Before the
UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

In the Matter of:	)	
	)	**HO-14317**
Uniswap Labs	)	

WELLS SUBMISSION ON BEHALF OF UNISWAP LABS

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I. Introduction

The Uniswap Protocol (the "Protocol") is a groundbreaking technology that enables the efficient, secure, and intermediary-free trading of digital assets—to the great benefit of users. It is not an exchange, broker, or clearing firm under any reasonable reading of the securities laws. It is a technological solution to many of the problems that plague traditional commercial and financial markets. The Protocol removes the need for a central order book, third-party custody, and a private order matching engine—and therefore eliminates the need for many of the middlemen who extract fees and add hidden risks. If traditional equity markets adopted the Protocol's model, American investors would save 30% of all transaction costs—roughly $12 billion a year according to independent research. The Protocol is exactly the kind of innovation the Commission should welcome and encourage.

The Protocol reimagines market structures. Unlike traditional markets—which tend to have various centralized intermediaries facilitating an exchange (for a fee), custodying assets (for a fee), and clearing and settling transactions (for a fee, and only after a 1-2 day delay)—the Protocol is autonomous software that enables users to transact digital file formats securely, without a host of centralized intermediaries. Each user can custody their own assets, and automatic settlement takes place instantaneously.

Many traditional markets also depend on centralized "market makers"—often high-frequency trading firms—who are willing to buy and sell certain assets, only so long as they can avoid directional risk and earn a spread between buying and selling. This centralized intermediation leads to potential costs and risks in the form of opaque and volatile pricing, front-running, deceptive sales practices, settlement delays, lost or stolen customer funds, and potential flash-crashes due to liquidity disappearing. The Protocol, by contrast, enables increased, more persistent liquidity because (i) a wide range of people can essentially crowdfund liquidity into

liquidity pools, and (ii) these liquidity providers ("LPs") generally already take market risk in both assets they contribute to the pool and therefore require lower spreads than traditional market makers.

The Protocol is already revolutionizing how people trade commodities and other assets. Since being first deployed as a set of "smart contracts" to the Ethereum blockchain, the Protocol has become the most used protocol on that blockchain. The Protocol enables anyone to trade assets using Ethereum's standard file format called ERC-20. Much as the PDF file format can represent any type of document (not just a stock certificate), ERC-20s can represent any kind of value (from commodities to collectibles). In enabling people to trade one ERC-20 for another, the Protocol has supported over 2 trillion dollars' worth of commerce across 18.5 million wallet addresses over the past six years. Tens of thousands of independent software applications have connected independently to the Protocol. Moreover, thousands of unrelated developer teams have forked (or copied) the Protocol to support hundreds of billions of dollars more in volume on other trading protocols. In short, the Protocol is a *tool* that millions of people use today in order to trade standardized crypto tokens—and that may eventually change how business is done in traditional finance and elsewhere.

At the same time that it provides these vast benefits, the Protocol is not an exchange under the securities laws:

- Secondary market trading does not constitute an investment contract, and the vast majority of volume traded on the Protocol is Bitcoin, Ethereum, and stablecoins, or foreign transactions, none of which are subject to SEC jurisdiction;
- The Protocol was not designed "for the purpose" of securities trading, as the law requires for it to be considered a "securities exchange." Rather, the Protocol is a

passive, internet-based communications protocol that enables users to post their interest in trading items online, similar to how HTML provides a standard way for people to display digital content in a web browser;

- The Protocol is not controlled by, or comprised of, any "group of persons," let alone Universal Navigation Inc. ("Uniswap Labs" or "Labs"). Labs initially developed the Protocol, but the Protocol is open-source and fully autonomous. Labs cannot change the Protocol's core code. Nobody needs Labs' permission to trade, add assets, or remove assets using the Protocol. Just as Satoshi Nakomoto does not control Bitcoin, Labs does not control or maintain the Protocol or its use; and
- The Protocol does not have the other aspects of an exchange: it does not match orders, bring together buyers and sellers, or constitute a market place.

In fact, the Protocol's basic nature renders it so obviously not an "exchange" that the Commission kicked off a still-pending rulemaking to change its own definition of "exchange" to capture communications protocols. That proposal unlawfully ignores dictionary definitions and statutory history, contravening the limits imposed by Congress and extending the statute's reach into open-source software with general-purpose, non-securities applications, like the Protocol.

Similarly, none of Labs' other conduct runs afoul of the securities laws. As the Commission has already learned in its recent loss in the Coinbase litigation, passive web interfaces for viewing, analyzing, and communicating with blockchain protocols, like Coinbase's wallet software and Labs' web-based interface (the "Interface"), even combined with an open-source trade path algorithm (like Labs' "Autorouter"), do not satisfy the test for a "broker." The "clearing agency" definition likewise does not reach Labs, as Labs does not take possession of third-party assets, become party to transactions, or otherwise function as a depository or

intermediary of securities or securities transactions. And Labs did not offer or sell (and has never offered or sold) any tokens in transactions that required registration. Labs' distributions of UNI governance tokens were exempt from registration, were non-securities transactions under the *Howey* test, or both. And fungible and non-fungible receipts evidencing LPs' ownership of tokens in pools ("LP Tokens") are not profit-sharing agreements and are not issued by Labs.

This case implicates constitutional questions as well. Before accepting the Commission's broad new assertion of authority to regulate and potentially ban the use of many crypto assets and decentralized finance generally, a court would have to consider whether the major questions doctrine precludes the Commission from making such economically significant decisions in the absence of specific congressional authorization. A court would also have to consider whether the Commission failed to provide fair notice that Labs' activities could violate the securities laws, given that many of the questions raised by this case are squarely before the Commission in a still-pending rulemaking regarding expansion of the "exchange" definition. Courts are likely to conclude that the Commission lacks authority to act under both doctrines.

The Commission should not take on these significant litigation risks. Bringing this case would encourage Americans to use harder-to-regulate foreign interfaces and trading protocols, while also discouraging future innovators from attempting to foster new ideas that bring much-needed competition and innovation to financial and commercial markets. Although there are legitimate questions about how best to protect customers and market integrity when traders transact on a peer-to-peer basis without an intermediary, those are policy questions that are primarily for Congress—and are part of ongoing policy discussions that Labs has helped lead. The Commission cannot obtain its desired answers through litigation in this matter.

For these reasons and more, the Commission should not pursue this case. The

Commission has more to lose than gain from doing so. And the Commission's time and resources would be better spent crafting a policy framework that responsibly addresses and promotes innovations like those developed by Labs—and encourages them to be adopted in the markets over which the Commission has jurisdiction.

II. Factual Background

A. Uniswap Labs Is an Innovative Software Company Based in New York

Universal Navigation Inc., doing business as Labs, is a private software company founded in 2018 and located in New York City.[1] Hayden Adams, the CEO of Labs, invented the Protocol, a peer-to-peer system for transacting in ERC-20 tokens on the Ethereum blockchain.[2] Labs primarily focuses on operating and developing software that enhances user experience in connection with the Protocol, including a web application for accessing the Protocol (the "Interface") and a mobile app-based wallet.

B. The Protocol Is an Automated Market Maker Technology Controlled by No Individual or Entity

The Protocol is an autonomous set of "smart contracts"[3] that run on the Ethereum[4] network—that is, software on the Ethereum blockchain programmed to automatically execute trades, akin to a pre-programmed digital vending machine. The Protocol is the first widely successful automated market maker ("AMM"), and relies on LPs contributing liquidity into a

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[1] Unlike many companies in the digital asset space, Labs made a deliberate decision to be domiciled in the United States. Labs counts among its shareholders leading U.S. institutional investors, such as Paradigm, Andreessen Horowitz, and Union Square Ventures. It has more than 100 employees, almost all of whom are within the United States, including in New York, Missouri, Texas, and California.

[2] *A Short History of Uniswap*, Uniswap Labs Blog (Feb. 10, 2019), https://blog.uniswap.org/uniswap-history.

[3] Versions 1 and 2 of the Protocol were released as open source under a general public license. Version 3 of the Protocol was launched by Labs under a business-source license that limited the use of its source code in a commercial or production setting until April 1, 2023, at which point it converted to a general public license. For more than a year now, anyone has been able to fork the code for their own use, so long as they keep it open source. *See Uniswap Help Center: Uniswap v3 Licensing*, https://support.uniswap.org/hc/en-us/articles/14569783029645-Uniswap-v3-Licensing (last visited May 20, 2024).

[4] The Uniswap Protocol has been deployed to other blockchains, but we focus on Ethereum here.

liquidity pool that generally contains two specific assets. Liquidity pools represent the quantity of assets that users in the aggregate are willing to have swapped at prices determined using a constant-product market maker formula ($x*y = k$), which automatically rebalances with swaps as the ratios of various assets fluctuate. The formula ensures that the product of x and y, representing the balance of the two tokens in any pool, equals a constant, k. Because the relative price of the assets can be changed only through trading, divergences between the Protocol price and external prices create market opportunities. The combination of the formula plus the rebalancing mechanism thus ensures that Protocol prices always trend toward the market-clearing price.

Labs has released three versions of the Protocol to date, each of which introduced additional features but performs the same basic function. Although Labs has been involved in developing and releasing different versions of the Protocol, the Protocol itself is autonomous and self-executing, and it is not centrally governed, controlled, or maintained by Labs or by any other person or organization. The developers of the Protocol, including Labs and its employees, lack the ability to approve or block any swaps on the Protocol, to "run" or shut off the Protocol, or to otherwise change the Protocol's code. Instead, the Protocol operates in accordance with a "governance minimization" principle: that automation of open-source software components is a strong form of decentralization and that anything that can be automated should be, leaving as little as possible in fundamental software operation open to human decision-making. In accordance with this principle, all of the core operations of the Protocol, including approving swaps, adding new pools, and providing liquidity, are initiated by users, not Labs, and implemented automatically according to the Protocol's code. If Labs disappeared tomorrow,

users could continue to use the Protocol like they do today—just as people can continue to use Bitcoin even after the disappearance of Satoshi Nakamoto.

Swappers on the Protocol use their self-custodial wallets—software that helps them manage the private keys controlling their assets—in order to connect with the Protocol's Ethereum smart contracts and swap against a liquidity pool, exchanging one asset in the pool for the other. The swaps take place on-chain. Labs never takes possession or custody of users' tokens during a swap and never approves or declines any transaction. Unlike a traditional exchange, the Protocol does not involve third-party custody, a central order book, or a private order matching engine, and users do not need to match with individual counterparties to complete a swap. Nor is there a clearing agency or any need for an intermediary or depository—the swaps are automatically processed and added to an updated ledger of who controls which assets by a vast network of unaffiliated, competing Ethereum validators who validate all swaps that occur on the Protocol. A substantial majority of daily volume on the Protocol comes from pools exclusively involving the swapping of Ether, wrapped Bitcoin, and stablecoins, all of which the Commission has acknowledged are not securities.[5]

LPs are remunerated for providing liquidity through fees paid by swappers. Fees vary based on the pool, but currently in version 3 of the Protocol, they can be set at 0.01%, 0.05%, 0.30%, or 1% by the user who first creates the liquidity pool.

[5] Since the first deployment of the Uniswap V3 smart contract on May 4, 2021, for example, 63.37% of Protocol trading volume across all blockchains exclusively consisted of wrapped Ether, wrapped Bitcoin, and stablecoins, according to on-chain data. *Uniswap Protocol key stats (token subset)*, Dune, https://dune.com/queries/3749536/6306642 (last visited May 20, 2024).

C. The Interface Is One of Many Applications that Allows Users to Access the Protocol

Labs created and operates the Interface, a web application that allows users to connect a self-custodial wallet and enables them to generate instructions that they communicate to the Protocol. Labs' Interface is not the only way to access the Protocol. In fact, only about 10–15% of volume (and only about 20% of total transactions) on the Protocol originates from the Interface[6]—and, of the subset of those Interface-enabled transactions, only 25% originate within the United States.[7] The remaining 85-90% of Protocol volume that does not originate on the Interface either originates from other interfaces developed by persons or entities unaffiliated with Labs or from users who are sophisticated enough to write their own code to communicate with the smart contracts. As a result, swappers who use the Interface to help them communicate with the Protocol could be accessing liquidity provided by someone who did not use the Interface to provide that liquidity, and liquidity provided with help from the Interface is often accessed by someone using a different interface entirely, or no interface at all.

D. The Autorouter Is an Open-Source Tool that Recommends the Best Trading Path on the Protocol

The Autorouter is an open-source tool that analyzes all of the potential paths for a swap to take place on the Protocol (*e.g.*, someone swapping Ether for wrapped Bitcoin could swap Ether for a stablecoin and then swap that stablecoin for wrapped Bitcoin). It then attempts to provide the Interface user with information about the most efficient swap with the lowest fees available at that time. This path could be "split" across multiple pools, if doing so produces a

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[6] *Uniswap Protocol Key Stats (Volume and Swaps)*, Dune, https://dune.com/queries/3749558/6306663 (percentage of swaps that originated from Labs' interface in the year preceding May 20, 2024) (last visited May 20, 2024); *Uniswap Protocol Key Stats (Volume and Swaps)*, Dune, https://dune.com/queries/3749558/6306658 (percentage of transaction volume that originated from Labs' interface in the year preceding May 20, 2024) (last visited May 20, 2024).

[7] Uniswap Labs internal data for the prior twelve months.

better price for the user. The Autorouter also takes into account "gas costs"—the network costs of submitting a transaction to the Ethereum blockchain collected by Ethereum validators. The user elects whether to take the proposed route. If a user chooses to proceed with the route identified by the Autorouter, it is the user's own, self-custodial wallet that submits the instructions to the blockchain to make the swap with the user's tokens. The Autorouter does not interact with the user's assets at any time. The user is the only entity exercising any discretion in the process.

E. The UNI Token Is a Governance Token that Allows Holders to Control the Limited Modifiable Aspects of the Protocol

UNI, the governance token of the Protocol, was launched on September 15, 2020. Shortly before the launch, another decentralized finance ("DeFi") entity, SushiSwap, had forked the Protocol and launched a "vampire attack" that attempted to lure LPs away from Uniswap with a Sushi governance token.[8] The user response to that incident revealed that the Uniswap community of users and LPs was interested in a governance token associated with the Protocol. UNI was released to enable "shared community ownership and a vibrant, diverse, and dedicated governance system" and to "officially enshrine Uniswap as a publicly-owned and self-sustainable infrastructure while continuing to carefully protect its indestructible and autonomous qualities."[9]

UNI holders may participate in the Protocol's governance system, which allows for limited decisions relating to the Protocol. Those decisions include, for example, voting to create new LP fee tiers on version 3 of the Protocol or allocating a portion of LP fees elsewhere (commonly referred to as the "fee switch"). The decisions are few and do not include the

[8] jakub, *What is a Vampire Attack? SushiSwap Saga Explained*, Finematics (Dec. 9, 2020), https://finematics.com/vampire-attack-sushiswap-explained/.

[9] *Introducing UNI*, Uniswap Labs Blog (Sept. 15, 2020), https://blog.uniswap.org/uni.

technical ability to block transactions, approve transactions, modify Protocol code, lock funds, or steal funds. Although Labs employees may own UNI tokens and delegate the associated voting power, Labs' policy currently forbids its employees (and Labs as an entity) from voting on governance proposals.

At launch, the UNI token was allocated to historical users of the Protocol (both swappers and liquidity providers), a governance treasury (which is collectively controlled by UNI holders), certain Labs investors and advisors, and, for approximately a two-month period, to LPs of four pools on Uniswap v2 (ETH/USDT, ETH/USDC, ETH/DAI, and ETH/WBTC). Labs also retained a portion of the original UNI supply, much of which was earmarked for current and future employees.

F. The Protocol Is Widely Used and Provides Tremendous Benefits to Consumers, with Even Greater Future Potential

The Protocol is the most popular decentralized trading software on the Ethereum network by volume. Across multiple blockchains, it has supported over $2 trillion in volume since launching in 2018, with current daily volume around $1.57 billion.

The Protocol also has earned the respect of leaders in finance and economics. For example, J.P. Morgan and DBS Bank partnered with the Singaporean government to launch a foreign exchange and government-bond trading pilot called Project Guardian, which is built on a fork of the Protocol.[10] And research by prominent academics, such as Stephen Boyd at Stanford, David Parkes at the Harvard School of Engineering, and Christine Parlour at the Hass School of Business, has shown that AMMs provide deep markets, prices that are aligned with those in

[10] Ornella Hernandez and Ben Strack, *JPMorgan Trade on Public Blockchain 'Monumental Step' for DeFi*, Blockworks (Nov. 2, 2022), https://blockworks.co/news/jpmorgan-trade-on-public-blockchain-monumental-step-for-defi; *Project Guardian*, Monetary Authority of Singapore (Oct. 19, 2022), https://www.mas.gov.sg/schemes-and-initiatives/project-guardian.

centralized exchanges, and lower costs for traders.[11] That can result in better functioning markets, especially for assets that are relatively less liquid.[12]

Additionally, research by professors at McMasters and the University of Toronto determined that, if the Protocol's model were adopted in traditional equity markets, it would have saved U.S. investors $34 billion over the previous three years—30% of all trading costs.[13] Research also suggests that the Protocol can provide efficient markets for the multi-trillion-dollar non-securities market of currency trading.[14]

III. Under the Plain Language of the Exchange Definition, Labs Does Not Operate an Exchange

The Staff alleges that Labs is operating an unregistered exchange in violation of Section 5 of the Exchange Act. This allegation is meritless. First, no securities transactions occur on the Protocol, and second, even if some number of securities transactions were occurring via the Protocol, Labs does not operate a "securities exchange" within the meaning of the Exchange Act. Choosing to litigate these issues would expose the Commission to serious risk of (a) an adverse decision concerning its authority over crypto tokens, and (b) precedent confining the scope of the "exchange" definition in ways that undermine the SEC's pending rulemaking in that area.

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[11] Guillermo Angeris et al., *Optimal Routing for Constant Function Market Makers*, Proceedings of the 23rd ACM Conference on Economics and Computation, 115–128 (July 2022); Zhou Fan et al., *Strategic Liquidity Provision in Uniswap v3* (Sept. 1, 2023), https://arxiv.org/pdf/2106.12033; Alfred Lehar and Christine A. Parlour, *Decentralized Exchange: The Uniswap Automated Market Maker* (Aug. 14, 2021), Journal of Finance forthcoming, https://ssrn.com/abstract=3905316.

[12] Katya Malinova and Andreas Park, *Learning from DeFi: Would Automated Market Makers Improve Equity Trading?*, 5 (Nov. 18, 2023), https://ssrn.com/abstract=4531670.

[13] *Id.* at 4.

[14] *See generally* Austin Adams et al., *On-chain Foreign Exchange and Cross-border Payments* (Jan. 18, 2023), https://uniswap.org/OnchainFX.pdf.

A. Because an Investment Contract Requires a Contract, Transactions on the Secondary Market Through the Protocol Are Not Investment Contracts

The Securities Act defines various categories of securities, including stocks, bonds, and "investment contract[s]." 15 U.S.C. § 77b(a)(1). Under the test announced by the Supreme Court in *Howey*, an "investment contract" exists only where "a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). Token transactions on the protocol do not satisfy the *Howey* test.

First, both case law and the SEC's own guidance confirm that crypto assets themselves are not investment contracts. For instance, the court in *Ripple* held that a crypto "token[]is not in and of itself a 'contract, transaction[,] or scheme' that embodies the *Howey* requirements of an investment contract." *SEC v. Ripple*, 682 F. Supp. 3d 308, 324 (S.D.N.Y. 2023). The Commission has accepted this reality. *SEC v. Coinbase, Inc.*, No. 23 Civ. 4738, 2024 WL 1304037, at *13 (S.D.N.Y. Mar. 27, 2024) ("[T]he SEC does not appear to contest that tokens, in and of themselves, are not securities."); Tr. of Oral Arg., *SEC v. Coinbase, Inc.*, No. 23 CIV. 4738 (KPF) (S.D.N.Y. Mar. 27, 2024), Dkt. No. 101, at 21:11 (Staff admitted the "token itself is not the security."). Yet the Commission has taken the position that secondary market *transactions* in digital tokens are themselves "investment contracts" because token purchasers are buying into the whole "ecosystem" surrounding such tokens.[15]

That "ecosystem" theory does not satisfy the *Howey* test. Secondary buyers on the Protocol do not have contracts with their counterparties, do not join a common enterprise, or expect to profit solely from the efforts of the token projects. The projects "issuing" the tokens

[15] Although there have been conflicting decisions on these issues from different courts in the Southern District of New York, the decision in *Ripple*—which did not accept this theory—came on a full record at summary judgment.

have generally made no promises or commitments to users of the Protocol to exert any efforts or share profits from their business, and secondary market buyers "could not have known if their payments of money went to" the project or to someone else. *Ripple*, 682 F. Supp. 3d at 328.

If transactions in digital tokens are nonetheless treated as "investment contracts" under the Commission's "ecosystem" theory, then all sorts of secondary sales of obvious non-securities and assets would be converted into investment contracts as well. That would include, for example, sales of luxury, limited-edition goods where the producers spend heavily on marketing and control who purchases which items, such as Hermes Birkin bags; collectibles such as baseball cards or stamps where quantities are artificially limited; and gems and metals including gold, thanks to an ecosystem anchored by the World Gold Council. These physical goods cannot be distinguished simply by saying they are tangible or have "inherent" utility, both because digital tokens *also* often have utility and because there are numerous intangible commodities—*e.g.*, emissions allowances, renewable energy credits, and carbon credits—that are recognized as non-securities commodities but that have value and utility derived entirely from their ecosystems.

Whether an investment contract can exist absent an actual contract, or at least the offer of one, remains a live question that is likely to be definitively decided by higher courts. Despite the Commission's arguments in district court proceedings, neither the Supreme Court nor a court of appeals has ever found an "investment contract" to exist in the absence of a contract. The Commission should refrain from bringing additional enforcement actions against new targets until appellate courts have had the chance to consider the Commission's novel interpretation of its authority under the securities laws.

Finally, and just as importantly, the vast majority of swaps on the Protocol are definitively not securities transactions even under the SEC's own view of its jurisdiction. On the Protocol, 65% of its volume unquestionably consists of pools that the SEC has conceded are not securities: Ether, wrapped Bitcoin, and stablecoin pools. U.S. securities law also does not extend to foreign transactions, and Labs estimates that roughly 75% of users transacting on the Protocol are foreign (assuming that Interface data is representative of the Protocol). Given that approximately 25% of users are domestic and only 35% of that domestic volume comes from outside of those BTC, ETH, and stablecoin pools, only 8.75% of the Protocol volume could arguably be within the SEC's jurisdiction, even under the SEC's own (incorrect) approach to the *Howey* test. Moreover, that 8.75% includes many tokens that are clearly not securities, such as (a) meme tokens like Pepe, Doge, or Jeo Boden, which the market understands to be "for entertainment purposes only"[16] and about which their creators (if they are even known) generally make no promises of future efforts or improvements and take no actions to support such enhancements, and (b) utility tokens whose functionality likely renders them non-securities in most transactions.[17]

B. Labs Does Not Operate a Securities Exchange as Defined by the Text of the Exchange Act

Even if there were securities transactions occurring via the Protocol, Labs does not operate a "securities exchange" within the meaning of the Exchange Act. "Exchange" is defined by the Exchange Act as "any organization, association, or group of persons, whether

[16] VanEck, an investment manager with $89.5 billion in assets under management, has launched a Meme Coin Index through its MarketVector platform, with the explanation that "these coins are intended for entertainment purposes." *Meme Coin Index*, MarketVector, https://www.marketvector.com/indexes/digital-assets/marketvector-meme-coin (last visited May 20, 2024).

[17] The Commission has noted that a token is less likely to be part of an investment contract if the network is operational and "delivering currently available goods or services for use on an existing network." *Framework for 'Investment Contract' Analysis of Digital Assets* 8 (Apr. 3, 2019), https://www.sec.gov/files/dlt-framework.pdf.

incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities." 15 U.S.C. § 78c(a)(1). Neither the Protocol (which Labs does not control) nor any of Labs' products or technology fall within the plain language of the statute. Notably, in March 2022, the Commission released its proposal to amend Rule 3b-16 of the Exchange Act, which in part would expand the definition of "exchange" to reach "communication protocols" like the Protocol. The fact that the Commission has proposed a wholesale change to the meaning of "exchange" underscores that the Protocol is *not* already an "exchange" under the current rules. And even a new Commission rule cannot change the boundaries of the Exchange Act itself, as numerous comments to that rulemaking explained.

1. The Protocol Does Not Meet the Statutory Definition of an Exchange

The Protocol does not fall within the statutory definition of an "exchange."

First, the Protocol is not a "market place . . . *for* bringing together purchasers and sellers of securities." 15 U.S.C. § 78c(a)(1) (emphasis added). "For" requires purpose.[18] Thus, the Exchange Act's definition of "exchange" extends to marketplaces designed for the purpose of facilitating securities transactions, but not marketplaces where securities transactions are incidental or unintentional. *See Intercontinental Exch., Inc. v. SEC*, 23 F.4th 1013, 1025 (D.C. Cir. 2022) ("[B]y speaking of 'facilities *for* bringing together etc.,' and not of 'facilities *that* bring together,' the statute could be limited to facilities that are maintained for the purpose of bringing together purchasers and sellers of securities."). Tellingly, the Commission itself endorsed this interpretation in the Proposing Release for its proposal to amend Rule 3b-16 of the Exchange Act, explaining that "a system that displays trading interest and provides only

[18] *See* For, The Shorter Oxford English Dictionary (2d ed. 1936) ("With the object or purpose of," "In order to obtain," "Indicating the object to which the activity of the faculties or feelings is directed"); For, The Winston Simplified Dictionary (1931) ("for the sake of").

connectivity among participants without providing a trading facility to match orders or providing protocols for participants to communicate and interact would not meet the criteria of Rule 3b-16(a)" because "such providers are not specifically designed to bring together buyers and seller[s] of securities or provide procedures or parameters for buyers and sellers [of] securities to interact." 87 Fed. Reg. 15496, 15507-08 (Mar. 18, 2022).

Thus, even if the Staff were correct that some small number of securities transactions occur on the Protocol, a court could not conclude that the Protocol is therefore a securities exchange because it is not specifically designed for the purpose of facilitating such transactions. To the contrary, the Protocol supports a general file format for all forms of value—the ERC-20 file format—and the Protocol is almost exclusively used for non-securities transactions, with a vast majority of its swapping volume consisting of swaps of Ethereum, wrapped Bitcoin, stablecoins, and meme coins. A court has already ruled that the Protocol is used for lawful purposes in such trades. *See Risley v. Universal Navigation Inc.*, No. 22 Civ. 2780, 2023 WL 5609200, at *14 (S.D.N.Y. Aug. 29, 2023) (Judge Failla holding that "[w]hile no court has yet decided this issue in the context of a decentralized protocol's smart contracts, the Court finds that the smart contracts here were themselves able to be carried out lawfully, as with the exchange of crypto commodities ETH and Bitcoin"). Congress plainly did not intend the Commission to require other general-purpose protocols such as SMTP, TC/IP, or HTTP, let alone Gmail, Twitter, eBay, or Indiegogo, to register as exchanges simply because a security may occasionally be sold via their technologies. Reading "exchange" to cover the Protocol is equally irreconcilable with the statutory text.[19]

[19] In other areas of law, courts have distinguished between protocols built for infringement and those that have "significant noninfringing uses." *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 931-33 (2005) (citation omitted). Analogous reasoning applies here, as DeFi protocols are general-purpose technology that can be used

Second, the Protocol is not "an organization, association, or group of persons." 15 U.S.C. § 78c(a)(1). Unlike centralized exchanges, including those with active SEC enforcement actions, the Protocol is an autonomous smart contract created from software code and not controlled by any person or entity. This feature necessarily excludes the Protocol from the statutory definition of exchange, because there is no person or entity that "constitutes, maintains, or provides" the Protocol. 15 U.S.C. § 78c(a)(1); *see* 17 C.F.R. § 240.3b-16(a). To the extent the Staff contends that the Protocol is a "group of persons" because independent programmers contributed code to "a protocol for buyers and sellers to negotiate a trade," Reopening Release, Amendments to Exchange Act Rule 3b-16 Regarding the Definition of Exchange, Release No. 34-97309 at 29456 n.78 (May 5, 2023), that interpretation unreasonably reads "group" to include people who do not know one another—and may not even know *of* each other—and even people who are *competing* with each other.

Third, the Protocol is not a "market place," 15 U.S.C. § 78c(a)(1), and, in fact, it eliminates the need for one. When the Exchange Act was enacted, a "market place" was defined as "[a]n open square or place in a town where markets or public sales are held." *Market place*, Webster's New International Dictionary of the English Language (2d ed. 1935); *see also Market*, The Winston Simplified Dictionary (1931) ("a public or private place for the sale or purchase of provisions"); *Market*, The Comprehensive Standard Dictionary of the English Language (1934) ("A place where things can be bought or sold"). Although it may be possible to interpret the statutory phrase "market place" to reflect new ways of constituting virtual "places," such as a centralized digital exchange, the fundamental requirement of "place" remains. The key feature of DeFi protocols is that they *do not* provide a single, centralized market, but rather enable users to

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for trading of unregulated cash commodities (and overwhelmingly are used for that purpose) as well as for trading of other types of assets.

engage with one another through decentralized transactions. Consequently, the fundamental requirement of "place" is not satisfied.

Fourth, since the Protocol is autonomous, there is no person, entity, or place acting as an intermediary "bringing together purchasers and sellers." 15 U.S.C. § 78c(a)(1). Instead, the Protocol connects a swapper on one side and an automated market making function coded into the autonomous Protocol on the other. In other words, a user connects with the smart contracts underlying the Protocol to trade against the liquidity pool. *See Risley*, 2023 WL 5609200, at *2 ("instead of users interacting with each other and matching trades, they interact with the pool"). The Protocol also does not match "orders" as that term is defined in Rule 3b-16(c); nor does it provide a centralized order book. *See* § 240.3b-16(c) (defining an "order" as "any firm indication of a willingness to buy or sell a security . . . including any bid or offer quotation, market order, limit order, or other priced order").[20]

Fifth, even if the Protocol could qualify as an exchange, the Protocol is not an "organization, association, or group of persons" *under the control of Labs*—and Labs therefore cannot be penalized for how others use it. Once a particular version of the Protocol is deployed, it exists indefinitely, even if Labs were to stop operating, and it cannot be modified or deleted by Labs or by any other person or entity.[21] Nor can Labs prevent any swaps from occurring on the Protocol or prevent users from accessing the Protocol. Although Labs employees wrote much of the code for different versions of the Protocol, each version is autonomous once launched. Labs

[20] In its rulemaking proposal, the Commission defined "Communication Protocol System" as "includ[ing] a system that offers protocols and the use of non-firm trading interest to bring together buyers and sellers of securities," *Securities Exchange Release No. 94062* (Jan. 26, 2022) at 15497 n.5, again demonstrating that the current rule does not reach the Protocol.

[21] There is a very limited set of attributes that may be modified on certain versions of the Protocol if and when a series of governance procedures and votes by holders of the UNI token have taken place. However, this decentralized power to make a limited number of modifications does not mean that UNI token holders are maintaining or providing the Protocol, and it certainly does not mean that Labs is doing so.

cannot be held liable for someone's use of the Protocol, just as Satoshi Nakomoto is not held liable for others' use of Bitcoin. To hold the developer of an autonomous protocol liable for how people use it is akin to holding the manufacturer of a self-driving car liable when someone uses it to commit a traffic violation, as one court wrote in analogizing to the Uniswap Protocol. In such a situation, "one would not sue the car company for facilitating the wrongdoing; they would sue the individual who committed the wrong." *Risley*, 2023 WL 5609200, at *14.

For all of these reasons, it would be a radical departure from the language of the statute and rules for the Commission to claim that the Protocol is an exchange.

2. The Interface Does Not Meet the Statutory Definition of an Exchange

The Interface likewise cannot be an exchange under the Exchange Act. The Interface functions like the online bulletin boards or connectivity providers that the Commission has repeatedly determined not to be exchanges, and the Commission cannot do an about-face on that position without notice.[22]

First, the Interface does not bring together the orders of multiple buyers and sellers. The Interface is software that enables users to connect their self-custodial wallets and better formulate their requests directed to the Protocol. The actual swapping of tokens does not occur on the Interface; the swap takes place in a direct interaction between the user's wallet and the blockchain. During this process, the user never relinquishes control of the crypto asset to the Interface. If a user elects to make a swap, it is the user's wallet that submits the code to the

[22] The Staff's allegation that the Interface operates as an exchange would contradict prior no-action letters from the Commission that considered similar activity. *See, e.g.*, Broker-to-Broker Networks Inc., SEC Staff No-Action Letter, 2000 WL 1886745 (Dec. 1, 2000) (system that allows "broker-dealers to communicate with each other and their respective settlement agents" regarding the "fulfillment of a customer's securities transaction order"); S3 Matching Technologies LP, SEC Staff No-Action Letter, 2012 WL 2948910 (July 19, 2012) (platform that "electronically link[s] registered broker-dealers to one another," permitting them to "send electronic messages that communicate buy and sell orders to other broker-dealers participating on the Platform").

blockchain, not the Interface—and the swap itself is not executed on the Interface but on the Protocol, which (as discussed above) does not qualify as an exchange.

Second, the Interface does not "[u]se[] established, non-discretionary methods . . . under which . . . orders interact with each other. . . ." 17 C.F.R. § 240.3b-16(a)(2). The Interface is not an order book and does not provide access to one. It also does not "receive or store orders from [u]sers in digital assets" or "provid[e] the means for [token swaps] to interact and execute." *In the Matter of Poloniex, LLC*, Exchange Act Release No. 92607, 2021 WL 3501307 (Aug. 9, 2021). The Interface does not execute any transactions or take any actions of an exchange. Rather, each individual user of the Interface controls all key aspects of their transaction, including selecting the input token, the output token, and their slippage tolerance.

Third, the Interface is not a "facility" of an exchange. Since Labs does not control the Protocol, the Interface cannot be considered a facility of the Protocol, even if the Protocol were an exchange. *See* 15 U.S.C. § 78c(a)(2) (defining facility to include a "system of communication to or from the exchange" only if (among other things) it is "maintained by or with the consent of the exchange"); *Intercontinental Exch.*, 23 F.4th at 1023 ("Communications systems that incidentally facilitate the trading of securities . . . do not owe their existence to the consent of any exchange, nor are they maintained by any exchange.").

3. The Autorouter Does Not Meet the Statutory Definition of an Exchange

The Autorouter function also does not meet the statutory definition of an exchange. Similar to the Protocol and the Interface, the Autorouter does not bring together orders of multiple buyers and sellers or use established non-discretionary methods. The Autorouter is an open-source tool that analyzes all of the potential paths for a swap to take place on the Protocol and then attempts to provide the Interface user with information about the most efficient swap

with the lowest fees available at that time. The user ultimately elects whether to take the identified path. If a user does elect to proceed, it is the user's own self-custodial wallet that submits the instructions to the blockchain to make the swap.

IV. Recent Precedent Establishes that Labs Does Not Meet the Definition of a Broker Under the Exchange Act

The Staff alleges that Labs is operating as an unregistered broker in violation of Section 15(a) of the Exchange Act. But Labs is not—and has never been—required to register as a broker. Choosing to litigate this issue will lead to yet another precedent narrowing the Commission's regulatory authority over technology services by definitively deeming them not to be brokers—precedent that may well cause leading service providers who operate trading platforms and order/execution management services in equity securities markets to reconsider their decisions to register as brokers.

The Exchange Act defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). In evaluating whether a person acted as a broker, courts consider a list of non-exclusive factors, including whether that person is (1) helping an issuer identify potential purchasers of securities; (2) soliciting securities transactions (including advertising); (3) negotiating between issuers and investors; (4) providing advice, recommendations, or valuation as to the merit of an investment; (5) taking, routing, or matching orders, or facilitating the execution of securities transactions; or (6) handling investor funds or securities in connection with securities transactions. *SEC v. Hansen*, No. 83 CIV. 3692, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984); *SEC v. GEL Direct Tr.*, No. 22-cv-9803 (JSR), 2023 WL 3166421, at *2 (Apr. 28, 2023). The broker determination is fact-specific and based on the totality of the circumstances—meaning no one factor is dispositive. *See, e.g.*, *SEC v. RMR Asset Mgmt. Co.*, 479 F. Supp. 3d 923, 926 (S.D. Cal. 2020).

The Staff alleges that Labs operates as an unregistered broker on the ground that it participates regularly in securities transactions, including by soliciting customers for transacting crypto asset securities, routing customer orders, making evaluations as to the merits of investments, and providing advice. That allegation fails as a threshold matter because, as explained above, the underlying transactions on the Protocol are not securities transactions. But even assuming otherwise, the allegation does not stand up to scrutiny, as the decision in *Coinbase* illustrates. In *Coinbase*, the Commission alleged that Coinbase Wallet—a non-custodial wallet, with very similar functionality to the Labs wallet and legally indistinguishable from the Interface—allowed users to connect with external sources of liquidity to send, receive, or swap crypto assets. *Coinbase*, 2024 WL 1304037, at *6. The Commission also alleged that Coinbase had regularly solicited investors through advertisements on its website and social media, provided pricing information, routed user orders across platforms, and charged fees on certain digital asset swaps. *Id.* at *6, *34. The court in *Coinbase* held that the Commission's limited allegations, "alone or in combination," were "insufficient to establish 'brokerage activities' under the definition of broker and relevant case law." *Id.* at *34-35. The Staff's allegations against Labs similarly fail to establish brokerage activities—Labs does not solicit users to swap on the Protocol and does not provide investment advice, and Labs' receipt of certain fees does not render it a broker.

A. Labs Does Not Solicit Users to Swap on the Protocol

Labs does not solicit investors. Soliciting investors is defined as "any affirmative effort by a broker or dealer intended to induce transactional business for the broker-dealer or its affiliates," including "prepar[ing] letters . . . which extoll[] the virtues of [the investment]," "plac[ing] advertisements in newspapers," and "us[ing] gifts, bumper stickers and other promotional items to induce investors to purchase" the investment. *Registration Requirements*

for Foreign Broker-Dealers, Exch. Act Release No. 34-27017, 54 FR 30013-01, at * 30017 (July 18, 1989); *Hansen*, 1984 WL 2413, at *2. Labs' general public statements about the Protocol do not amount to solicitation of investments, and Labs and its employees do not direct users to purchase or swap specific tokens on the Protocol. The court in *Risley* found that Labs' conduct was "too attenuated to state a claim" for solicitation. *Risley*, 2023 WL 5609200 at *19.

B. Labs Does Not Evaluate the Merits of Investments or Provide Advice to Users of the Protocol or the Interface

The functions of the Interface and Autorouter do not amount to providing investment advice. Although the Autorouter is available to users of the Interface, it does not provide investment advice to those users. The Autorouter is software that analyzes possible paths to swap one token for another and informs the user which path likely has the lowest gas fees and smallest price impact. It therefore simply provides information about the most efficient path using the Protocol to execute a user's desired swap, not investment advice.

Such information sharing does not amount to effecting securities transactions. *See Rhee v. SHVMS, LLC*, No. 21-cv-4283, 2023 WL 3319532, at *8 (S.D.N.Y. May 8, 2023) ("[M]erely providing information . . . do[es] not implicate the objectives of investor protection under the Exchange Act and do[es] not constitute effecting a securities transaction"). In addition, the Commission has issued no-action letters to a variety of communication systems used to "facilitate the transmission of order information," which is extremely similar to what the Autorouter does.[23] In these no-action letters, the Commission emphasized that the subject company did not handle customer funds or assets and did not execute transactions—which is also

[23] *See* Quick America Corporation, SEC No-Action Letter, 1993 WL 241518, at *2 (June 18, 1993); *see also* Broker-to-Broker Networks, Inc., SEC No-Action Letter, 2000 WL 1886745 (Dec. 1, 2000); Charles Schwab & Co., Inc., SEC No-Action Letter, 1996 WL 762999 (Nov. 27, 1996); GlobalTec Solutions, LLP, SEC No-Action Letter, 2005 WL 3695276 (Dec. 28, 2005); Loffa Interactive Corp., Inc., SEC No-Action Letter, 2003 WL 22228634 (Sept. 12, 2003); NeptuneFI Fixed-Income System, SEC No-Action Letter, 2020 WL 1042613 (Mar. 4, 2020); S3 Matching Technologies LP, SEC No-Action Letter, 2012 WL 2948910 (Jul. 19, 2012).

the case here. The fact that the companies in question dealt with non-blockchain technologies whereas the Autorouter involves blockchain technology makes no difference to the analysis.

C. An Interface Fee is Not Sufficient to Support a Broker Claim

The small fee that Labs receives on swaps by Interface users is not evidence that Labs is acting as a broker. The Commission alleged that Coinbase operated as a broker because it charged a flat fee of 1% of the principal amount for any swap or trade executed in its wallet product. *Coinbase*, 2024 WL 1304037, at *34. In rejecting the Commission's assertion, the court in that case reasoned that the fact that "Coinbase has, at times, received a commission does not, on its own, turn Coinbase into a broker." *Id.* at *35. The fact that Labs receives Interface fees (which are significantly smaller than those charged by Coinbase) does not transform Labs into a broker.

V. Because Labs Does Not Take Custody of or Touch Users' Tokens, Labs Does Not Engage in Clearing Activity

The Staff's claim that Labs acts as an unregistered clearing agency in violation of Section 17A(b) of the Exchange Act, 15 U.S.C. § 78q-1(b), is also completely without merit. As a threshold matter, there can be no clearing-agency violations without security transactions. The Staff nevertheless contends that Labs is operating as an unregistered clearing agency based on the theory that (a) the Protocol's liquidity pools act as depositories for "crypto asset securities" contributed to those pools by LPs, and (b) Labs acts as an intermediary for the transfer of tokens by "moving" "crypto asset securities" to and from users who trade through the Protocol and the Interface. This characterization misunderstands the facts, as Labs does nothing to move these assets; the users themselves submit instructions executed by Ethereum miners.

A. Labs Does Not Act as a Depository Because it Does Not Take Custody of Users' Tokens

As the Commission has recognized in the context of investment advisers, a company "has custody if it holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them."[24] The Commission also has recognized that software platforms that link broker-dealers together but do not themselves engage in "execution, settlement or clearance of transactions, and will not hold or have access to customer funds or securities," are not violating the Exchange Act.[25]

Because Labs does not directly take custody of LPs' crypto assets, so the Staff has to suggest that Labs *indirectly holds and controls* these assets through the Protocol. The Staff alleges that the Protocol's smart contracts serve as depositories for crypto asset securities because LPs who deposit their assets into a pool relinquish possession and control of their assets to the smart contract. But Labs does not control the Protocol—indeed, *no one* controls the Protocol because it operates autonomously. Accordingly, neither Labs nor any other party can be said to have taken custody of any crypto assets in any liquidity pool on any version of the Protocol. Rather, LPs control their own assets and can withdraw them from (or maintain them in) liquidity pools at the LP's sole discretion.

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[24] Custody of Funds or Securities of Clients by Investment Advisers, SEC (Mar. 12, 2010), https://www.sec.gov/info/smallbus/secg/custody_rule-secg.htm#foot1; *see also* Frequently Asked Questions Concerning the July 30, 2013 Amendments to the Broker-Dealer Financial Reporting Rule, SEC (July 1, 2020), https://www.sec.gov/divisions/marketreg/amendments-to-broker-dealer-reporting-rule-faq ("Non-Covered Firm that limits its business activities exclusively to one or more of the following would be eligible to file an exemption report: […] (3) receiving transaction-based compensation for identifying potential merger and acquisition opportunities for clients, referring securities transactions to other broker-dealers, or *providing technology or platform services*") (emphasis added).

[25] S3 Matching Technologies LP, SEC Staff No-Action Letter, 2012 WL 2948910 (July 19, 2012).

B. Labs Does Not Act as an Intermediary that "Moves" Assets Because it Does Not Touch Users' Tokens

The Staff's strained argument that Labs acts as a clearing intermediary likewise fails. Labs is not involved "in making payments or deliveries or both" in connection with transactions of securities on the Protocol or the Interface. 15 U.S.C. § 78c(a)(23)(A).

1. Labs Plays No Role in Effecting or Settling Transactions

Labs never touches a user's input or output tokens. All swaps occur on-chain, through autonomous smart contracts that anyone can use. Labs plays no role in effecting or settling the swaps. And, as discussed above, at no time do users relinquish control and custody of their assets to Labs while tokens are being swapped through the on-chain smart contracts.

2. The Interface Does Not Take Custody of Users' Crypto Assets

The Interface also does not facilitate "payments or deliveries or both in connection with transactions in securities" or take custody of a user's assets. 15 U.S.C. § 78c(a)(23)(A). As noted previously, the Interface is software that offers one of many means through which users can interact with the Protocol. The Interface does not receive or store users' orders or hold their funds. At all times, a user of the Interface controls the key aspects of the transaction, and a user's crypto assets remain self-custodied in their own wallet until that user executes the swap on the Protocol and receives a different asset. As such, Labs does not act as a clearing intermediary through the Interface.

VI. Labs Did Not Engage in the Offer or Sale of Unregistered Securities

A. Labs' Distributions of UNI Either Did Not Involve an Investment of Money or Property or Were Exempt from Registration

The Staff alleges that Labs engaged in an unregistered offer and sale of UNI tokens in violation of Sections 5(a) and 5(c) of the Securities Act of 1933, which require that any offer or sale of securities be registered with the Commission or exempt from such registration. *See* 15

U.S.C. §§ 77e(a), (c). Labs has distributed UNI in four ways: (1) to institutional investors, through direct sales or pursuant to token warrants; (2) to historical users of the Protocol through a retroactive airdrop; (3) to employees; and (4) to LPs in four Uniswap pools for a limited period of time. None of these distributions could be unregistered securities offerings under the *Howey* test: either they did not involve the investment of money or, for sales to investors, Labs availed itself of established exemptions to registration out of an abundance of caution.

1. Distributions to Investors Were Exempt from Registration

Over the past several years, Labs has sold tokens in a handful of private transactions to sophisticated institutional investors. Although Labs is confident that the sale of UNI tokens does not involve an investment contract, *see infra* Section VI.B, Labs recognized the risk that the Commission—which has failed to clarify when it considers digital-asset distributions to be securities offerings—could assert a contrary view. Thus, Labs structured each UNI sale to ensure that it was exempt from registration under Section 4(a)(2). *See* 15 U.S.C. § 77d(a)(2). Labs did not engage in public solicitation or advertisement of these private UNI sales, and the tokens were sold only to sophisticated, accredited investors. Further, each investor purchased tokens for their own account and agreed to not transfer or sell their tokens for a defined period of time that removed the investors from the definition of underwriters. At any rate, these sales were made to sophisticated venture capital firms that often specialized in the blockchain space and were well positioned to "fend for themselves" within the meaning of *SEC v. Ralston Purina Co*, 346 U.S. 119, 125 (1953); *see Barrett v. Triangle Min. Corp.*, No. 72 CIV. 5111, 1976 WL 760, at *5-6 (S.D.N.Y. Feb. 2, 1976).

2. The Airdrop to Historical Users Did Not Involve an Investment of Money or Property

The retroactive airdrop to historical users of the Protocol, which occurred in September 2020, did not involve any investment of money. Notably, in the *Ripple* case, the Commission at first asserted that an initial distribution of XRP through giveaways to early adopters, developers, and programmers, for which the company received no compensation, could still be considered an investment of money if the "would-be gifts may be characterized as subterfuge to evade registration."[26] However, the Commission abandoned this position in its summary judgment reply brief in November 2022.[27] And it did so for good reason: giveaways, such as airdrops, do not even arguably involve the kind of "risk of loss" that is essential to *Howey*'s investment-of-money prong. *See, e.g.*, *Coinbase*, 2024 WL 1304037, at *30 (discussing the risk-of-loss requirement and citing *Marine Bank v. Weaver*, 455 U.S. 551, 558-59 (1982)).

3. Distributions to Employees Did Not Involve an Investment of Money or Property

The distributions to Labs' employees were also not investment contracts because there was no investment of money or property by employees in exchange for the tokens. Although the Commission has attempted to characterize similar distributions as consideration for services, Labs employees did not "pay money or some tangible and definable consideration to" Labs. *Ripple*, 682 F. Supp. 3d at 330 (internal quotation marks omitted).

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[26] SEC Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. at 26 n.15, *SEC v. Ripple Labs Inc.*, No. 20 Civ. 10832 (S.D.N.Y. Oct. 18, 2022), ECF. No. 667 (quoting *SEC v. Sierra Brokerage Servs., Inc.*, 608 F. Supp. 2d 923, 941 (S.D. Ohio 2009)).

[27] SEC Reply Mem. of Law in Further Supp. of Its Mot. for Summ. J. at 5, *SEC v. Ripple Labs Inc.*, No. 20 Civ. 10832 (S.D.N.Y. Nov. 30, 2022), ECF. No. 726 ("Defendants bury in a footnote (at 17 n.7) their concession that they 'sometimes' sold XRP for money, but then attempt to distract the Court by arguing (at 8-9, 17-18) about giveaways, donations, and secondary market transactions. Those transactions are not part of the SEC's claims here.").

4. Liquidity Mining Did Not Involve an Investment of Money or Property

The distributions via liquidity mining similarly involved no investment of money by LPs. From September 18, 2020, until November 17, 2020, Labs initiated a liquidity mining rewards program for LPs in four specific pools on version 2 of the Protocol that consisted of Ethereum, wrapped Bitcoin, and two stablecoins.[28] Around 20 million UNI (approximately 2% of the total supply) were distributed during this period, divided among all qualifying LPs.[29] There was no investment of money involved in the distribution via liquidity mining—the recipients received the tokens without parting with anything of value. LPs retained ownership of all the tokens they provided to these pools. In fact, they earned a profit based on the fees from users swapping tokens with the respective pools, wholly apart from any UNI that was distributed to them for free.

B. These Four Distinct Distributions of UNI Cannot Constitute an Integrated Offering

The Staff has tried to characterize all of the distributions discussed above as an integrated offering. This offers no help to the Staff: because none of the distributions could amount to a Section 5(a) or 5(c) violation on their own, the distributions in combination cannot amount to such a violation either. But even if integration of the distributions into a single offering would make a difference, these distributions do not meet the criteria for integration.

Courts consider the following factors in determining whether offers and sales should be integrated for purposes of the exemptions under Regulation D: (a) whether the sales are part of a single plan of financing; (b) whether the sales involve issuance of the same class of securities; (c) whether the sales have been made at or about the same time; (d) whether the same type of

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[28] *Introducing UNI*, Uniswap Labs Blog (Sept. 15, 2020), https://blog.uniswap.org/uni.

[29] *Uniswap's Year in Review: 2020*, Uniswap Labs Blog (Dec. 31, 2020), https://blog.uniswap.org/year-in-review.

consideration is being received; and (e) whether the sales are made for the same general purpose." *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 364 (S.D.N.Y. 1998), *aff'd* 155 F.3d 129 (2d Cir. 1998). *Cavanagh* noted that "a review of the cases and no-action letters strongly suggests that the 'single plan of financing' and 'same general purpose' factors normally are given greater weight than the other factors." *Id.*

That test is not satisfied here. First, the UNI distributions were not made as part of a "single plan of financing." *Id.* Each distribution was made independently, and the distributions did not rely on one another. When Labs issued the UNI token, it had no plan to fund the development of a UNI ecosystem through the sale of tokens. Subsequent token sales to investors, months or years later, were made as part of fundraising for Labs' products, but were not specifically intended to fund development of the UNI token. And the airdrop and liquidity mining were not part of any plan of financing. Second, the UNI distributions were not "made for the same general purpose." *Id.* On the contrary, the distinct distributions met needs that arose at different times.[30] The remaining *Cavanagh* factors either favor Labs or are neutral. The UNI distributions were not "made at or about the same time." *Id.* Unlike in the *Kik* case, where distributions occurred over a period of days, the UNI distributions happened across a *multi-year period*. *See Kik*, 492 F. Supp. 3d at 181. Labs received varying amounts of consideration, or—for the overwhelming majority of UNI—no consideration at all, in exchange for the different UNI distributions. And although all UNI tokens are fungible with one another, the "same class" factor is less applicable to tokens (and digital assets broadly), which are generally fungible and not distinguished by classes. *See Cavanagh*, 1 F. Supp. 2d at 364.

[30] The mere fact that Labs contemplated using different sets of UNI tokens for different purposes in 2020 distinguishes this situation from the *Kik* circumstances, where the offeror put on a "Token Distribution Event" and a "Pre-Sale" that occurred one after the other and promoted them together as a collective fundraising effort. *Kik*, 492 F. Supp. 3d at 181 ("Both internally and in statements to the public, Kik . . . fail[ed] to differentiate between the $50 million raised in one sale and the $50 million raised in the other.").

C. The UNI Token Distributions Do Not Satisfy the Remaining Requirements of the *Howey* Test

Even if the distributions of UNI had not been exempt, could be integrated, or somehow involved the investment of money, they would not qualify as investment contracts under the other *Howey* factors.

1. There Was No Common Enterprise

Courts determine whether a common enterprise exists under *Howey* by analyzing whether offers and sales feature horizontal or vertical commonality. *Revak v. SEC Realty Corp.*, 18 F.3d 81, 87-88 (2d Cir. 1994). Only the former is even potentially relevant, and it does not exist here because "the fortunes of each investor" do not "depend upon the profitability of the enterprise as a whole." *Id.* at 87.[31] In prior digital-asset cases where horizontal commonality was found, there was a pooling of funds from the initial distribution of the asset used to improve the value of the asset in some way. *See, e.g.*, *Kik*, 492 F. Supp. 3d at 178-79; *Ripple*, 682 F. Supp. 3d at 325. Labs did not pool funds from the initial distribution of UNI because it received no funds. Labs launched two successful versions of its protocol before UNI was created by relying on equity financing, and equity financing has continued to be a major source of operational funding. Labs also has recently implemented ways to generate revenue through fees on its Interface and Wallet that do not involve the UNI token.

[31] Although the Second Circuit has not explicitly adopted the idea of vertical commonality, which requires that the investors' fortunes be "interwoven with and dependent upon the efforts and success of" the promoter's fortunes, that too is absent here. *See SEC v. Glenn W. Turner Enter., Inc.*, 474 F.2d 476, 482 n.7 (9th Cir. 1973), *cert. denied*, 414 U.S. 821 (1973). Labs' fortunes are not interwoven with those of UNI holders because Labs has multiple sources of revenue independent from its UNI holdings—money that would keep the company well-funded even if the price of UNI went to zero.

2. There Was No Expectation by UNI Purchasers of Profits Based on Labs' Efforts

Labs' distributions of UNI were not accompanied by an expectation of profits. First, unlike in other cases, there were no public statements made by Labs or its senior employees touting UNI as an investment or tying UNI's success to that of the company. *See, e.g.*, *SEC v. Ripple Labs, Inc.*, No. 20-CIV-10832, 2022 WL 762966, at *2, 10 (S.D.N.Y. Mar. 11, 2022); *SEC v. LBRY, Inc.*, 639 F. Supp. 3d 211 (2022); *SEC v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352, 373-74 (S.D.N.Y. 2020). Labs merely described the UNI token as exactly what it is—a governance token[32]—and never touted a potential increase in its value.

Second, Labs made no promises to increase the price of UNI, and there was no other basis for holders to expect that the price of UNI would increase or that Labs would undertake efforts designed to increase its price. UNI tokens could have been purchased for various reasons, including shaping the future of the Protocol through Governance, showing support for the values of DeFi, or other purposes. UNI tokens also could have been purchased for potential returns from the crypto space in general, as the price of UNI is largely correlated with the performance of the overall crypto market and not Labs' financial performance as a company.

Finally, although Labs retained some UNI for itself following the initial distribution, UNI is not Labs' primary means of funding its operations. Labs has raised multiple equity rounds—including a $165 million Series B round following the initial distribution of UNI—and it has implemented a number of different ways to generate revenue that do not rely on its UNI holdings or UNI sales, such as fees assessed on the Interface.

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[32] *Introducing UNI*, Uniswap Labs Blog (Sept. 15, 2020), https://blog.uniswap.org/uni ("Having proven product-market fit for highly decentralized financial infrastructure with a platform that has thrived independently, Uniswap is now particularly well positioned for community-led growth, development, and self-sustainability. The introduction of UNI (ERC-20) serves this purpose, enabling shared community ownership and a vibrant, diverse, and dedicated governance system, which will actively guide the protocol towards the future.").

D. LP Tokens Are Not Securities

The Staff alleges that LP Tokens are investment contracts and that their distribution amounts to Section 5(a) and (c) violations by Labs.

As an initial matter, Labs does not offer or sell LP Tokens, and the Staff cannot show that Labs is a counterparty to any transaction with LP Token holders. LP Tokens are generated automatically by the Protocol, which Labs does not operate or control.

Equally fundamentally, "the economic reality" is that LP Tokens are not issued (or sought) for investment purposes. *Foxfield Villa Assocs., LLC v. Robben*, 967 F.3d 1082, 1100-01 (10th Cir. 2020) (finding that a plaintiff's shared interest in an LLC was not a security, "even if [the plaintiff's] interests could be characterized as certificates of interest or participation in a profit-sharing agreement in theory"); *see also Marine Bank v. Weaver*, 455 U.S. 551, 558 (1982). Instead, the LP Token is used as a bookkeeping device to keep track of which assets the user provided to the smart contract and any fees earned on the user's liquidity. In other words, the LP Tokens are issued not for investment purposes, but instead as accounting tools, and they are therefore not securities. *See Kirschner v. JP Morgan Chase Bank, N.A.*, 79 F.4th 290, 304 (2d Cir. 2023) ("only 'notes issued in an investment context' are 'securities[]'" and "notes 'issued in a commercial or consumer context' are not") (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990)).

Finally, the individualized nature of LP Tokens means they cannot be considered profit-sharing agreements or certificates of interest. In *Tcherepnin v. Knight*, the Supreme Court held that withdrawable capital shares in an Illinois savings and loan institution were securities because they were "evidenced by a certificate . . . [and] contingent upon an apportionment of profits." 389 U.S. 332, 339 (1967). LP Tokens are different. When an LP deposits liquidity into a

pool, the smart contract generates an LP Token corresponding to the LP's liquidity position.[33] These tokens simply memorialize the portion of the pool owned by the LP and fees it has earned, akin to a voucher or receipt, and the LP Token can be redeemed for those at any time. The Protocol applies a fee to swaps, which is paid proportionally to all LPs who have an active liquidity position within the price range at that point in time. In addition, these fees are provided to users when they redeem their LP Tokens (and users also can remove earned fees without modifying their liquidity positions).

LP returns also are highly individualized. Their actual return is based upon their holders' overall position in a pool. This depends on a number of factors, including how long LPs leave their liquidity in the pool, at which prices the liquidity is placed, and the size of the price movement in the pool over time. Put simply, unlike in *Tcherepnin*, where investors received discretionary dividends based on the entity's profits, here LPs receive fees connected only to the performance of their own liquidity. *Tcherepnin*, 389 U.S. at 337.

II. An Enforcement Action Would Violate the Major Questions Doctrine and Labs' Due Process Rights

A. The Commission Lacks Congressional Authority to Regulate the Protocol as an Exchange

For all the reasons explained above, the contemplated enforcement action rests on untenable interpretations of the Commission's statutory mandate. But even if the Commission's reading of the Exchange Act were not unreasonable on its face, that reading would still run afoul of the major questions doctrine, which precludes the Commission (or any agency) from regulating in an area of major economic significance without clear congressional authority. *West Virginia v. EPA*, 597 U.S. 697, 723 (2022). This doctrine applies with special force where, as

[33] On version 2 of the Protocol, the liquidity position is represented by a UNI-V2 token; on version 3 of the Protocol, that position is represented by an NFT.

here, an agency "claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (citations omitted).

The Commission's lack of regulatory authority over the multi-billion-dollar crypto industry falls squarely within the Supreme Court's recent jurisprudence on the major questions doctrine—especially given that the Commission did not assert the authority it now claims to possess for many years and Congress is actively debating enacting a new regulatory regime. *See West Virginia*, 597 U.S. at 723; *Nat'l Fed'n of Indep. Bus. v. Occupational Safety and Health Admin.*, 595 U.S. 109 (2022); *Alabama Assn. of Realtors v. Dep't of Health and Human Servs.*, 594 U.S. 758 (2021). No appellate court has yet weighed in on this issue. And the Supreme Court's rulings suggest that the Commission should take little comfort in the fact that a few district courts have so far ruled in the Commission's favor on issues presented here.

There are multiple major questions implicated by the Commission's potential enforcement action against Labs. First, the Commission's assertion of authority over all assets using a new digital file type affects the $100 trillion traditional financial markets by protecting those markets from new competition. In an amicus brief filed in the Commission's case against Kraken, Senator Lummis has argued that crypto asset markets and the technology underlying these markets "will impact every quarter of finance." Amicus Curiae Brief of United States Senator Cynthia M. Lummis in Support of Defendants' Motion to Dismiss at 9, *SEC v. Kraken*, ECF No. 41, Case No. 23-cv-06003-WHO (N.D. Cal. Feb. 27, 2024). For example, the blockchain technology stack underlying the Protocol could disrupt custodians such as banks (through self-custodial technology), law firms that help issue assets (through simplifying the asset-production process), centralized markets makers, traditional central-limit order books,

trading for the large number of relatively illiquid assets, and clearing agencies and transfer agents. Senator Lummis also notes the risk of the Commission claiming jurisdiction over non-securities in other asset classes. *Id.* at 10.

Second, the crypto industry is valued at over $2.5 *trillion*,[34] and eliminating it and causing consumer and institutional investor losses as a result—which is what the Commission is attempting to do, since it provides no path to registration—clearly makes this a major question under recent Supreme Court precedent. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (finding release of $430 billion in student debt to be a matter of "economic and political significance" that should give judicial pause "before concluding Congress meant to confer such authority"). Nearly twenty percent of all Americans now hold crypto assets[35]—more than the 13% who have student loan debt[36]—and their holdings would be wiped out by the Commission's approach. And the Commission's attempt to reinterpret the statutory language "investment contract" to eliminate the word "contract," contrary to all appellate and Supreme Court precedent, would effectively ban digital assets and have larger repercussions beyond the crypto industry as well.

B. The Commission Did Not Provide Fair Notice that It Considered Labs' Conduct Unlawful

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required," which means the statute at issue must "provide a person of ordinary intelligence fair notice of what is prohibited." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). An entity being regulated should not be

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[34] *See Cryptocurrency Prices Today By Market Cap*, Forbes, https://www.forbes.com/digital-assets/crypto-prices (last visited Apr. 23, 2024).

[35] Casey Wagner, *A fifth of US voters have bought crypto, Paradigm survey finds*, Blockworks (Mar. 14, 2024), https://blockworks.co/news/us-voters-holding-cryptohttps://blockworks.co/news/us-voters-holding-crypto.

[36] Eliza Haverstock and Anna Helhoski, *Student Loan Debt Statistics: 2024*, Nerd Wallet (Feb. 5, 2024), https://www.nerdwallet.com/article/loans/student-loans/student-loan-debt.

"held liable when [an] agency announces its interpretations for the first time in an enforcement proceeding." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012).

The lack of clarity in the statutes being used by the SEC and other federal agencies in enforcement actions against the crypto industry is now obvious to courts. For example, Judge Wiles noted that "regulators themselves cannot seem to agree as to whether cryptocurrencies are commodities that may be subject to regulation by the CFTC, or whether they are securities that are subject to securities laws, or neither, or even on what criteria should be applied in making the decision." *In re Voyager Dig. Holdings, Inc.*, 649 B.R. 111, 119 (Bankr. S.D.N.Y. Mar. 11, 2023). This commentary is not surprising given the state of the industry, with the CFTC labeling at least one token (BUSD) as a commodity,[37] and the SEC later claiming it is a security.[38]

In light of this lack of clarity, an enforcement action would violate Labs' due process right to fair notice. In November 2018, when Hayden Adams announced the first version of the Protocol, no court had ruled that any crypto asset transaction was an investment contract—let alone that any asset using a new file format automatically became an investment contract or that designing the world's first successful protocol for automated market-making entailed running a securities exchange. To the contrary, a top official at the Commission had announced just months earlier that the token paired with all other tokens in version 1 of the Protocol, Ether, was specifically *not* a security.[39] When the UNI token was launched, it was listed on major centralized exchanges, such as Coinbase, within mere days, and subsequently Coinbase was allowed by the Commission to go public while listing UNI in 2021, now more than three years

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[37] Compl. at ¶ 24, *CFTC v. Zhao*, No. 23-cv-01887 (N.D. Ill. Mar. 27, 2023), ECF No. 1.

[38] *Paxos Issues Statement*, Paxos (Feb. 13, 2023), https://paxos.com/2023/02/13/paxos-issues-statement/.

[39] William Hinman, Dir., Div. of Corp. Fin., SEC, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, U.S. Sec. & Exch. Comm'n (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418.

ago.[40] Thus, any reasonable person would have had no reason to believe that the SEC might change its mind and later take the position that creating and deploying the Protocol, operating the Interface, or deploying the UNI token would violate federal securities laws.[41]

III. An Enforcement Action Would Harm the Public Interest and Undermine the Commission's Goals

If the Commission files a lawsuit against Labs, the Commission would harm an important, emerging industry that can help achieve many of the Commission's stated goals, such as creating efficient markets and protecting investors. An action against Labs would not just affect Labs; rather, it would affect all crypto companies that offer similar services, including myriad companies that offer access to the Uniswap Protocol and create innovative ways to use it. And it would chill the kind of innovation on US soil that benefits individual consumers who seek and deserve fair access to the global economy.

First, the Commission's theory of liability, if adopted by a court, would effectively ban all AMMs. The Commission thus would violate its own mandate and make U.S. markets *less efficient* by benefiting some incumbents at the expense of AMMs. Research also estimates that the use of AMMs like the Protocol could save American investors *billions* of dollars in transaction costs per year by removing unnecessary costs of traditional middle men.[42] These savings stem from liquidity providers on AMMs also being longer term holders of the underlying assets and therefore needing less compensation for the smaller intraday risk they take.[43] This means traders get better prices and sellers get the return commensurate with their risk.

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40 *Uniswap (UNI) is launching on Coinbase Pro*, Coinbase (Sept. 16, 2020), https://www.coinbase.com/blog/uniswap-uni-is-launching-on-coinbase-pro.

41 Compl. at ¶¶ 82–85, *Consensys Software Inc. v. SEC*, No. 24-cv-00369-Y (N.D. Tex. Apr. 25, 2024), ECF. No. 1.

42 Katya Malinova and Andreas Park, *Learning from DeFi: Would Automated Market Makers Improve Equity Trading?*, 5 (Nov. 18, 2023), https://ssrn.com/abstract=4531670.

43 *Id.* at 10.

Additionally, the 24/7 liquidity available on crypto asset platforms promotes efficiency by allowing consumers to engage in transactions at the moment they need or want to, without waiting for the market to "open" or for the last hour before "close" to have sufficient liquidity for a fair trade.[44] In fact, traditional financial markets are now seriously considering implementing this popular feature of DeFi platforms.[45] Finally, AMMs provide more liquidity—reflected in lower spreads and higher depth of pricing—for both fat-tail and long-tail assets.[46] As a result, an AMM can solve a long-standing problem in traditional markets, which is that most assets are illiquid. The Commission has recognized this problem and tried to address it with years of written reports and Wall Street industry roundtables.[47] Those efforts have failed, and this technology, which the Commission is trying to ban, can solve this important consumer problem. And it can do so for securities markets as well as the much larger non-securities markets.

Second, the Commission's actions have already forced many companies in the crypto industry offshore,[48] and bringing an action against Labs would only accelerate the offshoring of this emerging financial sector. That trend deprives the American public of access to intermediary-free platforms, takes jobs away from the American economy, and poses security risks. Nearly one million jobs could be created in the DeFi industry by 2030, but a large portion of those will not be in the United States if the Commission continues to pursue its current

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44 Austin Adams et al., *On-Chain Foreign Exchange and Cross-Border Payments* (January 18, 2023), https://ssrn.com/abstract=4328948.

45 Jennifer Hughes, *New York Stock Exchange tests views on round-the-clock trading*, Financial Times (Apr. 22, 2024), https://www.ft.com/content/31c3a55b-9af9-4158-8a49-4397540571bf.

46 *The Dominance of Uniswap v3 Liquidity*, Uniswap Labs Blog (May 5, 2022), https://blog.uniswap.org/uniswap-v3-dominance.

47 *SEC Staff to Host Roundtable on Market Structure for Thinly-Traded Securities*, SEC (Apr. 13, 2018), https://www.sec.gov/news/press-release/2018-65.

48 *See, e.g.*, Electric Capital, *U.S. Share of Blockchain Developers is Shrinking*, Crypto Council for Information (Apr. 24, 2023), https://cryptoforinnovation.org/u-s-share-of-blockchain-developers-is-shrinking/.

strategy.[49] Moreover, offshoring forces companies beyond the direct jurisdiction of U.S. regulators and law enforcement, allowing riskier behaviors to thrive. The cases of FTX and Terra (Luna) show exactly how offshoring crypto companies can breed the type of fraud from which the Commission should be protecting investors.

Third, Uniswap has already benefitted a significant number of consumers, creating innovative products (with more to come) and saving consumers significant transaction costs. An action against Uniswap would put all of that at risk, with no legal basis.

IV. Conclusion[50]

For all of these reasons, Labs urges the Staff not to recommend an enforcement action in this matter.

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[49] *Id.*

[50] If after reviewing this submission the Staff still intends to proceed with its enforcement action recommendation, we request a meeting with the Director and Deputy Director of Enforcement to discuss the matter before any recommendation is made to the Commission.