegations must be credited as true, the SEC does not posit anything else

that happened on the date the notice was made public, April 10, 2024, to explain why UNI tokens fell about 10% in one day, and over 33% within three days. *See* UNI, CoinMarketCap, perma.cc/WE4Y-VWQT; *see also* Am. Compl. ¶183. The "basic economic rationality" of something losing value because the SEC said it was illegal is much simpler than the allegations that were deemed sufficient in *NICA*. *See* 116 F.4th at 500. And the causal chain is especially strong here because the injury *already happened*. *See Oklevueha Native Am. Church of Haw. v. Holder*, 676 F.3d 829, 837 (9th Cir. 2012) ("In this case, that injury has already occurred, thereby eliminating any concerns that [it] is purely speculative").

The causal chain as to Beba is also straightforward. The SEC's policy makes it harder to disseminate a token and build a business around token receipts because it makes them illegal and, thus, far less valuable. If there were a legal market for BEBA tokens, people would pay more for them and be able to acquire enough to buy Beba's duffel. The SEC demands some further evidence "demonstrating" Beba's causal allegations. SEC Br. 23. Even though Beba can provide "general factual allegations" at the pleading stage, *Gen. Land Off.*, 71 F.4th at 272, Beba described its lost business and the SEC's policy and effects in detail. Am. Compl. ¶¶177-78. The SEC also demands that Beba provide an accounting of the exact lost "trading volume" or "price," but the Fifth Circuit has repeatedly condemned this sort of factual nitpicking. *See, e.g.*, *Rest. L. Ctr. v. DOL*, 66 F.4th 593, 599 (5th Cir. 2023). "Stringently insisting on a precise dollar figure reflects an exactitude [the] law does not require." *Id.*

Diversion of Resources. DEF has a separate injury because the SEC's new policy has forced it to divert resources to counteract its negative effects. When an action causes a plaintiff to "divert extensive time and resources from their normal operations," that plaintiff has standing under *Havens Realty v. Coleman*, 455 U.S. 363, 379 (1982). *Book People*, 91 F.4th at 331-32. Because the SEC's new policy presents an existential threat to the decentralized finance ecosystem that DEF protects, it must divert time and money to counteract those harms and help the public respond to the problems created by the policy. Am. Compl. ¶¶179-81. The SEC's only response is that the Supreme Court overruled

Havens Realty and the long line of cases recognizing this theory of standing in *Alliance for Hippocratic Medicine*. SEC Br. 19. But it didn't. It *applied* it. It asked whether the challenged action "directly affected and interfered with" the plaintiff's "core" activities, such that it had to divert responses to respond. 602 U.S. at 395. The plaintiffs there lost because their injuries were based on mere advocacy against the challenged policy. *Id.* But DEF's injuries are based on defensive measures taken to prevent obvious economic harms posed by the SEC's policy, separate from any advocacy. Am. Compl. ¶¶179-81. This Court should therefore "decline" the SEC's invitation "to announce for the Supreme Court that it has overruled [*Havens Realty*]." *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000).

B. The APA claim is ripe.

The APA claim is also ripe. In this context, too, "'if a threatened injury is sufficiently 'imminent' to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied.'" *Mccall*, 390 F.3d at 362; *see also supra* I.B. To the extent any separate analysis is warranted, the APA claim satisfies both ripeness requirements. It is "fit" for judicial decision—which the SEC doesn't dispute, SEC Br. 18-19—because it presents a purely legal challenge. *Gulfport Energy*, 41 F.4th at 679. And delay causes "hardship" because the policy has already injured and is continuing to injure both Beba and DEF. *See supra* II.A. The SEC again says this claim is not ripe until it brings "an enforcement action against Beba." SEC Br. 19. But the SEC's position is again at war with binding precedent. *See supra* I.B. "One does not have to await the consummation of threatened injury to obtain preventive relief." *Thomas v. Union Carbide Agr.*, 473 U.S. 568, 581 (1985). The hardship inquiry is especially easy here because the economic injuries have already happened. *See Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir. 2010) (unripeness only possible for an injury that "has not yet occurred"); *cf.* SEC Br. 18 (claiming the policy caused "no practical or legal harms"). And courts often find that economic injuries and credible threats of enforcement satisfy ripeness. *See, e.g.*, *Groome Resources v. Parish of Jefferson*, 234 F.3d 192, 200 (5th Cir. 2000); *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 154 (1967).

C. Sovereign immunity does not bar the APA claim.

Congress waived sovereign immunity for the APA claim. A plaintiff may sue under the APA and therefore be exempt from sovereign immunity whenever it challenges a "final agency action." *See* 5 U.S.C. §§702, 704; *see Nat'l Ass'n of Mfrs. v. DOD*, 583 U.S. 109, 118 (2018). Courts interpret "the 'finality' element in a pragmatic way." *Abbott Lab'ys*, 387 U.S. at 149. Because "the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation,'" a "broad spectrum of administrative actions" qualify as final agency actions. *Id.* at 140-41. An agency action is final if it represents the "consummation of the agency's decisionmaking process" and has "legal consequences." *Army Corps of Eng'rs v. Hawkes*, 578 U.S. 590, 597 (2016). The SEC's policy presuming that digital asset tokens are securities satisfies both elements.

First, the SEC's policy represents the "consummation of the agency's decisionmaking process." *Id.* It is not "of a merely tentative or interlocutory nature." *Id.* The SEC's policy was adopted after Gensler took office and is not awaiting any interlocutory review—it has been in effect for years. Am. Compl. ¶¶129-70. Though the SEC acts confused about what the alleged policy is, the amended complaint states it repeatedly: "Since Defendant Gary Gensler's appointment as Chair in 2021, the SEC has adopted a de facto rule, without notice or comment, that the vast majority of digital assets are securities." ¶8 (cleaned up).[9] It does not matter if the agency says it could change its mind tomorrow and "revise" this position because it's following it now. *Hawkes*, 578 U.S. at 598; *accord Sackett v. EPA*, 566 U.S. 120, 127 (2012). It does not matter if the policy operates as "a presumption," SEC Br. 8, because it establishes the framework used to decide cases going forward. *See, e.g.*, *Whitman*, 531 U.S. at 479. And even a vague or poorly thought out policy can be the consummation of the agency's

[9] *Accord, e.g.*, ¶105 ("The SEC has taken the position that the 'vast majority' of digital assets themselves 'are securities' because they represent an investment contract, and their initial distribution and later sale are unlawful without registration."); ¶147 (similar); ¶203 (similar).

decisionmaking process. *See Venetian Casino Resort v. EEOC,* 530 F.3d 925, 929 (D.C. Cir. 2008) (unpublished policy was final agency action although "details of the Commission's [challenged] policy are still unclear").

Second, the SEC's policy has "legal consequences." An action satisfies this element if it "has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability" *Louisiana v. Army Corps of Eng'rs*, 834 F.3d 574, 581 (5th Cir. 2016). For example, an agency action is final if it expresses "how the Commission interpreted" the relevant statute, even though it "would have effect only if and when a particular action was brought against a particular [entity]." *Hawkes*, 578 U.S. at 599-600 (cleaned up). Paradigmatically, "[a]n agency's interpretation of its governing statute, with the expectation that regulated parties will conform to and rely on this interpretation, is final agency action fit for judicial review." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 438 (D.C. Cir. 1986); *cf.* SEC Br. 10. For example, in *Shell Offshore v. Babbitt*, an agency's "practice" suggested that it had "substantially alter[ed] a well established … interpretation" of existing law, so that altered interpretation was subject to APA review. 238 F.3d 622, 629 (5th Cir. 2001). Because the "new agency policy represents a significant departure from long established and consistent practice that substantially affects the regulated industry, the new policy is a new substantive rule," and thus subject to APA review. *Id.* at 630.

The SEC's policy has drastic legal consequences. As the complaint alleges in detail, the SEC's policy commits the agency to the view that digital-asset tokens themselves are securities. *Louisiana*, 834 F.3d at 581; Am. Compl. ¶¶8-9, 105, 117, 147. It substantially alters the agency's interpretation of "securities" as applied to digital assets and departs from its long-settled previous interpretation. *Shell Offshore*, 238 F.3d at 629. Under the old policy, a digital asset token "all by itself [wa]s not a security." Am. Compl. ¶131 (quoting Hinman, *Digital Asset Transactions, supra*). Under the new policy, by contrast, digital-asset tokens themselves *are* securities. ¶¶8-9, 105, 117, 147. Though the SEC promises that it is

still applying the same policy that it always applied, SEC Br. 8-9, Plaintiffs plausibly alleged otherwise. While before "3/4 of the market is non-securities," ¶135 (quoting Gensler, *Lecture Transcript*, *supra*), now "pretty much every sort of crypto transaction already falls under the SEC's jurisdiction," ¶8 (quoting Khardori, *supra*). The new policy unilaterally expands the SEC's power to cover most of a multi-trillion-dollar industry. It is "forward looking" and outcome-determinative. *Cf.* SEC Br. 7-8. It establishes the SEC's "internal agency position" and "dictate[s] the result in a category of" enforcement decisions taken by the agency—namely, those against digital-asset tokens. Am. Compl. ¶145. And it has forced an entire two-trillion-dollar industry to "alter its conduct" or "expose itself to potential liability." *Louisiana*, 834 F.3d at 581; *see* Am. Compl. ¶¶122-23, 147-50. The new policy therefore is final agency action. *See Shell Offshore*, 238 F.3d at 629; *Hawkes*, 578 U.S. at 599-600.

Of course, Beba and DEF agree that the new policy has not been formally published, whether in the "Federal Register," SEC Br. 6, or anywhere. That is part of the problem (and the source of an independent APA violation). Unpublished policies are no less final agency actions than published ones. *See Phillips Petroleum v. Johnson*, 22 F.3d 616, 618-19 (5th Cir. 1994). For obvious reasons, agencies are not *rewarded* with sovereign immunity for making their policies without public notice or participation. *W&T Offshore v. Bernhardt*, 946 F.3d 227, 238-39 (5th Cir. 2019). Countless cases affirm that "the absence of a written memorialization by the agency does not defeat finality." *Bhd. of Locomotive Eng'rs & Trainmen v. FRA*, 972 F.3d 83, 100 (D.C. Cir. 2020).[10] And here, once the SEC's motion to dismiss

[10] *See also, e.g.*, *Whitman*, 531 U.S. at 479 ("Though the agency has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior thus belies the claim that its interpretation is not final."); *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) ("Defendants emphasize that Plaintiffs have failed to cite any statute, regulation, policy memoranda, or any other document memorializing the policy they challenge. Agency action, however, need not be in writing to be final and judicially reviewable."); *Venetian Casino,* 530 F.3d at 929 (unpublished internal agency policy was final agency action).

is denied, the SEC "will be required to produce in the administrative record documents constituting the new policy." Am. Compl. ¶146.[11]

Although the SEC is right that its enforcement actions are not themselves policy, SEC Br. 7-8, those actions are *evidence* of the policy that the SEC adopted. *See Velesaca v. Decker*, 458 F. Supp 3d 224, 237 n.7 (S.D.N.Y. 2020) ("courts infe[r] from a course of agency conduct that the agency has adopted a general policy, even in the face of agency denials of such policies existing" (collecting cases)). Unlike in the SEC's cited cases, SEC Br. 10-11, the new policy here "control[s]" the outcome of those enforcement decisions—it is the basis for the SEC's new wave of enforcement actions that were not justified under the old policy (and thus weren't brought). Am. Compl. ¶¶143-45. The new policy itself "has the force and effect of law" inside the agency. ¶204. And it "binds private parties because it renders unlawful a wide range of private digital asset transactions, has formed the basis for … enforcement actions, and subjects users of digital assets to serious penalties." *Id.*; *cf.* SEC Br. 10-11.

Finally, the SEC is again wrong that an agency's decision to enact a substantive rule beyond its statutory authority and without notice and comment is "committed to the agency's discretion." SEC Br. 15-16. As before, this exception applies only if there is "no meaningful standard" for assessing the claims on the merits. *Commerce*, 588 U.S. at 772. The SEC does not even suggest that exception covers Plaintiffs' claims, which endless cases have decided on the merits. *E.g.*, *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022) (notice-and-comment and excess-of-statutory-authority claims).

CONCLUSION

This Court should deny the motion to dismiss.

[11] Notably, the SEC chose not to introduce any outside evidence itself, challenging jurisdiction only on the face of the complaint rather than the actual facts. If this Court is inclined to credit the SEC's extra-complaint assertion that it has no such policy, Beba and DEF respectfully request leave to take jurisdictional discovery so they can test that unproven evidentiary premise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I e-filed this response with the Court on October 21, 2024, which emailed everyone requiring notice.

/s/ Cameron T. Norris