NELSON MULLINS

Digital Assets and the Major Questions Doctrine

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Agenda

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2024 Presidential Election

226 Harris

71,157,025 votes (48.0%)

270 electoral votes to win

✓ Trump 312

74,685,739 votes (50.3%)

MAP VIEWS

Called races

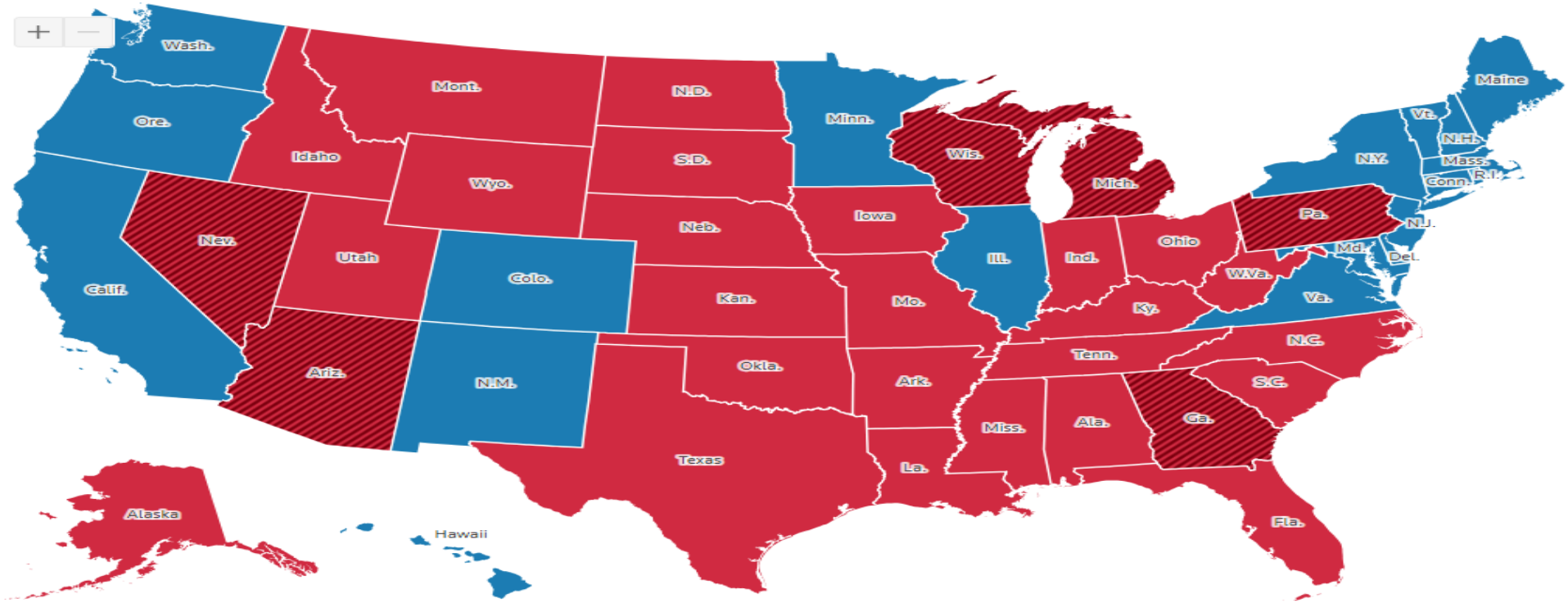
Strength of lead
By how much is a candidate winning?

Vote count status
How many votes are left to count?

REPORTING

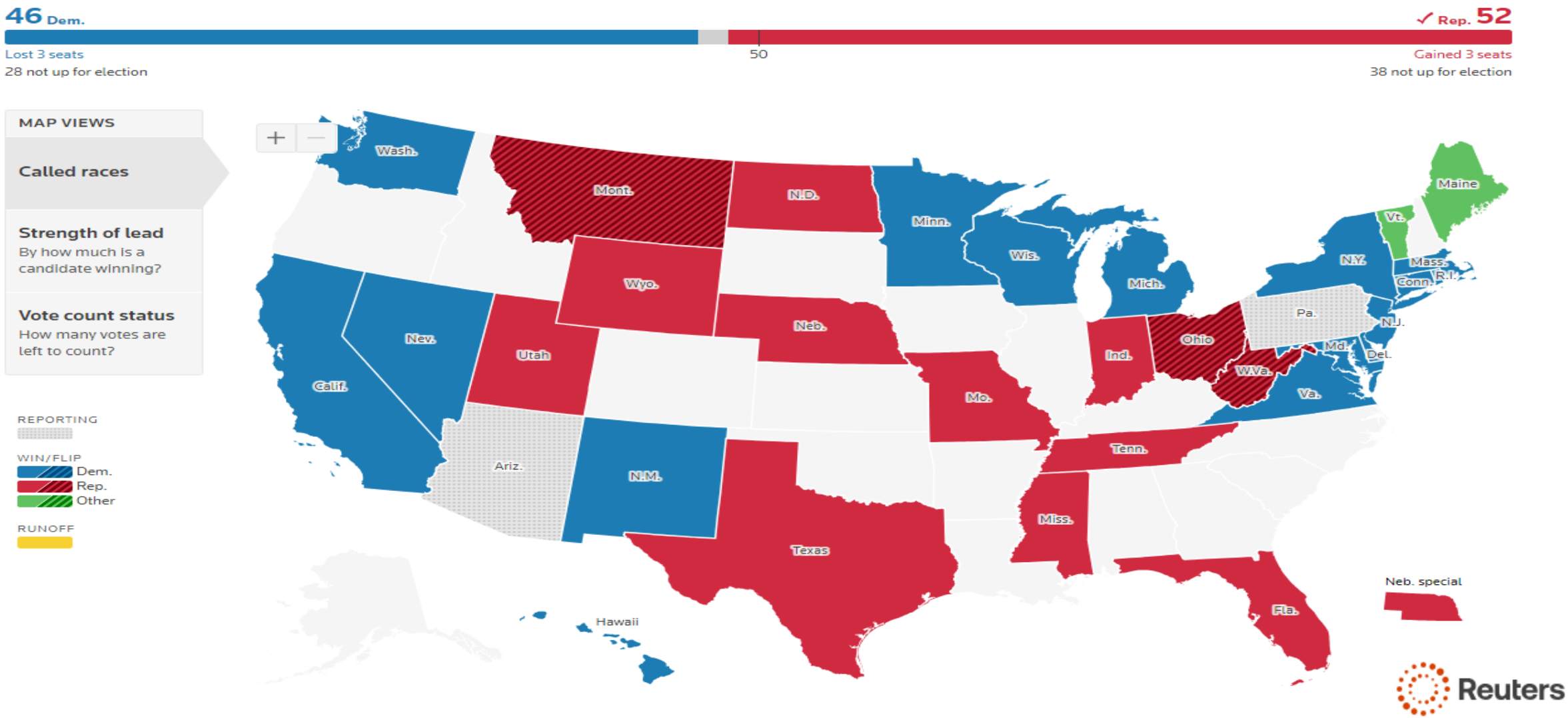
WIN/FLIP
Dem.
Rep.
Other

RUNOFF



Reuters

2024 Senate Election



2024 House of Representatives Election

205 Dem. — Lost 2 seats

218 seats for majority

Rep. **214** — Gained 2 seats

MAP VIEWS

Called races

Strength of lead
By how much is a candidate winning?

Vote count status
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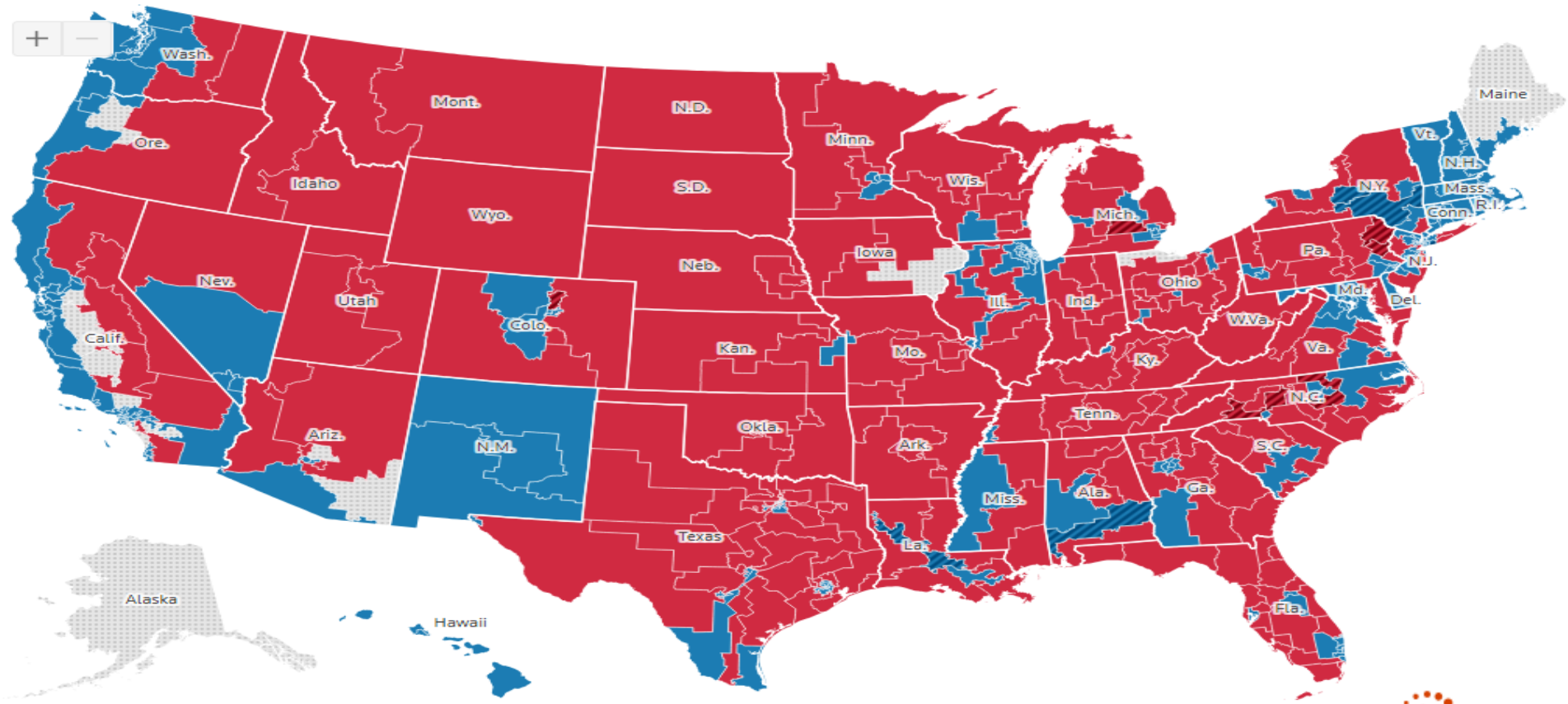
REPORTING

WIN/FLIP
Dem.
Rep.
Other

RUNOFF



Reuters

Major Questions Docrtrine

- Federal courts have increasingly reviewed the actions of regulators in light of past actions by regulators.
- In *Utility Air Regulatory Group v. Environmental Protection Agency* ("UARG"), the U.S. Supreme Court announced that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' . . . we typically greet its announcement with a measure of skepticism." 573 U.S. 302, 324 (2014).
- In *UARG*, the Court held that the Environmental Protection Agency ("EPA") lacked authority to require permitting of stationary sources based solely on the emission of greenhouse gases. *UARG*, 573 U.S. at 333.
- While parts of the decision rested on more traditional tools of statutory interpretation, the Court also noted that it was "reluctant to read into ambiguous statutory text" the "unheralded power" that EPA's interpretation effectively asserted over the "construction and modification of tens of thousands, and the operation of millions, of small sources nationwide." *Id.*
- According to the Court, the fact that EPA had never previously claimed authority over nearly so many sources offered strong evidence that the Clean Air Act did not delegate that authority.
- Since UARG, the Court has applied that doctrine three times to hold agency actions unlawful.
- In each decision issued since August 2021, the Court emphasized what it characterized as a lack of regulatory antecedents for the challenged action.

Major Questions Doctrine

- In *West Virginia v. EPA,* the Court reaffirmed its focus on regulatory novelty from prior cases and centralized that focus within its newly-articulated major questions doctrine. 142 S. Ct. 2587 (2022).

- In dispute in the case was the Clean Power Plan, a 2015 regulation from the EPA issued under Section 111(d) of the Clean Air Act aimed at reducing greenhouse gas emissions from the power sector.

- Section 111(d) authorizes EPA to issue "standards of performance" for existing stationary sources for certain types of pollutants. 42 U.S.C. § 7411(d).

- The statute defines a "standard of performance," in relevant part, as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction." *Id*. § 7411(a)(1).

- In the Clean Power Plan, EPA defined the "best system of emission reduction" for greenhouse gases from the power sector through a combination of three approaches, or "building blocks." *West Virginia,* 142 S. Ct. at 2593.

Major Questions Doctrine

- The first and least contentious of these building blocks involved certain technological improvements at coal-fired power plants.
- The second and third building blocks relied on an approach called "generation shifting," in which power generation shifts from higher- to lower-emitting power sources.
- Specifically, the second building block envisioned that generation would incrementally shift from coal-fired power plants to lower-emitting gas-fired power plants; the third building block envisioned that generation would incrementally shift from those fossil-fuel plants to zero-emitting renewable-energy power sources.
- Having identified these three building blocks as the "best system of emission reduction," EPA then imposed emissions limits for the power sector that could be achieved through these approaches.

Major Questions Doctrine

- In *West Virginia,* the Court held that Section 111(d) does not permit EPA to premise its emissions limits under that provision on the reductions achievable through generation shifting.

- The Court discussed each of those decisions (and several others) to identify a canon of "extraordinary cases" involving "regulatory assertions [that] had a colorable textual basis" but in which "'common sense as to the manner in which Congress would have been likely to delegate' such power to the agency at issue . . . made it very unlikely that Congress had actually done so." *West Virginia*, 142 S. Ct. at 2609.

- Among other common features of those prior decisions, the Court pointed to the "unprecedented" and "unheralded" nature of the challenged regulations as a reason for "reluctance" to read the claimed authority "into ambiguous statutory text." *Id.*

- **The Court labeled this "identifiable body of law" as the "major questions doctrine."** *Id.*

Major Questions Doctrine

- Turning to the Clean Power Plan, the Court explained that "this is a major questions case" in which "EPA claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority." *Id.* at 2610.

- The Court began by emphasizing the Clean Power Plan's unprecedented nature, claiming that "[p]rior to 2015, EPA had always set emissions limits under Section 111" premised on the emission reductions achievable through at-the-source pollution controls and not on generation shifting. *Id.*

- The Court dismissed one counter-example offered by EPA in litigation—a 2005 mercury regulation that set a sector-wide emissions cap rather than mandate controls for individual sources —on the basis that the 2005 rule supposedly "set the cap based on the application of particular controls" that could be installed at individual plants (a characterization the dissent disputed). *Id.*

- The Court also pointed to EPA's longstanding preference for a "technology-based approach" since the Clean Air Act's passage. *Id.* at 2611.

- As *West Virginia* makes clear, regulatory novelty is now embedded as one of the core aspects of the major questions doctrine. For the doctrine to apply, the Court explained, a regulation must be both "unprecedented" and "effect[] a fundamental revision of the statute." *Id.* at 2612.

- While regulatory novelty by itself does not trigger the major questions doctrine or invalidate an agency regulation, it is a key factor that courts will consider when assessing the doctrine's application and the regulation's legality.

Major Questions Doctrine

- In recent years, the Securities and Exchange Commission ("SEC") has attempted to regulate digital assets.*
- Under the Securities Act of 1933 ("Securities Act"), all securities sold to the public must be registered with the SEC. 15 U.S.C. § 77e (declaring it generally unlawful to sell unregistered securities to the public).
- The SEC has alleged that many digital assets are securities subject to that registration requirement.
- This development has caused the FinTech industry to cry foul and is increasingly being echoed by academics and practitioners who posit that the SEC's actions are incompatible with the major questions doctrine. *See* Chris Brummer et al., Regulation by Enforcement, 96 S. CAL. L. REV. 1297 (2024).

* For purposes of this presentation, the authors use the term "digital asset" in the same manner as the SEC to refer to "an asset that is issued and transferred using distributed ledger or blockchain technology." Statement on Digital Asset Securities Issuance and Trading, Division of Corporation Finance, Division of Investment Management, and Division of Trading and Markets, SEC (Nov. 16, 2018), *available at:* https://www.sec.gov/news/public-statement/digital-asset-securites-issuuance-and-trading . As the SEC has noted, digital assets include, but are not limited to, virtual currencies, coins, and tokens. *Id.* A digital asset may in certain instances be deemed a security under the federal securities laws. While not defined in the securities laws, the SEC often refers to digital assets that are securities as a "digital asset securities." *Id.*

What is a Security?

- The definitions of "security" under the Securities Act and the Securities Exchange Act of 1934 are nearly identical and each is broad enough to include the various types of instruments that are used in commercial marketplaces that one might suspect to fall within the ordinary concepts of a security.

- This would include common instruments like stocks, bonds, and notes, as well as the various collective investment pools and common enterprises devised by persons seeking to generate profits from the efforts and investments of others (i.e. investment contracts and instruments commonly known as securities).

- Section 2(a)(1) of the Securities Act defines a "security" as:

  [A]any note, stock, treasury stock, security future, security-based swap, ***bond***, debenture, evidence of indebtedness, . . . transferable share, ***investment contract***, . . . any put, call, straddle, option, or privilege on any security, certificate of deposit, . . . or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

What is a Security?

- What constitutes an investment contract is determined based on the test articulated by the U.S. Supreme Court in *Securities and Exchange Commission v. W. J. Howey Co.,* 328. U.S. 293 (1946).

- Under the *Howey* test, an investment contract is a contract, transaction, or scheme involving (i) an investment of money, (ii) in a common enterprise, (iii) with the expectation that profits will be derived from the efforts of the promoter or a third party.

- The SEC has taken the position that the investment does not have to be in the form of "money," but it can be any "specific consideration in return for a separable financial interest with the characteristics of a security."

- Courts generally have analyzed "common enterprise" as a distinct element of an investment contract.

- There is a split in authority among the federal circuit courts regarding what constitutes a "common enterprise."

- The courts are divided regarding whether horizontal or vertical commonality is required (and, in the latter case, whether the broad or narrow variety is required) to satisfy the *Howey* common enterprise requirement.

What is a Security?

- Under the *Howey* test, profits can be either capital appreciation resulting from the development of the initial investment or a participation in earnings resulting from the use of investors' funds.
- Profits are income or return that investors seek on their investment, not the profits of the scheme in which they invest.
- Profits include, for example, dividends, other periodic payments, or the increased value of the investment.
- The determining factor under this prong of the *Howey* test is that the investor is "attracted solely by the prospects of a return" on his or her investment.
- In determining whether an investor was "attracted or led" by the expectation of profits, courts look at whether the promoter induced prospective investors with proposed or promised profits.

What is a Security?

- Although the term "note" is specifically enumerated in the Securities Acts' definitions of "security," courts have not found all notes to be securities because notes are used in a variety of contexts.

- A note may function as both a commercial vehicle, which is not a security, as well as an investment vehicle, which courts have deemed to be a security.

- In *Marine Bank v. Weaver*, 455 U.S. 551 (1982), the U.S. Supreme Court addressed whether the sale of a $50,000 certificate of deposit, with a 6-year maturity that featured a 7.5% interest rate was a security.

- The note also provided that, if the bank permitted early withdrawal, the depositor would earn interest at the bank's current savings passbook rate on the amount withdrawn, except that no interest would be paid for the three months prior to withdrawal.

- The Court noted that while the definition of "security" in the Securities Exchange Act of 1934 (the "1934 Act") is quite broad, Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.

What is a Security?

- The Court cautioned, however, "[t]he definition of ‘security’ in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the context otherwise requires."

- The Court also noted that a certificate of deposit is not the functional equivalent of the withdrawable capital shares of a savings and loan association held to be securities, nor is it similar to any other long-term debt obligation commonly found to be a security.

- The purchaser of a certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long-term debt obligation assumes the risk of the borrower's insolvency.

- The Court held neither the certificate of deposit nor the agreement in question was a security within the meaning of § 10(b) of the Securities Act.

Stablecoins

- On July 16, 2021, Treasury Secretary Yellen announced the formation of a Presidential Working Group to explore the regulation of stablecoins.

- The announcement noted:

  For the purposes of this statement, "stablecoins" are the digital assets themselves. A "stablecoin arrangement" includes the stablecoin as well as infrastructure and entities involved in developing, offering, trading, administering or redeeming the stablecoin, including, but not limited to, issuers, custodians, auditors, market makers, liquidity providers, managers, wallet providers, and governance structures.

- ***Depending on its design and other factors, a stablecoin may constitute a security, commodity, or derivative subject to the U.S. federal securities, commodity, and/or derivatives laws.***

- If so, the federal securities laws, and/or the Commodity Exchange Act ("CEA"), would govern the stablecoin itself, transactions in, and/or participants involved in the stablecoin arrangement.

- Whether a stablecoin is a security, commodity, or derivative will depend on the relevant facts and circumstances.

Exchanges

- Section 3(a)(1) of the Exchange Act defines an "exchange" as "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange."

- Exchange Act Rule 3b-16(a) interprets the definition to mean any organization, association, or group of persons that: (1) ***brings together the orders of multiple buyers and sellers*** and (2) uses established, nondiscretionary methods (***whether by providing a trading facility*** or by setting rules) ***under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade***.

- Absent an exemption, an exchange must register as a national securities exchange pursuant to section 6 and section 19(a) of the Exchange Act.

- If a blockchain technology platform brings together multiple buyers and sellers of digital assets that are deemed securities, the platform could be required to register as a securities exchange unless it falls within an exclusion from registration.

Alternative Trading Systems

- In 1998, the SEC adopted Regulation ATS, which allows an ATS to choose whether to register as a national securities exchange or to register as a broker-dealer and comply with additional requirements of Regulation ATS.

- An "alternative trading system" means any organization, association, person, group of persons, or system: (1) that constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of Rule 3b-16 under the Exchange Act, and (2) that does not set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or discipline subscribers other than by exclusion from trading.

- A blockchain technology platform may be required by the SEC to register as an ATS if it maintains a marketplace or facilities for bringing together purchasers and sellers of digital assets that are deemed securities, and it does not set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such platform.

- If the platform is not required to register as an ATS, the operator of the platform may be required to register as a broker-dealer.

Broker-Dealers

- Section 15 of the Exchange Act requires registration with the SEC of all broker-dealers using interstate commerce or the facilities of any national securities exchange to effect transactions in securities (other than exempted securities and certain short-term debt instruments).
- Section 3(a)(4)(A) of the Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others."
- The Exchange Act and the rules thereunder do not define these terms.
- The courts and the SEC have taken an expansive view of the scope of these terms.
- The SEC and the courts apply a "facts and circumstances" analysis in evaluating whether a person has acted as a broker, with no single element being dispositive.
- Depending on the circumstances, the operator of a blockchain technology platform may be deemed a broker-dealer if the operator of the platform is deemed to be engaged in the business of effecting transactions in securities for the account of others.

The SEC Meets the Major Questions Doctrine

- Investment contracts, like stocks and bonds, are one of the various categories of securities. *See* 15 U.S.C. §§ 77b(a)(1), 78c(a)(10) (defining "investment contract" as one category of security under the statutes).

- The Supreme Court has repeatedly maintained that whether an asset is an investment contract subject to securities laws is determined using the *Howey* test to determine whether a "scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." 328 U.S. 293, 301 (1946).

- Rather than issuing proposed rules that would address the regulation of digital assets that are securities, the SEC has issued policy statements and other guidance on the subject.

- The SEC has also brought enforcement actions against the issuers of digital assets the SEC deems securities that were offered and sold without a registration under the Securities Act or reliance on a safe harbor from registration.

- Frustrated with the "case-by-case" nature of the SEC's strategy, critics have claimed that the agency's approach is "problematic," "has created arbitrary and destructive results," and that the SEC's authority over crypto assets violates the ***major questions doctrine***.

The SEC Meets the Major Questions Doctrine

- Two defendants in an SEC enforcement action claimed that "[i]t is hard to fathom a more archetypal violation of the [major questions doctrine] than the SEC's assertion of authority over digital assets." Defendants Motion to Dismiss, *SEC v. Wahi*, No. 2:22-CV-01009-TL (W.D. Wash. Feb. 6, 2023), ECF No. 33.

- In that suit, in an amicus brief filed by Coinbase, one of the largest digital asset trading platforms, claimed that "[e]ven if the [SEC] could demonstrate some ambiguity in the statute and put forward a passable interpretation, that interpretation still would have to be rejected under the [major questions doctrine].“ Brief of Amicus Curiae Coinbase, Inc.

- Coinbase told a court the SEC's lawsuit against it should be dismissed pursuant to the major questions doctrine "in deference to Congress's prerogative to decide how to establish and allocate authority over the digital asset arena." Memorandum of Law in Support of Coinbase's Motion for Judgment on the Pleadings at 9, *SEC v. Coinbase, Inc.,* No. 1:23-CV-04738-KPF (S.D.N.Y. Aug. 4, 2023), ECF No. 36.

The SEC Meets the Major Questions Doctrine

- The rise of crypto enforcement means the Supreme Court may soon have to confront these questions.

- The SEC enforcement actions are moving through the legal system and could reach the Court, including those involving issuers digital asset securities and the nation's largest digital asset trading platforms *See, e.g., SEC v. Coinbase,* No. 1:23-CV-04738 (S.D.N.Y. Aug. 4, 2023); *SEC v. Binance Holdings Ltd.,* No. 23-CV-01599 (D.D.C. June 5, 2023).

- In response to the agency's allegation that the defendants sold or facilitated the sale of digital assets that are securities, they have responded that the SEC's complaints should be dismissed in part thanks to the major questions doctrine.

- Reply in Support of Defendants' Motion to Dismiss the Amended Complaint at 6, *Terraform Labs,* No. 1:23-CV-01346 (S.D.N.Y. May 19, 2023), ECF No. 37 (stating "This is a stronger record for application of the major questions doctrine, and thus invalidating the SEC's position, than presented in West Virginia."); Answer to Plaintiff's Complaint at 6, Coinbase, No. 1:23-CV-04738 (S.D.N.Y. June 28, 2023), ECF No. 22 (arguing "Even if the SEC's construction were colorable, the major questions doctrine would require its rejection in deference to Congress's prerogative to choose for itself how to regulate `a significant portion of the American economy.”); Defendants Memorandum of Law in Support of Their Motion to Dismiss at 31, *Binance Holdings Ltd*., No. 23-CV-01599 (S.D.N.Y. Sept 21, 2023), ECF No. 117-1 (stating "Even if the SEC plausibly alleged that transactions involving the Digital Assets were investment contracts (which they have not), the major questions doctrine would require dismissal.").

SEC v. Coinbase

- The SEC brought an enforcement action against Coinbase, Inc. ("Coinbase"), alleging the company intermediated transactions in digital asset securities on its trading platform and through related services in violation of the federal securities laws.
- Coinbase provides a platform and other services that allow customers to transact in hundreds (and in one instance, thousands) of different digital assets.
- Coinbase offers these services without registering with the SEC as a securities exchange, broker, or clearing agency.
- Coinbase believes the transactions executed and facilitated through its platform and related services do not qualify as "securities," and thus fall outside the scope of the SEC's delegated authority.
- The SEC argues that at least some of the transactions on Coinbase's platform and through related services constitute "investment contracts."
- While it has evolved over the years, the major questions doctrine proceeds from the premise that Congress does not delegate extraordinary powers that transform an agency's authority without speaking clearly.

SEC v. Coinbase

- The court noted, the major questions doctrine requires that an agency point to "clear congressional authorization" in the "extraordinary" case where it claims the "power to regulate a significant portion of the American economy" that has "vast economic and political significance." *Id.*

- Citing *West Virginia*, the court noted the major questions doctrine is based on "both separation of powers principles and a practical understanding of legislative intent." *Id.*

- The court recognized the major questions doctrine is premised on the notion that "one branch of government" should not "arrogat[e] to itself power belonging to another," *Biden v. Nebrask*a, 143 S. Ct. 2375, 2373 (2023), and the "presum[ption] that Congress intends to make major policy decisions itself," *West Virginia*, 597 U.S. at 723.

- **The court noted the doctrine is reserved for the most "extraordinary cases," and is therefore rarely invoked.** *Id.*

- The court recognized that in the nearly twenty-five years since its recognition in *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 159 (2000), the doctrine has rarely been successfully invoked. *Id.*

SEC v. Coinbase

- With this standard in mind, the court found that the instant enforcement action did not implicate the major questions doctrine.

- The court noted, while certainly sizable and important, the cryptocurrency industry "falls far short of being a 'portion of the American economy' bearing 'vast economic and political significance.'" *Id.*

- The court stated the FinTech industry cannot compare with those other industries the Supreme Court has found to trigger the major questions doctrine. *Id.*

- The court noted, "the securities industries over which Congress has expressly given the SEC enforcement authority are even broader than the markets for cryptocurrencies and implicate larger portions of the American economy." *Id.*

- Perhaps more importantly, the court recognized SEC is asserting neither a "transformative expansion in its regulatory authority," nor a "highly consequential power beyond what Congress could reasonably be understood to have granted" *Id.*

SEC v. Coinbase

- The court recognized, "in filing this action, the SEC is exercising its Congressionally bestowed enforcement authority to regulate 'virtually any instrument that might be sold as an investment ... 'in whatever form they are made and by whatever name they are called,' including '[n]ovel, uncommon, or irregular devices' like the [digital assets] at issue here." *Id.*

- The court noted the "very concept of enforcement actions evidences the SEC's ability to develop the law by accretion." *Id.*

- The court recognized the "SEC has a long history of proceeding through such actions to regulate emerging technologies and associated financial instruments within the ambit of its authority as defined by cases like Howey — a test that has existed for nearly eight decades." *Id.*

- The trial court noted "[u]sing enforcement actions to address crypto-assets is simply the latest chapter in a long history of giving meaning to the securities laws through iterative application to new situations." *Id.*

SEC v. Coinbase

- The court noted, "a finding that transactions involving certain crypto-assets qualify as investment contracts would merely result in those sales having to comply with longstanding securities laws." *Id.*

- **Accordingly, the Court declined "to permit the major questions doctrine to displace or otherwise limit SEC enforcement actions under Howey." *Id.***

- The court concluded Congressional consideration of new legislation implicating cryptocurrency, on its own, alter the SEC's mandate to enforce existing law, notwithstanding Defendants' arguments to the contrary. *Id.*

- **The court concluded by noting, "[u]ntil the law changes, the SEC must enforce, and the judiciary must interpret, the law as it is." *Id.***

SEC v. Binance

- The SEC brought an enforcement action against defendants Binance Holdings Limited, its founder Changpeng Zhao, and two related U.S. entities, BAM Trading Services, Inc. and BAM Management US Holdings, Inc., alleging violations of federal securities laws.

- The SEC alleged that defendants violated the Securities Act and the Exchange Act by offering and selling digital assets and related programs without a registration statement; operating crypto currency trading platforms without registering as an exchange, as a broker-dealer or broker, or as a clearing agency; and making false statements to investors and engaging in acts and practices that operated as fraud upon purchasers.

- The Defendants moved to dismiss the complaint and raised the major questions doctrine as a basis for the court to do so.

SEC v. Binance

- The court noted the major questions doctrine applies to "extraordinary cases . . . in which the history and breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *Id.*

- **This court concluded this was not such a case. *Id.***

- The court referenced the Supreme Court's precedent that when an agency claims the "power to regulate a significant portion of the American economy" that has "vast economic and political significance," the agency must identify "clear congressional authorization" for that power. *Id.*

- According to defendants, the doctrine was applicable because the SEC's lawsuit was a "power grab." *Id.*

- While this case and the other similar actions involving the crypto currency industry discussed above represent an effort to regulate a new variety of economic activity, and a ruling in this case – while not the first – could have implications for the industry as a whole, defendants have not begun to show that the effort would affect the U.S. economy as a whole. *Id.*

SEC v. Binance

- The court stated that it had not been given grounds to find that the industry, while important, has the broad reach that has motivated courts to apply the doctrine to other industries. *Id.*

- The court noted, a ruling that certain of defendants' sales of crypto assets are investment contracts, and therefore securities, would not have the economic reach that other regulatory actions found to be subject to the doctrine would have had. *Id.*

- The court rejected the argument the SEC was engaging in a "power grab". *Id.*

- The court recognized the SEC's enforcement action against Binance does not reflect "enormous and transformative expansion in [the agency's] regulatory authority without clear congressional authorization." *Id.*

- The court concluded, the SEC asks the Court to rule whether defendants' crypto assets are "securities" within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934, an application of enforcement powers that the agency has exercised since at least 1946, when the Supreme Court held in Howey that the contracts at issue in that case "under the circumstances . . . together constitute[d] an 'investment contract' within the meaning of" the federal securities laws. *Id.*

SEC v. Binance

- The court noted, such enforcement was fully contemplated by the Supreme Court. *Id.*
- The court recognized a ruling that either BNB, BUSD, BNB Vault, or Simple Earn is an investment contract under the securities laws could have important implications for the broader crypto asset industry and how issuers or platforms market digital assets. *Id.*
- But the SEC's lawsuit seeking that ruling is an unremarkable exercise of the agency's enforcement authority. [T]he SEC's role is not to exercise vast economic power over the securities markets, but simply to assure that they provide adequate disclosure to investors. *Id.*
- The court stated the SEC's decision to require truthful marketing of certain crypto-assets based on its determination that certain of such assets are securities **hardly amounts to a "transformative expansion in its regulatory authority."** *Id.*
- The court agreed with other others that have concluded the crypto asset industry "falls far short of being a portion of the American economy bearing vast economic and political significance." *Id. (citing Terraform I,* 684 F. Supp. 3d at 189 (quotation marks omitted); *see also SEC v. Coinbase, Inc.,* 2024 WL 1304037, at *24 (S.D.N.Y. Mar. 27, 2024) at *14–*15).
- **This Court agreed and found that the major question doctrine does not apply. *Id.***

Presenter Biographies

RICHARD B. LEVIN

Richard is chair of the FinTech and Regulation Practice and was one of the first lawyers to focus on the regulation of blockchain and digital assets. He is considered a thought leader in the FinTech space. Richard brings his experience as a senior legal and compliance officer on Wall Street and in London to bear in advising clients on corporate, FinTech, securities, and regulatory issues. A problem-solver by nature, he has been advising FinTech clients on legal and regulatory issues since the start of electronic trading in the late 1990s. His practice focuses on helping financial services and technology clients identify and address regulatory issues as they build their businesses.

Richard's practice focuses on the representation of early stage and publicly traded companies in the FinTech space, including investment banks, broker-dealers, investment advisers, peer-to-peer lending platforms, digital currency trading platforms, alternative trading systems (ATSs), exchanges, and custodians. He represents these firms before the U.. Securities and Exchange Commission (SEC), the U.S. Commodity Futures Trading Commission (CFTC), the Financial Industry Regulatory Authority (FINRA), the U.S. Department of the Treasury, Office of the Comptroller of the Currency (OCC), state regulators, and Congress. Richard has represented clients before regulators in Australia, Canada, France, Germany, Hong Kong, Ireland, Japan, Singapore, South Korea, and the United Kingdom. His current and past clients include leading national financial institutions, multinational financial services holding companies, leading firms in the FinTech space, and institutions engaging in global investment banking, investment management, securities, and other financial services with institutional clients.

Richard has been identified by Chambers and Partners as one of the leading lawyers in the Blockchain and Cryptocurrencies category since the inception of the category. He has been recognized by Chambers for his knowledge on regulatory matters, great relationships with regulators, for helping clients push the boundaries of the FinTech sector, and for his advice on matters such as broker-dealer licensing and alternative trading systems. Richard is routinely quoted by leading publications including Bloomberg, the New York Times, Reuters, and the Wall Street Journal and is a frequent speaker at conferences around the world on the regulation of FinTech, blockchain, and digital assets.

Presenter Biographies

Bobby Wenner

Bobby counsels financial services and technology firms on financial services regulatory and corporate matters. He focuses on the representation of financial technology companies working with blockchain, tokenization, digital assets, and cryptocurrencies, including broker-dealers, alternative trading systems (ATS), digital asset and currency trading platforms, digital asset issuers and custodians, securities exchanges, and derivatives trading platforms including swap execution facilities.

Bobby represents these clients before Congress, the Securities Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA), the Commodity Futures Trading Commission (CFTC), and state financial services regulators. He also represents banks, money services businesses, and payment processors before the federal banking regulators, including the Office of the Comptroller of the Currency, the Financial Crimes Enforcement Network (FinCEN), and state banking regulators.

Before joining Nelson Mullins, Bobby served as the Chief Legal Officer of a FINRA-member broker-dealer and ATS designed for trading digital asset securities, as well as the Associate General Counsel of the holding company, and the company's digital asset trading and issuance ecosystem. In these roles, Bobby led various state and federal financial services licensure applications, interfaced with regulators, provided counsel on a wide range of securities, commodities, and derivatives product development efforts, and helped develop a regulatory compliant business model and launch strategy. Prior to his positions in-house, Bobby was an associate in the FinTech and Regulation practice of a national law firm.

Presenter Biographies

Daniel Newman

Dan began his career with the United States Securities and Exchange Commission's Division of Enforcement where he was responsible for investigating and prosecuting violations of the federal securities laws. He litigates complex commercial and securities matters in federal and state courts and before various arbitration forums. He also regularly represents individuals and entities in Securities and Exchange Commission, Department of Justice, Commodities Futures Trading Commission, FINRA and state securities regulator investigations and litigation arising from such investigations. Other representative business and securities-related litigation includes commercial torts, contracts, non-compete agreements, shareholder derivative actions, class actions, and common law and statutory securities fraud actions. Dan has been recognized by Chambers USA in Band 1 America's Leading Lawyers for Business, Litigation: Securities – Florida (2022–2024). Dan is a frequent speaker on securities litigation and regulatory issues. He will be serving as an Adjunct Professor this Spring at the University of Miami teaching a course on SEC investigations and has served as an Adjunct Professor teaching litigation skills at Nova Southeastern University Shepard Broad College of Law.

Contact Details

To learn more about our FinTech and Regulation practice, or to contact a member of our team, click here or visit our website at nelsonmullins.com.

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