UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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MANN, ET AL | CIVIL ACTION NO.24-1881
SECTION "T"

VERSUS | WEDNESDAY, MAY 21, 2025

SECURITIES AND EXCHANGE COMMISSION, ET AL

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TRANSCRIPT OF ORAL ARGUMENT HEARD BEFORE THE
HONORABLE GREG G. GUIDRY
UNITED STATES DISTRICT JUDGE

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P-R-O-C-E-E-D-I-N-G-S

Wednesday, May 21, 2025

M O R N I N G S E S S I O N

(COURT CALLED TO ORDER.)

THE DEPUTY CLERK: All rise.

THE COURT: Please have a seat and, Dedra, we can call up this morning's case.

THE DEPUTY CLERK: We're here today in the Civil Matter 24-cv-1881, *Jonathan Mann, et al versus Securities and Exchange Commission, et al* relative to defendant's motion to dismiss.

Counsel, please make your appearance for the record.

MR. GOTTLIEB: For the plaintiffs, Your Honor, Jason Gottlieb from Morrison Cohen, together with my colleagues, Rachel Fleder and Vani Upadhyaya.

MR. PATRON: David Patron of Phelps Dunbar, Your Honor.

THE COURT: Hello.

MR. MOORES: Good morning, Your Honor. Peter Moores on behalf of the United States Securities and Exchange Commission along with --

MS. VERDI: Alexandra Verdi.

THE COURT: Okay. Nice to meet you.

I will put a time limit on the argument only because when I don't do that then people choose to go on forever and ever. We'll do half an hour on each brief's side, but you don't have to take the entire time. I just put a limit just so that there will be a parameter, but don't feel like you're required to go the full 30 minutes. And if the plaintiff would like, reserve some time for rebuttal argument. Make sure you -- you make sure you're aware of your time so that you can reserve that time. I'll try to remind you if you're getting close to 30 minutes, but please be aware of that. And no more than five minutes for rebuttal. Okay. We can proceed.

MR. GOTTLIEB: Your Honor, however you would like to proceed is fine with us. So we brought the complaint. We're here on my friend's motion to dismiss the complaint. If you want to hear from us first or from them first is --

THE COURT: No, I'd like to hear from them -- I'd like to hear from the first.

MR. GOTTLIEB: From the defendants?

THE COURT: Yeah. I'm sorry?

MR. GOTTLIEB: You'd like to hear from the plaintiff's side or the defendant's side?

THE COURT: I'd like to hear from the defendant's side first.

MR. GOTTLIEB: Thank you, Your Honor.

THE COURT: And I'm sorry. And you can reserve some rebuttal time, if you choose to do that.

MR. MOORES: Thank you, Your Honor.

Your Honor, again, Peter Moores on behalf of the United States Securities and Exchange Commission and I also am appearing on behalf of the defendants.

Before I get into the substantive part of the motion today, I did want to bring up one administrative issue. And I understand that this might be cutting into my time, but I do think it's important to bring up one administrative thing. The plaintiffs filed their complaint back last year in July of 2024 and, at least, since the beginning of this year, in January, the makeup of, essentially, who is on -- who are the individual defendants has significantly and materially changed. And I know that under rule -- Federal Rule of Civil Procedure 25 there is the opportunity to substitute parties and so I want to bring this up to the Court's attention. I briefly have discussed this with plaintiffs' counsel, but I think it's important to make sure -- before we get into the substance of today's motion, we understand who -- who the plaintiff -- I'm sorry -- who the individual defendants are.

So first and foremost, and I'm not sure if the Court has the complaint at its disposal or just some of the pleadings here, but the individual defendants are Eric Bustillo, Gary Gensler, Caroline Crenshaw, Jaime Lizarraga, Hester Peirce, and Mark Uyeda. And they're identified in a little bit more detail in the complaint on Pages -- on Page 11, which is Paragraphs 26 through 31. So, again, like I said, since the beginning of the year the staff of the Commission and the Commission itself has changed significantly.

So first and foremost, Paragraph Number 26 is defendant Eric Bustillo who is identified as a regional director of the Miami Regional Office. He has retired in April of this year, Your Honor, and so he's no longer at the Commission. He was sued in his official capacity and so I think that he, essentially, should be dismissed out because he's no longer at the Commission and no longer in that official capacity.

Paragraph Number 27, which is the defendant, Gary Gensler, who is listed as the chair of the SEC. He resigned from the Commission, I believe, effective January 20th of 2025 and he's no longer the chair of the Commission. There has been appointed a new chairman of the Commission. That would be Paul Atkins. So, under FRCP 25, that would be arguably a substitution of parties there, but I do believe that Mr. Gensler should no longer be a defendant because he's no longer at the Commission. He was only sued in his official capacity.

Number 28, Commissioner Crenshaw is still at the Commission.

Number 29 -- Paragraph 29, Commissioner Lizarraga, I believe, his last day at the Commission was approximately January 17th or something, Your Honor. And, again, I believe that he should be dismissed and no longer a defendant. He was sued only in his official capacity and he's no longer at the Commission.

Commissioners Peirce and Uyeda, who are mentioned here in Paragraphs 30 and 31, do remain at the Commission. So, currently, the Commission only has four members. Commissioner Peirce and Uyeda are two of them. As I mentioned, the new chairman is Paul Atkins and Commissioner Crenshaw does stay on.

So I'm not sure if we can come to an agreement or consensus on how to handle the defendants who are no longer at the Commission, but I would propose to the Court that they be -- that they be dismissed out of this case and with the possible exception of Commissioner Chairman Atkins be substituted.

THE COURT: This won't count into your time, but let's -- would you like to respond to this?

MR. GOTTLIEB: Yes.

The facts recited by my friend, Mr. Moores, are all correct about the commissioners leaving, commissioners being substituted in. My understanding is that, under FRCP 25(d), there is an automatic substitution of parties. So I don't have any objection.

Obviously, Mr. Bustillo, Chair Gensler and Commissioner Lizarraga are all gone. Chair Gensler would be automatically substituted with the new chair, Mr. Atkins.

Mr. Lizarraga has not -- my understanding is there's been no appointment yet, so, for now, that is replacement with nobody pending any kind of replacement for that seat. Commissioners Peirce and Uyeda are still -- so the factual recitation is all correct.

My understanding is, that it happens automatically and my proposal for the Court and my friend is after this motion hearing, presuming that the case is not dismissed, which I would hope that it is but that's to come later, if it's not dismissed, we can substitute the appropriate parties on the caption. I think that's purely mechanical and won't cause much difficulty.

MR. MOORES: No objections with that, Your Honor. I know that the Court can do it sua sponte, but if --

THE COURT: No. I'm going to want to do it through a motion being filed, but we'll take this one step at a time and we'll make you aware of that. Okay.

MR. MOORES: Thank you, Your Honor.

Your Honor, the question now in terms of substance of our motion today before the Court is whether the United States has waived sovereign immunity permitting these plaintiffs or frankly, everyone, to sue the United States of America for the purpose of getting an advisory opinion about a contingent hypothetical. And the answer to that question is, no, Your Honor and primarily for three grounds. First, is sovereign immunity, second, is the plaintiffs lack standing and, three, that this matter is not ripe at this time. And I'm happy to go through the arguments as laid out in our brief or just a supplement parts of the argument that the -- Your Honor would like to hear most or primarily. Otherwise, I'll just run through our arguments probably starting with sovereign immunity, Your Honor.

THE COURT: Or just make the argument that you would like to make.

MR. MOORES: Will do. Thank you, Your Honor.

So, first, I'd like to address sovereign immunity. So the United States has to waive sovereign immunity for plaintiffs to bring any action against the United States, in this case, the SEC or any of the defendants in their official capacity. They're sort of highlighting, sort of, muddled nature of the plaintiffs' case against the SEC or the defendants is the fact that, in their complaint they don't actually bring a particular cause of action. They are filing Count 1 as a DJA claim, but that does not provide a substantive cause of action. So as we try to figure out whether or not Congress has unequivocally abridged the United States sovereign immunity for this case, we're left sort of grasping at straws at to what the actual cause of action is.

We've, sort of, tried to discern that it must arise ultimately under the Administrative Procedures Act, the APA, and specifically, under the general provisions of the APA. And so, you know, plaintiffs do bring up in their opposition brief, and they try to make arguments either that there's a constitutional violation or that Section 5 of the Securities Act is the cause of action. Essentially, in the DJA action where you have the declarants -- the defendant declarants' potential cause of action satisfied in here. However, the plaintiffs can't amend their complaint by putting stuff in their opposition brief. It has to actually be in the complaint to control the analysis. So first and foremost, there is no constitutional claim in their complaint. There's no mention of First Amendment. There's no mention of the Constitution. And so we are left with the general provisions of the APA.

Our briefing didn't specifically say what the general provisions of the APA are, but I just want to highlight it is Section 706, so it's 5, U.S.C., 706. And that is where you will find the general provisions of the APA. In -- for the purposes of the sovereign immunity analysis, it is -- requires final agency action and, here, there's no agency action at all, let alone final agency action. And so, going through the analysis of what is and what is not agency action, the plaintiffs have proffered that the agency action are these two administrative proceeding orders coming out of the commission in *Stoner Cats* and *Impact Theory* and in their opposition briefing they've included a third one, *Flyfish Club*. However, those are involving different parties. Those are third parties and so there is no actual agency action that is specific under the law. Under *Alabama-Coushatta*, the agency action has to be specific as to the plaintiffs and those are as to third parties.

Essentially, if that was the agency action that would be suitable, then it would open up -- basically, essentially, waive sovereign immunity as to any potential plaintiff in the country or, actually, globally. Any person who has a computer or smart phone and wants to create and offer and sell digital assets globally, whether or not they're in Timbuktu or in Bangkok, could allege that, because of these two actions, *Stoner Cats* and *Impact Theory*, involving entirely different third parties that that constitutes a waiver of sovereign immunity. And frankly, that would swallow the rule. That would eviscerate the concept of sovereign immunity of the United States. If it -- it opened up the doors to anybody in the world who wants to sell digital assets in the -- or crypto assets in the United States to be able to sue them in federal court.

So I'm going to flow through and start talking a little bit more about standing. I think that the arguments that plaintiff makes about -- actually, let me just take a step back, Your Honor. I didn't get into one of the arguments that we put in our papers and I apologize if I just sound like I'm repeating the papers, Your Honor. My aim is not to bore you today, but one of the arguments that we made in our papers is that part of the APA actually has an exception to sort of the rule of -- waiver of sovereign immunity.

So first and foremost, there's Section 702, which is where you would find the waiver of sovereign immunity tieing into Section 704, but the section -- the threshold question, actually, as the Supreme Court has defined it, is whether or not 701 exempts the waiver of sovereign immunity by the United States and it does that anytime that the action by the agencies is actually committed to agency discretion and that's what is at play here. The decision to actually investigate and bring in an enforcement has been delegated by Congress, specifically in the statutes, and provided full discretion to the Commission in order to do that.

What I think is interesting is that plaintiffs actually cite to a couple -- one case which involves the FTCA, which is *U.S. versus Sutton*. In that case they say that there's the opportunity to get judicial review, but when you actually look at that case there's, actually, a vein of cases which talks about the FTCA and similar to the APA, the FTCA has this sort of discretion exemption from the waiver of sovereign immunity. So, essentially, the statute will waive sovereign immunity, but there's an exception to that as well. And so what we have is a string of cases that talk about the FTCA and, specifically, say that decisions to investigate, how to investigate, and whether to prosecute generally fall within the exceptions. So basically, courts then -- that's the Fifth Circuit in the *Nguyen versus The United States*, similarly, even in *Sutton* talks about that the decision to bring a case is fully within the discretion of that agency and that's analogous here to the SEC's discretion as mandated by Congress to be able to bring cases.

And, in fact, courts have recognized that that discretion -- what it really means is whether or not a court sitting here, today, like yourself has the -- basically, the parameters to conduct that analysis. Can it sit in judgment about whether or not the United States should or should not have brought a case and the courts say there just isn't sufficient law to -- there isn't a permissible analysis that should be done by the judicial branch and second guessing the executive branch in terms of when to bring a case.

Now, plaintiffs also cite to *Heckler v. Chaney*, which is a Supreme Court case, which I believe actually helps them, but *Heckler v. Chaney* is the opposite. It acknowledges that the -- the SEC has the discretion to bring cases -- to investigate and bring cases and, specifically, says that what's important is, is making sure that there's a concrete analysis that's fully developed -- a fully developed case. And in the context of challenging the SEC's action as either being in --

not in accordance with law, the right forum is not this type of DJ Action, that the plaintiffs are bringing in here today, but it is, in fact, the enforcement action if it should ever happen. So the Supreme Court said, if the SEC does act to bring an enforcement case, that is the proper forum for the challenging that the SEC was not acting in accordance with law. It is not a separate DJ Action. And that reflects the congressional view that the SEC has discretion and these types of decisions have been committed to the discretion under 701(a)(1) -- (a)(2).

So going over to standing, Your Honor. And, again, if there's any questions Your Honor has, I'm happy to answer them as we go through, but --

THE COURT: Let me say, you're not boring me. That's why I wanted to have argument in this case. It's an interesting case. In my mind, it's a close question. So, you know, I'm not -- you're not boring me. Just make your arguments that you would like -- that you think are most important for me to hear. That's why I'm here.

MR. MOORES: Thank you, Your Honor. I appreciate your willing to hear us out on this matter.

THE COURT: But I did put a time limit, so we won't go on -- but go ahead.

MR. MOORES: I appreciate that.

So standing, I think what's helpful to -- when we look to standing -- first of all, I also want to acknowledge that there are -- have been a number of matters that have been brought by DJA plaintiffs similar to this case that have sued the SEC recently. One of which is a *Consensys*, another one is *Hodl Law*, and a third one is called *Broadstreet* that have actually had decisions made, at this point, and they have all dismissed the actions pending -- the plaintiffs' actions. And so I think that those are very helpful in understanding the analysis, especially, in either standing or in ripeness. And so at some point we'll touch upon those more specifically, but I do think that this Court should join those courts in dismissing these actions against the SEC.

Now, as we turn to standing, I think that there's actually some really good language in the recent Supreme Court decision that was *FDA versus Alliance for Hippocratic Medicine*. It was Justice Kavanaugh's decision in 2024. And, essentially, he walks through the purpose of Article III as laid out by the framers of the Constitution, including Benjamin Franklin, who I noticed his statue is out in the square here, but, essentially, says, "Standing also tends to assure that the legal questions presented to the Court will be resolved, not in the rarefied atmosphere of debating society, but in a concrete factual context." And as we go through, I'll argue and make sure it's understood that this is not a concrete factual context, that what is being proposed has not been fleshed out. It has not already occurred. It's in the future. It's contingent. It's hypothetical and speculative.

Similarly, Justice Kavanaugh says, "Standing allows issues to percolate and potentially be resolved by the political branches in the democratic process." So it talks about how standing is important in the various branches of our government and how there's checks and balances, but, at the same time, each branch is entitled to its own specific role.

And Number 3 -- Article III does not contemplate a system where 330 million citizens can come to federal court whenever they believe that the government is acting contrary to the Constitution or other federal law. And, essentially, that is what is going on in this case, Your Honor, is that, you know, perhaps the plaintiffs disagree with how the SEC has been conducting itself and has said, "How do we get into court? How do we, basically, create policy at the SEC? How do we force the SEC to do what we want them to do as opposed to what the SEC might have been doing at the time?" And so standing is an important barrier to allow just any plaintiff, you know, as I said earlier, anyone with a computer, anyone with a crypto asset, you know, platform, is just going to say, "How do I get into court? Well, I can just conjure up a potential future offering and that's my way in." And, instead, I think what is really important is to determine whether or not there is injury in fact. And in this case, there is not any injury in fact.

There's not any impending or imminent situation. There's no threat against these particular plaintiffs.

If you look -- again, looking at the language in the complaint. What the complaint shows or what it doesn't show is that there's been any communication between these -- between the SEC, specifically the enforcement division, and these plaintiffs with respect to their either proposed offering or their past offerings of NFTs and crypto assets. There has been no investigation. There have been no subpoenas. There has been no factual development.

In all the cases that plaintiff has brought forth and spoken about, especially, in the pre-enforcement review or pre-enforcement challenge context, those, first of all, have involved an actual statute or regulation that they deem to be unconstitutional. First of all, there's no constitutional claim in this -- in this complaint and even to the extent that it was -- the complaint was amended. It's not actually arguing that the statute, which is perhaps Section 5 of the Securities Act or maybe it's Section 17 of the Securities Act or it's Section 14 -- I'm sorry -- Section 10(b) of the Exchange Act. All of these various statutes are in play, but the plaintiffs never argue that any of them are unconstitutional. And so if we look at some of the cases they cite, what is really being challenged is not the action of the agency as much as the -- the statute itself or perhaps some regulation that has been --

or some rule that has been promulgated. Here, that is not the case. There is no guidance and, in fact, plaintiffs complain throughout their complaint that there is no guidance. And what they're --

THE COURT: How long have they been engaged in this activity? A number of years, correct?

MR. MOORES: Correct. So plaintiff, Jonathan Mann, I believe, has been doing -- offering NFTs since approximately 2018 and Mr. Frye has been -- it's a little unclear exactly when he started, but, at least according to Law Review Articles he had been offering NFTs for years at this point. And even with a backdrop of everything they have done, there's no investigation, even to this day. So they filed this complaint in July of 2024, which is the first time that they, basically, became really known to the Commission, in any sort of meaningful way, of what they're planning on doing. And, again, there's no investigation. There has been no factual development of what they're trying to do, at all, and so there's no real imminency. There's no concrete and particularized threat.

And so I know that plaintiffs oftentimes characterize it as that they have a credible fear, but really the law is whether or not there's a credible threat. It's an objective test and it isn't subjective. So whether or not the plaintiffs themselves are in fear is not really the test. It's whether or not there's a credible threat. That's an objective test. And based upon all of the facts, and I know *Hodl Law* -- as I said, *Hodl Law versus the SEC*, the Ninth Circuit found and the district court found it very important that there hadn't been any investigation. That there hadn't been any sort of finding, specifically, at all about the offerings that they were doing or what they were contemplating doing.

So with respect -- the other thing that I think is noteworthy is that plaintiffs also acknowledge that there is no First Amendment right to violate the Securities Laws. So, once again, they're not alleging that there's a unconstitutional statute or unconstitutional rule. What they're basically alleging is that maybe the SEC might, at some point, do an investigation and might apply the law in a way that we don't think is correct. And that does not rise to an actual injury in fact. And whether or not they have a subjective fear or they're concerned about actually doing their offering, that doesn't qualify because there is no actual substantial risk. And, especially, under what they're seeking here, which is injunctive relief, the bar is, actually, a little bit higher because they have to show that there is going to be a likelihood of continual actions and future violations. There have been no past violations, so there's clearly not going to be anything here which would rise to that level.

And then I'd like to briefly or go on to talk about ripeness.

And I apologize, Your Honor, because I'm not sure how much time I've used.

THE COURT: You've used about 15 minutes.

MR. MOORES: Fifteen minutes. Okay. Thank you, Your Honor.

I would like to reserve a fair amount of time for rebuttal to sort of sharpen the issues once I've heard Mr. Gottlieb make his arguments.

So, with respect to ripeness, the law sort of laid out in the *Walmart* case -- in Fifth Circuit and *Walmart* and talks about how there's, essentially, two -- two matters that have to be solved and -- and sort of -- preliminarily, there's some language in plaintiffs' brief which sort of questions whether or not ripeness is still, actually, a doctrine that is followed. And I think that the more recent Supreme Court decision in *Trump versus New York* has -- would squarely put that to bed where ripeness is still an important constitutional -- again, stand -- like similar to standing, coming out of the Article III, and the framer's roles of what the judiciary branch should do.

And importantly, with respect to ripeness, is the concept that, you know, is the court in the best position at this time to make a determination on an actual case in controversy or would it benefit from further factual development and -- and development that would happen in the future?

THE COURT: Can you give a more specific when you believe that the plaintiff's claim would be ready, would be ripe?

MR. MOORES: So -- I'm saying it's not ripe, Your Honor.

THE COURT: No, I know you are. But I'm saying, under what situation would you believe it would be ripe?

MR. MOORES: Okay.

THE COURT: What things would occur? What things would have to be in place?

MR. MOORES: Right. So I think some of the important cases that have addressed ripeness in the Fifth Circuit have noted that there is no new -- there's no further factual development that has to occur. And here, this is -- the application of the Howey Test -- the Howey Test is oftentimes what governs whether or not an offering is actually involved in an investment contract. And so under the Howey Test there's approximately three prongs of the Howey Test and it is a very fact intensive analysis. And in order to conduct that analysis then the offering -- like a lot of the components of the offering have to have either occurred or be fully spelled out.

So, for example, here, there is no prospectus. There's no memorandum. There's no offering documents concerning the NFTs. There's no representations or statements by -- by the plaintiffs as to what they will or will not do. No promises. No inducements. None of that has actually occurred. Nor -- nor laid out in the complaint.

And so I think what is important is, it's going to ultimately be -- so one of the -- one of the prongs of the -- of ripeness, in terms of whether or not it's fit for judicial review, is whether or not it's a pure question of law. And in the Howey Test it is a legal question in terms -- but the facts themselves have to be determined. Otherwise, it is construing the statute and applying the law itself. So it's a mixed question of law and fact. And so, here, at minimum, you'd have to have those facts for the Howey Test set forth to include what are the representations by the -- by the plaintiffs to the -- to the potential purchasers. That's at least one important aspect of it because I think -- or not I think, the law is very clear in terms of the four prongs; so whether an agency's action is sufficiently final, the likelihood that the threatened litigation will occur, whether judicial review of the issues would benefit from a more concrete setting, and whether the issues presented are purely legal.

So with respect to ripeness, what I was trying to get at right now is just whether judicial review of the issues would benefit from a more concrete setting. And so all of those facts, many of which have to almost wait until the actual offering occurs, need to be set forth. And so the more concrete setting would be, actually, whether or not there is an enforcement action against the plaintiffs and so the likelihood that threatened litigation will occur. So in order for this matter to be ripe there has to be, again, time withstanding, actual threatened enforcement action. There's nothing. So there's no investigation. There's no action, obviously, been brought. There's no subpoenas. There's no collection.

So, again, not only do you have to have the facts of the plaintiffs offering nailed down, but you also have to have some sort of threatened enforcement action as well or that it's imminent or likely to occur soon. Under the law it has to occur soon, not just some speculative time out in the future.

So, again, whether agency's action is sufficiently final, that is important, too, for ripeness. So another thing that this case would need in order for it to be ripe is there actually has to be some agency action.

Again, going back to the sovereign immunity analysis, there is no agency action here. There's no -- especially, no final agency action.

It's important that -- that the sort of decision-making process of the SEC has occurred, so that this court has something to look at and say whether or not that decision-making process was improper. So you need to have -- the, sort of, obligations and rights and duties have to be set from some sort of agency action for this matter to be ripe and there has been nothing.

The orders that have been brought against third parties don't -- aren't specific as to these plaintiffs, which is required for there to be agency action that is applicable here.

And just as a sort of segue, there is a statute, Section 9 of the Securities Act, which allows for judicial review of an AP order. It is essentially allowing the respondents, the defendant in that case, to appeal the decision of the AP order and jurisdiction is not in a district court but it is reserved for Circuit Court of Appeals. And in order for that to qualify, it is the party that is aggrieved by that order has to bring that within 60 days and has to also exhaust some administrative remedies to bring their arguments to the SEC in advance.

So the plaintiffs are not aggrieved by any of these orders. If they had been aggrieved by the order, jurisdiction, actually, would not lie in this court at all. It would have to go to the court of appeals, but it sort of shows that these plaintiffs are not aggrieved by those -- by those agency actions.

So, again, in order for this matter to be ripe there has to be some agency action. That agency action has to be final and as has been seen in *Broadstreet* and the *Consensys* matters and -- just for the record, I know that we didn't actually cite *Broadstreet* in our papers because it was issued -- one of the issues in *Broadstreet* was actually issued after our reply brief was due. But it's *Broadstreet versus SEC* and the citation is 2025, Westlaw 417933. It was a decision by Judge O'Connor in the Northern District of Texas, came out on February 6, 2025. And in that case Judge O'Connor distinguishes the appellate decision, *Braidwood*, and says that this case or a case against the SEC was not ripe and goes through the analysis of what the final agency action would be in order for it to be required. And I think it's very illustrative because even in that case you had a situation where the SEC was investigating *Broadstreet* and, in fact, ultimately did bring a case against -- an enforcement action against *Broadstreet* and the court still found that there was no final agency action there and so the decision-making process was not -- had not been consummated and was not complete.

And, importantly, when it comes to whether or not -- just looking at -- there's one -- oh, yeah. So, with respect to ripeness, if the fitness for judicial review, the failure to satisfy even one of these factors is sufficient to make a matter unripe. And in just stepping back, one of the purposes of ripeness is to ensure that courts are not getting entangled in policy making. They're not getting entangled in the agency's decision-making process. Similar to the notion of standing, it's allowing the political process of an agency to play out. And so this court should not get entangled in the academic exercises of the plaintiffs or their efforts to create policy of the SEC.

THE COURT: Now, you have five minutes left, if you want to reserve it for rebuttal you can.

MR. MOORES: I would like to do that, Your Honor. I would like to reserve that. Thank you.

THE COURT: Okay.

MR. GOTTLIEB: Thank you, Your Honor. Jason Gottlieb from Morrison Cohen for the plaintiffs.

I would like to start here by talking about what this case is and what this case is not. This case is not a broad side to tell the SEC what they should be doing or to form policy or to try to talk about the policy for all of digital assets in all of America as some of my friend's straw mans have been.

This case is about art and it's about the art of my two clients, Jonathan Mann and Brian Frye. They would like to --

THE COURT: But the law is directed toward the SEC and --

MR. GOTTLIEB: Yes. It is direct --

THE COURT: Obviously, there's an interest there and lampooning or provoking or trolling, however you want to describe it, there's a real interest there.

MR. GOTTLIEB: There is an interest there, but the interest was, actually, brought to them by the SEC and here's why. My clients have been making NFTs for years, but I want to be very careful to distinguish what they have been doing and the projects that they proposed to do that they cannot do because of the SEC's settlement with other actors in this space and the SEC's pronouncements that it speaks through its enforcement actions, which everyone in this space should be hearing.

What they've previously done is one-off NFTs. What they're proposing to do is effectively a series and I think it's important to -- we can read, as we've alleged in the complaint, and for Mr. Mann it's in Complaint Paragraphs 122 to 127. For Mr. Frye it's at 128 through 136, where they discuss, with some specificity, the projects that they would like to elicit and they are a series of NFTs. And when they were preparing these, as alleged in the complaint, they saw the decisions against *Impact Theory* and *Stoner Cats*, these finalized settlements that act as final agency orders. We don't need to show that there's a final agency action, just that there's agency action, but these are final agency actions nevertheless. They looked at those releases of NFTs and said, "My goodness. That's exactly what we're planning on doing and the SEC is saying we can't do that." And that is essentially why we're here.

It is a declaratory judgment action and that's cause of action enough, but if we look at the complaint again, Paragraph 149, right then, starts the declaratory judgment cause of action. And in Paragraph 163, it's very clear that we're seeking a declaratory judgment regarding Sections V(a) and V(c) of the 1933 Act, the Securities Act from 1933, and those, of course, are the provisions that the -- about issuing Securities. Saying that, if you issue Securities, they must either be registered or fall under an exemption and what *Stoner Cats* and *Impact Theory* and then later *Flyfish* were forced to settle over was exactly this provision, issuing unregistered Securities under the 1933 Act, for doing exactly the thing that my clients were planning to do, had been in the process of planning -- were prepared to do, and now can't do because the SEC has brought these actions against other people and said we speak through our enforcement actions. As a result, this case really is ripe. My clients have standing and sovereign immunity has not been waived. And, with Your Honor's indulgence, I'll go through those points in the same order that my friend, Mr. Moores, did just for conceptual ease.

We'll start with sovereign immunity. Section 702's waiver of sovereign immunity applies to plaintiffs' suit. Plaintiffs' suit is seeking nonmonetary relief and therefore the APA Section 702 waives sovereign immunity. Now, under the

Fifth Circuit's doctrine in the *Alabama-Coushatta Tribe* case, plaintiffs must allege agency action that affects them specifically and adversely. These are the two factors. Mr. Moores spoke about both of those, I will as well.

First, the plaintiffs are alleging the agency action that affects them in a specific way and this, I return to the SEC's enforcement actions and cease and desist orders against *Stoner Cats*, *Impact Theory*, and *Flyfish*, which qualify as agency action under 5, U.S.C., 551(13), which defines agency action including orders and these are orders from the SEC. These actions specifically affect plaintiffs because plaintiffs plan to engage in substantially the same conduct that the SEC declared to be violative. The SEC has said these are violations of Section 5 of the 1933 Act and by issuing orders against others for substantially the same conduct, the SEC has made clear that it considers the plaintiffs intended offerings to be unlawful, to be a violation of the Securities laws. And, again, we point out in our papers, that the SEC has stated that it has spoken with a pretty clear voice through its enforcement actions. And that's a statement from the former chair of the SEC.

Now, the SEC has argued today and in its papers that Howey is very fact bound. Well, this is all in facts and circumstances and that's why, not only is it not -- do you not have ripeness or standing, but everything here is not about you, it's about these other folks. They may have different facts than you have. But the SEC doesn't dispute that plaintiffs' anticipated conduct is meaningfully different in some way. Plaintiffs have -- I'm sorry -- the SEC has not said in its papers, "Oh, we see what they're planning and that's perfectly fine. That's not a Securities Law violation." They have not come in and said, "Sure. Go right ahead and do that." If they did, I think we would have no problem. This case would be over and my plaintiffs -- my clients could go about their business and do what they want to do. But the SEC has very conspicuously not done that. They don't tell people, "That's fine. You can go ahead and do that." They're just speaking through their enforcement actions. The *Bear Creek Bible Church* case, this is out of the Northern District of Texas in 2021, that was later appealed and upheld, not on sovereign immunity but on standing and ripeness grounds by the Fifth Circuit, effectively rejects the SEC's argument that an agency order against third parties do not constitute an agency action against plaintiffs that plan to engage in similar conduct. And this makes sense if an agency comes out and says, "We think that this particular thing under the law is verboten and you should all pay attention to that," then it would make no sense to -- to force plaintiffs to engage in that exact same conduct and then potentially get penalized by the SEC before they could have any chance of challenging that. And we'll come back to the SEC's bind on standing and ripeness because the SEC has really put my -- my clients in a real bind here. A real rock and a hard place or Scylla and Charybdis if you are more classically minded.

In *Bear Creek* the court found that the EEOC had issued enforcement actions against other people and had issued guidance saying that what *Bear Creek* wanted to do was violative and the Northern District of Texas found that that was sufficient -- sufficiently targeted at the plaintiffs in that case so as not to constitute a waiver of sovereign immunity. The EEOC did not appeal that portion of the actions. The Fifth Circuit doesn't address it, but that was the standing -- that was the sovereign immunity argument that survived.

The plaintiffs -- the next thing I want to talk about is this notion of agency action committed to agency discretion because plaintiffs are not challenging something that's committed to agency discretion by law. Agency action can be reviewed to determine whether an agency has exceeded its statutory powers, whether it has exceeded what is afforded to it within its discretion. Agency discretion is one thing. If somebody else had put out a Securities offering that was unquestionably in violation of the 1933 Act, the SEC would have absolute discretion to choose whether or not to enforce against that. No third party can come in and say you must enforce against that project or you must not enforce against that project. That's something that's committed to agency discretion. This is something very different.

This is the SEC having decided in these three separate actions that the 1933 Act -- that Section 5 of the 1933 Act, that their interpretation of the Supreme Court's doctrine in *SEC v. Howey* means something different than it does. The SEC has said we believe that this activity is a violation of law. It's not a question of whether they're entitled to bring an enforcement action about it or not. It's a question of what the SEC's interpretation of the law is. And that's something that's, very decidedly, not committed to agency discretion. In fact, after the -- the recent overturning of Chevron, that's entirely within the ambit of the courts to decide what the law is.

So, here, if we again look at *Bear Creek* and then *Braidwood*, which, again, isn't on sovereign immunity but it deals with the similar issues, those cases prove wrong this notion. The notion that the SEC gets to take whatever action it wants and its decision whether to --

THE COURT: Well, wasn't there some degree of guidance in *Bear Creek* though?

MR. GOTTLIEB: There was some guidance in *Bear Creek*, but that's actually very similar to the guidance here. The SEC has issued guidance in the past, both specifically about what constitutes a Securities offering or not. That guidance which was issued back in April 2020 -- April 2019 -- my apologies. It was recently withdrawn. But more specifically the agency has said we speak through our enforcement actions and that's the guidance that we're really focused on. If the SEC is settling cases with people who are doing substantially the exact same thing that my clients want to do and the agency is giving the guidance to the public, "We speak through our enforcement actions. We are telling you what we think the law is." That is, in my view, sufficient guidance for people to set up and take notice. People should take notice of that. And when my clients look at those other actions and say, "We were planning on doing the same thing," and we fundamentally do not believe that those -- that the actions that we want to take are a violation of the 1933 Act. That's the thing that they're challenging. So it's not an issue of what -- or is or is not committed to agency discretion, it's the agency's interpretation of the law. So this is not -- it's not whether or not to bring an enforcement action or whether or not to investigate. It really is their interpretation of law on this point is very simply wrong and we're entitled to bring a Declaratory Judgment Action because we have a project -- we have projects that are ready to go that we feel we cannot.

Very briefly, just because it came up in the papers, the SEC asserted at some point that there had to be a final agency action and that's not correct for this section of the

APA. There just needs to be an agency action at all. Even if there had to be a final agency action, it is beyond cavil that the three actions that were settled or final. But just for the record, under the *Texas v. U.S. Department of Homeland Security* case out of the Fifth Circuit in November of 2024, the final agency action requirement is inapplicable where a case does not arise under the APA. Here, this case does not arise under the APA. The APA is just the waiver of sovereign immunity mechanism. The case arises as a Declaratory Judgment under the Federal Securities Laws.

I would like to also -- returning to the *Alabama-Coushatta* factors, we need to -- the fact that it shows that -- we need to show that it affects the plaintiffs and we need to show that there's some adverse affect. And the adverse affect here is very simple. Plaintiffs have a credible fear of enforcement action that prevents them from releasing these NFT projects, which impacts their careers, their reputations, and their livelihoods. This is where the First Amendment is relevant.

And, Your Honor, we are not making a First Amendment claim as a cause of action in this case for, I think, pretty obvious reasons. If what my client's were proposing to do was a violation of Securities Law, if it were, then there's no First Amendment implication. You don't have a First Amendment right to violate the Securities Laws. However, if what my clients are proposing is not a violation of Securities Law, which is what we respectfully submit is the case, then the SEC's actions against other people and its warning the general public to be mindful of those enforcement actions against other people and follow those rules acts as a drag on limitation on my client's First Amendment rights.

So the First Amendment argument is a gloss on sovereign immunity. It sort of gives -- it's why the sovereign immunity argument has life here because it shows that there's an adverse affect on my clients. Their free speech rights to make, produce, and sell their art is undeniably a First Amendment right and if the SEC's actions are outside their statutory authority, outside the Federal Securities Laws, then those actions are impinging on my clients' First Amendment rights, which gives rise to the adverse affect requirement necessary under the *Alabama-Coushatta Doctrine*. And the SEC is in some ways attacking a straw man when it says, "Well, these guys have been issuing NFTs all along." That's true. They have been issuing these one-off NFTs. That has been part of their business for quite some time, but it's a very different thing that's being proposed.

First, Mr. Frye has not released any new NFTs after the SEC's action in *Impact Theory*, *Stoner Cats*, and *Flyfish* and he has never released an NFT series as large as the one he plans to release now because of those actions, because what they were planning to do mirrors what was in those enforcement actions.

Jonathan Mann, known as the song-a-day man writes, produces, records, and releases one song every single day and he makes an NFT out of that song to sell it. That is his livelihood, but those single sales are markedly different from what he is proposing to do here, today, which is a limited edition of over 10,000 NFTs featuring variations of a particular song. They're sort of remixes, if you will.

So this series and Mr. Mann's series -- Mr. Frye's series are very similar to what's going on in these other actions. It's not the single one-off NFTs that I think even the SEC has never alleged would constitute a Securities Law violation. From a theoretical point of view, it's actually a pretty hard boundary to figure out where it is. Why does this constitute a Securities Law violation, whereas this one would not? But I think that's exactly the point is that the -- the lack of clarity over what that guidance is, is something that is hanging over my clients and making them somewhat fearful. And I think that the answer that satisfies that doctrinal clarity, which is not the issue for today but the issue for this case, the answer is that none of this is Securities Law activity at all, so there is no, sort of, invisible border we're trying to figure out the location of. There just is no border at all because none of this is Securities activity. So that's the sovereign immunity analysis.

Let's move onto standing.

THE COURT: But there's really no limit to -- under your argument, there's really no limit in -- any digital asset owner could make a pre-enforcement claim under your theory just based upon a fear or a private enforcement action?

MR. GOTTLIEB: Respectfully, Your Honor, I don't think that that's correct. That's a point that Mr. Moores made saying that anyone in the world could come in and sue the government.

THE COURT: Well, why wouldn't they be able to?

MR. GOTTLIEB: I think that they would have to come to court and allege that they were going to do the same thing that the SEC has already said is verboten. It's not the case that someone, you know, just sitting in a living room in -- in Baton Rouge or Toledo or Zimbabwe could say, "I want to sue the SEC because I want to do this thing that the SEC has said is bad." Frankly, for most people that would be a little bit crazy, deciding to sue the SEC out of nowhere, but you have plaintiffs here who have plans, concrete and tangible plans, as alleged in the complaint to do these -- this exact same thing. This is their business. This is their livelihood. Mr. Frye is also a law professor, but he's -- as he would tell you, he doesn't make his money from teaching law, he makes his money from his other endeavors.

What they want to do is exactly a thing that the SEC has said they can't do. And if the question is, "Well, wait a minute. Can't anyone say, well, that's the thing that I want to do as well. Can't I sue the government for that?" If they could show the factors for waiver of sovereign immunity, in the Fifth Circuit under the *Alabama-Coushatta Doctrine* as we have done, then the answer to that is yes.

The APA Section 702 says that there's a waiver of sovereign immunity if you're seeking nonmonetary relief, as we are here, just a Declaratory Judgment Action that this does not violate the Securities Laws. So if the fear is that this opens up a floodgate against the SEC there are two responses. One is, that's what Congress said in the APA and, two is, if the SEC doesn't want to face a flood of litigation from people saying the thing that you have repeatedly done is outside of the boundaries of the Federal Securities Laws, then the SEC can stop acting outside of the boundaries of the Federal Securities Laws, right? There is no rush of plaintiffs. This law has been around since 1933. There isn't a flood of plaintiffs coming in everyday saying, "I want to launch a publicly traded company and issue all of my stock, but I don't want to register," because the Securities Law are absolutely blatantly clear on that subject that the law is clear.

Unfortunately, we are in a place where, frankly, the law is also pretty clear that these should not be Securities issuances, but the SEC has taken a different view and because the SEC took that different view, my clients have been forced to vitiate their rights.

If we look at the case law on sovereign immunity it is precisely this sort of thing that that's made for, for people who are seeking a Declaratory Judgment or other nonmonetary relief where the government is taking action that impinges on their rights. And here those rights include, not just the right to issue product, to issue art, but because this is about art it goes to very core First Amendment concerns.

I'll move now, Your Honor, to the standing doctrine. The SEC contests one element of standing, the existence of an actual or imminent injury in fact. And what my friend, Mr. Moores, has said is that this is all purely hypothetical, right? We -- we don't actually know that there's any injury. The SEC has never talked with these people, which is not correct. Mr. Frye has had some back and forth with the SEC and they dismissed his concerns and never got back to him, but we are dealing with something that is a tangible product -- project. And, again, I would point you to the allegations in the complaint where the plaintiffs say exactly what it is they want to do and what kinds of facts and circumstances are arising from it.

Now, remember this is a motion to dismiss. This is an 8(a) standard. We just have to make a short and plain statement of the case. So my clients have set out what that project is, the kinds of statements that they would make. I think the fact that they -- they feel that they cannot do this gives them that standing. Now, the -- the -- under the *MedImmune* case, this is 549 U.S. 118, 2007, Article III does not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat and I think this is a really key point here. And it's a different argument than the SEC is making. The SEC's question -- Mr. Moores' question was, "How can we force the SEC to create policy?" That's the question he imagines that we are asking. That is not the question that we're asking. The question we're asking is, "How can my clients sell their art? Can they sell the series or is the series going to be deemed a Securities Law violation?" And that question that -- that -- which is -- it is constitutionally protected conduct, but that conduct is the core of the standing doctrine. Plaintiffs have achieved a credible -- they've established a credible threat of enforcement. And, again, I would point you back to the three recent prior actions targeting similar conduct and the fact that the SEC has not disputed that, when released, a project like this, would run afoul of the SEC's interpretation.

Plaintiffs are not required to allege that the SEC has initiated an investigation into their NFT offerings or considering bringing an enforcement action against them. The

SEC can say, "We've never even heard of these guys. We've -- there's no credible threat against them." But the very existence of these other cases and the SEC telling the public that this is the SEC's interpretation of the law gives rise to that credible threat. It does not have to be specifically targeted to them. It doesn't have to be the case that someone from the SEC has to send them a letter or pick up the phone and say, if you do this, we're coming after you. They don't have to do that. And, again, here -- the *Braidwood* case from the Fifth Circuit is absolutely instructive. In that case -- and where, earlier, I said that *Braidwood* was not about sovereign immunity because *Bear Creek* -- the *Bear Creek* decision was not appealed on sovereign immunity grounds, but it was absolutely appealed on standing grounds and the Fifth Circuit was unequivocal in finding that the plaintiffs had standing, where they identified a history of enforcement against a third party, not the plaintiffs in that case. But the government had not initiated an action against that plaintiff, had not specifically targeted plaintiff, plaintiffs had not yet taken the action that could have subjected them to an enforcement action.

The facts are very analogous to the *Braidwood* decision. And, in fact, district courts in this circuit have reached the same result in *Louisiana versus Equal Employment Opportunity Commission*, that's 705 F.Supp. 3d 643, Western

District of Louisiana, 2024 and Texas v. Bureau of Alcohol, Tobacco, Firearms, Explosives, which is 737 F.Supp. 3d 426, Northern District of Texas, 2024.

THE COURT: You have about five minutes left.

MR. GOTTLIEB: Plaintiffs reliance on the *Hodl Law* case is entirely inapposite because there a plaintiff, which was just a law firm that used Ether, a particular crypto currency, did want to tell the SEC, I think Ether should not be a Security. But there was no -- not only was there no credible fear there, there was no particular reason that anyone would have thought that it was, whereas, in our case, we have these three other actions.

Let me move now to ripeness. Your Honor asked "Under what situation would there be ripeness?" And that is exactly the right question to ask because, under the SEC's theory, the answer is never. This case would never be ripe. What we heard was it's very facts and circumstances based, so we really don't know. So the appropriate time to challenge it is after it's brought, but recall that we also heard that the decision about whether to bring an action or not is something that's committed to the agency discretion. So you couldn't challenge it then either. Really, all you could do was defend on the merits. What the SEC is trying to tell you is that you can never challenge the SEC's decision and that's just not the law in this circuit.

Again, *Braidwood* was instructive on this point. These issues are fit for judicial review. These issues are ripe. The case presents the question of, "Whether the SEC has the authority to regulate the offer and sale of NFT art series?" And that's exactly what plaintiffs want to do. The SEC has taken a uniform position against NFT issuers in these other actions and the facts specific nature of Howey doesn't mean that you can never challenge it.

Again, we have state -- set forth in the complaint the allegations about what the facts will be. And if the SEC wants to say, "Well, it's not ripe because we don't know what all of the facts are. We need to know all of the facts." That's why we can go to discovery in the case. They can learn all of the facts and then they can say, well, we think that this would or wouldn't be a challenge. Again, this is a motion to dismiss prediscovery. We're not required to set out every single statement that they ever might make. So this action is ripe even though the SEC has not taken any action against plaintiffs under the *Braidwood Doctrine*.

Finally, there are some other cases including the *Trump v. New York* case from the Supreme Court in 2020 that my friends have cited that are inapposite because there the case -- the court found that a case wasn't ripe where states and others challenged a presidential memo announcing a new policy, where the President qualified his directive with language like, to the extent practicable and to the extent feasible, and therefore there wasn't ripeness because nobody really knew what any of that meant. Whereas, here, we have three very clear settlements from the SEC and the statement from the SEC that this is exactly what it means.

So at the end of the day, my clients just want to be able to make and sell their art without the fear that the SEC is going to then turnaround and accuse them of issuing Securities. That's what this case is about and we've satisfied the requirements to get to this point in the complaint -- to get to this point in the case and move ahead to discovery.

Thank you, Your Honor.

THE COURT: Thank you very much.

Do you want to just start off with the *Bear Creek* in whether -- discuss the guidance that existed in *Bear Creek*?

MR. MOORES: Yes, Your Honor.

So *Bear Creek* is a very different case than the one at bar. In fact, the judge in *Bear Creek* is Judge O'Connor who actually ruled in *Broadstreet versus The SEC* that the *Bear Creek* situation/*Braidwood* factual pattern looks much different than these DJ cases being brought against the SEC. In *Bear Creek*, the guidance that was put forth by the EEOC was agency action. There is no agency action here. The guidance was coming after *Bostock* and that line of cases where the EEOC very clearly, sort of, set forth what it thought was the correct interpretation of the law and what would be in violation of the law and that was the agency action in which the *Bear Creek* decision is really based upon. Here, there is no guidance and that is the clear distinguishing factor.

The other thing is that, in *Bear Creek*, the plaintiff's conduct and their habits and their practices, in their business practices and the way they were going to conduct their operations going forward was the same as it had been historically. So both sides, essentially, stipulated to the, sort of, facts of what the plaintiffs in *Bear Creek* were doing and that in fact -- and that it would be in violation of the EEOC guidance. Here, we don't have the facts of what the offering will be. We don't have the statements that the plaintiffs will make in theory to potential purchasers, you know. The Howey analysis, as Judge O'Connor said in *Broadstreet*, is a very fact specific analysis and you need those facts in order to conduct the analysis.

And I do think that -- I just want to hit a couple of points, Your Honor, unless you still have more questions about *Bear Creek*?

THE COURT: No. Go ahead.

MR. MOORES: All right.

So first of all, my brother here at the bar talked about that there had been sort of a back and forth between Mr. Frye and the SEC. There hadn't been. Actually, Mr. Frye, according to his law review articles, was just merely trolling the SEC when he submitted his no action letter request, which, in fact, said that he was going to be offering securities and he was making a mockery of the process and the SEC did not respond. So there wasn't a back and forth between Mr. Frye and the SEC there.

Also, I think it's important when we think about standing, the supreme court in *Murthy versus Missouri* said that standing is not dispensed in gross and what that means is that there needs to be standing. There needs to be a case in controversy between every plaintiff or, at least, one plaintiff and every defendant, as well for each claim. And I think it's important to look at what the allegations are in the complaint. I think it's on Page 100 -- I'm sorry -- Paragraph 119, Page 33 of their complaint where the plaintiffs say that the SEC is, essentially, not listening to reason, except for two-fifths of the commission. Those two-fifths are -- happen to be Commissioner Uyeda and Commissioner Peirce who they cite continuously throughout their complaint. Those two-fifths now comprise a majority of the commission at the present.

So under the standing doctrine, as again in *Murthy versus Missouri*, the plaintiffs have to establish standing at the point that the complaint was filed and they're the ones who have the burden of establishing standing throughout the entirety of the case. And so standing here, today, Mr. Gottlieb did not mention at all what the case in controversy was, with respect to a majority of the individual defendants, and the Commission is now comprised of four members. And -- and the allegations in the complaint don't actually establish a case in controversy, with respect to the Commission, as presently constituted.

Separately, I wanted to address -- okay. So what the plaintiffs are attempting to do is, essentially, turn the prosecutor into a defendant here. They have a difference of opinion as to how the law should be interpreted and so they feel like they should get or they're entitled to an advisory opinion either from the SEC, but more importantly from this Court, because as they -- at least correctly recognize that the Court is the one that determines what the law is, not the SEC. So in the event that there was actually an enforcement action brought by the SEC against plaintiffs, it would be the Court that would be determining the law and so you do not have standing just because you have an intellectual sort of disagreement with how the SEC is interpreting the law.

I also wanted to address briefly *Alabama versus Coushatta*, this notion of whether or not there should be final agency action in order for there to be a waiver of sovereign immunity. Mr. Gottlieb points to a saying that you don't need final agency action if you're going outside of the general provisions of the APA, which is Section 706. 706(2)(B) talks about whether or not the agency had acted in an unconstitutional manner or in 706(2)(C) talks about whether or not they had exceeded their statutory authority. And so that, essentially, is what I can try to muster up as what plaintiffs are alleging here so that would be under the general provisions of the APA and, specifically, *Alabama-Coushatta* says, "When review is sought not pursuant to any specific authorization in the substantive statute," which, essentially, they're saying the substantive statute is Section 5 of the Securities Act. That doesn't provide any specific authorization at all. It doesn't provide any, sort of, meaningful guidance on how the SEC is in violation of the law, so in that circumstance, only under the general rule provisions of the APA, where the agency action being questioned, and that has to be final agency action.

I also wanted to briefly echo, Your Honor, what --

THE COURT: You need to wrap it up now.

MR. MOORES: Yes, Your Honor.

Just discovery doesn't solve any ripeness issues. If the facts haven't occurred, if the statements haven't happened, then you need to -- then it's not ripe. It's not concrete.

And, lastly, as you pointed out, Your Honor, there is no limitation that the plaintiffs have pointed to for the theory that they have standing, that there is a waiver of sovereign immunity, or that this case is ripe. Essentially, they're saying that if Your Honor had issued, between two third parties a decision, and the plaintiffs didn't like that decision, well, they could come into federal court and challenge that decision. That's essentially what they're doing here. They're saying that the decision by the SEC in *Stoner Cats* and *Impact Theory* is such that they can march in and bring the SEC into court and as you know, Your Honor, there is no standing for a third party to come into this courtroom and say your decision on something, among two other third parties, is incorrect.

And so for those reasons, Your Honor, we respectfully ask that you dismiss this action on the grounds offered in our motion. Thank you.

THE COURT: Well, thank you very much. I appreciate your time and your argument today and will take this matter under advisement.

MR. GOTTLIEB: Thank you, Your Honor.

THE COURT: Court will be adjourned.

MR. MOORES: Thank you, Your Honor.

THE DEPUTY CLERK: All rise.

(Whereupon, this concludes the proceedings.)

CERTIFICATE

I, Sammantha A. Morgan, RPR, CCR, Official Court Reporter for the United States District Court, Eastern District of

Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

/s/Sammantha A. Morgan, RPR, CCR
Sammantha A. Morgan, RPR, CCR
Official Court Reporter