UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JONATHAN MANN and BRIAN L. FRYE,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION, ERIC I. BUSTILLO, GARY GENSLER, CAROLINE A. CRENSHAW, JAIME E. LIZÁRRAGA, HESTER M. PEIRCE, and MARK T. UYEDA, in their official capacities,

Defendants.

Case No. 24-CV-01881

JUDGE GUIDRY

MAGISTRATE JUDGE ROBY

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Jonathan Mann and Brian Frye want to sell their art. Normally, offering to sell art would not present any particular legal problem, and would not require a federal lawsuit. But their art is sold in a digital format, and the Securities and Exchange Commission ("SEC") has recently declared three similar artistic projects to be illegal unregistered offerings of securities, and demanded that their creators terminate their activities, destroy their unsold art, and pay a substantial monetary penalty. The SEC has also threatened to sue a digital art market for allowing the sale of digital art that the SEC deems to be "securities." For obvious reasons, Mann and Frye do not wish to face similar reprobation. They just want to sell their art.

The SEC does not want to have this conversation. Frye twice requested a ruling in the SEC's "no-action relief" process, even going so far as to suggest that the SEC *should* declare his project a securities offering, or explain why it wasn't. The SEC ignored him, internally dismissing him as a "troll." And now, faced with this lawsuit about these two art projects, the SEC could have responded, "there is no case or controversy here, because *of course* these art projects aren't securities offerings." The SEC did not take that opportunity. Instead, it chose to declare its own "sovereign immunity," argue Plaintiffs' "lack of standing," and assert the lawsuit's "unripeness."[1]

Taken together, the SEC is telling Mann and Frye: the SEC alone decides which digital artists to attack; artists have no right to know in advance if their projects will be deemed illegal; the SEC has no obligation to tell artists whether they are breaking the law (until it decides to investigate or sue them); and Article III courts are powerless to remove this Sword of Damocles chilling the digital art markets. The SEC's position is a flagrant prior restraint on Plaintiffs' First Amendment rights, runs contrary to clear law establishing the merits of pre-enforcement

[1] Defendants' Motion to Dismiss (ECF No. 18) and Defendants' Memorandum of Law in Support of Motion to Dismiss (ECF No. 18-1) are hereinafter referenced as "MTD."

challenges, and is an illegitimate power-grab over an art market that has nothing to do with the "securities" or "exchanges" that are the statutory remit of the SEC. And so, with nowhere else to turn, here we are.

Instead of allowing the SEC to wriggle away from the damage it is causing these Plaintiffs, this Court should reject the SEC's Motion to Dismiss and allow this case to proceed.

This Court properly has jurisdiction over Plaintiffs' claims, which are not barred by the doctrine of sovereign immunity. Sovereign immunity does not preclude actions seeking to enjoin federal officials from violating the Constitution, a rule that applies with particular force to prior restraints on First Amendment rights, such as the right to make and sell art. Nor does sovereign immunity apply under the Declaratory Judgment Act, because, under 5 U.S.C. § 702, Congress waived sovereign immunity for actions seeking non-monetary relief against federal government agencies where an agency action (such as the SEC's actions recited in the Complaint) affected a plaintiff in a way that he is adversely affected or aggrieved by that action.

Next, Plaintiffs' claims satisfy Article III's standing and ripeness requirements. Plaintiffs' claims are neither "hypothetical" nor "speculative." MTD at 1. Plaintiffs have prepared artistic projects in the form of non-fungible tokens ("NFTs") that they imminently plan to release. Indeed, Plaintiffs have provided the Court with information about their proposed projects – enough information to determine whether their projects are "investment contracts" under federal securities laws. Plaintiffs' only hesitation to release their NFT projects is due to their credible fear that the SEC will bring an enforcement action against them, a fear that the SEC itself propagated by bringing enforcement actions condemning three other similar NFT projects over the course of the last sixteen months. After the pocket-veto of Frye's no-action requests, this suit is Plaintiffs' only vehicle to achieve clarity for their impending projects. If this Court does not have jurisdiction over

this action as the SEC suggests, Plaintiffs are left with an untenable Catch-22 – either they must risk prosecution by releasing their art and hoping that the SEC does not prosecute them the way it prosecuted others, or abandon their artistic endeavors, livelihoods, and First Amendment rights. This Catch-22 is exactly what pre-enforcement challenges were meant to correct.

This action does not seek a broad advisory opinion on securities law. Contrary to the SEC's argument, this case is narrowly tailored to Plaintiffs' particular NFT projects – not NFTs, digital assets, or the SEC's discretion over the enforcement of federal securities laws generally. Plaintiffs simply seek a declaration that their prospective artistic projects are not the offer or sale of investment contracts. While the SEC attempts to portray this suit as some sweeping programmatic challenge, Plaintiffs' request for declaratory relief is narrowly tailored to specific conduct, under the shadow of specific agency enforcement actions. The SEC cannot repeatedly state that the law is "clear" and laid out in its many enforcement actions, and then argue that substantially similar conduct is unreviewable because those enforcement actions are insufficient to give rise to a controversy. If an agency regulates by enforcement, then its enforcement actions are regulations.

Critical First Amendment issues are at stake. Requiring artists such as Plaintiffs to register their art prior to public distribution – or even incur the expense of having securities lawyers review their art to ensure it was "legal" – would constitute an unlawful prior restraint on artistic expression in violation of the First Amendment. Plaintiffs freely acknowledge that there is no First Amendment right to violate securities laws. However, as courts frequently state, the test for "investment contracts" established by *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) is "flexible." But, it is not meant to be infinitely flexible, and certainly not in a way that it can only be broadened to sweep more and more into its ambit and enable the SEC limitless regulatory discretion. It must be flexible enough to be narrowed as well, when circumstances warrant. And when critical First

Amendment rights are at stake, *Howey* should be flexed far more narrowly, in accord with the "economic reality" of the transactions at issue. Here, the economic reality is simply that Plaintiffs seek to sell their digital art without prosecution, in the same way that American artists have always had the constitutional freedom to do. These First Amendment considerations strongly weigh in favor of deciding this case on the merits, rather than finding it barred by the SEC's reflexive invocation of sovereign immunity, standing, and ripeness. This Court should deny Defendants' Motion to Dismiss in its entirety.

FACTUAL BACKGROUND

I. Digital Assets and NFTs

Blockchain-based digital assets, including those known as "cryptocurrencies," "crypto assets," and "tokens," are computer code entries that provide the owner with certain specified rights.[2] Compl. ¶ 46. As with real world assets, digital assets can be fungible, or non-fungible (each representing a unique and indivisible item, such as a single artwork). *Id.* ¶ 46.

NFTs are non-fungible digital assets recorded on a blockchain that allow people to authenticate ownership in a permissionless and public way. *Id.* ¶¶ 69-70. NFTs are used to convey ownership of artwork, including uniquely generated digital images, music, collectibles, or conceptual art. *Id.* ¶ 69. NFTs often provide the owner a wide array of rights to digital and/or physical assets, including all rights that typically accompany ownership, built directly into the software code. *Id.* ¶¶ 74-75. NFTs can usually be bought, sold, and traded on secondary markets, with ownership rights to the NFT being transferable by the owner to the buyer. *Id.* ¶ 74.

[2] A blockchain is commonly described as a distributed ledger, which is a database maintained on the Internet that can record and verify data across the entire network. Compl. ¶ 44. Transactions on a public blockchain can be viewed and verified by anyone with an Internet connection. *Id.*

II. The SEC's Claimed Authority Over the Digital Asset Industry and NFT Space

The SEC has aggressively regulated the digital assets industry through enforcement actions, and has announced that the "vast majority" of tokens are securities. *Id.* ¶¶ 56-62. Starting in August 2023, SEC began prosecuting NFT artists, charging Impact Theory, LLC ("Impact Theory"), Stoner Cats 2, LLC ("Stoner Cats"), and Flyfish Club, LLC ("Flyfish") with violations of the Securities Act of 1933 for offering and selling NFTs as investment contract securities without registering with the SEC. *Id.* ¶¶ 10-12, 68, 84-104.[3] The SEC declared the NFTs were offered and sold as securities because each company made public statements promoting the NFTs' value and their intended use of NFT sale proceeds, encouraging secondary market sales (for which they received royalties). *Id.* ¶¶ 87-89, 98-100. Each company created and sold works of digital art to the general public in the form of NFTs that were not shares of a company, and did not generate any type of dividend or ongoing commitment to generate profits for the purchasers. *Id.* ¶ 12. As part of the settlements, the SEC required the companies to destroy all of the purportedly offending NFTs in their possession or control. *Id.* ¶¶ 91-92, 101-102, 148. Two SEC Commissioners dissented, lamenting the "implications for creators of all kinds." *Id.* ¶¶ 17, 104.[4]

The orders against Impact Theory, Stoner Cats, and Flyfish establish the SEC's position that creators of NFTs engage in the offer and sale of securities when they set out to sell their art – at least when accompanied by public statements discussing their current and future artistic

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[3] *See In the Matter of Impact Theory, LLC*, Securities Act Rel. No. 11226 (Aug. 28, 2023); *In the Matter of Stoner Cats 2, LLC*, Securities Act Rel. No. 11233 (Sept. 13, 2023). The SEC announced settled charges against Flyfish after Plaintiffs filed their Complaint. *See In the Matter of Flyfish Club, LLC*, Securities Act Rel. No. 11305 (Sept. 16, 2024). All three actions settled with no admissions of liability from the respondents. Compl. ¶ 103.

[4] Compl. ¶¶ 17, 93-94, 104 (quoting SEC Comm'rs Hester M. Peirce and Mark T. Uyeda, *NFTs & the SEC: Statement on Impact Theory, LLC* (Aug. 28, 2023), https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-nft-082823; Peirce and Uyeda, *Collecting Enforcement Actions: Statement on Stoner Cats 2, LLC* (Sept. 13, 2023), https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-stonercats-091323); *see also* Peirce and Uyeda, *Omakase: Statement on In the Matter of Flyfish Club, LLC* (Sept. 16, 2024), https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-flyfish-091624.

endeavors, their hopes for the value of their projects, and/or their use of profits from the NFT sales to financially support themselves and their artistic endeavors. *Id.* ¶¶ 105, 144, 147. As further evidence of the SEC's continuing position, it has also embarked on at least two publicly-known NFT-related investigations, one of which led the SEC to issue a Wells Notice. *Id.* ¶ 84 n.31, 151 (discussing investigation of Dapper Labs Inc.); Devin Finzer, *Announcements: Taking a stand for a better internet*, OpenSea (Aug. 28, 2024) https://opensea.io/blog/articles/taking-a-stand-for-a-better-internet (announcing, after Plaintiffs filed the instant Complaint, SEC Wells Notice against OpenSea, a large NFT marketplace).[5] By way of these actions, the SEC grabbed the regulatory reins over digital art, without authorization from Congress, and without undertaking proper – or any – rulemaking procedures. *Id.* ¶¶ 68, 83.

III. Plaintiffs and their Prospective NFT Projects

Plaintiffs create and sell art to the public in the form of NFTs. Compl. ¶¶ 5, 6. Mann is a singer, songwriter, multi-instrumentalist, and music producer that writes and releases one song every day. *Id.* ¶ 7. His songs are published as NFTs and are currently sold via a "bid-to-earn" auction. *Id.* ¶ 23. Frye is a law professor and conceptual artist who creates conceptual art in the medium of legal scholarship and sells it as NFTs. *Id.* ¶¶ 8, 24. Frye submitted requests for no-action letters to the SEC in January 2020 and September 2021 pertaining to smaller-scale NFT projects, but received no response. *Id.* ¶ 131.

Plaintiffs have imminent plans to sell digital art as large-scale and widely-promoted limited edition NFTs. *Id.* ¶ 9. Mann plans to release a limited edition set of 10,420 NFTs, composed of unique remixes of his popular song entitled "This Song Is A Security" and one of a series of digital

[5] Additionally, during questioning before the House Financial Services Committee on September 27, 2023, Defendant Gensler admitted that a physical Pokémon card is not a security but expressed that a NFT representing a physical card could be a security. Compl. ¶¶ 107, 115.

images. *Id.* ¶¶ 122-24, 152. Frye plans to release a conceptual artwork series called "Cryptographic Tokens of Material Financial Benefit in the form of 10,320 Cryptographic Tokens of Material Financial Benefit NFTs," each representing ownership of one edition of the conceptual artwork "Cryptographic Tokens of Material Financial Benefit." *Id.* ¶¶ 128, 154. Plaintiffs intend to publicly promote their NFTs and discuss their current and future artistic endeavors and subjective hopes for the value of their projects, and their overall business success. *Id.* ¶¶ 126-27, 130, 158. Additionally, they plan to receive royalties for secondary market sales, and to use the profits from the NFT sales to financially support themselves and their other artistic endeavors. *Id.* ¶¶ 125, 129, 157. Plaintiffs have taken substantial steps to prepare for the release of their prospective NFT projects, and are ready and able to promptly release them, once this Court rules that their projects are not illegal securities offerings. *Id.* ¶¶ 127, 136.

If Plaintiffs' prospective NFT projects were deemed securities, it would be unlawful for Plaintiffs to proceed without registration, as Plaintiffs will not be registering the offer and sale of their NFTs with the SEC, nor would they qualify for any apparent exemptions under the securities laws. *Id.* ¶ 152. While Plaintiffs' prospective offers and sales do not constitute investment contract securities (*id.* ¶¶ 14, 109-11, 137-41, 156-58), the SEC's enforcement actions against Impact Theory, Stoner Cats, and Flyfish make clear that the SEC will view them as such. *Id.* ¶¶ 10, 144-48, 151, 153, 155. Accordingly, Plaintiffs bring this suit for declaratory and injunctive relief to preclude burdensome and unlawful SEC enforcement actions. *Id.* ¶¶ 19, 121, 159, 162-63.

ARGUMENT

Plaintiffs' claims are not barred by sovereign immunity, and present a ripe, justiciable case or controversy that this Court is empowered to hear. 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). Accordingly, 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 Plaintiffs, and asks whether their allegations give rise to a plausible basis for jurisdiction. *Barilla v. City of Houston*, 13 F.4th 427, 431 (5th Cir. 2021). Because the SEC only moves to dismiss on jurisdictional grounds, the Court "accept[s] as valid the merits" of Plaintiffs' claims for this motion. *FEC v. Cruz*, 596 U.S. 289, 298 (2022).

I. Plaintiffs' Claims Are Not Barred by Sovereign Immunity

A. Plaintiffs' First Amendment Rights Outweigh Any Claim of Sovereign Immunity

The SEC's invocation of sovereign immunity improperly sweeps aside Plaintiffs' First Amendment rights to sell their art. The First Amendment forbids government-imposed restrictions on speech before it occurs, or "prior restraints." *See Missouri v. Biden*, 662 F. Supp. 3d 626, 678-79 (W.D. La. 2023) ("Threatening penalties for future speech goes by the name of 'prior restraint,' and a prior restraint is the quintessential first-amendment violation.") (citations omitted); *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.").

The First Amendment's protections are technology-neutral. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears.") (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). "All manner of speech – from 'pictures, films, paintings, drawings, and engravings,' to 'oral utterance and the printed word' – qualify for the First Amendment's protections; no less can hold true when it comes to speech … conveyed over the Internet." *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023) (quoting *Kaplan v. California*, 413 U.S. 115, 119-20 (1973)).

The First Amendment also protects creative expression sold for profit. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) ("Speech likewise is protected even though it is carried in a form that is 'sold' for profit."); *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (commercial intent did not outweigh First Amendment right to sell parodic artwork). The First Amendment protects an artist's right to sell artwork in the conventional art market. And it applies with equal strength to the NFT market, which is just a cryptographic version of the traditional art market.

Requiring Plaintiffs to register their NFTs as securities before they can be offered or sold to the public constitutes an unlawful prior restraint in violation of the First Amendment. The SEC has repeatedly stated that it speaks through its enforcement actions.[6] In its actions against Impact Theory, Stoner Cats, and Flyfish, the SEC has spoken, and its directive is that Plaintiffs cannot offer and sell their digital art without first registering with the SEC (or qualifying for an exemption that would greatly limit to whom they could sell) – a quintessential prior restraint. *See Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 451-52 (1938) (ordinance requiring people to obtain a permit before distributing materials was an invalid prior restraint); *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 802 (1988) (law requiring fundraisers to obtain a license before fundraising imposed an unlawful prior restraint because "delay compel[ed] the speaker's silence").

Apart from bringing this suit, Plaintiffs have no other way of obtaining clarity from the SEC regarding their proposed NFT projects. Plaintiffs have first-hand evidence that the SEC will

[6] *See, e.g.*, Gary Gensler, Speech, *Kennedy and Crypto* (Sept. 8, 2022), https://www.sec.gov/newsroom/speeches-statements/gensler-sec-speaks-090822 ("Some in the crypto industry have called for greater 'guidance' with respect to crypto tokens. For the past five years, though, the Commission has spoken with a pretty clear voice here: through the DAO Report, the Munchee Order, and dozens of Enforcement actions, all voted on by the Commission …. Not liking the message isn't the same thing as not receiving it."); Press Release, SEC, *BlockFi Agrees to Pay $100 Million in Penalties and Pursue Registration of its Crypto Lending Product* (Feb. 14, 2022), https://www.sec.gov/newsroom/press-releases/2022-26 ("Crypto lending platforms offering securities like BlockFi's BIAs should take immediate notice of today's resolution and come into compliance with the federal securities laws.").

not respond to a no-action letter request: the SEC declined to respond to Frye's 2020 and 2021 requests, exercising a "pocket veto" over Frye's free speech rights. Compl. ¶¶ 131, 135. Thus, Plaintiffs' only options are to: (1) accept they cannot release their art without incurring the time and expense associated with attempting securities registration for artwork, damaging both their artistic pursuits and livelihoods, or (2) release their art and pray that the SEC does not sue them, despite the SEC's recent enforcement actions. This Catch-22 creates an untenable situation for Plaintiffs. The SEC's register-or-be-sued ultimatum is a quintessential "chilling effect" on First Amendment rights. *Id.* ¶¶ 15, 65, 117, 121, 127, 136; *Cf. Citizens United v. FEC*, 558 U.S. 310, 355-56 (2010) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.") (quoting *Virginia v. Hicks*, 539 U.S. 113 (2003)).

Courts have repeatedly held that sovereign immunity does not bar parties from seeking to enjoin federal officials from violating the Constitution. *See Missouri*, 662 F. Supp. 3d at 666 (collecting cases). This rule applies with particular force to prior restraints on First Amendment rights. *See id.* ("The constitutional exception to sovereign immunity must apply to such restraints, which limit speech before it occurs, in order to maintain any effectiveness in the protection of First Amendment rights."). Thus, where a prior restraint on free speech is potentially implicated, courts should not allow a sovereign immunity defense to bar suit.

B. Even if the First Amendment Was Not a Concern Here, Plaintiffs Sufficiently Allege Waiver of Sovereign Immunity

Under 5 U.S.C. § 702, Congress "waive[d] the United States' sovereign immunity for actions seeking non-monetary relief against federal government agencies" and officers and employees thereof. *Cambranis v. Blinken*, 994 F.3d 457, 462 (5th Cir. 2021). This waiver "is not

limited to suits under the Administrative Procedure Act" but rather "serves as a waiver of sovereign immunity in suits seeking nonmonetary relief for a cause of action that originates outside of the APA." *Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n*, 571 F. Supp. 3d 571, 598 (N.D. Tex. 2021) (citing *Alabama-Coushatta Tribe of Tex. v. U.S.*, 757 F.3d 484, 488 (5th Cir. 2014)), *aff'd in part, rev'd on other grounds sub nom. Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n*, 70 F.4th 914 (5th Cir. 2023); *Texas v. U.S. Dep't of Homeland Sec.*, 2024 WL 4903376, at *8 & n.11-12 (5th Cir. Nov. 27, 2024) ("[T]here is no ambiguity here. By its terms, § 702 waives immunity for any 'action' seeking nonmonetary relief in federal court.").

To invoke the Section 702 waiver, a plaintiff must allege (1) "some 'agency action' affecting him in a specific way, which is the basis of his entitlement for judicial review," and (2) that he "suffered legal wrong because of the challenged agency action, or is adversely affected or aggrieved by that action within the meaning of a relevant statute." *Alabama-Coushatta Tribe of Tex.*, 757 F.3d at 489 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990)).[7]

For non-APA claims, the challenged "agency action" is not required to be final. *Id.*; *see Texas*, 2024 WL 4903376, at *7 n.9 ("Th[e] claim does not arise under the APA, and so the final agency action requirement is inapplicable."). Agency action "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). It is "meant to cover comprehensively every manner in which an agency may exercise its power." *Clarke v. CFTC*, 74 F.4th 627, 637 (5th Cir. 2023) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001)); *Apter v. HHS*, 80 F.4th 579, 590 (5th Cir. 2023)

[7] "Most circuits that have considered the issue" have held that § 702 waives sovereign immunity "in all suits seeking equitable, nonmonetary relief against an agency" regardless of whether the plaintiff challenges a particular agency action. *Walmart Inc. v. U.S. Dep't of Justice*, 21 F.4th 300, 307 (5th Cir. 2021). The Fifth Circuit has held otherwise, requiring a plaintiff to identify some agency action affecting him in a specific way and showing that he has suffered legal wrong because of it, *id.* at 308. Plaintiffs respectfully submit that the majority view is correct and preserve this issue for further review, if necessary.

(explaining a rule encompasses "virtually every statement an agency may make," including non-final and "non-binding agency policy statements" that do "not mark the end of the agency's decisional process.") (citations omitted).

Here, the Section 702 waiver applies to Plaintiffs' non-APA claims seeking declaratory relief to remedy a clear and imminent threat of agency enforcement.

1. Plaintiffs Sufficiently Allege Agency Action that Specifically Affects Them

Plaintiffs have identified multiple agency actions, not least in the form of three SEC enforcement actions and cease-and-desist orders, that declared the unregistered offer and sale of NFTs to be unlawful securities transactions when accompanied by royalties and public marketing statements. Compl. ¶¶ 84-104. These orders qualify as "agency actions" under § 551(13). *See Lewis v. U.S.*, 2019 WL 4738791, at *23 (M.D. La. Sept. 27, 2019) (finding "cease-and-desist order … qualifies as an agency action by definition") (citation omitted); *Bear Creek*, 571 F. Supp. 3d at 598 (finding enforcement action against third-party qualified as agency action). Further, the SEC has made public statements expressing its strategy of regulation via enforcement, and advising the public to heed the lessons from its enforcement actions. The SEC cannot state that the law is clearly laid out in its enforcement actions, and simultaneously state that those enforcement actions do not constitute agency actions.[8]

These agency actions specifically affect Plaintiffs, because they plan to engage in the same conduct that the SEC declared violative. In a factually analogous case, another court in this Circuit found plaintiffs' allegations of agency action in the form of EEOC guidance documents and one

[8] Plaintiffs have also adequately asserted agency action based on the future enforcement action they face when they release their prospective NFT projects. Unlike the plaintiff in *Walmart*, Plaintiffs are not asserting that mere "[t]hreats [of future enforcement] designed to compel compliance" should qualify as an agency "sanction," 21 F.4th at 310-11, but rather that the forthcoming enforcement action itself qualifies as an agency action under § 702, as "part of an agency … imposition of penalty or fine" through the judicial process. 5 U.S.C. § 551(10) (defining "sanction").

prior enforcement action against a third party were sufficient to invoke § 702's waiver. *Bear Creek*, 571 F. Supp. 3d at 598-99.[9] Specifically, the court found plaintiffs were affected by the EEOC's prior action because plaintiffs intended to enforce a policy that "mirror[ed]" the third-party's policy, even though plaintiffs had not yet taken the adverse employment action. *Id.* at 597-98. Like the plaintiffs in *Bear Creek*, Plaintiffs intend to engage in conduct that has already been the subject of agency action – in this case, multiple actions on the same point.

Defendants' arguments concerning Plaintiffs' allegations of agency action fail for three additional reasons. **First**, Defendants are incorrect that Plaintiffs assert claims under the general provisions of the APA and therefore must assert *final* agency action. MTD at 3, 11. The Complaint only references the APA once, to invoke its waiver of sovereign immunity in § 702, which also applies to "causes of action that arise outside of the APA." *Bear Creek*, 571 F. Supp. 3d at 599. Plaintiffs' suit is instead explicitly brought under the DJA, which authorizes a federal court "[i]n a case of actual controversy within its jurisdiction" to "declare the rights and other legal relations of any interested party seeking such declaration" 28 U.S.C. § 2201(a); *see also Braidwood*, 70 F.4th at 930. In a suit brought under the DJA, the relevant cause of action is the defendant's anticipated claim against plaintiffs. *See, e.g.*, *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1179 (5th Cir. 1984). Here, the relevant cause of action underlying Plaintiffs' DJA suit is a claim under Section 5 of the Securities Act. *See* 15 U.S.C. §§ 77e (prohibiting offer or sale of unregistered securities); 77t(b) (authorizing SEC enforcement actions).[10] Additionally, even though this case

[9] The EEOC dropped its sovereign immunity defense on appeal. *Braidwood*, 70 F.4th at 922 n.5.

[10] Separately, Plaintiffs also have an equitable cause of action "to enjoin unlawful executive action" by the SEC. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-27 (2015) ("[W]e have long held that federal courts may in some circumstances grant injunctive relief ... with respect to violations of federal law by federal officials .... [I]n a proper case, relief may be given in a court of equity ... to prevent an injurious act by a public officer.") (citations omitted); *United States v. Texas*, 97 F.4th 268, 276 (5th Cir. 2024) (same); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority.").

is not brought under the APA and final agency action is not required, the cease-and-desist orders identified by Plaintiffs qualify as final agency actions. *See Lewis*, 2019 WL 4738791, at *24.

Second, Defendants are wrong that Plaintiffs' claims challenge "agency action [which] is committed to agency discretion by law." *See* MTD at 11; 5 U.S.C. § 701(a). The SEC's discretion does not entitle it to bring or threaten enforcement actions that exceed its statutory authority. *Sutton v. U.S.*, 819 F.2d 1289, 1293 (5th Cir. 1987) (discretionary function exception does not apply "when governmental agents exceed the scope of their authority"). Plaintiffs are not challenging an agency's "refusal to take requested enforcement action," which is "generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Nor are Plaintiffs merely seeking review of an agency's decision to open an investigation. *See Gentile v. SEC*, 974 F.3d 311, 318 (3d Cir. 2020). Plaintiffs instead are challenging the SEC's incorrect interpretation of an "investment contract" and exercise of its enforcement powers beyond its statutory mandate, which "can be reviewed to determine whether the agency exceeded its statutory powers." *Heckler*, 470 U.S. at 832; *Texas v. U.S.*, 809 F.3d 134, 166 (5th Cir. 2015) (same). It cannot be the case that a threatened enforcement action is unreviewable because an agency has discretion regarding whether to bring an action; if that were the law, pre-enforcement suits would never be reviewable; by definition, they involve challenges to enforcement actions that the government had discretion not to pursue.

Indeed, Plaintiffs are not bringing a programmatic challenge to the SEC's "overall approach to digital assets," but are challenging the specific, imminent threat that the SEC will bring an action against them when they release their prospective NFT projects, just as the SEC has done against others for substantially the same thing. *See* MTD at 14.

Finally, Defendants are incorrect that Plaintiffs' alleged agency action is a "generalized inchoate" threat of enforcement. MTD at 14.[11] The threat is not "generalized" or "inchoate" – the SEC has made clear it considers Plaintiffs' intended conduct unlawful by issuing orders against others for the same conduct. While the SEC argues "orders issued by the Commission against other entities do not constitute agency action *against Plaintiffs*," *id.* (emphasis in original), *Bear Creek* moots this assertion: agency orders against third parties count as orders. 571 F.Supp.3d at 599 ("Plaintiffs have successfully demonstrated a credible fear of enforcement based on the EEOC's action against [a third-party]" and thus "Plaintiffs have been 'adversely affected' by the threat of agency action.").

2. Plaintiffs Allege an Adverse Effect from the Agency Action

The SEC's prior actions against Impact Theory, Stoner Cats, and Flyfish adversely affect Plaintiffs by giving rise to their credible fear of an enforcement action. *See infra*, Argument Section II.A.1. Plaintiffs' fear of enforcement is preventing them from releasing their NFT projects, impacting their careers, reputations, and livelihoods. Accordingly, Plaintiffs have demonstrated both agency action that specifically affects them and that they are adversely affected, and therefore, have properly invoked § 702's waiver of sovereign immunity.

II. Plaintiffs' Claims Present a Justiciable Case or Controversy

Plaintiffs have alleged facts demonstrating standing and ripeness, such that this case falls within the boundaries of this Court's jurisdiction under Article III. Defendants' argument that

[11] The cases cited by the SEC are inapposite. *See Glenewinkel v. Carvajal*, 2022 WL 179599, at *4-5 (N.D. Tex. Jan. 20, 2022) (immunity not waived where plaintiffs sought "wholesale improvement" requiring "pervasive oversight"); *Rowan Ct. Subdivision 2013 Ltd. P'ship v. La. Hous. Corp.*, 2017 WL 4018859, at *8 (M.D. La. Sept. 12, 2017) (immunity not waived where "gravamen" of the complaint was a "broad … attack" on an agency program, and plaintiffs sought "wholesale improvement"); *Alabama-Coushatta Tribe of Tex.*, 757 F.3d at 491 (immunity not waived where plaintiff "challeng[ed] … broad policies and practices," rather than "a particular and identifiable action"). Here, Plaintiffs request a declaration that their prospective projects are not the offer or sale of investment contracts, which is narrowly tailored to their conduct, and is directed at the threat of a specific enforcement action.

Plaintiffs "merely seek[] an advisory opinion" is incorrect. MTD at 16. When the government has made clear it believes certain conduct is proscribed – and has already brought suit against others for engaging in that conduct – Article III "do[es] not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007); *Bear Creek*, 571 F. Supp. 3d at 595 ("Of course, a plaintiff need not show a specific threat of enforcement directed at him personally before seeking declaratory relief."). "[T]he entire point of a pre-enforcement challenge is to allow courts to rule on the legality of a plaintiff's conduct *before* an enforcement action is brought." *Id.* (emphasis in original).

A. Plaintiffs Have Standing to Bring their Claims

The "gist of the question of standing" is simply whether a 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). To have Article III standing, plaintiffs must demonstrate (1) "that they have suffered an injury" that is "concrete and particularized" and "actual or imminent," (2) that the injury is "fairly traceable to the defendant's allegedly unlawful conduct," and (3) that the injury is "likely to be redressed by the requested relief." *Braidwood Mgmt.*, 70 F.4th at 924 (citations omitted). The SEC only disputes the first prong. MTD at 17.

To demonstrate cognizable injury in a pre-enforcement challenge, plaintiffs must plead an intent to engage in arguably proscribed conduct and a "credible fear" of enforcement. *Braidwood*, 70 F.4th at 924; *Matter of Roman Cath. Church of Archdiocese of New Orleans*, 2024 WL 3440466, at *3 (5th Cir. July 17, 2024) ("[L]itigants can demonstrate standing before they face liability so long as they demonstrate a credible threat of enforcement."). Plaintiffs have alleged their intent to release their NFT projects – proscribed conduct given the SEC's enforcement actions and statements. Plaintiffs have also sufficiently alleged a credible fear of enforcement.

1. Plaintiffs Allege a Credible Fear of Enforcement

Courts have found a credible fear of enforcement in cases where plaintiffs identified prior proceedings targeting similar conduct and the government had not disavowed taking action against plaintiffs. For example, in *Braidwood*, the Fifth Circuit found plaintiffs had standing, even though the EEOC had not initiated an action against them or otherwise specifically targeted plaintiffs, and plaintiffs had not yet taken the action that could have subjected them to an enforcement action. 70 F.4th at 924-25. The Court found that the EEOC's guidance documents and one prior lawsuit against a third party gave rise to a credible threat that plaintiffs would face an enforcement action if they actuated their policies, emphasizing "[p]laintiffs are reasonably worried about the implications of that case on their practices" and "are entitled to receive clarification from this court before stifling their constitutional practices or otherwise exposing themselves to punishment or enforcement action." *Id.* District courts within this Circuit have reached the same conclusion.[12]

The SEC's three prior NFT enforcement actions against others for the same conduct Plaintiffs propose to engage in, as well as the SEC's Wells Notice to OpenSea and other public statements, support Plaintiffs' credible fear of an enforcement action. *See Braidwood*, 70 F.4th at 927 (finding that just one case "can be considered a history of enforcement" to establish a credible threat, "even if the facts would not be precisely the same as in an action against [plaintiffs].").

Additionally, the SEC does not dispute that Plaintiffs' NFT projects (when released) would run afoul of the SEC's interpretation of the federal securities laws, nor does the SEC disavow an

[12] *See Louisiana v. Equal Emp. Opportunity Comm'n*, 705 F. Supp. 3d 643, 656 (W.D. La. 2024) (finding plaintiff had standing even though EEOC had not brought an action against them and plaintiffs had not taken potentially violative action); *Texas v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 2024 WL 2967340, at *4 (N.D. Tex. June 11, 2024) (finding plaintiffs had standing where defendants announced intent to enforce rule and plaintiffs "identified a prior enforcement proceeding targeting conduct falling squarely within the [rule's] ambit") (citations omitted); *see also Missouri*, 662 F. Supp. 3d at 657 ("Past enforcement is good evidence that the threat of enforcement is not chimerical.") (citations omitted).

intent to bring an enforcement action against Plaintiffs when they release their projects. Courts have repeatedly held that agencies cannot avoid judicial review by refusing to articulate their position. *See Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 376 (5th Cir. 2022) ("We have repeatedly held that plaintiffs have standing in the face of similar prosecutorial indecision"); *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 696 (6th Cir. 2015) (finding plaintiffs had standing where "defendants ha[d] not enforced or threatened to enforce this statute against plaintiffs or any other … party," but "ha[d] not explicitly disavowed enforcing it in the future."). The SEC cannot rely on its own opacity to argue that Plaintiffs lack standing.

Further, like the plaintiffs in *Braidwood* who were forced to "choose either to restrict their religious practices or to risk potential penalties," *id.* at 926, Plaintiffs are forced to restrict their First Amendment rights or risk enforcement.[13] *See supra*, Argument Section I.A. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see Franciscan*, 47 F.4th at 380 ("[T]he loss of freedoms guaranteed by the First Amendment … constitute per se irreparable harm."). Thus, despite the SEC's "protestations that no one has brought a[n] … enforcement action against … [P]laintiffs, the [P]laintiffs have established a credible fear of such an action sufficient to establish standing." *Braidwood*, 70 F.4th at 923. Moreover, the restriction on Plaintiffs' First Amendment rights constitutes irreparable harm sufficient to confer standing.

The standing cases upon which the SEC relies are inapposite. **First**, in *Hodl Law, PLLC v. SEC*, 2024 WL 3898607 (9th Cir. Aug. 22, 2024), the court found plaintiff (who owned and

[13] The principle that Article III "do[es] not require a plaintiff to expose himself to liability before bringing suit [against the government] to challenge the basis for the threat," is not confined to constitutional claims. *MedImmune*, 549 U.S. at 128-29; *see Book People, Inc. v. Wong*, 91 F.4th 318, 331 (5th Cir. 2024) ("Independent of its alleged constitutional injuries, Plaintiffs have also established an injury in fact by alleging an economic injury."). Regardless, Plaintiffs' intended conduct "is arguably affected with a constitutional interest." *Id.* (citations omitted).

used Ether and sought a declaratory judgment that Ether is not a security) did not have standing because "the SEC ha[d] not taken an official position as to whether Ether or Ethereum is a 'security' under the Securities Act" and had not "allege[d] either that Ether is a security or that the transactions on the Ethereum network violated the Securities Act" in any enforcement actions. *Id.* at *2. Here, in contrast, the SEC has declared in prior enforcement actions that the offer and sale of NFT art (when accompanied by promotional statements and royalties) are securities transactions. The SEC has taken a clear position on the offer and sale of NFTs and has directed the public to look to its enforcement actions for guidance. **Second**, in *Nat'l Press Photographers Ass'n v. McCraw*, 90 F.4th 770 (5th Cir. 2024), the court found that plaintiffs had no standing where the government had "never enforced [the relevant statute] against Plaintiffs (or anybody else)." *Id.* at 782. Here, however, the SEC *has* brought enforcement actions against numerous others, for substantially identical conduct. **Third**, in *G.K. v. D.M.*, 2022 WL 19403388 (E.D. La. July 22, 2022), the court found that a plaintiff had no standing to challenge a statute targeting intentional exposure of HIV where his own HIV status was still uncertain. *Id.* at *4. Here, however, there is no such uncertainty; Plaintiffs have expressed a clear intention to release their projects.

Fourth, in *Rivera v. Wyeth-Ayerst Lab'ys*, 283 F.3d 315 (5th Cir. 2002), the court found that plaintiffs had no standing to claim drugs were defective where plaintiffs were not personally affected by the defect. *Id.* at 319-20. Plaintiffs here, conversely, are *personally* affected by the SEC's enforcement actions, since Plaintiffs intend to engage in conduct that was declared violative in similar actions. **Fifth**, in *Zimmerman v. City of Austin, Tex.*, 881 F.3d 378 (5th Cir. 2018), the court found plaintiffs lacked standing where the risk of engaging in prosecutable conduct "depend[ed] in large part on the actions of third-party donors" and there was "no evidence in the

record of such interested donors." *Id.* at 390. Here, Plaintiffs' release of their NFT projects is not dependent on uncertain third-party conduct.

2. Plaintiffs' Proposed Projects Differ from Their Past and Current Projects, Contributing to Their Credible Fear of Enforcement

The SEC tries to undermine Plaintiffs' fear of enforcement by claiming they have been "selling NFTS for years … without pause" and "without any SEC response." MTD at 19-20. However, Plaintiffs' past NFT sales are distinct from their prospective series, which are functionally identical to those in the SEC's NFT enforcement actions. Thus, a lack of SEC action against Plaintiffs to date does not neutralize their current fears of enforcement.

Mann sells a new song as a single NFT every day at an auction, but that single sale is markedly different from what he is proposing to do here: releasing a limited edition of 10,420 NFTs, each priced around $800, composed of unique remixes of his popular song "This Song Is A Security." Additionally, the SEC acknowledges that Frye's "specific current offers" are "not plead[ed]" in the complaint (MTD at 19), but that is because Frye has not released any new NFTs after the SEC's actions in *Impact Theory*, *Stoner Cats*, and *Flyfish*, and Frye has never released an NFT series as large as the one he plans to release now.

Frye's fear of enforcement is not undercut by his prior no-action letter requests, which pre-dated the SEC's NFT enforcement actions. Frye's no-action letter requests were attempts to obtain clarity on this exact point from the SEC. The SEC's failure to respond did not represent an acknowledgement that it will not take action against him. Rather, the SEC's decision to ignore rather than respond to his no-action letter requests, followed by their decision to take action against others for the offer and sale of NFTs, only *heightens* Frye's credible fear of enforcement. The SEC's argument that "Plaintiffs' alleged 'fear' has not stopped them from offering and selling

other NFTs" (MTD at 8) thus misses the mark completely: while they have been involved with NFTs in the past, they have refrained from the artistic releases implicated by recent SEC actions.

B. Plaintiffs' Claims are Ripe

Ripeness is determined by: (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." *Braidwood*, 70 F.4th at 930 (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967)). The Fifth Circuit has found hardship to inhere in "the harm of being forced to modify one's behavior in order to avoid future adverse consequence." *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 627 (M.D. La. 2015) (quoting *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012)).

"An injury need not be actual in a physical sense for a plaintiff's case to cross the ripeness threshold." *Id.* at 624. Rather, "[a] 'future injury' will be deemed ripe … if either 'the injury is certainly *impending*' or 'there is substantial *risk* that the harm will occur.'" *Id.* (emphasis in original) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). "Thus, 'ripeness is seldom an obstacle to a pre-enforcement challenge … where the plaintiff faces a credible threat of enforcement.'" *Id*. (citations omitted); *see McCall v. Dretke*, 390 F.3d 358, 362 (5th Cir. 2004) ("If a threatened injury is sufficiently imminent to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied.") (citations omitted).[14]

Moreover, "an agency's prospective, not yet consummated, action will be found ripe for review if 'the scope of the controversy has been reduced to more manageable proportions … by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.'" *Planned Parenthood*, 141 F. Supp. 3d. at 624 (quoting *National Park*

[14] "There is a fair amount of overlap between Article III standing requirements and the ripeness analysis." *Braidwood*, 70 F.4th at 930. Indeed, "[i]t remains unclear" whether a court can ever "reject a claim as unripe once plaintiffs have established Article III standing." *Id*. at 930 & n.28 (observing that the ripeness doctrine is of questionable "continu[ed] vitality") (quoting *Susan B. Anthony List*, 573 U.S. at 167).

Hosp. Ass'n v. DOI, 538 U.S. 803, 807 (2003)). Courts find claims to be ripe where a history of enforcement actions puts plaintiffs in the dilemma of deciding between refraining from conduct and putting oneself in danger of a similar enforcement action. *See Braidwood*, 70 F.4th at 930.

1. The Issues Are Fit for Judicial Decision

This case presents a pure question of law: whether the SEC has authority to regulate the public offer and sale of art as NFTs that do not involve ongoing obligations to purchasers. This is a legal question about the scope of the SEC's authority that turns on a question of statutory interpretation, namely the interpretation of "investment contract" in 15 U.S.C. § 77b(a)(1), and its application to artwork. *See Walmart*, 21 F.4th at 311 ("[T]he declarations [plaintiff] requests present pure legal issues in that they are predominantly questions of statutory interpretation.").

No further factual development is required. Plaintiffs have prepared their NFT projects, are ready to promptly release them, and are refraining from releasing them because they mirror projects that have been subject to recent SEC enforcement actions and pronouncements. Plaintiffs have provided all the relevant facts regarding their projects, and the SEC does not request any specific additional information, or identify any further information, that would help the Court render a decision on the merits. Thus, this case would not benefit from a more "concrete setting." *See Teva Pharms. USA, Inc. v. Sebelius*, 595 F.3d 1303, 1308-09 (D.C. Cir. 2010) (finding plaintiff raised "purely legal" issues that would not benefit from a more "concrete setting" where they "turn[ed] on questions of statutory construction, and the interpretations chosen by the [agency] and proposed by [plaintiff] both constitute[d] bright-line rules, impervious … to factual variation"). Courts routinely adjudicate pre-enforcement challenges based on future business plans which are subject to change. *See, e.g., Crown Castle Fiber, L.L.C. v. City of Pasadena*, 76 F.4th 425, 437 (5th Cir. 2023) ("no further factual development" needed regarding business's plan to develop a communications network). Further, the implication of Plaintiffs' First Amendment

rights are "pure question[s] of law that need no further factual or legal development." *Book People*, 91 F.4th at 334.

Contrary to the SEC's protestations, this action is not premature because the SEC has taken no action against Plaintiffs, nor does it "rest[] on too many speculative contingencies" or "require this Court to opine on unknown future circumstances." MTD at 22-23. The Fifth Circuit rejected similar arguments in *Braidwood*, 70 F.4th at 931 (finding claim ripe where EEOC "ha[d] brought a successful suit against another violator for the same policies" and rejecting the EEOC's argument that plaintiffs' "injury is abstract and hypothetical"). Plaintiffs have demonstrated that the issues are fit for judicial decision by showing that they face a credible threat of enforcement and that, through its enforcement actions, the SEC has reached "the consummation of [its] decisionmaking process" as to Plaintiffs' intended conduct.[15] Finding Plaintiffs' claims premature merely because Plaintiffs have not yet been targeted by the SEC would be inconsistent with "the point of a declaratory judgment," which is to "to settle actual controversies before they ripen into violations of law or breach of some contractual duty." *Braidwood*, 70 F.4th at 926 (citations omitted).

Finally, Defendants wrongly suggest that whether a specific offer or sale constitutes an investment contract security – or whether the SEC has statutory authority to regulate that offer or sale accordingly – can never be determined in a pre-enforcement challenge, before the potentially violative offer and sale occurs. MTD at 23-24. That argument belies the entire purpose of a pre-enforcement challenge. Plaintiffs are not asking the court to render its decision "in the abstract,"

[15] This case is nothing like those cited by the SEC that feature a challenge to a non-self-executing administrative subpoena, *see Google, Inc. v. Hood*, 822 F.3d 212, 227-28 (5th Cir. 2016), a suit by a prisoner seeking "a declaratory judgment as to the validity of a defense the State may, or may not, raise in a habeas proceeding," *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998), or a suit raising an abstract legal question without seeking "a judgment that the [defendant agency] is without power to enter any specific order or take any concrete regulatory step," *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 244 (1952). Plaintiffs instead seek relief to ensure they can release their art projects without facing an enforcement action like the ones that the SEC brought against others for the same conduct.

id. at 23, or without the relevant facts. While the SEC is correct that the "economic reality" of an offering is essential to the analysis, *Howey*, 328 U.S. at 298, MTD at 4, the economic reality here is clear: Plaintiffs propose to offer and sell their art, in fundamentally the same way artists always have, albeit in a digital medium. This case thus presents a purely legal question of whether the SEC has the authority to regulate NFT art sales that do not involve ongoing obligations to purchasers.[16] While the *Howey* test is "flexible," *Howey*, 328 U.S. at 299, it does not merely flex in one direction to give the SEC limitless discretion. Instead, it can flex in both directions to adjust to the economic reality of the situation. Where (as here) First Amendment concerns are implicated, the *Howey* test should be applied more *narrowly*, to avoid imposing a prior restraint on artists.

2. Withholding Court Consideration Will Cause Hardship to Plaintiffs

Plaintiffs are harmed, and will continue to be harmed, by the credible risk that the SEC will bring an action against them if they release their projects. Plaintiffs are refraining from pursuing their projects (forsaking additional potential revenue, publicity, and growth) until they receive a judicial resolution. "[E]conomic harm – like damage to one's business interest – is a quintessential Article III injury." *Book People*, 91 F.4th at 331. Absent "prompt judicial review," Plaintiffs are forced to choose between abandoning their right to sell their art or "putting themselves in danger of a costly enforcement action" by releasing projects that mirror conduct that the SEC has already deemed illegal. *See Braidwood*, 70 F.4th at 931. This is the "dilemma that it was the very purpose of the [DJA] to ameliorate." *MedImmune*, 549 U.S. at 129 (citations omitted). Thus, the SEC's prior actions affect Plaintiffs' "primary conduct" and do not leave them free to conduct business as they see fit. *See National Park Hosp. Ass'n*, 538 U.S. at 809-10.

[16] The NFT-related cases the SEC cites are inapposite. None involved the SEC as a party or addressed the SEC's authority to regulate NFTs. MTD at 4-5, 24. Whether the SEC has the authority to regulate the offer or sale of NFTs that do not involve ongoing obligations to purchasers remains an open question that no court has yet reached.

There are no other pending actions where Plaintiffs can raise their arguments. The SEC ignored Frye's no-action requests, and there is no other available vehicle to seek relief. *Cf. Walmart*, 21 F.4th at 311-13 (finding suit unripe where enforcement action against plaintiffs was pending); *TOTAL Gas & Power N. Am., Inc. v. FERC*, 859 F.3d 325, 337-39 (5th Cir. 2017) (finding suit unripe where action was pending and plaintiff conceded agency was "authorized to conduct a proceeding regarding the alleged violation and penalty"). With nowhere else to turn, Plaintiffs "remain under a constant threat that government officials will use their power to enforce the law against them" if they exercise their First Amendment rights and release their art. *Braidwood*, 70 F.4th at 932. Plaintiffs "are entitled to receive clarification from this [C]ourt before stifling their constitutional practices or otherwise exposing themselves to punishment or enforcement action. That is a core purpose of a declaratory judgment." *Id.* at 927-28.

CONCLUSION

The SEC's position has a severe chilling effect on artists' First Amendment rights, and is an existential concern for the livelihoods of artists and artistic expression in the digital age. Plaintiffs respectfully request that Defendants' Motion to Dismiss be denied in its entirety.

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