

IN THE SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: September 7, 2021 1:27 PM FILING ID: 290FBCBF39F8F CASE NUMBER: 2020SC595 ▲ COURT USE ONLY ▲
Court of Appeals Case No. 2018CA1769, Opinion by Jones, J., Welling and Hawthorne, JJ., concurring Denver District Court Case No. 2009CV7181, Martinez, J.	
Petitioner: TUNG CHAN, Securities Commissioner for the State of Colorado, v. Respondents: HEI RESOURCES, INC. f/k/a HEARTLAND ENERGY, INC., CHARLES REED CAGLE, BRANDON DAVIS, HEARTLAND ENERGY DEVELOPMENT CORPORATION, JOHN SCHIFFNER, and JAMES POLLAK	Case No. 2020SC595
Attorneys for Respondents Heartland Energy Development Corporation and Brandon Davis: Shain A. Khoshbin, <i>pro hac vice</i> S. Wallace Dunwoody, <i>pro hac vice</i> Chase A. Cobern, <i>pro hac vice</i> MUNCK WILSON MANDALA LLP 12770 Coit Road, Suite 600 Dallas, Texas 75251 Telephone: (972) 628-3600 Facsimile: (972) 628-3616 Email: skhoshbin@munckwilson.com Email: wdunwoody@munckwilson.com Email: ccobern@munckwilson.com Marcy G. Glenn, #12018 HOLLAND & HART, LLP 555 17th Street, Suite 3200 Denver, Colorado 80202 Telephone: (303) 295-8000 Facsimile: (303) 295-8261 Email: mglenn@hollandhart.com	
ANSWER BRIEF OF RESPONDENTS HEARTLAND ENERGY DEVELOPMENT CORPORATION AND BRANDON DAVIS	

CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g): It contains 9,495 words, exclusive of the caption, table of contents, table of authorities, certifications, and signature block.

The brief complies with the standard of review requirements set forth in C.A.R. 28(b): In response to each issue raised, it contains under a separate heading a statement that Appellee agrees with the relevant portions of Appellant’s statements concerning the relevant standard of appellate review and preservation for appeal.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

September 7, 2021

/s/ Marcy G. Glenn
Signature of attorney or party

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GLOSSARY

COA	Colorado Court of Appeals
CSA	Colorado Securities Act
GP	general partnership
HEDC	Defendant/Respondent Heartland Energy Development Corporation
<i>HEI-I</i>	<i>Rome v. HEI Res., Inc.</i> , 411 P.3d 851 (Colo. App. 2014)
<i>HEI-II</i>	<i>Chan v. HEI Res., Inc.</i> , 2020 COA 87
LO	Los Ojuelos Joint Venture
LO9	Los Ojuelos Joint Venture 9/9A
NASAA	North American Securities Administrators Association
NASAABr.	NASAA’s Amicus Brief
OB	Petitioner’s Opening Brief
O&G	oil and gas
Petitioner or Commissioner	Plaintiff/Petitioner Colorado Securities Commissioner
Respondents	Defendants/Respondents Heartland Energy Development Corporation and Brandon Davis
<i>Williamson 1</i>	The first <i>Williamson</i> exception
<i>Williamson 2</i>	The second <i>Williamson</i> exception
<i>Williamson 3</i>	The third <i>Williamson</i> exception

Note

All quoted emphasis is added unless otherwise indicated.

INTRODUCTION

Prevailing federal law follows the legal framework set forth in *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981), to determine whether a general partnership (“GP”) interest is an “investment contract” and thus a security. The Colorado Securities Act (“CSA”) mandates coordination with federal law, so long as federal law is consistent with the CSA’s provisions and purposes. Here, the CSA’s definition of “security” is identical to that of the federal securities acts; and aligning Colorado with federal law effectuates the purposes of the CSA. Accordingly, in *Chan v. HEI Resources, Inc.*, 2020 COA 87 (“*HEI-IP*”), the court of appeals (“COA”) adopted the *Williamson* general rule and correctly interpreted the exceptions to that rule. This Court should affirm.

STATEMENT OF THE CASE

The Court agreed to decide two subparts of a purely legal question: whether *HEI-II* pronounced the correct standard for determining whether a GP interest is an investment contract. The COA did not decide the distinct question of whether the GP interests in this case are in fact securities; and the petition did not present that question. The Court should not apply whatever standard it adopts to the facts of this case in the first instance. *See infra* pp13-14. Nevertheless, for context and to briefly address certain misstatements by Petitioner, Respondents Heartland Energy

Development Corporation (“HEDC”) and Brandon Davis (together, “Respondents”) provide the following factual and procedural background:

A. LO9 was a bona fide GP.

Los Ojuelos Joint Venture 9/9A (“LO9”) is a Texas GP involving an oil and gas (“O&G”) well.¹ Under LO9’s structure, partners received lucrative tax benefits designed to lessen U.S. dependence on foreign oil. 2013EX9a,pp1,9-10,28-41,43; 3/13/18TR,pp157:1-158:2; 7/24/13TR,p126:15-20; 7/30/13TR,p14:19-23; 9/18/17TR,p125:14-16.²

In accordance with Texas law, the LO9 partners delegated administration of day-to-day operations to HEDC as managing venturer. 2013EX9a,pp1,13; R9646¶17; *see* TEX. BUS. ORGS. CODE §154.101 (permitting partnership agreements to establish “one or more partners that have certain express relative rights, powers, and duties”). Such “delegation of rights and duties” to a managing partner is a common feature of GPs and, “standing alone[,] does not give rise to the

¹ It is undisputed that all of the Los Ojuelos Joint Ventures (“LO”) are organized as Texas GPs.

² Respondents cite the record as “R[page/paragraph]”; testimony as “[MM/DD/YY]TR,pp[page]:[line]”; and trial exhibits as “[YYYY]EX[exhibit],pp[page]”.

sort of dependence on others which underlies the third prong of the [*SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946)] test.” *Williamson*, 645 F.2d at 423.

LO partners received documents making clear their joint and several liability for the GP’s obligations, *e.g.*, 2013EX9a, pp1,54; their access to its books and records, *id.* p61; and their substantial rights to control the partnership, including to call meetings, access extensive information, conduct additional operations, remove the managing venturer, amend the joint venture agreement, and exercise other management control. *E.g.*, 2013EX9a, pp6,9,19,43,54-62,65; 7/24/13TR, pp104:24-106:2,107:6-23; 7/25/13TR, pp208:7-21,211:16-212:11; 7/26/13TR, pp43:12-44:5,104:1-7,143:4-9; 7/29/13TR, p23:1-24; 9/18/17TR, p87:4-11; R9646-47, ¶¶20-22; *see also* TEX. BUS. ORGS. CODE §152.209(a) (providing for decisions “by a majority-in-interest of the partners”).

Set apart and conspicuously placed at the bottom of the Confidential Information Memorandum’s (“CIM”) cover page was the statement:

Participants in this Joint Venture are provided extensive and significant management powers. Participants are expected to exercise such powers and are prohibited from relying on the Managing Venturer for the success or profitability of the Venture.

(2013EX9a,p1) (emphasis in original). On the next page, the CIM stated:

THE MANAGING VENTURER BELIEVES THE JOINT VENTURE INTERESTS ARE NOT SECURITIES....

NEITHER THIS MEMORANDUM NOR OTHER INFORMATION DESCRIBING THE JOINT VENTURE UNITS HAVE BEEN FILED WITH, SUBMITTED TO, APPROVED OR REVIEWED BY THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION NOR ANY STATE SECURITIES COMMISSION OR SIMILAR STATE REGULATORY AGENCY.

2013EX9a,p.2 (emphasis in original).

B. The partners were educated and experienced.

As the trial court initially found and later reconfirmed, “HEI [and] HEDC actively sought out individuals that were wealthy, educated and sophisticated[,]” and those who ultimately became partners were “educated (many with advanced degrees), wealthy (most were accredited investors), and experienced in business affairs (many holding executive management positions or owning their own businesses).” R8906¶28; R9649¶34. Many were bankers, physicians, engineers, business owners, CEOs, and accountants. 2013EX.HEDC021,pp31-32,97-114; 2013EX111/LO9; 7/24/13TR,pp94:4-96:12; 7/30/13TR,pp9:11-11:21. After a seven-day bench trial, and again after remand pursuant to *Rome v. HEI Resources, Inc.*, 411 P.3d 851 (Colo. App. 2014) (“*HEI-P*”), the trial court found that LO9 general partners possessed “sufficient business experience to exercise the

significant partnership powers granted to them under the joint venture agreements.” R8906¶28; R9649¶34.

All three LO9 partners who testified at trial, *see* R14323¶17, contradicted Petitioner’s depiction of partners as “unsophisticated” with “no experience in or knowledge of [O&G] well operations,” OB4,6:

LO9 Partner	Experience	Annual Income	Liquid Net Worth
William Hinkle ³	MBA; former accountant; 3 prior O&G GPs	\$240,000	\$1,500,000
Thomas Price ⁴	MBA; former investment banker; 6 prior O&G GPs	\$500,000	\$7,000,000
Doyle Waggle ⁵	Ph.D.; former company president; 3 prior O&G GPs	\$500,000	\$800,000

³ *See* 2013EX.HEDC021,pp36,45,57,81,105; 2013EX43; 9/21/17TR,pp156:5-157:9,159:4-6.

⁴ *See* R9655-56¶¶37(g)(ii)-(iii); 2013EX.HEDC021,pp49,61,69,75,83,94,109; 2013EX36; 7/24/13TR,pp71:6-72:12,80:22-81:15.

⁵ *See* 2017EX,pp3390-94; 2013EX.HEDC021,pp40,51,70,85,113; 9/18/17TR,pp66:11-67:10,78:21-79:6.

Twenty-two of the 90 LO9 partners had participated in prior LO partnerships.⁶ Others had additional O&G investment experience. *See, e.g.,* 7/30/13TR,p12:20-23; 7/24/13TR,pp110:11-111:14.⁷

C. The partners understood and exercised their rights of control.

The LO9 partners affirmed that they received and understood the partnership documents outlining their rights and responsibilities. *See, e.g.,* 2013EX111/LO9,pp1,4-5. Among other things, they swore that: (a) they understood their GP interests “*are not intended or considered by the Managing Venturer to be ‘securities’*”; (b) they were “capable of intelligently exercising [their] management powers”; and (c) other “managers...are readily available” and “competent to perform [the Managing Venturer]’s functions.” 2013EX9a,p72. They affirmed their understanding that LO9’s business was “SPECULATIVE AND INVOLVES A HIGH DEGREE OF RISK,” 2013EX9a,p1 (capitalization in

⁶ *See* 2013EX.HEDC021 (showing overlap between LO9 partners (pp97-114) and LO1-7 partners (pp33-96)).

⁷ Petitioner repeatedly fails to acknowledge differences between the LO ventures, even though HEDC was involved in only LO9. For example, contrary to Petitioner’s description of Joe Kinlaw as “hidden,” OB5, HEDC informed LO9 partners of Kinlaw’s role as a principal consultant. 2013EX9a,p19,22; 2017EX,p1664. And the partners whom Petitioner references, OB4, were not LO9 partners; but they too were educated and experienced, including in O&G ventures.

original), and that they were financially able to bear the risk of losing their entire contributions. 2013EX9a,pp1,14,74,78; 9/18/17TR,p116:1-21.

Petitioner's focus on two anomalous instances of non-LO9 partners not obtaining requested information hardly evinces "an informational disadvantage" due to the LOs' structure as GPs. OB6-7. To the contrary, partners had around-the-clock access to updated reports and data on the LO websites, and had numerous conference calls discussing well data, operations status, engineering reports, and impending decisions on whether to proceed with drilling, moving holes, fracking, etc. 2013EX9a,pp6,9,54-62; 7/24/13TR,pp104:24-106:2,107:6-23; 7/25/13TR,pp208:7-21,211:16-212:11; 7/26/13TR,pp43:12-44:5,104:1-7,143:4-9; 7/29/13TR,p23:1-24; 9/18/17TR,p87:4-11. Petitioner's claim that the budgeted cost estimates were not distributed to partners, OB6, ignores that the partners were informed of their share of LO9's actual costs should they vote to complete a well under the turnkey contract. 7/23/13TR236:6-9; 7/26/13TR58:11-16; 2013EX2.A1,p1.

Petitioner also ignores the partners' rights of control—powers that they regularly exercised. For example, the LO9 partners exchanged communications and voted to complete a well, move a drilling location, conduct remedial operations, and admit new partners—decisions that could independently determine

a well's profitability and the venture's success or failure. *See, e.g.*, 2013EX.HEDC021, pp160-74. These operations occurred in phases, and partners had rights of control at each phase. *See SEC v. Arcturus*, 928 F.3d 400, 414, 424 (5th Cir. 2019) (explaining phased process). The record refutes Petitioner's assertions that the partners "only contributed money" and "viewed their role as passive," while HEDC "retained all substantial powers." OB5-9.

D. After a bench trial, the trial court dismissed the case.

Nearly a decade ago, after trial, the trial court ruled that the interests in the LOs are not securities. R8927-33. "[F]ollowing [this Court's] holding in *Cagle* [*v. Mathers Family Trust*, 295 P.3d 460, 467 (Colo. 2013)], that provisions of the CSA be coordinated with federal securities law," the trial court applied the framework set forth in *Williamson*, "the preeminent case on federal securities law." R8927,8932. In so doing, the court applied *Williamson*'s general rule (sometimes called a "presumption") concerning GP interests; recognized that "the overwhelming federal authority addressing the knowledge and experience requirement under the second *Williamson* factor" ("*Williamson 2*") holds that partners "must have experience and knowledge in business affairs *generally*" and are "not required to have industry specific knowledge"; and found that "the testimony of the witnesses and exhibits ... confirms that the joint venturers were

unquestionably knowledgeable and experienced in business affairs, sufficient to carry out their roles as partners[.]” R8929-30. The court separately found that “there are no genuine issues of material fact by which [Petitioner] could prove *Williamson* exceptions 1 or 3,” R3276; HEI-I, ¶13; that the GP interests were not securities under the first *Williamson* exception (“*Williamson* 1”) as a matter of law, R3268; and that Petitioner had failed to prove “any other catch-all economic realities” amounting to “remaining available exceptions” to the “presumption.” R3276. The court concluded that Petitioner did not sufficiently show the existence of a security, R8932-33, and dismissed the case.

In its first decision, *HEI-I*, the COA reversed. In so doing, among other things, it “reject[ed]... the strong presumption that [GP] interests are not securities” and held that *Williamson* 2 turns on whether partners lacked “substantial collective experience in the *specific business of the venture*” rather than experience “in business affairs” generally. *HEI-I*, ¶¶61,58.⁸ Applying this new standard on

⁸ The COA remanded only for reconsideration of “the second and third *Williamson* factors and any other economic realities,” but not “a redetermination of the first *Williamson* factor” because Petitioner did not appeal it. *HEI-I*, ¶¶50-51; see *HEI-I*, ¶13 (“as a matter of law, the interests are not securities under the first *Williamson* factor”).

remand, the trial court reached the opposite conclusion on the exact same record, deeming all the LO interests securities.

In *HEI-II*, the COA recognized its errors in *HEI-I*, and upheld *Williamson*'s general rule and prevailing interpretations of the *Williamson* exceptions. *HEI-II* ¶¶18,33,44,51. Because the COA remanded for redetermination of the securities question under *Williamson* “in the first instance,” it did not address additional arguments raised by Respondents, including that the trial court’s securities finding would be erroneous even if *HEI-II* had reaffirmed rather than rejected *HEI-I*. *Id.* ¶¶61,14.

SUMMARY OF ARGUMENT

I. The *Williamson* framework comprises both a general rule and exceptions for adjudicating whether GP interests are “investment contracts” and thus securities. *Williamson*'s general rule that GP interests are *not* securities is based on the economic realities of general partners’ liabilities, rights, and responsibilities. *Williamson*'s three exceptions permit the general rule to be overcome by showing that general partners were so dependent on the GP’s managing venturer that they were unable to meaningfully exercise their rights. As the COA has recognized—most recently in *HEI-II*—*Williamson* states the prevailing federal legal standard concerning GP interests. And for good reason: By respecting general partners’

contractual arrangements and legal obligations, while still providing for securities regulation when, in fact, those partners so depend on the managing partner that they cannot exercise their rights of control, *Williamson* effectuates the policy objectives of contract, partnership, and securities law.

HEI-II correctly held that Colorado law requires adoption of *Williamson*'s general rule that GP interests are not securities. The CSA provides that it "shall be coordinated" with federal securities law. This Court has held that Colorado courts must follow federal law, including caselaw, regarding the federal acts, unless the federal law contravenes the CSA's provisions or purposes. Prevailing federal law applies *Williamson*'s general rule. The CSA and federal securities acts define "security" identically. *Williamson*'s general rule effectuates the CSA's express purposes of both protecting *and* avoiding unreasonable burdens on market participants.

II. *HEI-II* correctly interpreted the two *Williamson* exceptions (or "tests") at issue on appeal by interpreting them as articulated in *Williamson*. *HEI-II* held that *Williamson 2* requires "the business experience and expertise necessary to intelligently exercise partnership powers"—not some specialized expertise in all cases. *HEI-II*, ¶¶45-47; *Williamson*, 645 F.2d at 423. *HEI-II* recognized that the third exception ("*Williamson 3*") considers whether the partners "were incapable,

within reasonable limits, of *finding* a replacement manager”—not whether partners *themselves* could replace the manager. *HEI-II*, ¶¶50-52; *Williamson*, 645 F.2d at 425. Both exceptions meaningfully probe whether the general rule does not comport with economic reality in a given case. The call for an “unrestrained analysis of the economic realities” by Petitioner and amicus North American Securities Administrators Association, Inc. (“NASAA”), in contrast, would effectively replace the enduring stability of *Williamson* with unprecedented and unbounded enforcement powers, to the detriment of Colorado’s rule of law and economic welfare. Additional “economic realities” must be tied to the goal underlying the *Williamson* exceptions (determining whether a partner has been led to expect profits solely from the efforts of the managing partner). The Court should reject the Petitioner’s and NASAA’s standardless, “know-it-when-you-see-it” alternative to *Williamson*’s framework.

ARGUMENT

In *HEI-II*, the COA properly self-corrected its analysis in *HEI-I* and coordinated Colorado law with prevailing federal law on both issues before this Court: (1) whether Colorado should adopt *Williamson*’s general rule; and (2) the correct interpretations of *Williamson* 2 and 3.

I. The COA Correctly Adopted *Williamson*'s General Rule.

A. Standard of review and preservation.

Respondents agree that the legal standard for whether a GP interest constitutes a security, including whether to follow the general rule stated in *Williamson*, is a question of law subject to *de novo* review. See OB13; *Dep't of Corr., Denver Reception & Diagnostic Ctr. v. Stiles*, 477 P.3d 709, 716 (Colo. 2020). And any “[s]tatutory interpretation involves only questions of law,” which this [C]ourt reviews *de novo*.” *Goodman v. Heritage Builders, Inc.*, 390 P.3d 398, 401 (Colo. 2017).

Petitioner’s reference to the standard of review for findings of fact, OB13, is irrelevant. The legal issues before the Court involve no fact findings. Whether any of the LO interests are in fact securities was neither decided in *HEI-II* nor presented in the certiorari petition. See NASAABr.18 (“the Court of Appeals did not analyze the [] facts”). “It is axiomatic that in any appellate proceeding this [C]ourt may consider only issues that have actually been determined by another court or agency and have been properly presented for [its] consideration.” *Comm. for Better Health Care for All Colo. Citizens by Schrier v. Meyer*, 830 P.2d 884, 888 (Colo. 1992). Whether the GP interests at issue are securities has not “actually been determined” by the COA, which expressly “decline[d] [the] invitation to

make this determination in the first instance.” *HEI-II*, ¶61n.18. Even if the Court were to adopt without qualification the legal standard applied by the trial court based on *HEI-I*, it would need to remand to the COA to review the trial court’s judgment *under that standard*, because *HEI-II* did not reach that issue.

03/15/19.HEDC/Davis.COA.OB31-42; *see, e.g., People v. Borghesi*, 66 P.3d 93, 106 (Colo. 2003) (“We therefore return this case to the court of appeals to address any issues raised by the defendant on appeal not addressed by that court in its opinion.”).

Petitioner’s references to law of the case as part of the standard of review, OB13,26, and in her argument, OB29,32, are also off point. Petitioner’s certiorari papers framed the first issue presented to include “[w]hether the Court of Appeals erred in reversing a prior decision by another division of the Court of Appeals,” and argued that certiorari “should be granted because [*HEI-II*] is contrary to the ‘law of the case’ doctrine.” Pet.1,8-10. The Court’s certiorari order reframed the issues to exclude Petitioner’s law-of-the-case contention. Order.Granted.Cert.2. Petitioner is mistaken in describing *HEI-I* as “the governing law of this case[.]” OB29.

Petitioner preserved this issue.

B. The CSA mandates coordination with federal securities law.

Petitioner argues that the CSA “does not mandate following federal case law.” OB18. In support, Petitioner misstates and selectively quotes Section 11-51-101(3) as providing that “Colorado appellate courts *may* coordinate their interpretation of the [CSA] with federal securities precedent ‘to the extent coordination is consistent with the purposes and provisions of this article.’” OB19. Section 11-51-101(3) actually states that the CSA “*shall* be coordinated with the federal acts and statutes ... to the extent coordination is consistent with both the purposes and the provisions of this article.”⁹

“Unless context dictates otherwise, ‘shall’ denotes a mandate.” *In re Associated Gov’ts of Northwest Colo. v. Colo. Pub. Utils. Comm’n*, 275 P.3d 646, 650 (Colo. 2012). No context dictates otherwise here. Rather, “[t]he language of the CSA shows the legislature’s intent that Colorado securities law be coordinated with federal securities law[.]” *Cagle*, 295 P.3d at 467; *see also Thompson v. People*, 2020 Colo. 72, ¶34 (Colo. 2020) (“[S]ection 11-51-101(3) provides that the CSA is to be coordinated with the federal acts and statutes that it references.”).

⁹ Petitioner’s attempt to obscure this critical statutory text is disturbing.

Petitioner tries to distinguish between federal statutes and federal caselaw; but her insistence that “adherence to federal *case law* is not required,” OB19, conflicts with the very cases she cites. Petitioner asserts that “*Cagle* specifies that this Court ‘must construe the [Act] to coordinate with the federal securities acts.’” OB21 (emphasis Petitioner’s). However, in *Cagle*, the Court squarely rejected the “generalization that a Colorado court need not follow federal securities cases,” and instead “follow[ed] the reasoning of the federal courts that ha[d] analyzed” a “nearly identical” forum selection provision. 295 P.3d at 466-67; *see also id.* (looking to “federal authorities”) (quoting *Lowery v. Ford Hill Inv. Co.*, 556 P.2d 1201, 1204 (Colo. 1976)). Petitioner and NASAA, appearing as *amici*, unsuccessfully made the same unpersuasive arguments in *Cagle* that they make now, namely, that “despite [the CSA’s] language, Colorado precedent shows that Colorado courts depart from federal securities law when construing the CSA.” 295 P.3d at 466.¹⁰

Similarly, Petitioner cites *Thompson* for the proposition that if any federal precedent must be followed, it must be a U.S. Supreme Court decision. OB22-23.

¹⁰ *See Cagle*, Comm’r.Amicus.Br., 2012 WL 2395650, at *16 n.3 (urging Court to reject “contention that the CSA must be coordinated with federal law in this instance”); *Cagle*, NASAA.Amicus.Br., 2012 WL 2395649, at *32-33 (urging conclusion that “the federal authority ... is not controlling and is unpersuasive”).

Neither *Thompson* nor any other Colorado decision says that. In *Thompson*, unlike this case, lower “federal courts disagreed as to the proper test” for determining whether a note is a security. 2020 Colo. 72, ¶28 (reviewing split in federal decisions). So it is hardly surprising that this Court looked to the U.S. Supreme Court decision that “finally resolved [the] debate.” *Id.*, ¶29. But even in *Thompson*, the Court based its ultimate decision on a broader body of “federal and state case law.” *Id.*, ¶36. And *Thompson* confirms that *Cagle*, with its unambiguous reliance on federal circuit court decisions in addition to U.S. Supreme Court authority, remains good law. *Id.*, ¶45.

Here, the definitions of “security” under the CSA and federal securities acts are identical and the provisions have common purposes. *Cagle*, 295 P.3d at 466; *see infra* pp26-27. Consequently, both the statutes themselves *and* their interpretation must be coordinated under Section 11-51-101(3). *Id.* at 466-67; *see also Thompson*, 2020 Colo. 72, ¶36. *Cf. Raymond Lee Org. v. Div. of Secs.*, 556 P.2d 1209, 1211-12 (Colo. 1976) (finding it “appropriate to follow” federal courts of appeals’ “interpretation of ‘common enterprise’” element of *Howey* test).

In short, Petitioner’s criticism of *HEI-II* for “blind” and “mindless[]” adherence to federal law is misplaced. OB12,18. *HEI-II* correctly coordinated its analysis with the prevailing federal law.

C. *Williamson* established the prevailing federal framework.

The U.S. Supreme Court's decision in *Howey* first articulated the test to determine whether an interest is an "investment contract" and therefore a security. *Howey*'s third prong asks whether persons were "led to expect profits solely from the efforts of the promoter or a third party." 328 U.S. at 298-99. *Williamson* applied *Howey*'s third prong to GP interests. Federal courts have adopted the *Williamson* analytical construct regarding GP interests.

1. *Williamson*'s general rule or "presumption"

Williamson considered when GP interests constitute investment contracts based on general partners' "expectation of 'profits solely from the efforts of (others).'" 645 F.2d at 417-418, 421. The court began by observing that "the courts that have ruled on the issue have held that a general partnership or joint venture interest generally cannot be an investment contract under the federal securities acts." *Id.*; *see also id.* at 419-22 (collecting cases). Even when "each individual partner ha[d] only his proportionate vote in the partnership," courts had held that GP and joint venture interests are generally not securities because "[a]lthough general partners and joint venturers may not individually have decisive control over major decisions, they do have the sort of influence which generally provides them with access to important information and protection against a dependence on

others.” *Id.* at 421-22. For example, the “legal right to a voice in partnership matters” and “responsibility under state law for acts of the partnership” “critically distinguish the status of a general partner from that of the purchaser of an investment contract who in law as well as in fact is a ‘passive’ investor.” *Id.* at 421; *see also Arcturus*, 928 F.3d at 410 (“partners in a general partnership can guard ‘their own interests’ with their ‘inherent powers’ and do not need protection from securities laws”). Accordingly, where “the face of a partnership agreement” demonstrates that a partner “retai[ns] substantial control over his investment,” the partner “should be on notice ... that the federal securities acts will not protect him from a mere failure to exercise his rights.” *Williamson*, 645 F.2d at 423-24.

In view of these economic realities inherent to GPs, *Williamson* recognized that “an investor who claims his general partnership or joint venture interest is an investment contract has a difficult burden to overcome.” *Id.* at 424; *see id.* at 425. Though *Williamson* itself did not use the term “presumption,” that is “the logical conclusion from the court’s recognition of a ‘general’ rule and imposition of ‘an extremely difficult factual burden’ to overcome the general rule,” as “[n]umerous federal circuit courts of appeals, including the Fifth Circuit itself,” have

recognized. *HEI-II*, ¶28 (collecting cases).¹¹ See, e.g., *Banghart v. Hollywood Gen. P'Ship*, 902 F.2d 805, 808 (10th Cir. 1990); *Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F.2d 236, 240 (4th Cir. 1988); *Youmans v. Simon*, 791 F.2d 341, 346 (5th Cir. 1986).

2. *Williamson's* exceptions

Far from “favor[ing] the label of the investment regardless of the realities of its structure,” OB23, *Williamson* acknowledged that “the mere fact that an investment takes the form of a general partnership or joint venture does not inevitably insulate it from the reach of the federal securities laws.” 645 F.2d at 422. Accordingly, *Williamson* held that to “overcome” the general rule, a general partner “must demonstrate that, in spite of the partnership form which the investment took,” the partner “was so dependent on the promoter or on a third party that he was in fact unable to exercise meaningful partnership powers.” *Id.* at 424. *Williamson* set forth three exceptions to the general rule.

¹¹ Respondents cite *HEI-II* for the COA’s helpful aggregation and discussion of relevant cases—not as independent authority, as it is the decision under review. Petitioner and NAASA, by contrast, repeatedly cite to *HEI-I* as controlling legal authority (see, e.g., OB25,34)—often their sole authority—notwithstanding that *HEI-II* superseded *HEI-I* and that *HEI-I* is a “true outlier” without support from “any published decision of any court.” *HEI-II*, ¶33.

Williamson 1 applies if the GP agreement “leaves so little power in the hands of the partner” that it “in fact distributes power as would a limited partnership.” *Id.* Petitioner never appealed the trial court’s determination that “as a matter of law, the interests are not securities under the first *Williamson* factor.” *HEI-I*, ¶13; *accord HEI-II*, ¶27n.6. It is thus undisputed that the LO GPs neither allocated power as limited partnerships nor placed “controlling power in the hands of certain managing partners.” *Williamson*, 645 F.2d at 423-24. That finding undermines Petitioner’s and NASAA’s suggestion that the LOs were shams or otherwise illegitimate GPs. In such “legitimate general partnership[s]” by Petitioner’s own admission, “partners have the power to affect the outcome of the business.” OB14.

Williamson 2 applies if the partners, despite the legitimacy of the GP and their control rights, are “so inexperienced and unknowledgeable in business affairs that [they are] incapable of intelligently exercising” their rights. 645 F.2d at 424. *Williamson* describes the requisite “business experience and expertise” as that which is “necessary to intelligently exercise partnership powers.” *Id.* at 423; *see Arcturus*, 928 F.3d at 417-18 (experience requirement “should not be read to suggest that investors necessarily need a specialized background”).

Williamson 3 applies when partners, despite their rights and ability to exercise those rights, are “so dependent on some unique entrepreneurial or

managerial ability” of a manager that they “cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.” 645 F.2d at 424. This requires proof of “no reasonable replacement for the investment’s manager”—that the manager “was uniquely capable of such tasks or that the partners were incapable, within reasonable limits, of finding a replacement manager.” *Id.* at 423. “It is not enough [] that partners in fact rely on others for the management of their investment,” for “[t]he delegation of rights and duties—standing alone—does not give rise to the sort of dependence on others which underlies the third prong of the *Howey* test.” *Id.* at 423-24. While “other factors” may be considered, to overcome the general rule, such “other factors” must “give rise to such a dependence on the promoter or manager that the exercise of partnership powers would be effectively precluded.” *Id.* at 424 n.15.

3. Federal law following *Williamson*

Federal courts that address the application of securities law to GP interests use the *Williamson* framework—both its general rule and exceptions:

Circuit	Case(s)
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3d	<i>Goodwin v. Elkins & Co.</i> , 730 F.2d 99, 103 (3d Cir. 1984); <i>Great Lakes Chem. Corp. v. Monsanto Co.</i> , 96 F. Supp. 2d 376, 391 (D. Del. 2000)
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4th	<i>Rivanna Trawlers</i> , 840 F.2d at 240-41
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- 5th** *Arcturus*, 912 F.3d at 410; *Youmans*, 791 F.2d at 346
- 6th** *Odom v. Slavik*, 703 F.2d 212, 215 (6th Cir. 1983); *Roark v. Belvedere, Ltd.*, 633 F. Supp. 765, 767 (S.D. Ohio 1985)
- 7th** *Pfohl v. Pelican Landing*, 567 F. Supp. 134, 137 (N.D. Ill. 1983); *Conde v. SLS W., LLC*, No. 104CV1925JDTTAB, 2005 WL 1661747, at *8 (S.D. Ind. July 15, 2005); *Pershing v. Sirmer*, No. 89C2239, 1989 WL 165155, at *4 (N.D. Ill. Dec. 27, 1989); *Morrison v. Pelican Land Dev.*, No. 82C1093, 1982 WL 1347, at *2 (N.D. Ill. Aug. 20, 1982)
- 8th** *Less v. Lurie*, 789 F.2d 624, 627 (8th Cir. 1986)
- 9th** *SEC v. Schooler*, 905 F.3d 1107, 1112 (9th Cir. 2018); *Holden v. Hagopian*, 978 F.2d 1115, 1118-19 (9th Cir. 1992); *Koch v. Hankins*, 928 F.2d 1471, 1477-78 (9th Cir. 1991); *McConnell v. Frank Howard Allen & Co.*, 574 F. Supp. 781, 786 (N.D. Cal. 1983)
- 10th** *SEC v. Shields*, 744 F.3d 633, 643 (10th Cir. 2014); *Banghart*, 902 F.2d at 808
- 11th** *Gordon v. Terry*, 684 F.2d 736, 741 (11th Cir. 1982); *SEC v. Shiner*, 268 F. Supp. 2d 1333, 1340-44 (S.D. Fla. 2003); *SEC v. Telecom Mktg., Inc.*, 888 F. Supp. 1160, 1165 (N.D. Ga. 1995); *Westlake v. Abrams*, 565 F. Supp. 1330, 1343 (N.D. Ga. 1983)
- D.C.** *SEC v. Shreveport Wireless Cable Tel. P'Ship*, No. Civ.A.94-1781(HHG), 1998 WL 892948, at *5-7 (D.D.C. Oct. 20, 1998)

State and federal courts in Colorado have likewise treated *Williamson*'s framework as settled law. *E.g., Feigin v. Dig. Interactive Assocs., Inc.*, 987 P.2d 876, 881 (Colo. App. 1999) (recognizing *Williamson* as "[t]he generally recognized

leading case” on “whether an interest in a general partnership [is] a security”); *Toothman v. Freeborn & Peters*, 80 P.3d 804, 811 (Colo. App. 2002) (“To overcome the presumption that a general partnership interest is not a security, [Feigin] adopted the test articulated in *Williamson*[.]”); *People v. Pahl*, 169 P.3d 169, 184 (Colo. App. 2006) (finding jury instruction made “a correct statement of a general principle” in stating that “[u]nits in general partnerships are not generally considered to be investment contracts”); see *Kline Hotel Partners v. Aircoa Equity Ints., Inc.*, 725 F. Supp. 479, 481 (D. Colo. 1989) (applying *Williamson* to CSA claim); *Power Petrols., Inc. v. P&G Mining Co.*, 682 F. Supp. 492, 493-94 (D. Colo. 1988) (same). “[G]eneral partners are jointly and severally liable for the obligations of the general partnership,” and “[t]he *Williamson* ruling adheres to these principles in that a partnership interest is presumed not to be an investment contract to the extent that partners have a legal right to participate in the management of the partnership.” *Toothman*, 80 P.3d at 812.

Other state courts also follow *Williamson*. See, e.g., *Corp. E. Assocs. v. Meester*, 442 N.W.2d 105, 107 (Iowa 1989); *Bahre v. Pearl*, 595 A.2d 1027, 1031 (Me. 1991); *Ak’s Daks Commc’ns, Inc. v. Md. Sec. Div.*, 771 A.2d 487, 497 (Md. App. 2001); *State v. Kramer*, 804 S.W.2d 845, 848 (Mo. App. 1991); *Russell v.*

French & Assocs., Inc., 709 S.W.2d 312, 314 (Tex. App. 1986); *see also HEI-II*, ¶¶28n.7,32 (collecting cases).

Given this overwhelming body of law, it is not surprising that the COA correctly concluded that “the *Williamson* presumption is prevailing federal law.” *HEI-II*, ¶33. The COA observed that “apart from one case [*Goodwin*] taking an even more extreme view of general partnership interests as shielded from the securities laws,”¹² it could not “f[i]nd any published decision of any court holding that there is no such presumption.” *HEI-II*, ¶33. Petitioner’s counsel admitted at oral argument that he could not cite “any case from anywhere other than [*HEI-I*] expressly declining to adopt” the *Williamson* “presumption.”¹³

Nevertheless, Petitioner now asserts that courts “are split on whether a presumption should be used.” OB11. Tellingly, Petitioner never identifies that split, other than to assert that various cases cited in *HEI-II* “do not mention the presumption.” OB21. This is a distraction. One of Petitioner’s own cited cases actually *does* use the term “presumption.” *Kramer*, 804 S.W.2d at 848 (applying

¹² *See Goodwin*, 730 F.2d at 103 (reasoning that “the role of a general partner, by law, extends well beyond the permitted role of a passive investor”); *see HEI-II*, ¶33n.11.

¹³ *See* 5/6/20 Oral Argument Video, No. 2018CA1769 at 42:47-43:23, <https://cojudicial.ompnetwork.org/sessions/134091?embedInPoint=2567&embedOutPoint=2603&shareMethod=link>.

Williamson’s “strong presumption that a general partnership is not a security”). The others recognize and apply *Williamson*’s general rule that GP interests are not securities, regardless of how they denominate that rule.¹⁴

D. *Williamson*’s general rule is consistent with the CSA’s purposes.

The CSA defines “security” identically to the federal definition. This Court has construed that enactment as a “legislative intent” to follow federal law on the meaning of a security. *Lowery*, 556 P.2d at 1204-05; *see also Thompson*, 471 P.3d at 1053; *People v. Milne*, 690 P.2d 829, 833 (Colo. 1984); *Feigin*, 987 P.2d at 881. The CSA, for its part, provides that it “is to be broadly construed to effectuate” two “purposes”: (1) “to protect investors and maintain public confidence in securities

¹⁴ *See Schooler*, 905 F.3d at 1112 (under *Williamson*, when GP “arrangement was anticipated at the outset, and is not illusory in practice, investment in a general partnership is not a security”) (internal citations omitted); *Westlake*, 565 F. Supp. at 1342-43 (identifying *Williamson*’s “general rule” and “exceptions” and concluding same “legal principles and policies recognized in [*Williamson*] are applicable to the case *sub judice*”); *Telecom Mktg.*, 888 F. Supp. at 1165 (“As a general rule, general partnerships are not deemed securities because the partners usually have the power to exercise significant control over the partnership’s affairs.”); *McConnell*, 574 F. Supp. at 785 (recognizing courts “have generally held that an interest in a joint venture or general partnership is not a security” subject to “exceptions” under *Williamson*); *Meester*, 442 N.W.2d at 107 (“Ordinarily a general partnership or a joint venture interest is not an investment contract under federal securities law.”); *Bahre*, 595 A.2d at 1031-32 (analyzing whether general partner met “heavy burden” to show “retained powers provided by the agreement are illusory”); *Russell*, 709 S.W.2d at 314 (“The sale of an interest in a true joint venture or general partnership generally does not involve the sale of a security[.]”).

markets,” and (2) to “avoid[] unreasonable burdens on participants in capital markets.” C.R.S. §11-51-101(2).¹⁵ “The purposes of the federal securities acts are [] essentially the same as those of the CSA.” *Cagle*, 295 P.3d at 466. *Williamson*’s general rule against securitizing GPs effectuates *both* purposes.

Namely, *Williamson*’s general rule benefits businesspersons by “provid[ing] a degree of certainty that is essential for business transactions.” *HEI-II*, ¶40. “It gives promoters notice of the regulatory requirements with which they must comply.” *Id.* *Williamson*’s exceptions, in turn, ensure that “the label given to a particular interest isn’t determinative.” *Id.*

Petitioner and NASAA ask this Court to adopt an amorphous legal standard as to when a GP interest is a security—a standard that largely ignores the legal consequences of the GP structure and is admittedly “unrestrained.” NASAABr.21. *See also infra* pp31-32,40-42. Such a nebulous standard would vastly increase venturers’ exposure. It would provide a perverse incentive for partners to cry “security”—no matter what they initially agreed to—when businesses fail. It would require a jury trial in many more cases. And it would give the Commissioner

¹⁵ Petitioner and NASAA ignore the second purpose. *See, e.g.*, OB11 (“the Act, the purpose of which is to protect investors”), 24 (characterizing “purpose” of CSA as “the protection of investors”); NASAABr.9.

unprecedented authority to *post hoc* determine when GP interests will be subject to the weight and complexities of securities regulation. This scenario would drive GPs from Colorado—which would become the only state to so subject GPs to the open-ended uncertainty of jury verdicts and shifting government enforcement priorities.

As the U.S. Supreme Court has observed, “uncertainties attending the applicability of the [Securities] Acts would hardly be in the best interests of either party to a transaction,” since they “may never know whether they are covered by the Acts until they engage in extended discovery and litigation over a concept as often elusive as the passage of control.” *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 696 (1985); *accord Gould v. Ruefenacht*, 471 U.S. 701, 706 (1985) (“[T]he parties’ inability to determine at the time of the transaction whether the Acts apply neither serves the Acts’ protective purpose nor permits the purchaser to compensate for the added risk of no protection when negotiating the transaction.”). Uncertainty makes businesspersons, including partners and managing partners, unable to reasonably predict whether the GP is subject to securities regulation, creating vulnerability for non-compliance with the CSA’s extensive regulatory

requirements.¹⁶ *Cf., e.g., DCB Constr. Co. v. Cent. City Dev. Co.*, 965 P.2d 115, 120 (Colo. 1998) (regarding “unjustness” element of unjust enrichment claim, recognizing that “a general rule ... provides more stability and predictability than an ad hoc review” because “[l]andlords need to know, with some *degree of certainty*, what behavior and circumstances will subject them to these claims”); *Leonard v. McMorris*, 63 P.3d 323, 330 (Colo. 2003) (“[O]nly extraordinary circumstances justify disregarding the corporate entity[.]”).

By restoring *Williamson*’s general rule, *HEI-II* provided the “degree of certainty” necessary to restore the stability and predictability under Colorado securities law that GPs have long enjoyed nationwide. *HEI-II*, ¶40. Petitioner’s and NASAA’s “legal standard” is actually a repudiation of legal standards. If accepted, business partners will be forced to weigh the costs of protracted litigation against

¹⁶ This case illustrates that burden. In 2002, the Commissioner dismissed an action alleging that LO GP interests were securities. 2017EX, pp366-70; R3274. Among other things, Respondents relied on that dismissal, a federal court decision holding that interests in an O&G GP structured just like LO9 were not securities, and legal opinions from eminent securities/transactional attorneys—only to have the Commissioner reverse course in 2009 and bring this action. 2017EX, pp327-30; 2013EX9a, pp43-46; 9/25/17TR, pp69:5-70:7, 78:7-24, 82:8-10, 83:22-84:13, 236:4-238:11, 241:3-18; 9/20/2017TR, pp220:2-223:5.

the benefits of doing business in Colorado at all. The result is foreseeable: “Avoid doing business in Colorado.”¹⁷

Williamson also effectuates the policy that, despite the “broad statutory definition” of “security,” the securities acts were never “intend[ed] to provide a broad federal remedy for all fraud.” *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982); accord, e.g., *Odom*, 703 F.2d at 215-16 (securities laws “were not intended to remedy every instance of common law fraud” or “every wrong that occurs in a partnership scheme”); see *HEI-II*, ¶40.

Finally, although *Williamson* is fundamentally a securities law decision, it also recognizes and respects the contractual rights and responsibilities of general partners. Cf. *Arcturus*, 928 F.3d at 413 (signing documents “clearly state that the venture is not a security”). Determining what the general partners were “led to expect” without regard for what they voluntarily agreed to would undermine this Court’s strong public policy of freedom of contract, which “has been staunchly

¹⁷ At the very least, *HEI-I*’s rejection of the *Williamson* “presumption” was a substantial change in the law, as confirmed by the trial court’s reversal—on the identical record—of its original securities ruling. See *Vashone-Caruso v. Suthers*, 29 P.3d 339, 342-343 (Colo. App. 2001). Therefore, those who did business in Colorado in reliance on prevailing law, like Respondents, should not be subject to the manifest injustice of an improper and retroactive application of any departure from that law nearly a decade later—especially under the circumstances of this case. See, e.g., *People in the Interest of C.A.K.*, 652 P.2d 603, 607 (Colo. 1987).

defended in this jurisdiction throughout its existence.” *U.S. Welding, Inc. v. Advanced Cirs., Inc.*, 420 P.3d 278, 284 (Colo. 2018); *see also Ravenstar, LLC v. One Ski Hill Place, LLC*, 401 P.3d 552, 555-56 (Colo. 2017) (“It is a matter of great public concern that freedom of contract be not lightly interfered with.”).

Petitioner tries to rebut the consistency of *Williamson*’s general rule with the CSA’s text, its purposes, and the underlying policies of securities law, by essentially reasserting the rationales that *HEI-I* proffered for rejecting the “presumption.” OB23-26; *see* NASAABr.9-11; *HEI-I*, ¶¶40-47. However, as the COA ultimately recognized in *HEI-II*, Petitioner does not “point to anything” in “any policy underlying” the CSA “that dictates a course different from the one federal courts have charted for analyzing general partnership interests.” *HEI-II*, ¶34. None of Petitioner’s arguments justifies departing from federal law. And Petitioner’s assertion that *HEI-II* “refuted none of” these reasons, OB23, is false. *HEI-II* “address[ed] *HEI I*’s four stated reasons for rejecting the presumption.” *HEI-II*, ¶¶35-40.

First, Petitioner asserts that “applying the presumption puts weight on the form of the investment over the substance.” OB23; *see HEI-I*, ¶41. This ignores the *substantive* liabilities, rights, and responsibilities inherent to GPs. *See supra* pp18-19. In fact, “the *Williamson* presumption reflects the economic realities of being a

general partner[.]” *HEI-II*, ¶36. The “presumption” is also a general rule that can be overcome when general partners are shown incapable of exercising the rights attending their interests. In this way, *Williamson*’s general rule fully accounts for “substantive economic realities.” *See supra* p19.

Moreover, considering “substance over form” should not yield an amorphous, know-it-when-you-see-it standard. Fundamentally, “[t]he rule of law is *about* form.” Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (1997) (emphasis in original). No matter how desirable Petitioner’s enforcement efforts may be, they cannot be “unrestrained,” NASAABr.21, by the rule of law. Those doing business in Colorado have a right to at least *presume* that Colorado law will continue to respect the legal consequences that flow from their formal structures and the terms to which their partners agreed, which will not be “disregarded for” an undefined and infinitely elastic so-called “substance.” OB41 (internal quotation marks and citation omitted). *See also supra* p30-31 (regarding freedom of contract).

Second, Petitioner posits that “federal case law gives courts little to no guidance as to how to apply the presumption.” OB24; *see HEI-I*, ¶42. But as the COA eventually confirmed, “courts across the country have been applying the presumption for decades.” *HEI-II*, ¶38. The party seeking to overcome *Williamson*’s

general rule must demonstrate that “in spite of the partnership form which the investment took, he was so dependent on the promoter or on a third party that he was in fact unable to exercise meaningful partnership powers.” *Williamson*, 645 F.2d at 424.¹⁸

Third, Petitioner echoes *HEI-I*’s reasoning that “any policy judgment that the presumption should apply ‘should be left to the General Assembly.’” OB25 (quoting *HEI-I*, ¶45). However, as the COA itself later recognized, the General Assembly has spoken already, by directing that the CSA, including its definition of a “security,” “shall be coordinated” with federal law. *See supra* pp15-17.

Fourth, citing *HEI-I* as her sole authority, Petitioner contends that *Williamson*’s general rule is “unnecessary” because Petitioner “already has the burden.” OB25. Her assertion that *HEI-II* “offers no reason as to why that burden should be increased[,]” *id.*, is inaccurate. Under the heading “Necessity of the

¹⁸ As amicus in *Thompson*, concerning the “family resemblance test” for determining whether a promissory note is a security, Petitioner advanced many of the arguments she now opposes. *See, e.g., Thompson*, Comm’r.Amicus.Br., 2020 WL 6827614, at *13 (urging Court to “adopt the widely embraced [presumption] to enhance conformity with federal law and application of more uniform analysis across the states”); *id.* at *15 (contending that “presumption that a note is a security” is “more likely to promote uniformity and certainty in application” by “allowing investors to predict outcomes as to how courts will treat their instruments and to what protections they are entitled” while “provid[ing] concrete exceptions”).

Presumption,” *HEI-II* furnishes a fulsome explanation of why *Williamson*’s general rule is necessary, including to “provide[] a degree of certainty” for Colorado businesses and to “serve[] as a guard-rail in assuring that securities laws aren’t turned into general antifraud provisions allowing general partners to sue their copartners or the managers for alleged securities violations.” *HEI-II*, ¶40; *see supra* pp27-30; *infra* pp40-42.

Ultimately, not one of the purported justifications for rejecting *Williamson*’s general rule—whether voiced in *HEI-I* or by Petitioner here—is valid.

II. The COA Correctly Interpreted the *Williamson* Exceptions.

Despite the illogic of conceding exceptions to a general rule that she challenges as non-existent, Petitioner acknowledges that “Colorado courts have long applied” *Williamson*’s three exceptions to its general rule. OB27. Accordingly, the second issue presented is “[w]hether the court of appeals erred in its *interpretation*” of the second and third exceptions—not whether they apply under Colorado law at all. Order.Granted.Cert.2.¹⁹ According to Petitioner, *HEI-II* “create[d] its own, different version” of *Williamson* 2 and 3, amounting to “an

¹⁹ Nonetheless, Respondents’ arguments *supra* pp15-17,22-26 regarding how/why Colorado should follow federal law, and how/why the *Williamson* framework is prevailing federal law, apply with equal force to the *Williamson* 2 and 3 analyses.

anomaly in the case law” that “disregarded [] clear precedent.” OB27-28.

Petitioner’s arguments misstate both *HEI-II* and federal law.

A. Standard of review and preservation.

Respondents agree that the legal standards for interpreting *Williamson 2* and *Williamson 3* are questions of law subject to *de novo* review. *See* OB26,27; *Stiles*, 477 P.3d at 716. Petitioner preserved this issue. Otherwise, Respondents disagree with Petitioner’s statement concerning the second issue presented for the same reasons given concerning the first issue presented. *Supra* pp13-14.

B. *Williamson 2* does not require specialized expertise.

HEI-II correctly concluded that under *Williamson 2*, “venture-specific experience is relevant, but not necessarily required” because “[w]hat matters is whether, considering the nature of the business, the partners collectively possess sufficient knowledge and experience to intelligently exercise their powers”—a broader question involving a range of “factors.” *HEI-II*, ¶¶47-48. That holding is consistent with *Williamson*.

Williamson 2 considers whether “the partner or venturer is so inexperienced and unknowledgeable in *business affairs* that he is incapable of intelligently exercising his partnership or venture powers.” 645 F.2d at 424; *see id.* at 423 (“A general partner or joint venturer who lacks the business experience and expertise

necessary to intelligently exercise partnership powers may also be dependent on the investment’s promoter or manager.”). *Williamson* does not limit “business experience and expertise” to the particular business of the GP. To the contrary, in applying *Williamson 2*, *Williamson* held that an investor’s experience on the Frito-Lay board constituted “business experience and knowledge adequate to the exercise of partnership powers in a *real estate* joint venture.” *Id.* at 425.

The Fifth Circuit recently confirmed that *Williamson* and its progeny “should not be read to suggest that investors necessarily need a specialized background.” *Arcturus*, 928 F.3d at 417-48. Indeed, “no court has ever explicitly held that every investor needs specialized experience”; rather, “[i]f evidence shows that an investor can *intelligently control his investment*”—the focus of *Williamson 2*—“then courts do not require specialized experience.” *Id.* at 418, 421 n.24; *see, e.g., Robinson v. Glynn*, 249 F.3d 166, 170-72 (4th Cir. 2003) (“lack of technical sophistication” would not trigger *Williamson 2* exception where partner was a “savvy and experienced businessman”); *Holden*, 978 F.2d at 1121 (“The proper inquiry is whether the partners are inexperienced or unknowledgeable ‘in business affairs’ generally, not whether they are experienced and sophisticated in the particular industry or area in which the partnership engages and they have invested.”); *Koch*, 928 F.2d at 1479 (lack of specific experience “draws the

question too narrowly”); *Rivanna*, 840 F.2d at 242 n.10 (partners “who lack financial sophistication or business expertise nevertheless may exercise intelligently the powers conferred on them”); *Deutsch Energy Co. v. Mazur*, 813 F.2d 1567, 1570 (9th Cir. 1987) (relying on “level of general business expertise”); *Youmans*, 791 F.2d at 347 (“it c[ould] not be said” that physician who “engaged in a number of business transactions not connected with” real estate business, “was inexperienced or unknowledgeable in business affairs”).

Petitioner argues that “cases [that] ... do not deal with general partnerships ... do not shed light on whether the jurisdiction applies the *Williamson* presumption.” OB22. However, in an unconvincing response to the body of law referenced above, both Petitioner and NASAA rely almost exclusively on non-GP cases when addressing *Williamson*’s exceptions. *See, e.g.*, OB30 (citing *United States v. Leonard*, 529 F.3d 83, 90-91 (2d Cir. 2008) (LLC), and *SEC v. Merch. Capital, LLC*, 483 F.3d 747, 755-57 (11th Cir. 2007) (LLP)); OB32 (citing *Long v. Shultz Cattle Co.*, 881 F.2d 129, 133-34 (5th Cir. 1989) (consulting agreement)); OB33,38 (citing *Foxfield Villa Assocs., LLC v. Robben*, 967 F.3d 1082, 1098 (10th Cir. 2020), and admitting it “analyzes an LLC”); *see also* NASAABr.13-15 (citing *Merchant Capital; Long; Albanese v. Fla. Nat. Bank of Orlando*, 823 F.2d 408, 412

(11th Cir. 1987) (asset purchase and leaseback agreements); and *Nutek Inform. Sys., Inc. v. Az. Corp. Comm’n*, 977 P.2d 826, 833 (Ariz. App. 1998) (LLC)).²⁰

In any event, these non-GP decisions involve distinct economic realities from those involved in *Williamson*. “Unlike general partners, limited partners lack significant powers” because “their ‘liability for the partnership is limited to the amount of their investment’” and “‘they have little or no authority to take an active part in the management of the partnership.’” *Arcturus*, 928 F.3d at 410. For those reasons, a limited partnership “has long been held to be an investment contract.” *Williamson*, 645 F.2d at 423. LLCs are likewise “different enough to warrant different treatment” because “the LLC member has less incentive to be informed about, or take an active role in, the business.” *Nutek*, 977 P.2d at 833-34. This relative lack of incentive arises from a “critical difference” between LLCs and GPs: namely, that “general partners’ personal liability necessarily gives the partner an incentive to be highly informed about the business” and “[a]t the same time ... discourages involvement by unsophisticated investors.” *Id.*

²⁰ Of Petitioner’s few cited cases that address GPs, nearly all simply recognize the *factual existence* of specialized expertise *without holding* that it is *required* under *Williamson* 2. See, e.g., OB31 (citing *Feigin*, 987 P.2d at 883); see also NASAABr.15 (citing *Meester*, 442 N.W.2d at 109 (deciding first exception alone)).

Petitioner misleadingly cites *Long*, which did not involve a GP, to argue that general partners must have industry-specific knowledge and that the Fifth Circuit has “rejected the general-business requirement[.]” OB32; *see also* NASAABr.13. In truth, the Fifth Circuit has done the opposite. It subsequently made clear that “unlike the investors in *Long*, Nunez entered a joint venture, which carries with it the presumption of active involvement,” *Nunez v. Robin*, 415 F. App’x 586, 591 (5th Cir. 2011), and that the experience requirement “should not be read to suggest that investors necessarily need a specialized background.” *Arcturus*, 928 F.3d at 417-18.²¹

Petitioner cites only one federal case that applied *Williamson 2* to GP interests—the Tenth Circuit’s decision in *Shields*. Despite recognizing *Williamson*’s “strong presumption” that a GP interest “is not a security” (which Petitioner repudiates), *Shields* relied on non-GP cases for the proposition that *Williamson 2* “focus[es] on the experience of investors in the particular business.” 744 F.3d at 647 (quoting *Merchant Capital* (LLP) and *Leonard* (LLC)). However, as discussed above, neither *Williamson* nor any other federal case addressing GP

²¹ *Consol. Mgmt. Grp., LLC v. Dep’t of Corps.*, 75 Cal. Rptr. 3d 795, 807 (Cal. App. 2008), and *SEC v. Sethi Petrol., LLC*, 229 F. Supp. 3d 524, 536 (E.D. Tex. 2017), cited in NASAABr.15-16, adopted the same inaccurate reading of *Long* that Petitioner and NASAA advocate.

interests supports that statement. *See HEI-II*, ¶47 n.15 (addressing *Shields*). It is also inconsistent with a more recent Tenth Circuit decision finding “substantial *general* business experience” sufficient to overcome *Williamson 2*—even for an LLC that did not enjoy the presumption of active involvement. *Foxfield*, 967 F.3d at 1098.

This Court should reject NASAA’s suggestion that security regulators possess some omniscient understanding of what is “necessary to run” a business, including an O&G venture. NASAABr.4,12; *id.* at 13 (purporting to list specific “expertise,” “knowledge,” and “understanding” that “[r]unning an oil and gas venture necessarily requires”). And whatever rhetorical advantage Petitioner and NASAA may see in peppering their briefs with allegations of fraud, that puts the cart before the horse: “If there is no *security*, there cannot be securities fraud.” *People v. Mendenhall*, 363 P.3d 758, 763 (Colo. App. 2015). Likewise, NASAA’s assertion that “Congress realized” a “specialized experience” requirement when it defined “security” in the federal acts to include a “fractional undivided interest in oil, gas, or other mineral royalty lease,” NASAABr.12, is misguided. Petitioner asserted that the LO interests were securities because they were “investment

contracts”—not because they were a “fractional undivided interest in oil, gas, or other mineral royalty lease.”²²

Petitioner’s proposed specialized expertise standard, if adopted, would not merely contravene *Williamson* and the CSA’s coordination mandate. It also would render vague the term “investment contract”—perhaps unconstitutionally so, especially given the substantial penalties the CSA authorizes. *See* U.S. CONST. amends. V, XIV; COLO. CONST. art. II, §25. And it would encourage arbitrary enforcement and preclude reasonable notice of what the law proscribes. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). *See also supra* pp27-32. The doctrine of unconstitutional vagueness is concerned with (1) notice, so that persons of ordinary intelligence can know what conduct is prohibited, and (2) preventing arbitrary enforcement. *See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1981); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (violates due process of law). “Even a regulation which governs purely economic or commercial activities, if its violation can engender penalties, must be so framed as to provide a constitutionally adequate warning to those whose activities are governed.” *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1335-36 (6th Cir. 1978).

²² And, in any event, the LO9 partners did not own that type of interest concerning the LO9 venture.

For example, in the context of an O&G GP, does a roustabout with no business and financial wherewithal *have* the requisite experience, while Warren Buffett *lacks* the mandatory experience because he has never worked on an oil well? Is “industry experience” limited to working in the industry or does it also encompass prior investments? As a practical matter, conditioning security status on whether partners possess specialized expertise (*e.g.*, “expertise in reviewing geologic surveys,” NASAABr.13) mistakenly assumes that specialized expertise is a necessary precondition for one’s intelligent participation in any business. The law should not sanction such an illogical result. And this Court should reject Petitioner’s attempt to make the absence of some sort of specialized expertise a new and irrebuttable determinant that a GP interest is a security.

C. *Williamson 3* does not require the ability to replace the managing venturer with a general partner.

HEI-II correctly recognized that the replaceability of the managing venturer under *Williamson 3* does not “narrowly focu[s] on whether any of the general partners *themselves* possessed the skills necessary to replace the managing partner.” *HEI-II*, ¶¶50-51 (emphasis in original). Once again, Petitioner and NASAA identify no inconsistency between *HEI-II* and *Williamson* itself.

Williamson 3 applies if the general partners are “so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that [they]

cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.” 645 F.2d at 424. *Williamson* “emphasize[d]” that such dependence “does not exist merely because the partners have chosen to hire *another party* to manage their investment.” *Id.* at 423; *see, e.g., Rivanna*, 840 F.2d at 240 n.5 (rejecting “incorrect” argument that a GP interest is a security “when the partners cannot replace a particular manager with *themselves*”); *Holden*, 978 F.2d at 1123 (proof that general partners *themselves* cannot “fill the manager’s shoes simply is insufficient”).

Petitioner and NASAA assert that *HEI-II*’s incorporation of the *Williamson* 3 standard “disregards case law,” OB39, and represents “a significant deviation from established federal and Colorado law.” NASAABr.18. But neither cites a single contrary case.²³ *See, e.g.,* OB39 (citing *nothing* for the proposition that *HEI-II* “confuses the third *Williamson* test” because “it holds a broader view than that of other courts”). Nor does Petitioner or NASAA explain how *Williamson*’s explicit reference to partners “*finding* a replacement manager” and “hir[ing] *another party*

²³ Petitioner erroneously suggests that in *Foxfield*, the Tenth Circuit “agree[d]” with her interpretation of *Williamson* 3. OB38. *Foxfield*, an LLC case, found sufficient replaceability because non-managers’ “own entrepreneurial and managerial abilities” were “*at least one* other realistic option”—*not* the *only* permissible option. 967 F.3d at 1098.

to manage their investment” can be interpreted as requiring one of the partners *themselves* to become the manager. 645 F.2d at 423-24. Finally, Petitioner and NASAA improperly devote much of their *Williamson* 3 discussion to the facts of this case, *see* OB39-41; NASAABr.17-18; but those factual arguments are irrelevant to the legal issues presented. *See supra* pp13-14.

D. Any additional economic realities must be tied to a question that the *Williamson* framework is designed to answer.

Petitioner and NASAA’s final criticism of *HEI-II* is that it failed to apply an “economic realities test” and erroneously “force[d]” supposed “‘other economic realities’ into a box, which contravene[d] the determination that the *Williamson* tests are not exhaustive.” OB43-44. These arguments misstate what *HEI-II* says, again fail to identify any conflict with *Williamson*, and ultimately reflect a misunderstanding of the nature and role of “economic realities” in analyzing whether a GP interest is a security.

HEI-II agreed that “there may be considerations *in addition to* the three *Williamson* tests that bear on whether an ostensible general partnership interest is an investment contract,” because “*Williamson* said so.” *HEI-II*, ¶56 (emphasis in original). Yet to provide “guidance on the role of ‘other economic realities,’” the COA explained that if “the economic realities of the case need to be accounted for in some way in which the *Williamson* tests prove inadequate, that needs to be

articulated in terms of some relatively concrete principle that will assist the court in deciding whether the partners were ‘led to expect profits derived from the entrepreneurial or managerial efforts of others.’” *HEI-II*, ¶¶56,60 (citing *Howey*, 328 U.S. at 298-99).²⁴

Petitioner simply misreads these points when she argues that *HEI-II* permits consideration of economic realities only if they “fit into one of the *Williamson* tests.” OB44; *see also* NASAABr.19 (inaccurately asserting COA “limit[ed] its [economic realities] analysis to the three factors laid out in *Williamson*”). Additionally, Petitioner and NASAA fail to provide any explanation for their apparent disagreement with *HEI-II*’s conclusion that “economic realities” must be tied to the expectation-of-profits-from-others question that the *Williamson* exceptions are designed to answer. In fact, neither existing Colorado law nor federal law incorporates a freestanding, *post hoc* “economic realities test” to determine whether a GP interest is a security.

²⁴ *Feigin* (in the inapposite context of determining “probable cause” supporting a warrant) and *Mieka* (deciding only *Williamson* 1) are not to the contrary. The “factors” Petitioner cites, OB42-43, were merely the case-specific facts these decisions considered in applying *Williamson*. *Joseph v. Mieka Corp.*, 282 P.3d 509, 514–16 (Colo. App. 2012); *Feigin*, 987 P.2d at 881–83; *see HEI-II*, ¶¶57-58.

As *HEI-II* correctly recognized, applying “‘catch-all economic realities’ in an amorphous way, untethered to the goal of [of the *Williamson* exceptions], would significantly impair the utility of the entire *Williamson* framework.” *HEI-II*, ¶56.

CONCLUSION

For the reasons stated above, the Court should affirm.

Dated: September 7, 2021

Respectfully submitted,

/s/ Shain Khoshbin

Shain Khoshbin, *pro hac vice*
S. Wallace Dunwoody, *pro hac vice*
Chase A. Cobern, *pro hac vice*
MUNCK WILSON MANDALA LLP
12770 Coit Road, Suite 600
Dallas, Texas 75251
Telephone: (972) 628-3600
Facsimile: (972) 628-3616
Email: skhoshbin@munckwilson.com
wdunwoody@munckwilson.com
ccobern@munckwilson.com

/s/ Marcy G. Glenn

Marcy G. Glenn, #12018
HOLLAND & HART, LLP
555 17th Street, Suite 3200
Denver, Colorado 80202
Telephone: (303) 295-8000
Facsimile: (303) 295-8261
Email: mglenn@hollandhart.com

**ATTORNEYS FOR RESPONDENTS
HEARTLAND ENERGY
DEVELOPMENT CORPORATION
AND BRANDON DAVIS**

CERTIFICATE OF SERVICE

I certify that on this 7th day of September, 2021, I served a copy of the foregoing document to the following by:

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- ☒ Electronic Service by Colorado Courts E-Filing System

Philip J. Weiser
Robert Finke
Jodanna L. Haskins
Janna K. Fischer
Attorneys for Petitioner

Jeffrey R. Thomas, Esq.
Attorney for Respondent HEI Resources, Inc. and Charles Reed Cagle

Otto K. Hilbert, II
Attorney for Respondents John Schiffner and James Pollak

/s/ Kathleen O'Riley
Kathleen O'Riley

898815