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STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

STATE OF MICHIGAN, DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, CORPORATIONS, SECURITIES, AND COMMERCIAL LICENSING BUREAU,

Plaintiff-Appellee,

v

L.A. DEVELOPERS, LLC and DAVID BYKER,

Defendants-Appellants.

MSC No. 165824

COA No. 358656

Trial Ct No. 20-002976- AA

BRIEF OF *AMICUS CURIAE* NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1,2]

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 México. NASAA has 68 members, including the securities regulators in all 50 U.S. states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam. The Corporations, Securities, and Commercial Licensing Bureau of the Michigan Department of Licensing and Regulatory Affairs (the "Bureau"), the Defendant-Appellee in this proceeding, is a NASAA member.

The overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse. NASAA's members are responsible for administering state securities laws, including by: qualifying and registering broker-dealers, investment advisers, and their agents and representatives; conducting routine and for-cause examinations and audits of registrants; and enforcing the securities laws in criminal, civil, and administrative enforcement actions. NASAA supports its members in carrying out their investor protection and regulatory duties by, *inter alia*, promulgating model rules and statutes, coordinating examination sweeps and multi-state enforcement actions, and commenting on legislative and rulemaking processes. NASAA also offers its legal analyses and policy perspectives to state and federal courts as *amicus curiae* in cases involving the interpretation of state and federal securities laws.

Like many states, Michigan has modeled its securities law on the Uniform Securities Act. NASAA's members, including the Bureau, share a common interest in ensuring that state securities

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[1] No part of this brief has been authored by a party or counsel to a party. No party or counsel to a party has made a monetary contribution intended to fund the preparation or submission of this brief.

[2] NASAA submits this brief pursuant to the Court's order of December 20, 2023, inviting NASAA to file a brief *amicus curiae*.

laws based on the Uniform Securities Acts are interpreted correctly, and that investors are thereby protected from fraud and abuse. The need to protect investors is especially acute with regard to promissory notes, which are consistently reported as one of the top investor threats by NASAA members. *See*, *e.g.*, NASAA 2023 Enforcement Report, at 4, 13 (Feb 27, 2024), https://bit.ly/3Iitd4P (explaining that promissory notes are among the products most commonly involved in enforcement actions and investigations); NASAA 2022 Enforcement Report, at 5, 10-11 (Sept 20, 2022), https://bit.ly/47RbtJs (noting more enforcement actions involving promissory notes than any other product, and explaining why notes are attractive to fraudsters).

In this case, Appellants urge this Court to endorse an untenable interpretation of Michigan's securities laws that is inconsistent with the text, structure, and key policy goals of the statute. Adopting Appellants' interpretation would impair the Bureau's ability to protect Michigan investors from these schemes, and it would render Michigan an outlier among state securities regulators. It would also undermine uniformity among state securities laws and could erode the ability of other jurisdictions to enforce their securities laws.

SUMMARY OF ARGUMENT

The Bureau appropriately applied the "family resemblance test" set forth in *Reves v Ernst & Young*, 494 US 56 (1990), when it determined that Appellants' promissory notes were securities subject to the Michigan Uniform Securities Act (the "MUSA"), MCL 451.2101 *et seq*. The Court of Appeals rightly upheld the Bureau's interpretation of the law and formally adopted the *Reves* test. The Court of Appeals' decision should stand.

Neither the MUSA's text nor judicial precedent interpreting the definition of "security" in the MUSA or its predecessor require the MCL 451.2102c(c)(i) factors to be applied exclusively over other tests. To the contrary, by providing that the definition "includes" instruments that

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conform to those factors, the Legislature made clear that subparagraph (i) is one of multiple tests encompassed within the definition and does not preclude the use of others.

Further, the context in which the MCL 451.2102c(c)(i) factors were added to the statute shows that those factors were meant to add to the flexibility of the definition, not to constrain it. Those factors are a modified version of the "risk capital" test, which was developed as an alternative to perceived shortcomings in the prevailing analysis to identify securities in the form of investment contracts. By incorporating this test, the Legislature demonstrated its intent to make the definition broader and more flexible by ensuring that Michigan law would encompass what many expected to be an improved test.

Finally, Michigan caselaw does not require the exclusive application of MCL 451.2102c(c)(i) to notes. The cases on which Appellants rely involved statutes that were materially different from the current MUSA and did not consider (let alone reject) other tests. Moreover, Michigan courts have generally not construed the MCL 451.2102c(c)(i) factors as an exclusive test and have used other frameworks in appropriate circumstances.

Applying the *Reves* test to notes under the MUSA is appropriate because the *Reves* test would best effectuate the text, structure, and fundamental objectives of Michigan's securities law. The *Reves* test begins with a rebuttable "presumption" that a note is a security. The presumption directly tracks the language of the statute, which provides that a note is a security "unless the context otherwise requires" and places the burden of proof on a party claiming an exemption, exception, or exclusion.

The *Reves* test is also consistent with Michigan judicial precedent. Adopting the *Reves* test would not change the ultimate conclusions in the cases on which Appellants rely. Nor do Michigan and federal law differ materially in terms of the general principles underlying the definition of

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"security" or their treatment of fixed-return investments as securities. Appellants' contention that fixed-return investments are not securities under the MUSA is flatly inconsistent with other provisions of the statute and would lead to absurd results.

Finally, applying the *Reves* test furthers a key policy objective of the MUSA by defining key terms consistently with other state and federal securities laws. In enacting the current MUSA, the Legislature enacted a version of the Uniform Securities Act (2002). Michigan's since-repealed 1964 securities law was modeled on the Uniform Securities Act (1956). One of the key policy goals in both versions of the Uniform Securities Act is to promote uniformity in regulatory standards among state and federal securities laws. By enacting the Uniform Securities Act, the Legislature enacted a definition of "security" that is uniform in all material respects and demonstrated its intent that Michigan's uniform definition be interpreted consistently with the materially identical definitions in other state and federal securities laws. This Court should decline to read the statute in a way that makes Michigan an outlier among state securities regulators and undermines the Bureau's ability to protect investors.

ARGUMENT

The Bureau appropriately applied the "family resemblance test" set forth in *Reves v Ernst & Young*, 494 US 56 (1990), when it determined that Appellants' promissory notes were securities subject to the Michigan Uniform Securities Act (the "MUSA"), MCL 451.2101 *et seq*. As a statute designed to protect investors from fraud and abuse involving securities and investment advice, the MUSA "should be broadly construed to effectuate its purposes." *People v Dempster*, 396 Mich 700, 704 (1976). Consistent with that principle, the Court of Appeals rightly upheld the Bureau's interpretation of the law and formally adopted the *Reves* test. *See LA Devs, LLC v Dep't of Licensing & Regul Affs Corps, Sec, & Com Licensing Bureau*, ___ Mich App ___ (2023), 2023

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WL 3555079 (Mich Ct App, May 18, 2023). The Court of Appeals' decision should stand because (i) the MUSA does not require the factors articulated in MCL 451.2102c(c)(i) to be applied exclusively over other tests, and (ii) the *Reves* test is the best means to give effect to the text, structure, and purpose of the MUSA.[3]

I. Michigan law does not require the MCL 451.2102c(c)(i) factors to be applied exclusively over other tests.

Appellants' argument that the factors listed in MCL 451.2102c(c)(i) are the exclusive framework to determine whether any instrument is a security under the MUSA, *see*, *e.g.*, Appellants' Supp Br at 2, is wrong. The MUSA and its predecessor[4] purposely define the term "security" in broad terms. Neither the plain text of the definition in the MUSA nor caselaw interpreting the definition as it existed in the previous statute support Appellants' reading. To the contrary, the Legislature's use of "inclu[sive]" language demonstrates that subparagraphs (i)-(vi) of MCL 451.2102c(c) are not exclusive. Furthermore, the history of the development of the MCL 451.2102c(c)(i) factors and the context in which they were initially "include[d]" in the previous statute demonstrate that they were meant to add flexibility to the definition, not to constrain it. Finally, Michigan precedent does not require the exclusive application of MCL 451.2102c(c)(i) when more appropriate options are available.

A. MCL 451.2102c(c)(i) is one of multiple tests encompassed by the MUSA's definition of "security."

The text of MCL 451.2102c(c) makes clear that the factors in subparagraph (i) represent merely one framework to identify a security. Like much of the MUSA, the definition of "security"

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[3] NASAA takes no position in this brief as to whether the notes issued by Appellants are ultimately securities under the *Reves* test, nor as to whether Appellants have demonstrated sufficient grounds for this Court to grant leave to appeal under MCR 7.305(B).

[4] *See* 1964 PA 265; MCL 451.501-451.818 (repealed).

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in MCL 451.2102c(c) is a uniform provision that is intentionally modeled on the equivalent text in the federal securities laws. *See* MCL 451.2101 ("This act shall be known and may be cited as the 'uniform securities act (2002).'"); Unif Sec Act (2002), § 102 Official Comment 28 at 31 (stating that "much of the definition . . . is identical to the definition in Section 2(a)(1) of the Securities Act [of 1933, 15 USC § 77b(a)(1)]").[5] As a general rule, the definitions crafted in state and federal securities laws are designed intentionally to be "sufficiently broad to encompass virtually any instrument that might be sold as an investment." *Reves*, 494 US at 60-61; *see also State v McGuire*, 735 NW2d 555, 567-68 (Wis Ct App 2007); and *State v Taubman*, 606 NE2d 962, 968-69 (Ohio Ct App 1992).

Under the MUSA, notes, stocks, bonds, and a wide variety of other instruments are identified explicitly as securities unless the context requires otherwise. MCL 451.2102c(c). Consistent with other state and federal securities laws, the MUSA augments its list of specific instruments with further descriptive terms meant to capture other instruments that function economically as securities. As the U.S. Supreme Court explained, while "[s]ome, such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well settled meaning[,] [o]thers are of more variable character and were necessarily designated by more descriptive terms, such as 'transferable share,' 'investment contract,' and 'in general any interest or instrument commonly known as a security.'" *SEC v CM Joiner Leasing Corp*, 320 US 344, 351 (1943).

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[5] The definition in MUSA's immediate predecessor was likewise modeled on federal law. *See* MCL 451.816 (repealed) ("This act shall be known and may be cited as the 'uniform securities act.'"); Unif Sec Act (1956), Official Code Comment to § 401(*l*) ("This subsection [defining the term 'security'] is identical with § 2[(a)](1) of the Securities Act of 1933, 15 USC § 77b[(a)](1), except for oil, gas and mineral interests and the addition of the last sentence [excluding insurance products]."). The Uniform Securities Act (2002) is available at https://bit.ly/49ElhGy. The Uniform Securities Act (1956), as amended in 1958 by the National Conference of Commissioners on Uniform State Laws and from time to time by NASAA, is available at https://bit.ly/3P4WSme.

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In addition to the enumerated securities in MCL 451.2102c(c), the MUSA introduces several examples of instruments and transactions that are "include[d]" and "not include[d]" within the broader definition. MCL 451.2102c(c)(i)-(vi). *Accord* Unif Sec Act (2002), § 102(28)(A)-(E). Among these examples, the definition "includes" an arrangement that meets the factors in MCL 451.2102c(c)(i) as well as an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor. MCL 451.2102c(c)(i), (v). The definition also "may include" an interest in a limited partnership, limited liability company, or limited liability partnership as an "investment contract." MCL 451.2102c(c)(vi). However, the definition "does not include" an insurance or endowment policy, annuity contract, or interest in a retirement plan subject to the Employee Requirement Income Security Act of 1974. MCL 451.2102c(c)(iii), (iv).

The plain language of the entire definition is sufficient to end the inquiry. Appellants are asking this Court to take a single subparagraph inserted into the middle of the definition and elevate it above the language that precedes it and follows it. But there is nothing in MCL 451.2102c(c)(i) to suggest that it limits or subordinates the rest of the definition in that manner. To the contrary, as the U.S. Supreme Court has recognized, the use of "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle" underlying the broader definition. *Fed Land Bank of St Paul v Bismarck Lumber Co*, 314 US 95, 100 (1941); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 132-33 (2012) (explaining that in normal English usage, the term "include" is understood to introduce examples, not an exhaustive list). When a legislature "introduces factors that . . . courts should consider by using the word 'including,'" it merely "list[s] some of the factors that courts may consider" rather than "limiting the . . . courts' ability to consider factors not listed." *In*

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re Village Apothecary, 45 F4th 940, 947-48 (CA 6, 2022); *see also Reading Law* at 226 ("When a definitional section says that a word 'includes' certain things, that is usually taken to mean that it may include other things as well."). If the Michigan Legislature had wanted subparagraphs (i)-(vi) to be limiting or exclusive, it clearly knew how to do so because it used exclusive language, *i.e.*, "'[s]ecurity' *means*," to introduce the categories of securities in the first sentence of the definition. MCL 451.2102c(c) (emphasis added); *Helvering v Morgan's, Inc.*, 293 US 121, 125 n.1 (1934) ("The natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition."). Therefore, by couching subparagraphs (i)-(vi) in terms of "inclu[sion]," the Legislature demonstrated its intent that those provisions be non-exhaustive examples that do not foreclose reliance on other, unenumerated tests and factors to identify a security.

Furthermore, reading the MUSA to *require* application of MCL 451.2102c(c)(i) would violate the principle that "every word of a statute should be given meaning" and "no word should be treated as surplusage or made nugatory." *Apsey v Memorial Hosp*, 477 Mich 120, 127 (2007). If all instruments and transactions, including notes, must be filtered through the factors in MCL 451.2102c(c)(i), then it is wholly irrelevant whether the putative security is a stock, note, bond, investment contract, or any other named, functionally described, or otherwise "include[d]" type of security. Ultimately, the Court should read the MUSA in a way that avoids these results, rather than inducing them.

B. The factors in MCL 451.2102c(c)(i) were meant to add flexibility to the definition, not to constrain it.

In 1978, the Legislature amended Michigan's 1964 securities act to add the five factors currently embodied in MCL 451.2102c(c)(i) to the definition of "security." 1978 PA 481 at 1962;

Prince v Heritage Oil Co, 109 Mich App 189, 196 (1981). These factors were not an invention of the Legislature, but rather they are an adopted version of what was then a relatively new test to identify an investment contract. The "risk capital" test, now codified in MCL 451.2102c(c)(i), was developed as an alternative to the well-known test for investment contracts established in *SEC v WJ Howey Co*, 328 US 293 (1946), which itself was codified in subparagraph (v) when the Legislature enacted the MUSA. Given the manner in which state securities laws were developing at the time the MCL 451.2102c(c)(i) factors were added to Michigan's securities law, it is clear that the Legislature intended these factors to add flexibility to Michigan's securities laws, just as was being done in other jurisdictions.

State and federal courts have developed various tests to define different types of securities enumerated in their statutes, particularly those "of more variable character" like investment contracts. *Joiner*, 320 US at 351. One such test is the *Howey* test. *See Howey*, 328 US at 298-99. In *Howey*, the U.S. Supreme Court defined the term "investment contract" as "a contract, transaction or scheme whereby a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits [4] solely from the efforts of the promoter or a third party." *Id.*[6] This framework was intended to "embod[y] a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Id.* at 299.

Over time, the *Howey* test was subjected to criticism due to the perception that it was overly technical in certain aspects of its application. Thus, some courts and legal scholars developed the

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6 Michigan courts applied the *Howey* test long before it was added to the statute. *See*, *e.g.*, *People v Cooper*, 166 Mich App 638, 646-50 (1987) (citing *People v Breckenridge*, 81 Mich App 6 (1978)). *Cooper* was also decided after the Legislature "include[d]" the MCL 451.2102c(c)(i) factors in the definition in the MUSA's predecessor.

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"risk capital" test, aiming to make the analysis broader, more flexible, and to elevate the fundamental policy of broad investor protection. In a 1967 article, Professor Ronald J. Coffey, then-Assistant Professor of Law at Western Reserve University,[7] proposed an analytical framework that focused chiefly on the investor's risk of losing their initial capital investment (*i.e.*, the "risks of an enterprise"), rather than the presence of a "common enterprise" or the inducement of conventional "profits." *See* Ronald J. Coffey, *The Economic Realities of a "Security": Is There a More Meaningful Formula?*, 18 W Rsrv L Rev 367, 374-375, 375 n.42, and 377-78 (1967), https://bit.ly/49W05ML.[8]

A few years later, the Supreme Court of Hawaii observed that courts applying *Howey* had become "entrapped in polemics . . . and fail[ed] to consider the more fundamental question whether the statutory policy of affording broad protection to investors should be applied" more broadly. *State v Hawaii Mkt Center, Inc*, 485 P2d 105, 108 (Haw 1971. The court acknowledged "the remedial purposes of [the Hawaii securities law]" and adopted the "risk capital" test, holding that an investment contract is created whenever

[7] Western Reserve University and Case Institute of Technology "federated" in 1967 to form Case Western Reserve University. *See* Case W Rsrv Univ, *The Story of CWRU*, https://bit.ly/3wApIUT (last visited Feb. 28, 2024).

[8] Under Professor Coffey's test, a security is (1) a transaction in which (2) a person furnishes value to another and (3) a portion of that value is subjected to the risks of an enterprise (including a proprietary interest or debt-holder claim against the enterprise), and (4) at the time of the transaction, the buyer is not familiar with the operations of the enterprise or does not receive the right to participate in managing it, and (5) the furnishing of value is induced by the seller's promises or representations that give rise to a reasonable understanding that the buyer will realize a valuable benefit of some kind as a result of the operation of the enterprise. *Id*. at 377. *See also Silver Hills Country Club v Sobieski*, 361 P2d 906, 908-09 (Cal 1961) (holding that membership interests in a country club were a security where the proceeds financed completion of the club, finding that the purchasers contributed "risk capital," and explaining that "[s]ince the act does not make profit to the supplier of capital the test of what is a security, it seems all the more clear that its objective is to afford those who risk their capital at least a fair chance of realizing their objectives in legitimate ventures whether or not they expect a return on their capital in one form or another").

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(1) an offeree furnishes initial value to an offeror,

(2) a portion of this initial value is subjected to the risks of the enterprise,

(3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and

(4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

Id. at 109 (citing Coffey, *supra*, among other authorities).

The Michigan Legislature first "include[d]" the "risk capital" test in Michigan's statutory definition of "security" in 1978. 1978 PA 481 at 1962; *Prince*, 109 Mich App at 196. At that time, it was understood that this framework "should be read in light of" *Hawaii Mkt Center* and other seminal cases, and that Professor Coffey's analysis was "a prime basis behind the development of this modified risk capital theory." *See* Gov William G. Milliken, Section By Section Analysis of Proposed Uniform Securities Act Amendments (1977 SB 834), at 19, https://bit.ly/49DL5ml.

The Legislature's decision to codify the "risk capital" test in the MUSA does not make Michigan's securities law unique among other state and federal laws, as Appellants suggest. *See* Appellants' Supp Br at 44. Quite the opposite; as shown above, Michigan followed a prominent trend in the law and added the "risk capital" test to its toolbox for determining when a transaction involves a security. Although the "risk capital" test did not ultimately supplant the *Howey* test, it has been adopted in a number of jurisdictions as an additive approach to determine when the securities laws apply. *See* Thomas Lee Hazen, 1 Law Sec Reg § 1:55 (Nov 2023 update) (stating

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that the "risk capital" test "supplement[s] the *Howey* test" and noting that "many state courts and a few federal courts have followed [it]"). Other states have taken a similar approach to Michigan and expressly incorporated *both* tests by statute or regulation. *See* MCL 451.2102c(c)(i), (v) (including both the "risk capital" and *Howey* tests, respectively, within the definition of "security"); NH Rev Stat § 421-B:1-102(29)(A), (53)(A) (same); 71 Okla Stat § 1-102(32)(d), (f) (same); Wis Stat 551.102(28)(d) (same); Iowa Admin Code r 191-50.1, "Investment contract" (same); 950 Mass Code Regs 14.401, Investment Contract (same); Nev Admin Code § 90.090 (same); NC Admin Code 6A.1104(8) (same).

As such, it is clear that the purpose of "includ[ing]" these factors in the MUSA was to ensure that Michigan's securities law would encompass what many expected to be an improved test and to maintain the broad scope of the definition that the Legislature enacted. This dynamic is even clearer in the MUSA, as the definition now "includes" both the *Howey* and "risk capital" tests on equal footing with each other. It is wholly implausible that the Legislature intended the MCL 451.2102c(c)(i) factors to be the exclusive test for any form of security when the Legislature explicitly also kept the list of specific instruments that qualify and included the competing *Howey* test in the definition as well.

C. Michigan caselaw does not compel the exclusive application of the MCL 451.2102c(c)(i) factors.

As the Court of Appeals correctly acknowledged, "there is a lack of caselaw interpreting the definition [of 'security'] under the current [MUSA]." *LA Devs, LLC*, ___ Mich App ___ (2023), 2023 WL 3555079, at *8. The *Breckenridge*, *Ansorge*, and *Noyd* cases on which Appellants rely involved statutes that were materially different from the current MUSA, did not consider (let alone reject) other tests, and ultimately cannot be read to mandate the application of

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MCL 451.2102c(c)(i) over other tests. Furthermore, Michigan courts have generally not construed the MCL 451.2102c(c)(i) factors as the exclusive test to identify securities under Michigan law.

Breckenridge was decided in January 1978, before the "risk capital" test was added to the statute. *See People v Breckenridge*, 81 Mich App 6 (1978); 1978 PA 481 at 1976 ("Approved October 23, 1978"); *Prince*, 109 Mich App at 196 (noting that the amendment became effective on March 30, 1979). In considering whether the notes at issue were securities, the *Breckenridge* court relied primarily on two general principles; namely, that the inquiry turns on the economic reality of the transaction, and that the securities laws apply to investments (*e.g.*, notes acquired for speculation), not commercial loans. *Breckenridge*, 81 Mich App at 15-16 (citing federal caselaw for both propositions).[9] Although the court acknowledged that the "risk capital" test reflects "the basic economic reality of a security transaction," *id*. at 15 (citing *Hawaii Mkt Center*), it relied broadly on the full range of circumstances to determine that the notes in that case represented a loan rather than a security. *Id*. at 14-17.

Ansorge and *Noyd* also do not support Appellants' reading of the MUSA. Both cases were decided under the previous statute, in which the MCL 451.2102c(c)(i) factors were the only framework supplementing the broader definition. *See Ansorge v Kellogg*, 172 Mich App 63 (1988); *Noyd v Claxton, Morgan, Flockhart & Vanliere*, 186 Mich App 333 (1990). The current text of the MUSA is materially broader and more flexible, including both additional clarification as to the broad scope of the definition, MCL 451.2102c(c)(ii)-(iv), (vi), and the *Howey* test as an alternative framework, MCL 451.2102c(c)(v). The Court of Appeals' unanimous decision in this

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[9] The *Breckenridge* court's dictum that "[t]he salient feature of securities sales under the Uniform Securities Act is the public solicitation of venture capital to be used in a business enterprise," *id*. at 15 (citing *Hawaii Mkt Center*, *supra*), is merely another formulation of those general principles. To the extent that Appellants read that observation as establishing a substantive requirement, this Court should reject that interpretation. *See infra* at 19-21.

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case underscores that a different statute requires a different analysis. *See LA Devs, LLC*, ___ Mich App ___ (2023), 2023 WL 3555079.[10]

Other Michigan precedents further undermine Appellants' reading of *Breckenridge*, *Ansorge*, and *Noyd* because Michigan courts generally have not treated the MCL 451.2102c(c)(i) factors as the exclusive means to identify a security. For example, in *Prince v Heritage Oil Co*, the Court of Appeals found that it was "not necessary" to use the MCL 451.2102c(c)(i) factors and relied instead on the "general principle" that courts must focus on the "real nature of the transaction" and the "real intent and purpose of the parties." 109 Mich App at 197. The *Prince* court held that "the purpose of executing the documents was to secure plaintiffs' investment in a risky venture, exactly the type which the Uniform Securities Act was designed to regulate," and thus the investments were securities. *Id.* at 199 (relying on *People v Blankenship*, 305 Mich 79 (1943)). *Accord Hawaii Mkt Center*, 485 P2d at 109 (focusing on investor's risk of loss as the "essential reality" of a security transaction); *Silver Hills Country Club v Sobieski*, 361 P2d 906, 908-09 (Cal 1961) (noting the "objective [of the California securities statute] is to afford those who risk their capital at least a fair chance of realizing their objectives in legitimate ventures whether or not they expect a return on their capital in one form or another"); Coffey, *supra*, at 374-78. In another case decided after the MCL 451.2102c(c)(i) factors were added to the statute, the Court of Appeals simply applied the *Howey* test to determine whether a multi-level marketing contract was a security. *People v Cooper*, 166 Mich App 638, 646-50 (1987). Notably, as the *Cooper* court acknowledged, the *Howey* test was not explicitly adopted in Michigan until 1979,

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[10] The *Noyd* court's dictum that the MCL 451.2102c(c)(i) factors are "consistent with" the "general principles" articulated in *Breckenridge* and *Ansorge*, *see* 186 Mich App at 338-39, in no way precludes a finding that other factors or tests are also "consistent with" those principles.

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after the MCL 451.2102c(c)(i) factors were added to the previous statute. *See id*. at 647 (citing *Dep't of Commerce v DeBeers Diamond Investment, Ltd.*, 89 Mich App 406, 411 (1979)).

In sum, judicial precedent does not support Appellants' interpretation of Michigan's securities law. Michigan caselaw does not require the Bureau or the courts to apply MCL 451.2102c(c)(i) in any particular circumstance to identify securities under the MUSA, let alone that those factors be applied exclusively over other tests.

II. **<u>Applying the *Reves* test would best effectuate the text, structure, and fundamental objectives of Michigan's securities law.</u>**

Michigan courts routinely look to the interpretation of other state and federal securities laws for guidance in interpreting Michigan's securities law. As the Court of Appeals noted in *Breckenridge*, "[w]hile the interpretation Federal courts have placed upon terms under the Federal securities acts is not binding upon state courts as they interpret the Uniform Securities Act, the similarity of the purpose and provisions of the state and Federal securities statutes . . . cannot be ignored." 81 Mich App at 16-17. State and federal securities laws overwhelmingly include the term "note" or "promissory note" within the definition of "security," just like MCL 451.2102c(c). Accordingly, consistent case law interpretations as to when a "note" is a "security" from other jurisdictions should be regarded as strong persuasive authority in Michigan, especially given that in this case "there is a lack of caselaw interpreting the definition under the current [MUSA]." *LA Devs, LLC*, ___ Mich App ___ (2023), 2023 WL 3555079, at *8. *See also* Unif Sec Act (2002), § 102 Official Comment 28 at 31 ("State courts interpreting the Uniform Securities Act definition of security have often looked to interpretations of the federal definition of security.")).

Applying the *Reves* test to notes, as the Bureau did, is appropriate because the test tracks the plain statutory text of the MUSA and is easily reconciled with Michigan precedent. Applying

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the *Reves* test also promotes a key policy objective of the MUSA; namely, consistency among state and federal securities laws in the interpretation and application of key terms.

A. The *Reves* test tracks the plain language of MCL 451.2102c(c).

In *Reves*, the U.S. Supreme Court resolved a split among the federal Courts of Appeals regarding the proper approach to determine whether a note is a security under the federal securities laws. 494 US at 64-65. After appraising the various approaches taken by the federal Courts of Appeals at the time, the *Reves* court adopted the Second Circuit's "family resemblance" approach, rejecting the *Howey* test for this particular purpose. *Id*. Under the family resemblance approach, a note is "presumed" to be a security because the term is included in the statutory definition, and that presumption may be rebutted by showing that the note at issue "bears a strong resemblance" to an instrument on a judicially crafted list of exceptions. *Id.* at 67.

The "presumption" in *Reves* was not a judicial creation, but merely a faithful application of the statutory text. The Second Circuit's decision in *Exchange Nat'l Bank of Chicago v Touche Ross & Co.*, 544 F2d 1126 (1976), clearly details the textual basis for its family resemblance test, including the basis for the "presumption" recognized by the *Reves* court. After considering and identifying the deficiencies in the various "investment versus commercial" approaches applied by federal courts, the Second Circuit concluded that "*the best alternative now available may lie in greater recourse to the statutory language.*" *Exchange Nat'l Bank*, 544 F2d at 1137 (emphasis added). The court explained further that

> [t]he [Securities Exchange Act of 1934] says that the term "security" includes "any note . . . (excepting one) which has a maturity at the time of issuance of not exceeding nine months," and the [Securities Act of 1933] says that the term means "any note" save for the registration exemption in [15 USC § 77c(a)(3)]. *These are the plain terms of both acts, to be applied "unless the context otherwise requires."* A party asserting that a note of more than nine months maturity is not within the 1934 Act (or that a note with a maturity of nine months or less is within it) or that

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> any note is not within the anti-fraud provisions of the 1933 Act has the burden of showing that "the context otherwise requires."

Id. at 1137-38 (emphasis added).

The MUSA definition is identical in all material respects. "A note" is a security, "unless the context otherwise requires." MCL 451.2102c(c). But the MUSA goes further and explicitly places the burden to prove the applicability of an exception or exclusion from the definition – *i.e.*, that "the context otherwise requires" – on the person claiming it. MCL 451.2503(1). Thus, there is no need for the courts to establish a "presumption" that a note is a security because the plain text of the statute has already done so.

Other states have also recognized a similar presumption based on the same language in their own securities statutes. *See*, *e.g.*, *Perrysburg Twp v Rossford*, 814 NE2d 44, 47-50 (Ohio 2004) (holding that "promissory" notes and other instruments listed within the definition are "presumptively securities" and concluding based on *Reves* that the purchaser of a fixed-rate note had done so as an investment); *McGuire*, 735 NW2d at 559 (holding that the definition "establishe[d] the presumption that every note is a security," and concluding based on *Reves* that the investor's motive was to make a profit and a reasonable investor would have considered the transaction an investment because the promised interest rate was higher than commercial interest rates, despite a fixed rate of return); *State v Kelson*, 345 P3d 1136, 1138 (Utah 2014) (holding that instructing a jury that "a 'note' is presumed to be a security" was merely "an accurate statement of law" and not improper burden-shifting in a criminal case). Accordingly, this Court would be following a commonly recognized approach to presume notes are securities, except for those notes that bear a family resemblance to a set of recognized exceptions.

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B. The *Reves* test is consistent with judicial precedent interpreting Michigan's securities laws.

1. Adopting the *Reves* test would not change the ultimate conclusions in *Breckenridge*, *Ansorge*, and *Noyd*.

The adoption of the *Reves* test by the Bureau and the Court of Appeals is easily reconciled with the conclusions in *Breckenridge*, *Ansorge*, and *Noyd*. Rather than supporting Appellants' argument, these cases show that Michigan and federal law are aligned because the *Reves* test would not likely change the results of those cases.

In *Breckenridge*, the Court of Appeals found that "the nature of the transaction between defendant and Amway [Corporation] strongly suggests a loan was made," rather than notes purchased for investment purposes. *Breckenridge*, 81 Mich App at 14. That conclusion was based in large part on the facts that the defendant sought to obtain loans from Amway to fund construction projects, that Amway made loans to the defendant in exchange for a series of short-term notes, that the notes "would [purportedly] be secured by shares in defendant's Investor's Stock Fund Account," and that the defendant later granted Amway a security interest in several thousand shares of stock of the company for which he was a manager. *See id.* at 9. The result should be no different under the *Reves* test because this arrangement would "bear[] a strong resemblance" to one of the enumerated non-security notes; namely, a "short-term note secured by a lien on a small business or some of its assets." *Reves*, 494 US at 65.

Similarly, the notes in *Ansorge* and *Noyd* also should not be securities under the *Reves* approach. In *Ansorge*, the notes were issued by a canning company to cherry growers after the company concluded it would be unable to pay the amounts that it owed to those same growers for previous deliveries. *Ansorge*, 172 Mich App at 65-66. Thus, these notes would "bear[] a strong resemblance" to another enumerated non-security note; namely, a "note which simply formalizes

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an open-account debt incurred in the ordinary course of business." *See Reves*, 494 US at 65; *Ansorge*, 172 Mich App at 65-66 (explaining that the notes in question formalized amounts owed to cherry growers for previously delivered cherries). In *Noyd*, the plaintiffs entered into "loan participation agreements" under which they had potential recourse to the borrower's collateral if the borrower failed to repay the loan principal. *Noyd*, 186 Mich App at 335-36. *Noyd* does not conflict with *Reves* because the *Noyd* court did not purport to analyze the agreements as notes. *See id*. at 338-40.[11] However, even if the agreements were analyzed as notes, they would "bear[] a strong resemblance" to "short-term note[s] secured by a lien on a small business or some of its assets," *Reves*, 494 US at 65, just like the notes at issue in *Breckenridge*.

In sum, these cases do not support Appellants' argument. Instead, they show that Michigan law and federal law are aligned on the scope of the term "security."

2. Michigan and federal securities laws rest upon the same general principles.

Appellants incorrectly assert that "unlike the federal definition, the 'salient feature' of Michigan's definition is that 'public solicitation of venture capital . . . be used in a business enterprise.'" Appellants' Supp Br at 34 (quoting *Ansorge*, 172 Mich App at 69-71 and *Breckenridge*, 81 Mich App at 15) (omission in original). The Court of Appeals appropriately disposed of this argument, *LA Devs, LLC*, ___ Mich App ___, 2023 WL 3555079, at *9, and this Court should do the same. The dicta in *Breckenridge* and *Ansorge* on which Appellants rely is merely another formulation of the "general principles" that the inquiry to determine whether a transaction involves a security is focused on "economic reality" and the definition applies to investments, not to ordinary consumer or commercial loans. *See Ansorge*, 172 Mich App at 69-

[11] To the extent that such agreements are analyzed as investment contracts, both MCL 451.2102c(c)(i) and (v) would be appropriate tests to determine whether they are securities.

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70; *Breckenridge*, 81 Mich App at 15-16 (citing *Hawaii Mkt Center*); *Hawaii Mkt Center*, 485 P2d at 109 (discussing "the basic economic reality of a security transaction"). The *Reves* test is founded upon materially identical principles. *See Reves*, 494 US at 63, 64 (stating that "the 'family resemblance' and 'investment versus commercial' tests" applied by the majority of federal appellate courts at the time "are really two ways of formulating the same general approach").

This Court should reject any interpretation of the Court of Appeals' dicta as a literal requirement. Today's securities markets include many offerings that do not involve public solicitation, such as those conducted under Regulation D Rule 506(b) under the Securities Act of 1933. *See* 17 CFR 230.506(b); 17 CFR 230.502(c) (prohibiting general solicitation); SEC Office of the Advocate for Small Business Capital Formation, Annual Report (Fiscal Year 2023), 16 (Dec 2023), https://bit.ly/3SNXZHy (data reflecting that the number of Rule 506(b) offerings between July 1, 2022 and June 30, 2023 was more than double all other offerings combined). Such a requirement would lead to absurd results and deprive investors of the most fundamental protections afforded under the MUSA. *See Franges v General Motors Corp*, 404 Mich 590, 612 (1979) (explaining that statutes should be construed in light of their purpose and "to prevent absurdity, hardship, injustice or prejudice to the public interest"). If transactions such as those at issue in this case are not securities, then not only would they not be subject to registration and notice filing requirements (including baseline disclosures), but they would also be immune to antifraud provisions. *See* MCL 451.2501 (prohibiting fraud "in connection with the offer, sale, or purchase of a security"). Such a rule would also lead to the absurd result that securities sold on exchanges and in other secondary markets would lose their character as securities because the transaction results in no capital contribution to the underlying business enterprise. The same is true for other instruments that are defined as securities under Michigan law that do not offer capital to an issuer,

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such as security futures, puts, calls, straddles, warrants, and options. MCL 451.2102c(c). The Legislature clearly intended for Michigan's securities law – like all other state and federal securities laws – to apply beyond direct acts of capital formation for issuers.

3. Fixed-return investments are securities under the MUSA.

Appellants incorrectly assert that *Reves* must be rejected because it permits instruments with a fixed rate of return to be securities, while Michigan law does not. Appellants' Supp Br at 17, 34-36. Appellants contend that this is because, under Michigan law, a fixed rate of return is not "profit" and *the expected return* is not "subject to the 'risks of the issuer's enterprise'" or "tied to 'the operation of the enterprise.'" *Id*. The Court of Appeals properly rejected this argument as well, *LA Devs, LLC*, ___ Mich App ___, 2023 WL 3555079, at *9, and this Court should do the same.

Whether a fixed rate of return is considered "profit" is irrelevant to this case because neither MCL 451.2102c(c)(i) nor the *Reves* test require there to be a "profit" for a transaction to involve a security. *Compare* MCL 451.2102c(c)(i)(C) (requiring the investor to have a "reasonable expectation that a *valuable tangible benefit* will accrue" (emphasis added)) *with* MCL 451.2102c(c)(v) (requiring an "expectation of *profits*" (emphasis added)). In the case of the MCL 451.2102c(c)(i) factors, this distinction was intentional, as one of the primary objectives behind the development of the "risk capital" test was to redirect the inquiry away from a focus on conventional "profits" and toward a focus on investors' risk of losing the capital they had invested. *See*, *e.g.*, *Hawaii Mkt Center*, 485 P2d at 108-09; *Silver Hills Country Club*, 361 P2d at 908-09; Coffey, *supra*, at 374-78. *Accord* MCL 451.2102c(c)(i)(B)(C).

The *Ansorge* and *Noyd* cases that Appellants rely on also do not stand for the proposition that fixed-rate investments cannot be securities. In both cases, the Court of Appeals considered

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the fixed rate of return as just one of several relevant factors. *Ansorge*, 172 Mich App at 70-71; *Noyd*, 183 Mich App 339-40. *Accord LA Devs, LLC*, ___ Mich App ___, 2023 WL 3555079, at *9. To the extent that those decisions interpreted the MCL 451.2102c(c)(i) factors to require that *the expected return* vary based on the success of the enterprise, or otherwise be "subject to the risks of the enterprise" – *Ansorge*, 172 Mich App at 70-71; *Noyd*, 183 Mich App at 339 – those cases misapply the relevant factors in the statute. As explained above, the "risk capital" test is focused on the investor's risk of losing their investment, not on the nature of the expected return on the investment. *Cf. SEC v Edwards*, 540 US 389, 394, 397 (2004) (declining to distinguish between fixed and variable return and explaining that "[t]he fact that investors have bargained for a return on their investment does not mean that the return" is not dependent on successful management of the enterprise by others).

Furthermore, the notion that a fixed rate of return precludes an instrument from being a security is in conflict with the text and structure of the statute. MCL 451.2102c(c) expressly includes numerous debt instruments within the definition of "security." Appellants' interpretation would effectively exclude large swaths of investments paying fixed rates of return from the definition of "security," such as U.S. Treasury bonds and privately-issued bonds, debentures, and other common fixed-rate debt securities, despite such instruments being expressly included within the definition. It does not make sense to read the MUSA in a way that would exclude some of the most ubiquitous securities in our Nation's capital markets from the statute's scope. *See Franges*, 404 Mich at 612 (explaining that statutes should be construed in light of their purpose and "to prevent absurdity, hardship, injustice or prejudice to the public interest"). In addition, the MUSA provides clear and narrow exemptions from the statute's securities registration and filing requirements for transactions that involve certain securities that pay a fixed rate of interest, *see*

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MCL 451.2202(1)(e)(ii), or that are issued by not-for-profit entities and therefore do not entitle the investor to any part of the entity's net earnings, *see* MCL 451.2201(g). The fact that the MUSA narrowly exempts these specific types of securities from its registration requirements is proof that such instruments necessarily fall within the statute's definition of "security."

Adherence to Appellants' interpretation of the MUSA would make it easy for wrongdoers to evade the MUSA by promising exorbitant fixed returns, rather than variable returns. Such a result ignores statutory text and precedent in order to reach a result that is inconsistent with the goal of investor protection. *Cf. SEC v Glenn W Turner Enters, Inc*, 474 F2d 476, 482 (CA 9, 1973) (rejecting a strict, literal interpretation of the *Howey* test that would make the federal securities laws easy to evade). It would also severely inhibit the Bureau's ability to protect some of the most vulnerable investors, including those whose low risk tolerance and income needs require them to invest substantially in fixed income securities or products marketed as providing such income. *Cf. Edwards*, 540 US at 394 (noting that "investments pitched as low-risk (such as those offering a 'guaranteed' fixed return) are particularly attractive to individuals more vulnerable to investment fraud, including older and less sophisticated investors").

Thus, it cannot have been the Legislature's intent to remove the entire category of fixed income securities from the scope of the MUSA. A plain reading of the statute – that the MUSA embraces instruments that have either variable or fixed rates of return as securities – would avoid such absurd results.

C. Applying the *Reves* test furthers a key policy objective of the MUSA by defining key terms consistently with other state and federal securities laws.

When the Michigan Legislature adopts the language of a uniform or model act, "it is evident that the Legislature [is] cognizant of, and in agreement with, the policies which underlie the model act['s] language." *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 151 (1984). In

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enacting the current MUSA and its predecessor, the Legislature deliberately modeled Michigan's securities law on the Uniform Securities Act. *See* MCL 451.2101 ("This act shall be known and may be cited as the 'uniform securities act (2002).'"); 1964 PA 265 ("An act to enact the uniform securities act [(1956)] . . . ."). By enacting the Uniform Securities Act, the Legislature enacted a definition of "security" that is uniform in all material respects and demonstrated its intent that Michigan's uniform definition be interpreted consistently with the materially identical definitions in other state and federal securities laws.

One of the key goals of the model legislation is to encourage uniformity in regulatory standards among state and federal securities laws. *See* Unif Sec Act (1956), § 415 ("This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this act with the related federal regulation."); Unif Sec Act (2002), Prefatory Note at 2 ("Drafting language to achieve the greatest practicable uniformity, given differences in state practice, was a key aspiration of this Act."). To that end, both the 1956 and 2002 versions of the Uniform Securities Act substantially borrow provisions from the federal securities laws, including the definition of "security." *See*, *e.g.*, Unif Sec Act (1956), Official Code Comment to § 401(*l*) (explaining that the definition of "security" is substantially "identical with § 2[(a)](1) of the Securities Act of 1933, 15 USC § 77b[(a)](1)"); Unif Sec Act (2002), § 102 Official Comment 28 at 31 (stating that "much of the definition . . . is identical to the definition in Section 2(a)(1) of the Securities Act [of 1933, 15 USC § 77b(a)(1)]"). The drafters of the Uniform Securities Act (2002) sought to further "harmonize interpretation of the federal and state definition of a 'security,'" Unif Sec Act (2002), § 102 Official Comment 28 at 32, by adding examples of instruments and transactions that are "include[d]" and "not include[d]" within the definition, *id*. at § 102(28)(A)-(E). There is nothing in the text or the

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Official Comments to the Uniform Securities Act (2002) to suggest that these added examples were meant to supplant the broad language of the definition or to limit the application of different tests to different types of securities. The Legislature codified these examples when it enacted the current MUSA in 2008. *See* MCL 451.2101, 451.2102c(c)(ii)-(vi). Those provisions now exist alongside and on equal footing with the relevant factors that the Legislature carried forward into MCL 451.2102c(c)(i).

The policy of uniformity is not a rigid mandate to follow federal law when state statutory provisions are different or when policy considerations dictate that a different interpretation will better protect investors. *See*, *e.g.*, *Breckenridge*, 81 Mich App at 16-17 (stating that federal law is "not binding"); Louis Loss, *Commentary on the Uniform Securities Act*, 165, Draftsmen's Commentary to § 415 (2d printing, 1976) (explaining that the aim of "coordination at the state and federal levels" is "secondary" to investor protection and only applies "in so far as practicable"). However, as the Court of Appeals acknowledged in *Breckenridge*, "the similarity of the purpose and provisions of the state and Federal securities statutes, particularly those purposes and provisions pertinent to the facts at hand, cannot be ignored" and "[i]nterpretation of one offers valuable guidelines as to the interpretation of the other." 81 Mich App at 16. *See also Cooper*, 166 Mich App at 646-50 (applying the U.S. Supreme Court's *Howey* test, as further interpreted by federal courts). Given that the Legislature has repeatedly defined "security" in substantial conformity to other state and federal laws, the Court of Appeals rightly concluded that "[t]here is a compelling reason for the [Bureau] to determine that it is appropriate to apply *Reves* when interpreting whether a promissory note meets the definition of a 'security'" under the MUSA. *LA Devs, LLC*, ___ Mich App ___ (2023), 2023 WL 3555079, at *8.

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Although the Legislature included non-uniform language in the statutory definition of "security" – specifically, the five factors currently in MCL 451.2102c(c)(i) – the test embodied in that language is not unique to Michigan. As explained above, Michigan is not alone in applying the "risk capital" test, nor is Michigan unique in incorporating that framework by statute or regulation. *See supra* at 8-12. Appellants are also incorrect to focus exclusively on those states that have adopted the Uniform Securities Act (2002) and ignore state laws based on the Uniform Securities Act (1956) or non-uniform state laws that nonetheless define "security" in substantially uniform terms. *See* Appellants' Supp Br at 44. Although the drafters of the Uniform Securities Act (2002) elected to write a "new" model statute rather than amend earlier versions, many of the "new" provisions are nonetheless "identical or substantively identical" to the previous models, including the definition of "security." Unif Sec Act (2002), Prefatory Note at 1; *id*., § 102 Official Comment 28 at 31 ("Much of the definition in Section 102(28), like the definition[] in the 1956 Act Section 401(*l*) . . . is identical to the definition in Section 2(a)(1) of the Securities Act."). As such, the MUSA's definition should be interpreted consistently with similar definitions in all state laws, especially those based on any version of the Uniform Securities Act.

The Bureau's application of the *Reves* test furthers these fundamental goals. In addition to being consistent with federal securities law, the Bureau's approach is consistent with at least twenty-two other states that have adopted or applied the *Reves* test for notes under their respective securities statutes.[12] While some of those states have, like Michigan, adopted the 2002 version of

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[12] *See*, *e.g.*, *Caucus Distributors, Inc v State, Dep't of Commerce and Econ Dev, Div of Banking, Sec and Corps*, 793 P2d 1048, 1055 (Alaska 1990); *MacCollum v Perkinson*, 913 P2d 1097, 1104 (Ariz Ct App 1996); *Thompson v People*, 471 P3d 1045, 1048-49 (Colo 2020) (finding a fixed-rate note to be a security); *Boo'ze v State*, No. 331,2003, 2004 WL 691903, at **2-3 (Del, March 25, 2004) (Table); *Bookhardt v State*, 710 So2d 700, 701 (Fla Dist Ct App 1998); *Shiny Inv, LLC v Zeoli*, No. 1-20-1353, 2021 WL 5906043, at **15-17 (Ill Ct App, Dec 14, 2021) (Unpublished); *Reinhart v Boeck*, 918 NE2d 382, 392-96 (Ind Ct App 2009); *State v Logan*, No.

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66,922, 1992 WL 12944500, at *4 (Kan Ct App, June 26, 1992) (Unpublished) (noting, in appeal from conviction under Kansas law, that *Reves* "made clear the test to be applied in determining whether a note is a security" but declining to conduct the analysis "[g]iven the difficulty of identifying the note or notes allegedly offered, sold, or purchased" during the relevant time period); *Godair v Place Vendome Corp of America*, 648 So2d 440, 444-45 (La Ct App 1994) (holding that the trial court properly found that a fixed-return note was a security); *Caucus Distributors, Inc v Md Sec Comm'r*, 577 A2d 783, 788-91 (Md 1990) (applying *Reves* and rejecting the argument that "'the repayment of principal plus a fixed rate of interest is not an expectation of profits'"); *NTV Mgmt, Inc v Lightship Global Ventures, LLC*, 140 NE3d 436, 445 (Mass 2020); *Signature Bank v Marshall Bank*, No. A05-2337, 2006 WL 2865325, at **6-7 (Minn Ct App, Oct 10, 2006); *State v Friend*, 40 P3d 436, 437-38 (Nev 2002); *People v Van Zandt*, 981 NYS2d 275, 279-81 (NY Sup Ct 2014) (finding that the issuer of fixed-rate notes had failed to overcome the presumption); *Bucci v Burns*, No. 16-CVS-15478, 2018 WL 1975019, at *10 (NC Sup Ct, Apr 25, 2018) ("The [N.C. Securities Act] further defines "[s]ecurity" to include "any note," which raises a rebuttable presumption that every note is a security[.]") (internal citations omitted); *Saw Plastic, LLC v Sturrus*, No. 16-CVS-10068, 2017 WL 3686515, at **7-8 (NC Sup Ct, Aug 25, 2017) (applying *Reves*); *Rossford*, 814 NE2d at 49; *Lahn v Vaisbort*, 369 P3d 85, 96 (Or Ct App 2016); *Grotjohn Precise Connexiones Intern., SA v JEM Financial, Inc*, 12 SW3d 859, 868-70 (Tex Ct App 2000) (finding that "[a] favorable interest rate indicates that profit was the primary goal of the lender"); *Bailey v State*, No. 08-02-00422-CR, 2008 WL 1914265, at **2-4 (Tex Ct App, May 1, 2008) (Unpublished) (finding that "[fixed-rate] certificates of deposit . . . issued by an offshore, shell bank with no federal regulation and no insurance are securities"); *State v JRB,* 239 P3d 1052, 1055-58 (Utah Ct App 2010) (applying *Reves* "without deciding whether Utah should adopt that test," and accepting that Utah's statute establishes a presumption that every note is a security); *Ascher v Commonwealth*, 408 SE2d 906, 917-19 (Va Ct App 1991); *Douglass v Stanger*, 2 P3d 998 (Wash Ct App 2000); *McGuire*, 735 NW2d at 567. *See also In the Matter of the Desist and Refrain Order Issued To: William Benson Peavey, Jr, et al.*, OAH No. 201209224, 2013 WL 6054397, at **11-12 (Cal Dep't of Corps April 12, 2013); *Taylor v Bar Plan Mut Ins Co*, No. WD 76380, 2014 WL 1677814, at *7 (Mo Ct App Apr 29, 2014, as modified May 27, 2014) (Unpublished) (acknowledging *Reves* in support of the proposition that "loans are not always included among types of 'investments'") (affirmed on other grounds in *Taylor v Bar Plan Mut Ins Co*, 457 SW3d 340 (Mo 2015)).

But see Waters v Millsap, 465 SW3d 851, 858 (Ark 2015) ("declin[ing] to adopt the *Reves* test because [the *Reves*] factors are embraced within our flexible, all-inclusive *Schultz* test"); *Schultz v Rector-Phillips-Morse, Inc*, 552 SW2d 4, 10 (Ark 1977) (holding that Arkansas courts should "determine in each instance from a review of all of the facts, whether" the instrument is a security within the scope of the statute); *State v Tober*, 841 P2d 206, 207-08 and n.5 (Ariz 1992) (noting that "we do not need the [risk capital] test, the *Reves* test, or any variant to tell us when a note is not a security" to enforce statutory provisions prohibiting the sale of unregistered securities, but leaving open whether the *Reves* test, or other judicially created tests, apply to enforcement of the antifraud provisions); New Hampshire Bur of Sec Reg, Statement of Policy, *When are "Notes" Securities under the New Hampshire Uniform Securities Act*, at 4-5 (Nov 19, 2010), https://bit.ly/3Tg9uZM (rejecting the *Reves* test "for the more traditional approach that all promissory notes are securities because of the statutory definition" and electing to apply the *Howey* test "[i]f further analysis is necessary").

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the model, *e.g.*, Wis Stat 551.101 *et seq*., other states have retained the 1956 version, *e.g.*, Mass Gen Laws ch 110A, § 101 *et seq*., and still others have enacted non-uniform statutes, *e.g.*, Ohio Rev Code § 1707.01 *et seq*. Nonetheless, their respective statutes define "security" to include notes and all have used the *Reves* test to determine when notes are securities or the context requires a different result. In contrast, adopting Appellants' interpretation of the MUSA would make Michigan an outlier among state securities regulators and undermine one of the core policies of the statute. Neither the MUSA's language, its structure and history, nor judicial precedent interpreting the same endorse, let alone compel, such a result. In fact, the opposite is true; the MUSA was enacted with the purpose to reach greater uniformity among state and federal securities laws. Endorsing Appellants' preferred interpretation would require this Court not only to ignore the language of the statute, but also to reject the Legislature's very purpose in twice becoming a Uniform Securities Act state.

CONCLUSION

As explained above, the MUSA does not require application of MCL 451.2102c(c)(i) for any instrument or transaction, let alone a note, nor does it require the Bureau or the courts to reject other tests. Additionally, the Bureau's and the Court of Appeals' adoption of the *Reves* test will best serve the language, structure, and purpose of the statute. Accordingly, the decision of the Court of Appeals and the Bureau's interpretation of the MUSA should stand.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief was prepared in accordance with MCR 7.312 and 7.212 using Microsoft Word and 12-point Times New Roman font, and consists of 9,674 non-excluded words.

DATED: March 20, 2024

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