

<p>SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p style="text-align: center;">Δ COURT USE ONLY Δ</p>
<p>On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 2018CA1769 District Court, City and County of Denver No. 2009CV7181, Hon. Michael Martinez</p>	
<p>Petitioner: TUNG CHAN, Securities Commissioner for the State of Colorado, v. Respondents: HEARTLAND ENERGY DEVELOPMENT CORP. ET. AL.</p>	<p>Case No. 2020SC595</p>
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<p style="text-align: center;">BRIEF OF AMICUS CURIAE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI</p>	

CERTIFICATE OF COMPLIANCE PURSUANT TO C.A.R. 32(h)

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief of *amicus curiae* complies with the applicable word limit set forth in C.A.R. 29(d) and C.A.R. 53(g).

It contains **1,039** words (excluding the caption page, this certificate page, the table of contents, the table of authorities, and the signature block).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Theodore Hartl

Theodore Hartl (Reg. #32409)

Ballard Spahr LLP

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**IDENTITY AND INTEREST OF *AMICUS CURIAE* PURSUANT
TO C.A.R. 29(c)(2)**

Formed in 1919, the North American Securities Administrators Association, Inc. (“NASAA”) is the non-profit association of state, provincial and territorial securities regulators in the United States, Canada and Mexico. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. Colorado Securities Commissioner Tung Chan (the “Commissioner”), Petitioner here, is the NASAA member representative from this state.

NASAA’s members are responsible for administering state securities laws, commonly known as “Blue Sky Laws.” *See generally* 1 LOUIS LOSS ET AL., SECURITIES REGULATION 55–251 (5th ed. 2014)). NASAA supports its members and the investing public by promulgating model rules and statutes, providing training opportunities, coordinating multi-state enforcement actions and commenting on legislative and rulemaking processes. NASAA also offers its legal analysis and policy perspectives to state and federal courts as *amicus curiae* in cases involving the interpretation of state and federal securities laws. One of NASAA’s goals is to foster greater uniformity among state and federal securities laws, though the mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse. NASAA has an interest in this

case (and NASAA has filed two *amicus curiae* briefs previously in this litigation)¹ because this matter raises important questions of state securities law that could impact the ability of the Commissioner and other NASAA members to protect their citizens from fraud and abuse.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE JURISPRUDENTIAL “WHIPLASH EFFECT” BETWEEN HEI-1 AND HEI-2.

The Colorado Court of Appeals has twice issued decisions in this matter, first in *Rome v. HEI Resources et al.*, 411 P.3d 851 (Colo. App. 2014), *cert. denied HEI Resources, Inc. v. Rome*, No. 2015SC45 (Colo. Aug. 31, 2015), and a second time in the decision below, *Chan v. HEI Resources et al.*, Case No. 18CA1769 (Colo. App. June 4, 2020). These two decisions (referred to colloquially herein as “*HEI-1*” and “*HEI-2*,” respectively) are irreconcilable on an important question of law: *When is a general partnership interest a security under the Colorado Securities Act?* *HEI-1* held Colorado courts are not bound to follow the so-called “*Williamson* presumption” that general partnership interests are securities (*see HEI-1*, 411 P.3d at 854), while *HEI-2* held Colorado courts are bound to adhere to

¹ See Opening Brief of Amicus Curiae North American Securities Administrators Association, *Rome v. HEI Resources et al.*, Case No. 13CA2090 (Colo. App. filed April 14, 2014); and Brief of Amicus Curiae North American Securities Administrators Association, Inc., in Support of Plaintiff/Appellee Chris Myklebust, Securities Commission for the State of Colorado, *Myklebust v. HEI Resources et al.*, Case No. 18CA1769 (Colo. App. filed May 31, 2019).

this presumption (*see HEI-2*, Case No. 18CA1769 at *3). The Court of Appeals acknowledged its 180° turnaround in *HEI-2* from *HEI-1* and the “whiplash effect” of its decision. *Id.* This type of jurisprudential about face is precisely the sort of disagreement C.A.R. 49(c) prescribes as grounds for this Court to grant a writ of certiorari. This Court should do so, as it has in similar circumstances where the Court of Appeals has disagreed with itself. *E.g.*, *Anderson v. Brinkhoff*, 859 P.2d 819, 829 (Colo. 1993). The conflicting *HEI-1* and *HEI-2* opinions create ambiguity on a foundational question of law and if this Court declines to grant the writ, this Court will do a disservice to the litigants in this matter² and to business promoters and investors doing business in this state.

II. COLORADO IS NOT OBLIGATED TO FOLLOW THE WILLIAMSON TEST FOR GENERAL PARTNERSHIP INTERESTS; RATHER, THIS COURT SHOULD ESTABLISH THE LAW OF COLORADO.

NASAA intends to seek leave from this Court to file an *amicus curiae* brief at the merits stage if this Court grants the petition for writ of certiorari. We therefore will not attempt to recite our entire argument in this brief in support of the petition. However, we believe it is important to emphasize at this stage – as

² Given the seemingly never-ending nature of this litigation, if this Court declines to grant the writ, there is every possibility that the litigants will proceed through another trial and yet another appeal to the Colorado Court of Appeals, resulting in a third appellate decision. We are concerned that such an opinion – an “*HEI-3*” – could result in yet another interpretation of Colorado law, further confusing the issues for the present litigants and others similarly situated.

this Court considers the value of granting certiorari and taking up the open question framed by the conflict between *HEI-1* and *HEI-2* – that this Court is not compelled to follow *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981), or adhere to the so-called *Williamson* presumption that other courts have done. After all, “*Williamson* is ultimately simply a guide to determining whether the partners expected to depend solely on the efforts of others, thus satisfying the *Howey* test.” *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 755 (11th Cir. 2007). There are also compelling reasons why this Court should take a fresh look at the legal question of when a general partnership interest constitutes a security.

While it may have made sense for courts to interpret *Williamson* as creating a rebuttable presumption that general partnership interests are not securities when *Williamson* was decided in 1981, developments in partnership law since then have undermined this conclusion. For example, general partnerships can now elect to be treated as limited liability partnerships, and the resulting limitation of liability decreases the incentive for partners to be actively engaged in the management of the business. Additionally, state-by-state variations in partnership law now permit the modification or elimination of important agency and management attributes. In light of these significant changes in partnership law, which have resulted in a framework where partnership members have less incentive to actively participate

and less opportunities to do so, there are compelling reasons to rethink the very foundations upon which the *Williamson* decision was predicated.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari and resolve the important legal question left open by *HEI-1* and *HEI-2* regarding when a general partnership interest is a security under the Colorado Securities Act.

Dated: July 23, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 23, 2020, true and correct copies of the foregoing **BRIEF OF AMICUS CURIAE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI** was served electronically via ICCES on all counsel of record.

*/s/ Brandon Blessing*_____