No. ________

In The
Supreme Court of the United States

FOXFIELD VILLA ASSOCIATES, LLC, RICHARD A. BARTLETT, ERNEST J. STRAUB, III, BARTLETT FAMILY REAL ESTATE FUND, LLC, AND PRES, LLC,

Petitioners,

v.

PAUL ROBBEN AND RDC HOLDINGS, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN M. DUGGAN
Counsel of Record
DUGGAN SHADWICK DOERR & KURLBAUM LLC
9101 W. 110th Street, Suite 200
Overland Park, Kansas 66210
(913) 498-3536
(913) 498-3538 (facsimile)
jduggan@dsdklaw.com

Attorneys for Petitioners Bartlett Family Real Estate Fund, LLC, PRES, LLC, Foxfield Villa Associates, LLC, Richard A. Bartlett, and Ernest J. Straub, III

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Paul Robben fraudulently induced Rich Bartlett and his wife Dena along with Ernie Straub ("Straub") to invest in Robben's real estate venture called Foxfield Villa Associates, LLC ("FVA"). Robben told Rich Bartlett and Straub they were part of a "select group of investors." Robben admittedly convinced the investors that Robben would solely manage the enterprise and distribute the profits, structuring contracts and implementing resolutions accordingly.

Petitioners claim that they purchased "investment contracts" subject to federal securities laws. The Tenth Circuit disagreed invoking a six-part "objective" test only applicable to limited liability companies ("LLCs") which varies drastically from the test applied to limited and general partnerships. In doing so, the Tenth Circuit's LLC-only test further splintered an already non-uniform standard to determine whether defrauded investors were "led to expect profits solely from the efforts of others." *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946).

The Tenth Circuit's label-driven, LLC-only test constitutes a split with other circuits in that the Second, Fifth, and Ninth Circuits' expectation-of-profits analysis focuses on the totality of the circumstances by employing the same test regardless of the state-law entity's nominal title affording federal securities law protections to investors similarly situated as Petitioners unlike the Tenth Circuit's LLC-only framework.

QUESTIONS PRESENTED – Continued

The Tenth Circuit's decision raises the following issue not yet decided by this Court: Are limited liability company interests, like limited and general partnership interests, "investment contracts" under the Securities Exchange Act of 1934 when the investors rely on the promoter's admitted promises that he solely will manage and control the enterprise, the promoter prepares agreements and implementing resolutions providing the promoter such exclusive management control, and the promoter retains veto power over his removal such that the investors rely "solely" on the promoter's efforts to affect the enterprise's profits?

CORPORATE DISCLOSURE STATEMENT

Bartlett Family Real Estate Fund, LLC ("BFREF") is a Kansas limited liability company (alternatively referred to herein as "BFREF" and/or "the Bartletts"). PRES, LLC ("PRES") is a Kansas limited liability company. Foxfield Villa Associates, LLC is a Kansas limited liability company. BFREF and PRES are FVA's members. No publicly held company owns any interest in BFREF, PRES, or FVA.

LIST OF PROCEEDINGS

1. *Bartlett Family Real Estate Fund, LLC, et al. v. Paul Robben, et al.*, District Court Case No. 2:12-cv-02528-CM (consolidated with 13-cv-2120-CM); United States District Court for the District of Kansas.

Judgment Date: February 26, 2018

2. *Bartlett Family Real Estate Fund, LLC, et al. v. Paul Robben, et al.*, Appellate Court Case No. 18-3054; United States Court of Appeals for the Tenth Circuit.

Judgment Date: July 31, 2020

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OPINIONS BELOW

The Tenth Circuit Court of Appeals' opinion in *Bartlett Family Real Estate Fund, LLC, et al. v. Robben* is reported at 967 F.3d 1082.

JURISDICTION

Review of the United States Court of Appeals for the Tenth Circuit's July 31, 2020, opinion and judgment is requested. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 78c(a)(10) – App. 77

15 U.S.C. § 78j(b) – App. 78

17 C.F.R. § 240.10b-5 – App. 80

STATEMENT OF THE CASE

Petitioners challenge the Tenth Circuit's conclusion that their investments are not securities under the Securities Exchange Act of 1934 (the "Act"). The Tenth Circuit employed an LLC-only test for "investment contracts" which now requires LLC investors to hurdle a much higher bar than nearly identically situated limited partners and general partners.

As such, the Tenth Circuit's LLC-only test requires investors to prove an "investment contract" in ways not required in the Second, Fifth, Ninth, and Eleventh Circuits. Specifically, the Tenth Circuit's LLC-only test announced in *Robben* refuses to consider: (1) admitted oral representations of the promoter upon which the investors relied; and (2) decisions by the investors to voluntarily remain passive by signing agreements and implementing resolutions vesting the promoter with sole power to manage the enterprise.

Here, the Tenth Circuit decided the Bartletts and Straub possessed the "ability to control . . . profitability," and when they signed an implementing resolution as part of the initial investment allowing "Robben to do as he wished," *Robben*, 967 F.3d at 1097, they voluntarily relinquished that control ultimately driving the *Robben* Court to the conclusion there was no investment contract. The Tenth Circuit refused to consider the transaction as a whole and ignored (a) that Robben – the promoter – undeniably promised that he and he alone would manage all aspects of the enterprise; (b) the uncontroverted fact that investors expected that the promoter would do just that – control and manage the enterprise; and (c) the promoter and investors signed an implementing resolution to show the investors expected Robben to do just what he promised – exclusively manage the enterprise.

Notably, according to the Tenth Circuit's *Robben* decision, it was the investors' "choice" to be passive investors and grant Robben exclusive control over their investment that paradoxically doomed their right to claim securities laws' protection. Of course, this "investor-could-choose-to-maintain-control" mantra is antithetical to other circuits who conclude that investors choosing to relinquish exclusive control over their investment is precisely how one establishes an investment contract under the *Howey* test. *See, e.g.*, *Leonard*, 529 F.3d at 90 ("notwithstanding the language in the organizational documents suggesting otherwise – from the start there could be no 'reasonable expectation' of investor control"); *Siebel v. Scott*, 725 F.2d 995 (5th Cir. 1984) (limited partnership interests were investment contracts, where none of the limited partners "planned or desired to participate in the operation").

Moreover, according to the Tenth Circuit, an initial contractual right to cause a stalemate on the enterprise's management shows the investors control the enterprise's profitability. *Robben*, 967 F.3d at 1096. In other words, according to the Tenth Circuit, the power to cause deadlock on how to manage a business, such as how often to water the orange trees, which trees should be pruned, and when to pick the fruit, all show that the investor's power to cause a stalemate controls the enterprise's "profits." But such a clouded view of business is out of step with the common-sense economic reality that invoking such a deadlock in no way equals control over making profits. The fact is, the power to cause a deadlock only controls the ability to cause financial ruin. Simply put, employing contract rights to force a deadlock on how to operate the enterprise leaving the fruit of the investment rotting on the tree hardly equals control over the enterprise's profits.

Here, as set out in detail below, the contract right to force a stalemate only shows the Bartletts could, among other things, block Robben from fulfilling his promise to purchase $1.6 million of the enterprise's assets which Robben personally promised to do. Of course, blocking Robben from fulfilling this promise would eviscerate a guaranteed profit for the Bartletts resulting from Robben doing exactly what Robben promised by closing the $1.6 million transaction. Stated differently, the Bartletts technically could have blocked the promoter at the outset from fulfilling his promise to personally cause the purchase of the enterprise's assets eviscerating the Bartletts' profit, and instead block Robben from doing so. This would only leave the Bartletts' financial investment to rot on the tree because neither the Bartletts nor Robben could sell assets without breaking the stalemate.

Of course, this gloomy notion borders on the absurd suggesting that the Bartletts somehow would invoke contract rights to block themselves from obtaining the guaranteed profit Robben promised them as the investment promoter. Nonetheless, this is one of the reasons why the Tenth Circuit claimed the Bartletts somehow controlled their investment and were not "led to expect profits solely from the efforts of the promoter . . . " *Howey*, 328 U.S. at 298-99.

And, as set out below, the Tenth Circuit's LLC-only test ignores that in most cases, the nominal title for the state-law entity chosen by the promoter is irrelevant because state statutes provide virtually unlimited flexibility in structuring these entities causing them to be effectively indistinguishable in virtually every way (i.e., limited investor liability, management committees, no investor capacity to bind other investors, etc.).

Finally, the Tenth Circuit's *Robben* decision creates a bright line distinction with other Tenth Circuit precedent expressly considering oral promoter representations and subjective investor intent when a general partnership is at issue (*see SEC v. Shields*, 744 F.3d 633 (10th Cir. 2014)), but also directly conflicts with Second, Fifth, Ninth, and Eleventh Circuit decisions requiring an examination beyond mere theoretical contract formalities. *Compare United States v. Leonard*, 529 F.3d 83 (2d Cir. 2008); *S.E.C. v. Arcturus Corp.*, 928 F.3d 400 (5th Cir. 2019); *Koch v. Hankins*, 928 F.2d 1471 (9th Cir. 1991); *S.E.C. v. Merch. Capital, LLC*, 483 F.3d 747 (11th Cir. 2007); *with Foxfield Villa Associates, LLC v. Robben*, 967 F.3d 1082 (10th Cir. 2020). In fact, these circuits have ruled that even though (1) investors possess contractual rights to remove the promoter from managing the enterprise, and (2) the investors chose to remain passive, nevertheless an "investment contract" existed.

Review is necessary to resolve these circuit splits regarding an important federal matter.

Here, the Bartletts and Straub invested and lost millions in FVA. Robben told Rich Bartlett and Straub they were part of a "select group of investors." Robben promised his investors that Robben would solely manage the enterprise "because of [Robben's] knowledge of the assets" and that no investor would have invested if Robben refused to manage the enterprise. Robben agreed he was "essentially selling Mr. Bartlett" an "investment interest in the LLC that would pay him a return over time." Accordingly, Robben structured the arrangement taking the investors' money and promising "Robben would use his development expertise . . . to make a profit for everybody and distribute the profits based on the amount invested."

Neither the Bartletts nor Straub ever intended to manage the investment – everyone agreed Robben would solely do so. Robben told Rich Bartlett and Straub that he would exclusively handle meetings with the city; bookkeeping; writing checks; negotiating with and paying vendors; marketing; homes association details; and engineers; etc. Robben described himself as "the guy that was managing the company."

As such, thirteen (13) days after signing the FVA operating agreement and before FVA closed and funded the real estate purchase from Robben's former company, Rich and Dena Bartlett, Straub, and Robben signed an implementing resolution which gave Robben exclusive power to manage FVA's affairs. According to the *Robben* Court, "[a]t that point, [the investors] no longer even had the ability to prevent Mr. Robben from doing as he wished." *Robben*, 967 F.3d at 1097. This resolution only ratified what everyone had agreed to previously: Robben as promoter/president/treasurer would exclusively manage the enterprise and the Bartletts and Straub "would have nothing to do with it."

Petitioners asserted federal question jurisdiction under 28 U.S.C. § 1331, claiming that Robben violated section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. *See* 15 U.S.C. § 78j(b) (codifying section 10(b)); 17 C.F.R. § 240.10b-5 (codifying SEC Rule 10b-5). Petitioners asserted supplemental jurisdiction under 28 U.S.C. § 1367(a) for their state law claims. Robben sought summary judgment on Petitioners' federal securities law claim.

The District Court concluded the investments were not securities and discontinued exercise of supplemental jurisdiction dismissing Petitioners' remaining state law claims without prejudice under 28 U.S.C. § 1367(c). The District Court entered its Memorandum & Order on February 23, 2018, and on February 26, 2018, issued its corrected Memorandum and Order and Judgment. Petitioners timely filed their notice of appeal on March 23, 2018. The Tenth Circuit issued its Opinion on July 31, 2020.

The question for this Court is whether investors relying on the promoter's efforts to "significantly affect" the enterprise's profits own "investment contracts" when the promoter and all the investors unanimously agree that all parties intended the promoter to have exclusive management control, the promoter retained veto power over his removal, and all parties signed an implementing resolution granting such power to the promoter prior to investing the enterprise's money? In other words, should these facts be ignored under the *Robben* LLC-only test simply because the promoter chose to form the enterprise as an LLC instead of a limited or general partnership? And, when undertaking the *Howey* expectation-of-profit analysis by employing a substance over form review of the underlying economic reality, can the court ignore the promoter's representations, the uncontroverted testimony of all parties involved including the promoter, and instead single out the investor's contract right to force a stalemate as the only significant fact upon which an investment contract finding should rest just because the entity is nominally titled an LLC?

The Tenth Circuit concluded that the LLC-only "test of control is an objective one" and refused to consider "the control that [the LLC investors] intended to exercise," 967 F.3d at 1093, despite the fact the uncontroverted, objective evidence admitted by Robben, the promoter, was that Bartlett and Straub would "have nothing to do with" the enterprise. The Second, Fifth, Ninth, and Eleventh Circuits' decisions are antithetical to the Tenth Circuit's *Robben* LLC-only test.

REASONS FOR GRANTING THE PETITION

I. *Howey* factor three splinters over time leaving the original test blurred at best.

Over 70 years ago, this Court stated that an "investment contract" under Section 77b(a)(1) of the Securities Act[1] is "a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *Howey*, 328 U.S. at 298-99.[2]

Since then, the circuits have wedged so many varied factors and different presumptions into *Howey's* third prong that the test has splintered into chards that would now be difficult to put back together. To put it bluntly, Humpty-Dumpty has fallen off the wall, and the circuits seem ill-equipped to coherently assemble the pieces.

The circuits' fractured analytical framework is further complicated by the varied investment vehicles utilized by promoters, including presumptions finding "investment contract" status for limited partnerships, presumptions against such status for general partnerships, and no presumptions for other investment forms

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[1] The definition of "security" under the Securities Exchange Act of 1934 is "essentially identical in meaning" to the definition of that same word under the Securities Act of 1934. *S.E.C. v. Edwards*, 540 U.S. 389, 393 (2004).

[2] This Court last examined *Howey* in *S.E.C. v. Edwards*, 540 U.S. 389 (2004) to determine whether an investment scheme concerning the sale and leaseback of payphones for a fixed return was an "investment contract."

such as limited liability companies, joint ventures, and pyramid schemes. The label placed on these varied state-law entities is irrelevant since most states allow vast flexibility in structuring the entities' corporate governance. This structural flexibility often leaves traditional general partnerships looking like an old school limited partnership; and LLCs can take on the appearance of either an old school limited or general partnership depending on whether the investors choose to be "active" or "passive." All of this presents fertile ground for creative promoters to draft around the strictures of the securities laws and avoid those laws' protections.

And now with the Tenth Circuit's LLC-only test, unscrupulous promoters are sure to choose LLCs as preferred state-law vehicles knowing that no oral representations regarding their promises nor investor intent to be "passive" will be relevant under the securities laws.

A. The presumptions for and against limited and general partnerships are unwarranted. Joint ventures, LLCs, registered limited liability partnerships, and other business entities should fall under one unifying "expectation-of-profits" test providing clarity to investors.

Beginning in 1973, the *Howey*- "solely" test morphed, eliminating a literal application of the word "solely," and requiring instead that "the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." *S.E.C. v. Glenn W. Turner Enters, Inc.*, 474 F.2d 476, 482 (9th Cir. 1973); *Crowley v. Montgomery Ward & Co.*, 570 F.2d 875, 877 (10th Cir. 1975); *Banghart v. Hollywood Gen. P'ship*, 902 F.2d 805, 807 (10th Cir. 1990). Despite broad acceptance of *Glenn Turner's* revision to the *Howey*- "solely" test, this Court, while "expressing no view, . . . , as to the [*Glenn Turner*] holding," stated that the "touchstone" of the *Howey* test is "the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." *See United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 n. 16 (1975).

And, less than a decade later, a presumption favoring investment contract status evolved for limited partnerships because limited partners traditionally exercised no managerial powers. *See, e.g.*, *Mayer v. Oil Field Systems Corp.*, 721 F.2d 59, 65 (2d Cir. 1983); *L & B Hosp. Ventures, Inc. v. Healthcare Intern., Inc.*, 894 F.2d 150 (5th Cir. 1990); *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 752 F.2d 178 (5th Cir. 1985); *Goodman v. Epstein*, 582 F.2d 388 (7th Cir. 1978); *S.E.C. v. Murphy*, 626 F.2d 633 (9th Cir. 1980); *Merch. Capital*, 483 F.3d at 756.

Later, some circuits concluded that more creatively drafted limited partnership agreements effectively fall under the same analytical framework as general partnerships for investment contract analysis, and the decision turns on the limited partner's ability by majority vote to remove the promoter from running the enterprise and substituting their own manager. *See, e.g.*, *Steinhardt Group Inc. v. Citicorp*, 126 F.3d 144, 154 (3d Cir. 1997) (limited partnership agreement gave the limited partner "pervasive control over the management of the" limited partnership); *L & B Hosp. Ventures, Inc.*, 894 F.2d at 152-53 (holding that plaintiffs did not possess sufficient managerial control to remove their interests from the protections of the Securities Act); *Masel v. Villarreal*, 924 F.3d 734, 744 (5th Cir. 2019) (noting that interests in a limited partnership may not be securities "when limited partners are given such managerial control that it can no longer be said that the limited partners are dependent on the entrepreneurial skills of the promoter or a third party"); *Gordon v. Terry*, 684 F.2d 736, 741 n. 5 (11th Cir. 1982) (limited partnership is not a security because "it permits the partners to control, by majority vote, the general partner's decisions regarding partnership property").

In the same way, in the early 1980's, a rebuttable presumption against investment contract status developed concerning general partnership interests. *See Williamson v. Tucker*, 645 F.2d 404, 422 (5th Cir. 1981) (a general partnership interest is presumed not to be an investment contract because a general partner typically takes an active part in managing the business and therefore does not rely solely on the efforts of others). But, *Williamson*, while recognizing this no-investment-contract presumption for general partnership interests, changed the contours of the analytical framework recognizing that a general partnership interest may be an investment contract "if the general partner in fact retains little ability to control the profitability of the investment." *Merch. Capital*, 483 F.3d at 755.

Indeed, *Williamson* introduced what has become known as the *Williamson* three-part test, where the no-investment contract presumption for general partnerships gives way to an investment contract finding if any one of the three factors is satisfied:

(1) "[A]n agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership."

(2) "[T]he partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers."

(3) "[T]he partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers." *Williamson*, 645 F.2d at 424 (noting that any one of these factors renders a general partnership interest an investment contract).

Since *Williamson's* introduction, other circuits have followed suit. *See, e.g.*, *Odom v. Slavik*, 703 F.2d 212, 216 (6th Cir. 1983); *Hocking v. Dubois*, 885 F.2d 1449, 1460-61 (9th Cir. 1989); *Shields*, 744 F.3d at 644.

Moreover, in many circuits, a limited liability company falls somewhere between a limited partnership and a general partnership. *See, e.g.*, *Leonard*, 529 F.3d at 88-89 (consideration of a passive investment is complicated by the LLC structure which combines corporation and general partnership elements while retaining flexibility for federal tax purposes); *Robinson v. Glynn*, 349 F.3d 166, 174 (4th Cir. 2003) ("LLCs are particularly difficult to categorize under the securities laws, however, because they are hybrid business entities that combine features of corporations, general partnerships, and limited partnerships"); *Merch. Capital*, 483 F.3d at 756 (" . . . these business forms represent a hybrid between general and limited partnerships").

But historical distinctions have become immaterial over time given the flexibility afforded under state law in structuring these entities. For example, Kansas and Delaware allow limited liability company members flexibility in structuring their relationships limited only by freedom of contract principles. *See* K.S.A. § 17-76,134 ("It is the policy of this act to give maximum effect to the principle of freedom of contract . . . "); 6 Del.C. § 18-1101. Limited liability company members may agree that certain members or classes of members have voting rights on certain matters while others do not. K.S.A. § 17-7687; 6 Del.C. § 18-302. The LLC members may also provide for how the LLC is managed and how managers, if any, are chosen and removed. K.S.A. § 17-7693; 6 Del.C. § 18-402.

Likewise, the partners in a general or limited partnership enjoy flexibility in structuring their relationships. For example, the general partner's interest in a limited partnership may be eliminated upon the occurrence of an event specified in the partnership agreement. K.S.A. § 56-1a252; 6 Del.C. § 17-406. A general partnership agreement may limit the rights of a partner to control the partnership. K.S.A. § 56a-103; 6 Del.C. § 15-103; 6 Del.C. § 15-401. And, the partnership agreement can grant limited partners various rights, including the right to vote on any matter. K.S.A. § 56-1a202.

Obviously, with the vast freedom-of-contract flexibility provided in forming these state-law entities, limited partnerships, general partnerships, and LLCs can be structured nearly identically regardless of the label imposed on the entity. The common denominator is the agreement used to form the relationship and its terms and conditions. The nominal title has become largely insignificant.

B. Favorable and unfavorable presumptions, ever-evolving factors wedged into the *Howey* test, and form over substance analysis of varying state-law entities' largely insignificant differences have resulted in a mangled, unpredictable analytical framework to determine whether a claimant possesses an "investment contract."

Many courts, as a supplement to the *Williamson* test, have developed a hodge-podge of investment contract factors including among others:

- The Second Circuit's "passive investor" test ignores contractual obligations and powers and relies exclusively on the subjective intent of the investors to be "passive" and not actively engaged in the enterprise when determing whether the LLC investors owned "investment contracts." *See Leonard*, 529 F.3d at 90-91.

- Nominal involvement in the business operation does not negate an investment contract finding. *Merch. Capital*, 483 F.3d at 755 ("An interest does not fall outside the definition of investment contract merely because the purchaser has some nominal involvement with the operation of the business."). *Glynn*, 349 F.3d at 170 ("Agreements do not annul the securities laws by retaining nominal powers for investors unable to exercise them.")

- "General business" experience is relevant even if the investors do not have experience in the particular business or industry. *Robben*, 967 F.3d at 1097-98; but other circuits are diametrically opposed, concluding that experience in the particular business is relevant, not general business experience. *See*, *e.g.*, *Merch. Capital*, 483 F.3d at 762.

This tangled web of favorable and unfavorable presumptions; diametrically opposed views on the significance of oral representations; and the significance of general business experience or industry specific experience present an unpredictable and unwieldy *Howey* test often leading to form over substance conclusions with little or no attention given to the economic realities of a given investment.

This unpredictable and tangled web of investment contract tests undermines the securities laws' remedial purpose in predictably confronting "the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Howey*, 328 U.S. at 299. In addition to undermining the securities laws' remedial purposes, the circuits' disparate application of *Howey's* expectation-of-profits standard leads to varying conclusions based on virtually identical facts, affording federal securities law protections to some investors while denying these same protections to others based on mere geographic happenstance. Review is required to provide a uniform *Howey* application regardless of the often-times nominal state-law business vehicle employed by the promoter or the mere geographic location where suit is filed.

II. The Tenth Circuit's LLC-only test and Third Circuit's general "investment contract" test disagree with the Second, Fifth, Ninth, and Eleventh Circuits' application of *Howey's* expectation-of-profits standard. This split leaves an investor's right to seek federal securities law protections subject to mere geographical happenstance. Review is necessary to resolve the circuit split on this important matter concerning a significant federal statute with far-reaching implications.

The Tenth Circuit's LLC-only test and Third Circuit's *Howey* expectation-of-profits analysis conflict with the Second, Fifth, Ninth, and Eleventh Circuits. *See* S. Ct. R. 10 (providing that the Court, when considering review on a writ of certiorari, considers whether "a United States court of appeals has entered a decision in conflict with a decision of another United States court of appeals on the same important matter.").

Congress enacted the Securities Acts in response to "serious abuses in a largely unregulated securities market," and for the purpose of regulating "*investments*, in whatever form they are made and by whatever name they are called." *Reves v. Ernst & Young*, 494 U.S. 56, 60–61 (1990) (emphasis in original).

> Congress "painted with a broad brush" in defining a "security" in recognition of the "virtually limitless scope of human ingenuity, especially in the creation of 'countless and variable schemes devised by those who seek the use of the money of others on the promise of profits. . . .'" *Reves*, 494 U.S. at 60-61 (quoting *Howey*, 328 U.S. at 299).
>
> To that end, as the Court explained, Congress "determined that the best way to achieve its goal of protecting investors was to define the term security in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security." *Id.* at 61, 110 S.Ct. 945 (internal quotation marks and citations omitted). In furtherance of that goal, Congress "did not attempt precisely to cabin the scope of the Securities Acts," but instead "enacted a definition of 'security' sufficiently broad to encompass virtually any instrument that might be sold as an investment." *Id.*

Shields, 744 F.3d at 641-42.

This Court cautioned that when "searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on the economic reality." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

Section 77b(a)(1) of the Securities Act and Section 78c of the Securities Exchange Act of 1934 define a "security" to include "investment contracts." 15 U.S.C.

§ 77b(a)(1); 15 U.S.C. § 78c(a)(10). An "investment contract" means "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *Howey*, 328 U.S. at 298-99. "Under this prong of *Howey*, 'solely' is not interpreted restrictively." *Merch. Capital*, 483 F.3d at 755 (citation omitted).

Here, the dispute focuses on whether FVA investors were "led to expect profits solely from the efforts" of Robben. *Howey*, 328 U.S. at 298-99; *Shields*, 744 F.3d at 642-43 (citing *Forman*, 421 U.S. at 852).

The Tenth Circuit's LLC-only test and Third Circuit's general *Howey* test are diametrically opposed to the Second, Fifth, Ninth, and Eleventh Circuits on whether and how the totality of the circumstances surrounding the investment offering and the underlying economic reality are considered when determining whether the investor was "led to expect profits solely from the efforts of the promoter or a third party." *Howey*, 328 U.S. at 298-99. *Compare Foxfield Villa Associates, LLC v. Robben*, 967 F.3d 1082 (10th Cir. 2020); *Goodwin v. Elkins & Co.*, 730 F.2d 99 (3d Cir. 1984); *United States v. Leonard*, 529 F.3d 83 (2d Cir. 2008); *S.E.C. v. Arcturus Corp.*, 928 F.3d 400 (5th Cir. 2019); *Koch v. Hankins*, 928 F.2d 1471 (9th Cir. 1991); *S.E.C. v. Merch. Capital, LLC*, 483 F.3d 747 (11th Cir. 2007).

This Court should resolve the circuit split on this important matter. *See* U.S. Sup. Ct. R. 10(a).

A. The Second Circuit's "passive investor" test looks beyond the "formal" contract "terms" and relies instead on the subjective intent of the investors when deciding whether an LLC interest is an "investment contract."

The Second Circuit made plain "that, in applying the *Howey* factors, courts can (and should) look beyond the formal terms of a relationship to the reality of the parties' position to evaluate whether 'the reasonable expectation was one of significant investor control'" when deciding whether an LLC interest constituted an "investment contract." *Leonard*, 529 F.3d at 85 (citation omitted) (concluding interests in LLCs were investment contracts). The Second Circuit reasoned that if the court "were to confine [itself] to a review of the organizational documents, we would likely conclude that the interests in [the LLCs] could not constitute securities because the documents would lead us to believe that members were expected to play an active role in the management of the companies." *Id.* at 89.

For example, the LLC's organizational documents required each member "to participate in the management of the Company" and that "[e]ach important decision relating to the business of the Company must be submitted to a vote of the Members." *Id*. at 89. And, the organizational document summary stated that "[t]he purchase of interests in the Company is not a passive investment," and each "Member is required to participate in management . . . by serving on one or more committees established by the Members." *Id.* The

Members also had the right to "replace the manager and appoint his successor upon majority vote." The "Company shall be managed by the Members . . . [E]ach Member shall have the right to act for and bind the Company in the ordinary course of its business." *Id.*

The Second Circuit determined, however, that "[i]n actuality, . . . , the [LLCs'] members played an extremely passive role in the management and operation of the companies." *Id.* (concluding that "record evidence allowed the jury to conclude that – notwithstanding the language in the organizational documents suggesting otherwise – from the start there could be no 'reasonable expectation' of investor control.").

This consideration "of the reality of the transaction is consistent with the Supreme Court's repeated instruction to prize substance over form in our evaluation of what constitutes a security." *Id.* at 90 (stating that the "jury could reasonably have found managerial rights contained in the organizational documents were hollow and illusory"); *see also Reves*, 494 U.S. at 61 ("In discharging our duty, we are not bound by legal formalisms, but instead take account of the economics of the transaction under investigation.").

Here, had the Bartletts and Straub sued in the Second Circuit, the result would have been much different because no dispute exists that Robben, the Bartletts, and Straub all agreed that Robben would exclusively manage the business enterprise. The *Robben* Court's LLC-only test, however, refused to look at any such promoter representations or that both the promoter and investors agreed that the investors wanted to be "passive." Instead, the *Robben* Court focused on the investors' initial power to cause a stalemate with Robben, ignoring the economic reality caused by such deadlock.

That is, any such power to cause stalemate is not "control" over the investment's profit. The fact is, the deadlock power identified by the Tenth Circuit ignores the economic reality that leaving the enterprise unmanaged and without direction would only lead to financial ruin, not profits. And, the Tenth Circuit's stalemate-equals-control conclusion ignores the economic reality that the Bartletts had no incentive to prevent the promoter from fulfilling his promise to exclusively manage the enterprise by purchasing assets from the business for $1.6 million resulting in a guaranteed profit for the Bartletts. The economic reality shows the Bartletts had no incentive to stop the promoter from fulfilling his promise through the promoter's exclusive efforts.

B. The Fifth Circuit also determined that courts must look beyond contract formalities to determine whether investors can in fact control their investment.

The Fifth Circuit similarly concluded that "[e]ven though an investor might retain 'substantial theoretical control,' courts look beyond formalities and examine whether investors, in fact, can and do utilize their powers." *Arcturus Corp.*, 928 F.3d at 410. "Economic reality must govern over form." *Nunez v. Robin*, 415 Fed. App'x 586, 589 (5th Cir. 2011) (citing *Williamson*, 645 F.2d at 418); *see also Affco Investments 2001, L.L.C. v. Proskauer Rose, L.L.P.*, 625 F.3d 185 (5th Cir. 2010) (in applying same test used in limited partnership and general partnership cases concluded that LLC ownership interests constituted "investment contracts" in that the investors' "control was theoretical rather than actual"). The Fifth Circuit was clear: "formal powers are not dispositive – courts must determine whether investors can and do exercise those powers." *Arcturus Corp.*, 928 F.3d at 413.

Here, there is no dispute. The Bartletts and Straub never managed the enterprise until Robben drove the enterprise into financial ruin years later and abandoned the business. Instead, at the outset, the Bartletts and Straub signed an implementing resolution ratifying the parties' intent that Robben would exclusively manage the FVA enterprise.

C. The Ninth Circuit similarly concluded that the *Howey* "expectation-of-profits" analysis is not limited to the parties' agreement.

The Ninth Circuit concluded that "[i]n attempting to determine whether a scheme involves a security, the inquiry is not limited to the contract or other written instrument." *Hocking*, 885 F.2d at 1457. "Characterization of the inducement cannot be accomplished without a thorough examination of the representations made by the defendants as the basis of the sale." *Id.* (citation omitted).

Indeed, the Ninth Circuit expressly rejected the promoters' urging that the court only look to the parties' "agreement in evaluating whether the investors expected profits through the efforts of others." *Hankins*, 928 F.2d at 1477. Rather, consistent with "*Howey's* mandate that courts address 'economic reality' rather than focusing on labels attached to schemes by promoters," the Ninth Circuit made clear that "[w]e look not only to the . . . agreement itself, but also to other documents structuring the investment, to promotional materials, to oral representations made by the promoters at the time of the investment, and to the practical possibility of the investors exercising the powers they possessed pursuant to the . . . agreements." *Id.* at 1478. "[T]he question of an investor's control over his investment is decided in terms of practical as well as legal control." *Hocking*, 885 F.2d at 1460.

Here, Robben admitted that he promised the Petitioners that he, and he alone, would manage the enterprise. And, the Bartletts and Straub executed an implementing resolution before the enterprise purchased the very assets Robben promoted for purchase as the foundation for the enterprise's profitability ratifying the fact that Robben would exclusively manage the enterprise. The *Robben* Court, however, ignored this uncontroverted evidence concluding somehow that this admittedly uncontroverted testimony was somehow not "objective" enough to be considered.

One wonders, if the only three (3) witnesses to a car accident swear the light was red when the car entered the intersection, including the driver of the offending vehicle as an admission against his interest, how much more "objective" the evidence can be? Instead, under the Tenth Circuit's LLC-only, claimed "objective" standard, the only objective evidence of the parties' intent are the boilerplate provisions of the FVA Operating Agreement, not the sworn testimony of the promoter and the investors, nor the written implementing resolution signed to put Robben in charge, as all agreed.

D. The Eleventh Circuit likewise concluded that the courts must consider the whole scheme, including representations made by the promoter.

And, the Eleventh Circuit likewise concluded that "[c]onsistent with *Howey's* focus on substance over form, we look at all representations made by the promoter in marketing the interests, not just at the legal agreements underlying the sale of the interest." *Merch. Capital*, 483 F.3d at 756. "The ultimate test under *Howey* is whether the [investors] expected to rely solely on the efforts of others, and we may rely on the totality of the circumstances surrounding the offering in making this determination." *Id.* at 757 (noting the investors' practical inability to remove the manager);

Bamert v. Pulte Home Corp., 45 Fed. App'x 256, 264 (11th Cir. 2011) ("We may not look only to the purchase agreements, but must instead consider the whole transaction or scheme, including the other representations made by the defendants.").

Indeed, "[a]n interest does not fall outside the definition of investment contract merely because the purchaser has some nominal involvement with the operation of the business." *Merch. Capital*, 483 F.3d at 755. Rather, "the focus is on the dependency of the investor on the entrepreneurial or managerial skills of a promoter or other party." *Id.* (citation omitted). The court must examine "the representations and promises made by promoters . . . to induce reliance upon their entrepreneurial abilities." *Id.* at 756-57 (citation omitted).

Here, no one disputes, and Robben admitted that he promised Petitioners that he, and he alone, would manage the enterprise. The *Robben* Court, however, wrongly ignored Robben's admissions to reach its no-investment contract conclusion.

E. The Third Circuit conversely limited the *Howey* "expectation-of-profits" analysis to the parties' written agreement.

The Third Circuit conversely confined its investment contract analysis to the parties' agreement. *Goodwin v. Elkins & Co.*, 730 F.2d 99 (3d Cir. 1984) (majority of panel confining their examination to the Partnership Agreement whereas remaining panel member while agreeing with the ultimate no-investment-contract conclusion reasoned that the role of general partner, by law, extends well beyond the permitted role of a passive investor). Indeed, the Third Circuit concluded that "a general partner with this degree of participation [as set forth in the Partnership Agreement] in partnership affairs is not a security holder." *Id.* at 113 (Seitz, Chief Judge, concurring).

F. The Tenth Circuit's LLC-only test impermissibly constricts the *Howey* "expectation-of-profits" analysis effectively neutering the remedial purposes of the Securities Acts and ignoring consideration of the underlying "economic realities."

The Tenth Circuit's LLC-only test constricts the analysis to the parties' operating agreement, ignores the promoter's oral representations, ignores the investor's intent to rely on the promoter and remain passive, and ignores an implementing resolution that vested Robben with exclusive power to manage the enterprise. This test further finds general business experience relevant even if the investor has no industry-specific experience. *Robben*, 967 F.3d at 1092-94, 1097-98.

The *Robben* LLC-only test, while claiming six parts, is essentially a three-part test, with the final three parts largely deemed insignificant. The three primary parts of the Robben LLC-only test are: (1) the investors' access to information; (2) the investors' contractual powers; and (3) the investors' contribution of time and effort to the enterprise's success. *Robben*, 967 F.3d at 1091.

Part one of the test relied on the FVA Operating Agreement requirements that the investors be provided full access to the enterprise's books and records, which is consistent with other circuits. *Id.* Where the *Robben* LLC-only test departs dramatically is on the second and third part.

1. LLC-only test: Investors' Contractual Powers.

The *Robben* Court's second factor focusing on the investors' "contractual powers" limits its consideration only to the Operating Agreement signed on March 11, 2008. According to *Robben*, a resolution signed thirteen (13) days later before FVA purchased the real estate assets Robben promised would result in profits was meaningless to show the "control" the investors had over the enterprise.

The rationale for the *Robben* Court's conclusion is that its LLC-only test is an "objective one, so we do not consider the control that [investors in the LLC] *intended* to exercise." *Robben*, 967 F.3d at 1093 (emphasis in original) (internal citation omitted). Simply put, "intent" is not relevant. The *Robben* Court went onto explain that even if the parties "intended from the start to pass a resolution granting Mr. Robben" the power to "do as he wished," under the LLC-only test, control is measured objectively, not based on the intent of the investors. *Robben*, 967 F.3d at 1097.

In other words, according to the LLC-only test, even if Robben, the Bartletts, and Straub signed the implementing resolution contemporaneously with signing the FVA Operating Agreement, vesting Robben the promoter with authority to do as "he wished," it matters not. *Id.* According to the Tenth Circuit, the relevant inquiry rises and falls on the control the investors "could exercise," not what they intended or expected Robben to do. *Id.* at 1097. That is, all investors "could exercise" control over the investment by not giving control to the promoter. And when investors in fact give up this control, whether 13 seconds after signing an operating agreement, 13 minutes, or 13 days, giving up that control over the enterprise because the investors "intend" to be "passive" is fatal to establishing an "investment contract" under *Howey*. *Robben*, 967 F.3d at 1092, 1097.

Of course, this is exactly what *Howey* requires to establish an investment contract, namely – giving up control to earn a profit. *Howey*, 328 U.S. at 300. And to suggest that investors who sign multiple documents at or near the time of investing, as the Tenth Circuit hypothesizes, makes no difference in its conclusion, turns on its head the general principle that courts construe documents executed at or near the same time to determine the parties' intent. *In re Villa West Associates*, 146 F.3d 798, 803 (10th Cir. 1998) ("Where two or more instruments are executed by the same parties at or near the same time in the course of the same transaction and concern the same subject matter, they will be read and construed together to determine the intent, rights, and interests of the parties.").

But of course, the parties' intent is not in dispute: all agree that the Operating Agreement and implementing resolution, whether signed concurrently, 13 seconds, 13 minutes, or 13 days apart, all show unequivocal intent to put Robben in charge of the enterprise because the investors wanted to be "passive." But the LLC-only test cares not – the investors' and promoter's intent to do so is irrelevant because before ever making the investment the investors "could" have chosen not to grant that authority to Robben.

This transcends the absurd and leaves one wondering: What more must investors do to invoke securities law' protections when buying an LLC interest if everyone agrees the investors are to be passive and the parties sign documents at or near the time they invest saying just that? Apparently, nothing can be done other than choosing a state-law entity which is not an LLC.

2. *Robben* factor three: the investors' "contribution of time and effort to the success of the enterprise."

If the *Robben* Court's factor two analysis of the investors' contractual powers was not a sufficient paradoxical conundrum, then factor three's analysis is sure to leave investors scratching their heads. According to the *Robben* LLC-only test, when investors "intend" to be "passive," in other words, "voluntarily decide not to control" their investment by signing an implementing resolution such as the one in the instant case, definitionally there can be no "practicable inability to control the investment": "[the] third factor therefore contemplates a practical inability to control the profitability of the investment rather than a voluntary decision not to control it." *Robben*, 967 F.3d at 1092.

The *Robben* Court concluded under its LLC-only test that it would look to the *Williamson* three-part test only if the investors never acted to voluntarily give up control. *Id.* The *Robben* Court made clear that even if the investors choose to sign an implementing resolution like the one giving Robben power to "act as he wishes" at the very moment they make their investment, that such actions constitute the exact type of voluntary giving up of control that leads to a no "investment contract" finding. *Id.* at 1097.

When one clears away the underbrush of the *Robben* LLC-only test, a clear path emerges leading to an obvious destination: under factor two or three when investors "choose" to voluntarily give up control of their investment contemporaneously with making that investment and put the promoter in charge of their money to earn the investors a profit, that investor can never claim securities laws protections as an investment contract. *Robben*, 967 F.3d at 1092, 1097.

But of course, this long-winding, form over substance analysis is antithetical to the *Howey* test: whether the investor is "led to expect profits solely from the efforts of the promoter or a third party." *Howey*, 328 U.S. at 298-99. Of course, doing exactly what the Bartletts and Straub did here is the textbook definition of an "investment contract." They signed an implementing resolution – whether 13 seconds, 13 minutes, or 13 days – after investing making plain their intent to be "passive" investors. But because the promoter chose an LLC as the state-law entity for the enterprise, the Bartletts and Straub somehow can't satisfy the *Howey* test.

3. The LLC-only test conflates a contract right to force a stalemate into control.

Lastly, the Tenth Circuit's conclusion that contract rights empowering the ability to cause a stalemate somehow equals control over the enterprise's profits is starkly different than the Second, Ninth, and Eleventh Circuits' analytical framework employed for LLCs. The *Robben* Court ruled that when an LLC is involved, the "'test of control is an objective one' so we do not consider 'the control that [the LLC investors] intended to exercise.'" *Robben*, 967 F.3d at 1093 (quoting *Ave. Capital Mgmt. II, L.P. v. Schaden*, 843 F.3d 876, 884 (10th Cir. 2016)). Indeed, the *Robben* Court ignored the promoter's undisputed admission that Robben not only promoted the FVA investment as an opportunity to profit solely from Robben's exclusive management and control, but Robben structured FVA in just that way. Robben admitted that neither Bartlett nor Straub "had anything to do with any of [FVA's] management" and that he structured the transaction so that "Robben [took] money, money invested by Mr. Bartlett, [and] money invested by Mr. Straub" and that Robben would use his "expertise in this enterprise to make a profit for everybody and distribute the profits based on the amount invested."

And, the *Robben* Court's deadlock-power-equals-control rationale clearly ignored this Court's admonition that "in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin*, 389 U.S. at 336. Instead, the *Robben* Court circularly concluded that the technical, contract right to force a stalemate amounted to investment control. That is, the *Robben* Court reasoned that since the Bartletts as 50% owner, could technically block actions Robben promoted, it made no difference that Robben, the promoter, the Bartletts and Straub all agreed that Robben, and he alone, would run and control the business enterprise. *Robben*, 967 F.3d at 1096-97.

The fact is, the Tenth Circuit's "technical-legal-control-to-effectuate-a-stalemate" standard is no standard at all. A stalemate in no way allows the Bartletts to manage the enterprise going forward to cause profits, but, instead, only the power to ensure their investment dies on the vine. Such a dystopian view of *Howey's* expectation of profits test is at best unnatural.

Indeed, "[b]y profits, the Court has meant either capital appreciation resulting from the development of the initial investment, . . . or a participation in earnings resulting from the use of investors' funds." *Forman*, 421 U.S. at 852. That is, "the investor is 'attracted solely by the prospects of a return' on his investment." *Id.* (citing *Howey*, 328 U.S. at 300); *see also Merch. Capital*, 483 F.3d at 760 ("A focus on the bare terms of the legal agreement would . . . be inconsistent with the substance over form principle of *Howey*, and would be an invitation to artful manipulation of business forms to avoid investment contract status").

The Tenth Circuit *Robben* LLC-only test makes plain LLCs are treated differently without any substantive reason for such divergent treatment.[3] In stark contrast to the Second, Fifth, Ninth, and Eleventh Circuits, the nominal title chosen by the promoter drives the Tenth Circuit's analytical framework. That is, by nominally labeling an investment scheme a limited liability company, the Tenth Circuit unnaturally constrains the investment contract analysis such that the promoter's promises and promotional materials and the parties' expressed intent that the promoter solely manage the enterprise have no relevance to whether the promoter sold an "investment contract."

The Tenth Circuit's label-driven analytical framework is directly contrary to "*Howey's* mandate that courts address 'economic reality' rather than focusing on labels attached to schemes by promoters." *Hankins*, 928 F.2d at 1478. And, the Tenth Circuit's label-driven analytical framework begs several questions: Why are

[3] *Robben*, 967 F.3d at 1093, n. 9.

the "totality of the circumstances" and the promoter's representations relevant for one defrauded investor, but not another? Are the defrauded LLC investor's expectations to rely solely on the promoter's efforts deserving of less protection than a limited or general partner's expectations?[4] The questions cast doubt on the soundness of the *Robben* Court's reasoning.

There appears to be no good reason to further avoid a uniform standard. A defrauded investor's right to seek redress in federal court for securities fraud should not depend upon the investor's geographical happenstance. In other words, the conflicting interpretations within the Tenth Circuit and between the Tenth and Third Circuits, on the one hand, and the Second, Fifth, Ninth, and Eleventh Circuits concerning *Howey's* expectation-of-profits prong warrants review so that the Act is applied uniformly and consistently to defrauded investors regardless of their geographical location. *See Commonwealth of Massachusetts v. United States*, 333 U.S. 611, 615 (1948) ("Because of the obvious confusion concerning the effects of our prior decisions and the asserted differences between this case and the Illinois cases, certiorari was granted"); Sup. Ct. R. 10(c) (review is warranted when an important and unsettled question of law exists).

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[4] Indeed, focusing on labels attached to schemes by promoters runs directly contrary to *Howey's* mandate that courts address "economic reality." *Hankins*, 928 F.2d at 1478.

III. This case raises important issues concerning the Act's scope. The Tenth Circuit's expectation-of-profits analysis for LLCs impermissibly narrows the Act's protections leaving investors unprotected against fraudulent promoters who paper-over the Acts anti-fraud protections while retaining ultimate control over the investment. The Second, Fifth, Ninth, and Eleventh Circuits' "expectation-of-profits" analysis correctly concludes that a focus on the bare terms of the agreement is inconsistent with *Howey*. Review is necessary to resolve this important issue of federal law.

Certiorari may be granted when important issues are raised concerning a federal statute's scope. *See Arroyo v. United States*, 359 U.S. 419, 421 (1959); *Palmero v. United States*, 360 U.S. 343, 345 (1959). This case raises questions concerning the extent of the Act's protection. The Tenth Circuit concluded that only LLC interests are subject to an "investment contract" analysis that ignores investor intent to remain passive, ignores the promoter's oral representations, and ignores an implementing resolution's stated intent to effectuate what all parties agreed to – the promoter will solely control the enterprise. *See Robben*, 967 F.3d at 1093; *Schaden*, 843 F.3d at 884. But the Tenth Circuit's LLC-only test which is diametrically opposed to the general partnership test in *Shields* is also in stark contradiction with the Second, Fifth, Ninth, and Eleventh Circuits' reliance on all representations by the promoter in marketing the interests, not just the legal agreements underlying the sale. *Shields*, 744 F.3d at 646; *United States v. Leonard*, 529 F.3d 83, 85 (2d Cir. 2008); *Arcturus Corp.*, 928 F.3d at 410-411; *Koch v. Hankins*, 928 F.2d 1471 (9th Cir. 1991); *Merch. Capital*, 483 F.3d at 756-57.

The *Robben* Court impermissibly narrowed the Act's protections available to defrauded investors contrary to the Supreme Court's admonition that when "searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on the economic reality." *Tcherepnin*, 389 U.S. at 336 (1967).

The protections afforded by and liability imposed under the Act are important issues with far-reaching consequences for limited and general partners, joint venturers, and LLC investors. Parties to these transactions lack definitive guidance. Without review by this Court, "federal law will be administered in different ways in different parts of the country; citizens in some circuits are subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to." *Beaulieu v. United States*, 497 U.S. 1038, 110 S. Ct. 3302 (1990) (White, J., dissenting) (denial of petition for writ of certiorari); *see also Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (noting that granting review is proper in "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals"); Joseph C. Long, Michael J. Kaufman, John M. Wunderlich, 12 Blue Sky Law § 3:71 (June 2020) (noting that "there are clear philosophical differences between the courts on how management participation or passivity should be measured").

The uniform application of *Howey's* expectation-of-profits prong to determine whether interests are securities under the Act, entitling defrauded investors the Act's protections, is critical given the prevalent use of limited liability companies as investment vehicles. Debra R. Cohen, *Citizenship of Limited Liability Companies for Diversity Jurisdiction*, 6 J. Small & Emerging Bus. Law 435, 436 n. 4 (2002) (identifying the dramatic increase in the number of limited liability companies).

The *Robben* Court ignored this Court's "repeated instruction to prize substance over form in evaluation of what constitutes a security." *Leonard*, 529 F.3d at 90. The Robben Court's failure to adhere to this Court's "repeated instruction" warrants review. Sup. Ct. R. 10(c) (review warranted when a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court.").

CONCLUSION

For the foregoing reasons, Petitioners request this Court grant review to reverse the Tenth Circuit Court of Appeals' holding that BFREF's and PRES's FVA limited liability interests are not "investment contracts" under the Securities Exchange Act of 1934. Petitioners also request remand of this proceeding to the District Court of Kansas for resolution on the merits.

Respectfully submitted,

JOHN M. DUGGAN
DERON A. ANLIKER
DUGGAN SHADWICK DOERR & KURLBAUM LLC
9101 W. 110th Street, Suite 200
Overland Park, Kansas 66210
(913) 498-3536
jduggan@dsdklaw.com
danliker@dsdklaw.com

Attorneys for Petitioners Bartlett Family Real Estate Fund, LLC, PRES, LLC, Foxfield Villa Associates, LLC, Richard A. Bartlett, and Ernest J. Straub, III