No. 24-1899

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS JOSEPH POWELL, BARRY D. ROMERIL, CHRISTOPHER A. NOVINGER, RAYMOND J. LUCIA, MARGUERITE CASSANDRA TOROIAN, GARY PRYOR, JOSEPH COLLINS, REX SCATES, MICHELLE SILVERSTEIN, REASON FOUNDATION, CAPE GAZETTE, LTE., AND THE NEW CIVIL LIBERTIES ALLIANCE,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review from the United States Securities and Exchange Commission, No. 4-733

BRIEF FOR *AMICI CURIAE* TEXAS BLOCKCHAIN COUNCIL AND AI INNOVATION ASSOCIATION IN SUPPORT OF PETITIONERS' PETITION FOR REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 16.1, A*micus Curiae* Texas Blockchain Council is a nonprofit, public interest organization. It has no parent corporation and no publicly held corporation has an ownership interest of 10% or more.

Amicus Curiae AI Innovation Association is a nonprofit, public interest organization. It has no parent corporation and no publicly held corporation has an ownership interest of 10% or more.

Dated: June 24, 2024

/s/ Angela Laughlin Brown

Angela Laughlin Brown

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY[1]

Amicus Curiae Texas Blockchain Council ("TBC") is a nonprofit, public interest organization working to foster growth, innovation, and sensible regulation in the bitcoin, blockchain, and digital asset industry. TBC has no parent corporation, and no publicly held company has a 10% or greater ownership interest in TBC.

Amicus Curiae AI Innovation Association ("AIIA," and together with TBC "*Amici*") is a nonprofit, public interest organization that serves as a forum for policymakers, academic researchers, practitioners, and entrepreneurs to gather as stakeholders in building a free and prosperous future through the expanded adoption of artificial intelligence and machine learning. AIIA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in AIIA.

Amici advocate for innovation and growth in two rapidly-growing industries—digital assets and artificial intelligence ("AI"). Amici have a

[1] All parties consent to the filing of this brief. No party's counsel authored this brief in whole or part, and no party or party's counsel made a monetary contribution to fund preparation or submission of this brief. No person or entity other than *Amici* made a monetary contribution to the preparation or submission of this brief.

significant interest in ensuring that the Securities and Exchange Commission's ("SEC") application of the federal securities laws to these industries proceeds in a way that protects investors without stifling innovation and growth. This balance is especially important for emerging industries like digital assets and AI. To the extent that the SEC's regulation of these emerging industries imposes burdensome regulation with little or no benefit to the market, the SEC impedes growth and harms individuals and organizations seeking to participate in these industries. This is inconsistent with SEC's stated mission of protecting investors while fostering capital formation.[2] It harms emerging industries. And it harms investors who would like to participate in those industries.

To date, the SEC's ambiguous and expansive application of nearly century old laws to the digital asset industry, in particular, has had far-reaching and oftentimes negative consequences.[3] Worse yet, the SEC has regulated not by issuing new regulations—which allow for public input

[2] U.S. Securities & Exchange Commission, *About the SEC, Mission* (June 21, 2024), https://www.sec.gov/about/mission (describing "Protecting Investors" and "Capital Formation" as two of the three components of the SEC's mission).

[3] These include the Securities Act of 1933 ("Securities Act"), the Securities Exchange Act of 1934 ("Exchange Act"), and other federal securities laws.

and participation—but almost entirely through enforcement action. The SEC's approach has been to sue industry participants and extract a settlement that muzzles the Defendant. With the Defendant silenced, the SEC then tells only its story of the case—through press releases, speeches, and other public statements. Obvious constitutional concerns aside, this approach greatly distorts debate around the regulation of emerging industries. This harms industry participants on all sides.

The interests of Amici differ from those of the parties. As stated above, Amici are non-profit organizations advocating for innovation and growth in emerging industries. This perspective may not be adequately represented by the positions of either Petitioners (individuals and organizations focused on the constitutional infirmities of the gag rule) or the SEC (a federal government regulatory agency).

ARGUMENT

The SEC's gag rule, 17 C.F.R. § 202.5(e), harms emerging industries like digital assets and AI, by:

- Stifling debate around sensible and cost-effective regulation of these industries;
- Creating greater risk for both the industry and investors, by injecting significant uncertainty into the market—since the SEC's "regulation by enforcement" approach fails to offer clear rules and guidance; and
- Depriving the markets of potentially valuable information about the SEC's regulatory activities.

The SEC's history of regulating digital assets is informative. Its regulation in this space has taken place almost completely through enforcement, and risks establishing a dangerous precedent that threatens potentially complementary and overlapping technologies like AI.[4] In fact, the SEC maintains a web page listing its extensive list of

[4] There are indications that the SEC intends to follow the same approach with AI. *See, e.g.*, Will Kubzansky, *SEC's AI Crackdown Signals Trickle of Cases Will Turn to Flood*, Bloomberg (June 20, 2024), https://www.bloomberg.com/news/articles/2024-06-20/sec-s-ai-crackdown-signals-trickle-of-cases-will-turn-to-flood.

digital asset enforcement actions.[5] From this page, one can easily click a link and read about the SEC's version of the enforcement action—and only the SEC's version.[6] The Defendant's version of events is nowhere to be found—because the SEC has silenced the Defendant.

The SEC has engaged in this litany of enforcement actions while refusing to offer critically-needed guidance to the public through the rulemaking process. For instance, Chair Gensler stated that he was "pleased" to deny Coinbase Global, Inc.'s Petition for Rulemaking—which, if approved, could have provided some of this much-needed guidance.[7] All the while, the SEC's enforcement efforts have ramped up significantly.[8]

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[5] *See* U.S. Securities and Exchange Commission, *Crypto Asset and Cyber Enforcement Actions* (June 20, 2024), https://www.sec.gov/spotlight/cybersecurity-enforcement-actions.

[6] *See, e.g.,* U.S. Securities and Exchange Commission, *Crypto Assets and Cyber Enforcement Actions*, Litigation Release (Apr. 24, 2024), https://www.sec.gov/litigation/litreleases/lr-25983 (*SEC v. Geosyn Mining, LLC*, 4:24-cv-00365 (N.D. Tex.)).

[7] *See* Gary Gensler, Chair, U.S. Securities and Exchange Commission, *Statement on the Denial of a Rulemaking Petition Submitted on behalf of Coinbase Global, Inc.* (Dec. 15, 2023), https://www.sec.gov/news/statement/gensler-coinbase-petition-121523.

[8] *See* U.S. Securities and Exchange Commission, *SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit (2022-78)*, Press Release (May 3, 2022), https://www.sec.gov/news/press-release/2022-78.

In short, the SEC has focused tremendous resources on enforcement while focusing almost none on rulemaking. Most meaningful dialogue has consisted of private discussions during the SEC's non-public enforcement investigations. The SEC then muzzles any Defendant who settles one of these enforcement actions. This eliminates countervailing voices and robs the public of much needed debate and guidance.

The SEC maintains no guidance is necessary because its approach to crypto enforcement has been "consistent, principled, and tethered to the federal securities laws and legal precedent."[9] Not so. Because the SEC regulates the crypto space almost entirely through enforcement—with only its version of events making it to the public—industry participants, and legal and compliance professionals seeking to guide those participants, are left with no clear guidance on what the rules of the road are. For instance, the public does not know what underlying facts may have led the SEC to allege certain violations but not others. Nor does the public know whether a Defendant had strong defenses but simply no resources to continue defending the case. As similar

[9] *See* Gurbir Grewal, Director, Division of Enforcement, U.S. Securities and Exchange Commission, *Remarks at SEC Speaks 2024* (Apr. 3, 2024) https://www.sec.gov/news/speech/gurbir-remarks-sec-speaks-04032024.

discussions and engagement regarding AI are ongoing, this method of *ad hoc* development through regulation by enforcement can only undermine a necessary process to promote comprehensive and clear AI stakeholder consultation.

These SEC-imposed blind spots do great harm—deterring potential participants from entering emergent industries and increasing compliance costs for those who do. This undermines the SEC's self-described mission to foster capital formation. Its investor protection mission is likewise harmed—as increased compliance costs are passed down to investors, and as their investments are put at risk by regulatory uncertainty.

Ironically, the SEC regularly requires transparency from the entities it regulates. And it touts this transparency in proposing and implementing new regulations.[10] Appropriately so, because

[10] *See* U.S. Securities and Exchange Commission, *SEC Proposes Rule to Amend Minimum Pricing Increments and Access Fee Caps and to Enhance the Transparency of Better Priced Orders*, Press Release (Dec. 14, 2022), https://www.sec.gov/news/press-release/2022-224 (SEC Press Release touting "Enhance[d] Transparency" provided by proposed regulation); Gary Gensler, Chair, U.S. Securities and Exchange Commission, *Statement on Approval of FINRA Proposed Rules to Establish Post-Trade Transparency in the Treasury Markets*, Newsroom Statement (Feb. 7, 2024), https://www.sec.gov/news/statement/gensler-statement-finra-020724.

transparency—appropriately balanced with the benefits and costs of disclosure—is good for business. Yet, with the gag rule, the SEC fails to practice what it preaches—imposing a near-total blackout around its enforcement settlements. For the same reason that transparency is good for business, this lack of transparency is bad for business.

Moreover, the gag rule silences those who "are often the most informed and in the best position to raise red flags about the [SEC's enforcement] process."[11] In doing so, the SEC "insulate[s itself] from criticism and the public scrutiny that accountability demands."[12]

In emerging markets with emerging technologies, this approach is particularly harmful. It is in these markets that a public debate about regulation and enforcement is most important—so that regulation can occur without stifling innovation and growth. Yet the gag rule eliminates much of this debate.

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[11] James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, Yale J. on Reg., Notice & Comment (Dec. 4, 2017), https://www.yalejreg.com/nc/the-cftc-and-sec-are-demanding-unconstitutional-speech-bans-in-their-settlement-agreements-by-james-valvo/

[12] *Id.*

This allows the SEC to dodge key questions, such as:

- Is the software which underpins digital assets and AI protected by the First Amendment—and if so, how does this protection limit the SEC's enforcement authority?[13]
- Are digital assets that are scarce by nature—like oil or crops—securities, since this scarcity can lead to increases in value as a result of market fluctuations, rather than managerial efforts[14]
- Do investment firms have affirmative disclosure obligations around the use of AI—and if so, what are they?

These questions only scratch the surface of the novel questions facing the digital asset and AI industries. The public is better served with a robust, public debate that includes all perspectives—including those of companies and individuals who have been in the SEC's crosshairs and are thus arguably best positioned to speak on these issues. The failure to

[13] Amanda Tuminelli and Marisa Coppell, *Opinion: Crypto rights are fundamental American rights*, Blockworks (Aug. 21, 2023), https://blockworks.co/news/crypto-fundamental-rights-constitution; *see also* Will Oremus, *Want to regulate social media? The First Amendment may stand in the way*, Washington Post (May 30, 2022), https://www.washingtonpost.com/technology/2022/05/30/first-amendment-social-media-regulation.

[14] *See, e.g.*, *SEC. v. Belmont Reid & Co.*, 794 F.2d 1388, 1391 (9th Cir. 1986) (instrument not a security where profits depended on "fluctuations of the gold market, not the managerial efforts of [defendant]").

give these stakeholders a seat at the table is damaging to these emerging industries and those seeking to participate in them.

CONCLUSION

For these reasons, and on behalf of their members, Amici supports Petitioners' Petition for Review. (ECF No. 18).

June 24, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature */s/ Angela Laughlin Brown* **Date June 24, 2024**

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2024, I electronically filed the above Brief of *Amici Curiae* Texas Blockchain Council and AI Innovation Association in Support of Petitioners with the Clerk of the Court by using the appellate ACMS system.

I further certify that service will be accomplished by the appellate ACMS system.

Dated: June 24, 2024

/s/ Angela Laughlin Brown
Angela Laughlin Brown