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IN THE SUPREME COURT OF THE UNITED STATES

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SECURITIES AND EXCHANGE :  
COMMISSION, :  
Petitioner :

v. : No. 02-1196

CHARLES E. EDWARDS :  
- - - - -X

Washington, D. C.  
Tuesday, November 4, 2003

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:01 a.m.

APPEARANCES:  
GEN. THEODORE B. OLSON, ESQ., Solicitor General,  
Department of Justice, Washington, D. C. ; on behalf of  
the Petitioner.  
MICHAEL K. WOLENSKY, ESQ., Atlanta, Georgia; on behalf of  
the Respondent.

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-1196, the Securities and Exchange Commission v. Charles E. Edwards.

General Olson.

ORAL ARGUMENT OF GEN. THEODORE B. OLSON

ON BEHALF OF THE PETITIONER

MR. OLSON: Thank you, Mr. Chief Justice, and may it please the Court:

Over 10,000 persons in 38 States invested \$300 million in respondent's payphone business on the expectation that their investments would yield a 14 percent return due to respondent's experience, efficiency, and management expertise. The decision below that these transactions were not investment contracts merely because they specified a fixed return to the investor, rather than an unspecified portion of the enterprise's profits, can not be squared with the language, history, and purpose of the Securities Acts, 70 years of consistent SEC interpretation and enforcement, and this Court's jurisprudence.

The congressional definition of security, as this Court has repeatedly said, is broad and flexible, and intended to be all-inclusive to cover the countless and

1 variable schemes devised by those who would seek money  
2 from others on the promise of a return. Congress  
3 intended, in the words of this Court, to encompass  
4 virtually any instrument that might be sold as an  
5 investment, and the term investment contract, this Court  
6 has held, was intended to be a broad catch-all.  
7 Therefore, substance, not form or title, governs.

8           These terms, investment contract, are to be  
9 construed broadly to embrace - again, in the words of this  
10 Court - all forms of investment schemes that bear a  
11 resemblance to what is commonly understood to be a  
12 security. And this Court has said, because promoters are  
13 so creative, these terms must be flexible and inclusive.  
14 A catch-all must catch all. It is irrational to conclude  
15 that Congress would have defined security - .

16           QUESTION: Mr. Solicitor General, may I jump  
17 ahead for a second? Is the - is your adversary correct in  
18 saying that as far as decided cases are concerned, not the  
19 position of the SEC, but there is no judicial decision  
20 holding that a - an instrument that provides a fixed  
21 return is an investment contract?

22           MR. OLSON: Well, Justice Stevens, I can answer  
23 this by saying that the seminal case, *Howey*, referred to  
24 and cited *Blue Sky* cases and Federal court of appeals  
25 decisions, which did contain those type of instruments,

1 fixed return instruments. This specific question has not  
2 previously been decided by this Court, but the Court has  
3 never decided, and the cases that the Court referred to in  
4 *Howey* did not ever say that - that the fixed return  
5 instrument was excluded from the term investment contract.

6 QUESTION: How about the *United Housing* case?

7 MR. OLSON: Well, again, with respect to that  
8 case, the - I - the Court has decided consistently that  
9 what is critical is the - that the investor expects a  
10 return. The Court has never said -

11 QUESTION: But the *United Housing* case did refer  
12 - suggest that the requirement that the income come from  
13 profits, did it not?

14 MR. OLSON: Well, the - the references to the -  
15 to the - this - from this - our perspective, Mr. Chief  
16 Justice, is that the return must be examined from the  
17 standpoint of the investor, the invest - and the Court - I  
18 don't think the Court intended to restrict in that case,  
19 and the language is not reasonably susceptible in my  
20 judgement to the - to the understanding that that was  
21 intended to exclude investments or instruments that  
22 provided a fixed return.

23 What the Court has repeatedly referred to is the  
24 - from the standpoint of the investor, what the investor  
25 is expecting to do is to put his or her money to work for

1 him or her, that is to say, put that money into an  
2 enterprise of some sort so the investor can sit back and  
3 watch the returns come in. The investor doesn't care  
4 whether that's a fixed return or a speculative return. In  
5 fact, the definition in both the 33 and the 34 Act  
6 includes types of investments, such as common stock, that  
7 have speculative returns built into their definition, so  
8 to speak, fixed returns instruments, such as bonds,  
9 preferred stock, indentures, and that sort of thing.

10 Then the term, as this Court has repeatedly  
11 said, those terms are relatively fixed and understood.  
12 But because Congress wanted to embrace, because this is a  
13 remedial statute intended to protect the investing public  
14 and the integrity of the marketplace so that people will  
15 feel secure in investing their resources in other  
16 instruments that promoters are offering -

17 QUESTION: General Olson, you - you put the  
18 stress on investment and that seems right with the statute  
19 refers to investment contracts, but there are surely debt  
20 instruments that would not be investment contracts. So  
21 what is the dividing line between something that  
22 constitutes a plain old debt that is not an investment  
23 contract and not a security, and one that is? I mean, how  
24 do we identify something as an investment contract rather  
25 - rather than an ordinary debt?

1                   MR. OLSON: Well, I think the answer, Justice  
2 Ginsburg, is that many of those instruments that are  
3 ordinary debt instruments may be investment contracts as  
4 well. This Court has repeatedly said is that these terms  
5 are overlapping -

6                   QUESTION: And what makes it - what makes  
7 something an investment contract?

8                   MR. OLSON: Well, what this Court has said is  
9 that when a person puts their money into a common  
10 enterprise with the expectation - expectation of a return,  
11 that is - through the - as a result of the efforts of  
12 others, that is an investment contract. Now, many notes,  
13 or many types of offerings, might be based upon a fixed  
14 return and might appear in the - to look like notes or  
15 fixed return types of investments and still be investment  
16 contracts.

17                   QUESTION: But the - depending on the investment  
18 skills of others, that's - is very unhelpful to me. I - I  
19 would think most creditors who extend credit rely on the  
20 investment skill or the financial responsibility of - of  
21 the lender. That's how they're going to get their money  
22 back. So, I - I find that test hard to work with as a  
23 limitation. I know it comes from Howey.

24                   MR. OLSON: It does - it does come from Howey,  
25 and I think that the best way to look at that, Justice

1 Kennedy, is to look at that the investor, as opposed to  
2 using his own resources, his own efforts, his own energy,  
3 his own creativity, is counting on other people to make  
4 the - the instrument -

5 QUESTION: Well, but my point is all creditors do  
6 that just on straight loans -

7 MR. OLSON: Well - well -

8 QUESTION: - so that doesn't advance us very far.

9 MR. OLSON: Well, that's right. That's correct.  
10 And there are some overlap, but this Court has said, and  
11 it repeated it and analyzed it from that context in the  
12 Reves case, that there are some commercial contexts and  
13 some consumer contexts in which the Securities Acts were  
14 never intended to cover.

15 QUESTION: Well, the Reves case had language that  
16 doesn't help you because it seems to exclude a fixed  
17 return, but -

18 MR. OLSON: Well -

19 QUESTION: - so I - I don't -

20 MR. OLSON: We -

21 QUESTION: - know how great the Reves case is for  
22 you.

23 MR. OLSON: What the Reves case says, and I think  
24 Your Honor is referring to footnote 4 in the case, in  
25 which the Court, in construing what was meant by the - the



1 term note, looked at the definition of - in - in the  
2 Forman case, which included the earlier Howey case, as to  
3 define an investment contract. But in that footnote, the  
4 Court very carefully went on to say the definition that  
5 we're examining here with respect to investment contract  
6 is irrelevant with respect to notes. That is dicta piled  
7 upon dicta in a sense, because the Court - we - I - we  
8 respectfully submit - mischaracterized Forman, the case  
9 that the - where the Court was concentrating on the  
10 difference between someone investing their resources to  
11 get something to use, in that case -

12 QUESTION: Well, if - if you - if you don't like  
13 dicta that's against you, a lot of the things you've been  
14 quoting are dicta that weren't really necessary to  
15 deciding the case.

16 MR. OLSON: Well, what we - Mr. Chief Justice, I  
17 don't think that what we're quoting with respect to what  
18 we're relying on is dicta. What the - the Court is - has  
19 defined the term investment contract, first of all, in the  
20 Joiner case, and then in the Howey case in very broad  
21 terms.

22 QUESTION: Supposing I - I loaned someone  
23 \$10,000, they've just hung out their shingle to practice  
24 law, and I'm - I want obviously the money back, but  
25 whether I get the money back or not is very much going to

1 depend on his skill. Is that an investment contract?

2 MR. OLSON: That's - that is - that is probably  
3 not an investment contract because it is a personal  
4 transaction between individuals. What this - could the  
5 factors that this Court used in the *Reves* -

6 QUESTION: Well, but all these are transactions  
7 between individuals. That doesn't distinguish anything.

8 MR. OLSON: Well, what the - one of the - one of  
9 the things that the Court said in *Reves* is that, to the  
10 extent that there are any ambiguities at the edge and  
11 those particular factors were considered in *Reves*, it -  
12 the - the scheme of distribution, the nature of the  
13 relationships between the individuals, is this - the - is  
14 someone seeking to acquire money to use as capital in the  
15 - in the operation of an enterprise -

16 QUESTION: Well, is - are you saying then that a  
17 one-on-one transaction can never be an investment  
18 contract?

19 MR. OLSON: No, we're not saying that. In fact,  
20 the Court held to the contrary in the *Wharf Holdings* case  
21 that there may be - and in another case in this Court's  
22 jurisprudence - that simply because there are one  
23 individual or one entity dealing with another entity  
24 doesn't exclude the - the operation of the term investment  
25 contract.

1           QUESTION: But the problem is, as - as you well  
2 know, Justice Ginsburg begins it, and the Chief Justice is  
3 asking the same question, if we're going to write this  
4 opinion, it seems to me we have to have some limiting  
5 principles, some limiting language. Now, we could just  
6 talk about these facts and it'd be a case good for this  
7 ride only, but we're - we're wondering about whether or  
8 not these facts yield certain insights as to what might be  
9 definitional principles for an investment contract.

10           MR. OLSON: Well, with respect to the cases at  
11 the margin, the Court articulated the same kind of  
12 analysis that the Securities and Exchange Commission does.  
13 Where there are cases at the margin, the Court will  
14 consider the motivation of the person raising the money,  
15 the person investing in the - in the operation, the nature  
16 and type of promotion that's taking place, and - and the  
17 motivations of the seller and things of that nature. What  
18 - what the question presented here is considerably more  
19 narrow, the question presented here is it - is - is it  
20 disqualified as an investment contract simply because the  
21 return is fixed or specified?

22           Now, if the Court were to adopt that definition,  
23 imagine the size of the super highway loophole that would  
24 be created in the Securities Act. Instead of promising  
25 the sky or - or a speculative return, the investors that

1 develop these types of schemes will simply say 50 percent  
2 or 25 percent -

3 QUESTION: Yes, but - but - but you don't - well,  
4 maybe you do - we just say an investment contract can  
5 include a fixed return and then remand it to the Eleventh  
6 Circuit for it to figure out the puzzle?

7 MR. OLSON: Well, it's not - the - the only  
8 reason that the Eleventh Circuit decided that this case  
9 couldn't go forward - they couched it in terms of  
10 jurisdiction, but it's really failure to state a claim -  
11 was that this instrument had a fixed 14 percent return and  
12 said investment contracts can't not include that -

13 QUESTION: So your point is that's all we have to  
14 decide, whether the fact that it's a fixed return excludes  
15 it from the definition of a security?

16 MR. OLSON: Precisely.

17 QUESTION: But it would be desirable to have some  
18 clearer understanding of what's covered, and if you had to  
19 take your best shot at constructing a definition, what  
20 would it be?

21 MR. OLSON: Well, I would adopt, and the  
22 Government would propose, that the Court do no more than  
23 rearticulate what the Court has repeatedly stated - and  
24 it's stated it as well in *Howey* as it could possibly state  
25 it - a transaction in which a person invests money in an

1 enterprise with the expectation of a return, gain, profit.  
2 Now, in the Forman case that we submit was not  
3 characterized correctly in the Reves footnote, the Court  
4 used all of those terms, the expectation of a profit, the  
5 expectation of a return. In Howey itself the Court -

6 QUESTION: We - we've gone - gone around that. I  
7 mean, the problem is the ordinary loan, the ordinary loan  
8 from one individual to another. I loan you \$10,000 and  
9 you will pay it back over so many years and give me so  
10 much interest a year, meets that qualification, meets that  
11 description, and you acknowledge that that is not an  
12 investment contract.

13 MR. OLSON: The - what the Court has said is that  
14 in - in those kind of cases, where it does not look as  
15 typical as the typical investment scheme - .

16 QUESTION: What makes it look like a typical  
17 investment - I mean, that's what we're trying to get -

18 MR. OLSON: What makes it look like a -

19 QUESTION: What makes it look like the typical  
20 investment -

21 MR. OLSON: Well, the characteristics are -

22 QUESTION: You say it is not the mere fact that  
23 it's not a fixed return. That isn't it. What is it then?

24 MR. OLSON: Well, the things that make it look  
25 like an investment contract in this context is that the

1 individual is putting himself, his money, into an  
2 enterprise that is being, in this case, widely promoted -  
3 as I said, 10 - over 10,000 investors put their money  
4 into this enterprise hoping to get some return as a result  
5 of the - the efficiency or effectiveness -

6 QUESTION: So at least where it's marketed to the  
7 public you would say it's covered, at least that, even  
8 though you don't know backing up where to cut it off?

9 MR. OLSON: Well, the - the precise lines here,  
10 Justice O'Connor, may be difficult in a particular one-  
11 on-one investment case. The Court acknowledged that in  
12 the Reves case, said that there - there are - there are  
13 situations that look more like consumer transactions or  
14 they may look - more look like -

15 QUESTION: So isn't the question about the  
16 individual transaction really related to the conflict on  
17 this horizontal and vertical distinction that Judge Lay  
18 relied on in his concurring opinion? And as I understand  
19 it, that's not before us as to the validity of his vote in  
20 the case.

21 MR. OLSON: That's - that's correct, Justice -

22 QUESTION: Because I don't understand either  
23 party to have addressed the - this alleged conflict over  
24 horizontal or vertical.

25 MR. OLSON: That was not what - yes, that's

1 correct. Judge Lay discussed that in his concurring  
2 opinion, but the court did not rely upon that, the parties  
3 have not briefed that, and that question is not before  
4 this Court.

5 QUESTION: So it's entirely possible that you  
6 could win here and the case would be remanded for the  
7 court of appeals to decide whether or not Judge Lay was  
8 right?

9 MR. OLSON: I guess that's - I guess that's -  
10 that's possible. I -

11 QUESTION: Your - your opening argument says  
12 there are agreements for investment contracts -

13 MR. OLSON: Yes, we did.

14 QUESTION: - that's what you asked us -

15 MR. OLSON: Yes, we do. And - and - I think that  
16 there is - this is not a difficult case from that  
17 standpoint, because all of the indicia that the SEC has  
18 been using for years, and what the SEC has articulated  
19 this standard in formal adjudications, to which this Court  
20 defers under Chevron, it did 2 years ago in the Zandford  
21 case, with respect to the SEC, there is here in this case  
22 70 years of consistent enforcement of this principle by  
23 the Securities and Exchange Commission -

24 QUESTION: So to be clear about your - what  
25 you're saying is, there are a lot of criteria that rule

1 out loans, ordinary loans, because after all, they would  
2 otherwise come in the words evidence of indebtedness.  
3 There are a lot of words in this contract that could pick  
4 up ordinary loans, but then there are a lot of criteria  
5 that rule them out, of all those words, not just  
6 investment contract. And this case is about one word.  
7 What you would like is a decision that says, the word  
8 profit in *Howey* meant profit in the sense of ordinary  
9 return, return being broad enough to encompass fixed or  
10 variable returns of various kinds, period, end of the  
11 matter, reversed or remanded. That's - that's your -  
12 that's your point, not get into these other criteria for  
13 other things.

14 MR. OLSON: Precisely, and the Court has not done  
15 that in the past, does not need to do so here. There are  
16 situations like the *Reves* case where the Court said, well,  
17 some notes are securities, some notes are not securities,  
18 and then goes through - what the Court in that case was  
19 looking at, a Second Circuit decision that said, well,  
20 some notes are not securities, some are securities, and  
21 then laid out a methodology, which, by the way, is the  
22 same methodology that the SEC understand - well - widely  
23 understood to employ with respect to those cases at the  
24 margin.

25 But, Justice Breyer, I agree completely. This



1 is a paradigmatic investment contract. It's like the  
2 cases involving chinchillas or rabbits, one of these cases  
3 involving rabbits, it - there's two of the - two of the -

4

5 QUESTION: Except it's different in that here  
6 there's a fixed return. In those, there was not.

7 MR. OLSON: That's not correct, respectfully, Mr.  
8 Chief Justice. Two of the - two of the cases cited in  
9 Howey, People v. White and Stevens v. Liberty Packing,  
10 were -

11 QUESTION: Well, I thought you meant cases in  
12 this Court.

13 MR. OLSON: No. I'm talking about cases that  
14 this Court accepted when it decided the Howey case, but  
15 this Court has never -

16 QUESTION: Well, that's a pretty, you know,  
17 that's a pretty tentative attribution to - to this Court,  
18 that - that it was paying that close attention that it  
19 understood in all of those cases whether it was a fixed  
20 return or not.

21 MR. OLSON: Well, it certainly wasn't ruling it  
22 out, Justice Scalia. What this Court - what the - this  
23 Court specifically said in Howey, because it had nothing  
24 to go on. Congress, first of all, decided to make the  
25 definition as wide as possible to use again this Court's

1 language to cover everything that might commonly be  
2 understood to be a security, and because promoters are so  
3 ingenious, to cover all types of investments that might  
4 carry some of those characteristics.

5           So the Court said, we're going to look at the  
6 cases that involve the Blue Sky statutes that - that had  
7 been in existence and had been interpreted prior to the  
8 adoption of the 33 Act. There's not one of those statutes  
9 that limited investment contract to a variable return and  
10 excluded fixed return, was not one of those cases under  
11 the Blue Sky statutes that excluded fixed return  
12 investment contracts from the definition of investment  
13 contract.

14           QUESTION: Well, were - were they all fixed  
15 return cases then? You say there was not one of them that  
16 excluded fixed returns.

17           MR. OLSON: They were not - they were not - some  
18 of them were variable returns, Mr. Chief Justice, but some  
19 of them were fixed return. The two cases I cited, the one  
20 was People v. White, where, if the Court looks at that  
21 case, the Court will find that the - the - the language of  
22 it is - the party of the first part will pay \$5,000 and  
23 the party of the second part after 5 years will pay \$7,500  
24 back. That was a fixed return investment. But not only  
25 did the Court in Howey cite those two Blue Sky cases that

1 involved fixed returns, but the Court cited then four -  
2 and we mention these, I'll not go through the names again  
3 here, we mention them in our briefs - four court of  
4 appeals decisions that had involved no pooling of interest  
5 and there - there have been two SEC formal adjudications,  
6 which again, as I said, this Court gives deference to.

7           And the first time the SEC sought to enforce an  
8 investment contract in this kind of context is SEC v.  
9 Universal Services, which goes back to 1936. Very seldom  
10 does this Court have that kind of 70-year history of  
11 consistent enforcement by the agency vested with  
12 responsibility, and again, these have matured themselves  
13 into not only court decisions but, in addition, formal  
14 adjudications. The securities laws have prophylactic  
15 purposes. They are designed to protect people that put  
16 their money in the hands of other people who are running  
17 business - businesses - and from whom they expect to make  
18 a return.

19           I invite the Court's attention to exhibit 17 and  
20 particularly pages 116 through 119 of the joint appendix,  
21 and this is the type of note that the - the respondent  
22 will say, well, this was not our document, this was one of  
23 our distributor's documents, but it's alleged in the - in  
24 the complaint and there is evidence to support that this  
25 is - this was out there available for investors to see.

1 There are millions to be made from pay - owning payphones,  
2 watch the profits add up. And then on page 119, this  
3 document goes on to say, for the payphone owner, the need  
4 to do individual things to make money is taken care of  
5 through these management contracts, because the payphone  
6 owner can benefit from the experience, operating  
7 efficiencies, and management expertise provided by ETS  
8 Payphones.

9 QUESTION: What sort of management expertise is  
10 required to manage payphones?

11 MR. OLSON: Well, there's - there are many of  
12 things, at least, A, there was a promise that it was done,  
13 and secondly, Mr. Chief Justice, where that payphone is  
14 put, how it is managed, the appearance of the payphone, is  
15 it - is it mechanically functioning properly. This was  
16 the promise that was held out - give your money to us, we  
17 have thousands and thousands of these payphones -

18 QUESTION: This isn't exactly Warren Buffett,  
19 though, running around replacing payphones.

20 MR. OLSON: Well, that's correct, Mr. Chief  
21 Justice, and maybe that's the point, that - that the  
22 thousands of investors who invested in this type of scheme  
23 are the same type of thousands of investors that invest in  
24 other types of schemes. What the Securities Exchange Acts  
25 require is that for people who are marketing opportunities

1 to invest widely to the public - and I use the word widely  
2 carefully because it doesn't have to be that widely, but  
3 it was here - to expect people to provide their money and  
4 then to provide a return to put their money to work,  
5 that's what the securities laws are all about, to provide  
6 that remedial prophylactic purpose of requiring  
7 registration so honest transactions will take place in the  
8 marketplace.

9 If the investor could do to - to - to comply  
10 with the Eleventh Circuit and say, well, I'm not going to  
11 say 14 percent anymore, I'm going to say you're going to  
12 double your money every 5 years, or it's going to be a  
13 good return, it's going to - it's going to be pie in the  
14 sky, you're going to go home and retire, that would all of  
15 a sudden make it not an investment contract. And the very  
16 people -

17 QUESTION: But you're - you're saying that it -  
18 it somehow remains - does it remain or not remain an  
19 investment contract is - if all that you alter is that it  
20 was not offered to the public, it's one individual who  
21 loans money to this company and the business of this  
22 company is with - with payphones, okay, and the deal with  
23 him is you will get 14 percent a year back on your -

24 MR. OLSON: If it's - if -

25 QUESTION: - on your loan.

1                   MR. OLSON: Mr. - Justice Scalia, if it's the  
2 same kind of transaction where I - I'm going to buy this  
3 payphone, lease it back to me, I'm going to have a  
4 management contract, and you're going to make a lot of  
5 money, the fact that it's one person, this Court's  
6 jurisprudence says does not make it not that - does not  
7 make it not an investment contract.

8                   QUESTION: What - what makes it different just  
9 from a straight loan? What makes it different? The  
10 buying -

11                   MR. OLSON: Because it is a - it is -

12                   QUESTION: - the buying of the phone first or  
13 what?

14                   MR. OLSON: It is a - it is a package in which it  
15 - in the - in the first place is, I think, Justice  
16 Breyer's question suggests it might - that might be a note  
17 and that might be a security under certain circumstances.  
18 But is it a - it is the type of scheme transaction in  
19 which people invest their money on - for those types of  
20 purposes, and - and in - where - where there are  
21 difficulties at the margin, this Court and the SEC have  
22 provided a formula by which these various different  
23 factors can be examined as in the Reves case.

24                   What I was about to say is that to the extent  
25 that you change the requirement and allow it to be

1 speculative, the more speculative you can be, the less  
2 likely you're required to comply with the securities laws.  
3 That seems like tilting the securities laws completely on  
4 their head. The people that are the least - that are the  
5 most risk-averse are looking for guarantees of returns and  
6 fixed returns. The people that depend - that aren't the  
7 Warren Buffetts, that depend upon the integrity of the  
8 system, are the ones that are going to be most vulnerable  
9 if the Eleventh Circuit decision is upheld.

10 Mr. Chief Justice, I'd like to reserve the  
11 balance of my time.

12 QUESTION: Very well, General Olson.

13 Mr. Wolensky, we'll hear from you.

14 ORAL ARGUMENT OF MICHAEL K. WOLENSKY

15 ON BEHALF OF THE RESPONDENT

16 MR. WOLENSKY: Mr. Chief Justice, and may it  
17 please the Court:

18 We start with the language of the statute, and  
19 that tells us two things. First of all, commercial leases  
20 is not a term included in the statute, and second of all,  
21 the term investment contract is undefined. But over a  
22 course of 10 decisions during the past 60 years, this  
23 Court has identified the essential attributes of  
24 investment contracts. It has identified those, defined  
25 those, and explained those.

1                   One of the essential attributes of investment  
2 contracts is a return of profits. The Court's restrictive  
3 definition of profits in the - in the Forman case and then  
4 reiterated in the Reves case, captures very effectively  
5 the investment risk and investment reward characteristics  
6 -

7                   QUESTION: Is it your position that no debt  
8 security could ever be an investment contract?

9                   MR. WOLENSKY: As long as it was a fixed return,  
10 that is correct.

11                  QUESTION: Well, why it distinguished between a  
12 fixed return and an other kind of debt security?

13                  MR. WOLENSKY: Well, under the SEC's explanation  
14 in its briefs, it refers to a lot of things as fixed  
15 returns, which are really just sham, boastful promises by  
16 promoters, and I believe that's what takes this situation  
17 completely out of what the SEC is proposing. Both parties  
18 here agree that the correct test the Court should apply is  
19 the Howey test. There - we don't disagree on that.

20                  QUESTION: And you contend that test would never  
21 cover a debt security? That's my question.

22                  MR. WOLENSKY: That is correct. That test would  
23 never cover a debt securities because this Court has  
24 defined profits for Howey test purposes to mean an  
25 expectation of profits from earning -



1                   QUESTION: What would be the underlying reason  
2 for excluding debt securities and limiting the coverage of  
3 the Act to equity securities?

4                   MR. WOLENSKY: Investment risk, Your Honor. That  
5 is the key.

6                   QUESTION: Well, there was an investment risk  
7 here.

8                   MR. WOLENSKY: Well, there really wasn't, because  
9 what you have is a commercial lease arrangement, a  
10 telephone acts as the collateral, so to speak, to use this  
11 Court's words from the Reves case, but you have a  
12 commercial lease arrangement like commercial lease  
13 arrangements done throughout the country -

14                   QUESTION: Well, but this is a leasing  
15 arrangement that's really a financing arrangement. The  
16 use of leasing for financing purposes really developed  
17 after the Act was passed -

18                   MR. WOLENSKY: It did -

19                   QUESTION: - and this is really a financing  
20 transaction.

21                   MR. WOLENSKY: It can be characterized that way,  
22 Your Honor. That's correct.

23                   QUESTION: Well, certainly the person's return,  
24 it didn't depend on what happened in his own phone booth,  
25 the one he happened to own. His - his risk was what the

1 overall enterprise would produce, as I understand it.

2 MR. WOLENSKY: That's absolutely correct, Your  
3 Honor, and that is a credit risk, not an investment risk.

4 QUESTION: What's preferred stock?

5 MR. WOLENSKY: Preferred stock is an - has both  
6 investment risk, because it can have fluctuating values,  
7 some do.

8 QUESTION: So can debt.

9 MR. WOLENSKY: Debt can if there's a market for  
10 the debt. That's correct.

11 QUESTION: There is.

12 MR. WOLENSKY: But the investor - that's correct  
13 - but the characterization of the return to the investor  
14 in debt is generally viewed as - as a return, the interest  
15 rate, and as far as the market - market - .

16 QUESTION: That is preferred stock.

17 MR. WOLENSKY: Preferred stock, but it's a  
18 capital appreciation issue and that's not an issue here.

19 QUESTION: So can debt appreciate.

20 MR. WOLENSKY: Well, that's right, but that's  
21 capital appreciation and we don't have capital  
22 appreciation in this case.

23 QUESTION: What about bonds? The definition also  
24 includes bonds. The term security means any note, stock,  
25 bond.

1           MR. WOLENSKY: That's correct, and a bond is a  
2 fixed return instrument.

3           QUESTION: It is indeed.

4           MR. WOLENSKY: It's a specifically designated  
5 type of security by Congress. It is not - it does not  
6 fall under the investment contract rubric. It may vary in  
7 its value and have capital appreciation -

8           QUESTION: Yes, but - but when some of the things  
9 that are specifically listed are fixed return items, it  
10 seems hard to credit your contention that somehow the  
11 reason investment contracts cannot cover this particular  
12 arrangement is because this arrangement has a fixed  
13 return. But - but Congress intended the term security to  
14 cover some things that have fixed return. Why not  
15 investment contracts?

16           MR. WOLENSKY: Without question, it did, but  
17 Congress and - and this Court has stated very clearly,  
18 certainly in the Reves case -

19           QUESTION: Yeah, but the Reves case was dictum,  
20 and the question here is, are we going to turn that dictum  
21 into a holding? And before we get to a holding I think  
22 you've got to answer Justice Scalia's question. When we  
23 have specific examples of - of - of fixed returns, why  
24 should the general proposition investment contract somehow  
25 be held not to include as a generality a fixed return

1 contract?

2 MR. WOLENSKY: Our position is that investment  
3 contract is an equity-type security, and we think that is  
4 founded on all of the history and when Congress used the  
5 term investment contract -

6 QUESTION: Let - let me - I - I don't want to be  
7 - be short with you, but I don't think you're getting at  
8 what he and I want. We - we have examples in which the  
9 fixed returns securities are specifically listed. Why -  
10 let's be specific - why would Congress have wanted to  
11 exclude this kind of a scheme?

12 MR. WOLENSKY: Because -

13 QUESTION: It's being marketed as a classic  
14 investment scheme. Why would it have wanted to exclude  
15 this one?

16 MR. WOLENSKY: Because this is a - this is a  
17 commercial lease.

18 QUESTION: Well, it's not a - a normal commercial  
19 lease. It's a - it's a commercial lease of an essentially  
20 trivial piece of property, which is replicated thousands  
21 and thousands and thousands and thousands of times. It is  
22 marketed on - on the theory that you're going to get an  
23 extraordinarily generous rate of interest. These are -  
24 these are not classic sale and lease-back contracts.

25 MR. WOLENSKY: Well, I - I disagree with Your

1 Honor. I believe it is a legitimate lease. There's never  
2 been a question that it's not an enforceable lease.  
3 There's never been a question that the telephone didn't  
4 have the value ascribed to it. It was fairly valued.

5 QUESTION: But it's being marketed not to people  
6 who want to go into the lease business, but people who  
7 want to invest their money and sit back at home and get at  
8 return.

9 MR. WOLENSKY: That may be true, but it cannot be  
10 denied that in fact there was a lease agreement. Every  
11 witness who testified or provided a declaration in  
12 connection with the case acknowledged that it was a lease.

13 QUESTION: Let's assume it is not denied. Why  
14 would Congress have wanted to exclude this kind of fixed  
15 return transaction when it is classically being marketed  
16 as an investment?

17 MR. WOLENSKY: There were leases that were being  
18 used for commercial purposes in 1933. Lease financing was  
19 being used on very significant items then in the railroad  
20 area and other areas, but leases are not new, novel, or  
21 unusual. Investment contract was designed, as this Court  
22 has said -

23 QUESTION: No, but as a public policy issue, I  
24 have the same question Justice Souter has. From a  
25 standpoint of public policy, why in the world would

1 Congress want to exclude a broadly marketed scheme like  
2 this from the definition of investment contract? Why  
3 would it? It's marketed like other schemes that might  
4 have a variable return. They put all these little phone  
5 booths together and it required the management of others  
6 to know how to place them and service them and make it  
7 work. It's not something that the - a person acquiring  
8 the lease is going to do individually. I mean, why isn't  
9 - why would Congress have wanted to exclude this?

10 MR. WOLENSKY: Justice O'Connor, the - the only  
11 answer I can give is because it does not have investment  
12 risk. It's - it is excluded from the term investment  
13 contract because it doesn't have investment risk. All of  
14 the pre-33 Act cases -

15 QUESTION: Well, I suppose it does from the  
16 standpoint of the management required to make this scheme  
17 work.

18 MR. WOLENSKY: Well, that's a credit risk -

19 QUESTION: Anybody who was investing in - in  
20 payphones in the era of the - the satellite was taking an  
21 investment risk, I would think.

22 MR. WOLENSKY: Well, when the -

23 QUESTION: Like the buggy went just before the  
24 horse - just before the automobile.

25 MR. WOLENSKY: Justice Scalia -

1                   QUESTION: Must mean something special by  
2 investment risk. You must not mean what we ordinarily  
3 mean because I think your investors don't feel that way.  
4 So what do you mean by it? When you say no investment  
5 risk, you know, we're all reacting this way because it  
6 seems so obvious to us, anybody who invested money in this  
7 has now lost all his money, so it must have been pretty  
8 risky. So - so I - you must mean something special by it.  
9 If you do, I want you to explain it.

10                  MR. WOLENSKY: Well, the - the money that was  
11 lost was lost as a result of a bankruptcy and what  
12 occurred in the bankruptcy, but when the bankruptcy was  
13 filed, these phone owners still owned their telephones and  
14 they were still entitled to their lease payments. That  
15 was dealt with in the bankruptcy and the details of that  
16 are not involved in the record here but in - there's a - a  
17 significant difference between investment risk, which this  
18 Court characterized in Forman and recognized from the  
19 VALIC case, is a matter of fluctuating value generally.  
20 When you look at credit risk you're -

21                  QUESTION: I'm sure you don't think a person who  
22 buys a bond doesn't take an investment risk.

23                  MR. WOLENSKY: A person who buys a bond takes a  
24 credit risk, not an investment risk. There is a  
25 difference, and I believe -

1 QUESTION: There's a significant -

2 QUESTION: You think buying a - a whole portfolio  
3 of bonds is not an investment?

4 MR. WOLENSKY: Well, it - it is an investment,  
5 but it - it is not the type of investment risk that you  
6 see in fluctuating values securities or equity securities.

7 QUESTION: Have you ever held a bond when  
8 interest rates were going up?

9 MR. WOLENSKY: I - I agree -

10 QUESTION: You would have learned what an  
11 investment risk was.

12 MR. WOLENSKY: Justice Souter, I agree that bonds  
13 can fluctuate in value and that deals with a capital  
14 appreciation -

15 QUESTION: Which means that it is more than a  
16 mere credit risk.

17 MR. WOLENSKY: To the extent you were looking to  
18 the bond to return a value and - and hold it for purposes  
19 of changing value, it theoretically could.

20 QUESTION: And anyone who buys a bond with the  
21 possible expectation of selling before maturity assumes  
22 exactly that.

23 MR. WOLENSKY: They are going to face that risk  
24 and that - that is, in fact, an investment risk. But the  
25 key here, it seems to me, is the fact that you do have a



1 lease agreement, that is what it is involved here. It is  
2 a legitimate lease agreement. It is like any other  
3 equipment lease agreement and it is going to be dealt with  
4 under State law. There is also a significant issue here  
5 with respect to the coverage of other regulatory agencies.  
6 We have in fact Federal Trade Commission coverage here.  
7 There's no question about that. It is involved -

8 QUESTION: Mr. Wolensky, you don't challenge, do  
9 you, that under State Blue Sky Laws, this distinction  
10 between variable and fixed return is not made, that State  
11 Blue Sky Laws treat as investment contracts - do not draw  
12 the line between fixed and variable returns?

13 MR. WOLENSKY: The - the challenge I make is that  
14 before 1933 the State Blue Sky Laws that were - cases that  
15 were incorporated and mentioned in Joiner and in Howey  
16 were variable return cases. I disagree with the SEC on  
17 the two cases.

18 QUESTION: Do you agree that there are a body of  
19 cases under State Blue Sky Laws that involve - maybe some  
20 of them even involve these payphone schemes - but that  
21 have fixed and not variable returns?

22 MR. WOLENSKY: As of today, that is correct.  
23 That is what I see in the amici brief and I have no reason  
24 to question that. The way the law has developed under  
25 State law, it would include fixed returns, that's correct.

1                   QUESTION: So why, if this notion of an  
2 investment contracts comes out of State Blue Sky laws and  
3 we are told that the one thing in this area, because  
4 schemes are invented every day, is that - that the  
5 interpretation should be flexible, not static, to meet the  
6 countless and variable schemes devised by those who seek  
7 the use of money of others?

8                   MR. WOLENSKY: Justice Ginsburg, this Court has -  
9 has repeated that over and over. I will agree with that,  
10 but the Court has talked about new, novel, and unusual  
11 schemes. There is nothing new, novel, or unusual about  
12 lease agreements and commercial leases, and what you have  
13 to focus on here is what the Court has said. It has given  
14 guidance. It has said that unanimously - it may have a  
15 been a footnote in *Reves*, but certainly - .

16                   QUESTION: But when the issue isn't in the case,  
17 what a court says in a casual footnote, when the case had  
18 nothing to do with fixed versus variable returns. I mean,  
19 yes, the Court made it used in cautious languages, but we  
20 - but in none of the cases that came here was the  
21 question, do you draw the line between fixed and variable  
22 returns? In the case that - that you featured - you call  
23 it *Forman* or *United Housing* - there it was a question of  
24 investment versus consumption. Did you buy this thing to  
25 sit back and get money from it or did you buy it so you

1 could live in the house? That was the distinction that  
2 was before the Court in this case. I don't know any of  
3 our cases that - that drew the line between - that where  
4 the issue was before the Court.

5 MR. WOLENSKY: Justice Ginsburg, in Forman, the  
6 Court had to address the issue of whether there was an  
7 investment contract involved, and it stated what I would  
8 call the Forman formulation of profits in connection with  
9 doing that analysis on the three types of profits that  
10 allegedly - or that had been found and allegedly were  
11 present in the Second Circuit decision, and it applied  
12 that formulation to each one of those. So it was -

13 QUESTION: But it did - but the case was not  
14 about equity versus debt classification. It was about  
15 whether you were attracted - whether you were attracted to  
16 purchasing the shares by a desire to get a financial  
17 return or were you attracted because you wanted a place to  
18 live. That's what - that's the two questions - that was  
19 the dividing line that the Court was dealing with there.  
20 It wasn't dealing with equity versus debt.

21 MR. WOLENSKY: That is correct, Justice Ginsburg.  
22 And then in Reves, it was dealing with the distinction  
23 between equity and debt.

24 QUESTION: Well, but in - in Forman there was no  
25 distinction between fixed and variable income.

1           MR. WOLENSKY: It was not, but when you read the  
2 - Justice Kennedy, when you read what the Court said in  
3 Forman, it's talking about an expectation of profits or  
4 capital appreciation, and those are two variable forms.  
5 They're not - they're not fixed. They necessarily vary  
6 with the marketplace.

7           If I can finish answering your question, Justice  
8 Ginsburg, with respect to Reves, there was a distinction,  
9 a very specific distinction there, between fixed and - and  
10 variable. That's what that case was about, investment  
11 contract versus note. And the Eighth Circuit had decided  
12 that the investment contract case of - that the investment  
13 contract test of Howey would apply to notes. There were a  
14 series of tests and this Court used the Reves opinion to -  
15 to go through those and decide, and it came up with a  
16 family resemblance test that had been used by the Second  
17 Circuit. In the footnote in Reves, it is very clear that  
18 what the Court is doing is distinguishing and explaining  
19 why Howey does not apply to notes, which are fixed  
20 instruments. I think it is not just a passing reference  
21 and it - it was unanimously stated that -

22           QUESTION: But I thought that - I thought that  
23 the meaning of investment contract was not at issue in  
24 Reves.

25           MR. WOLENSKY: The meaning of investment contract

1 was not at issue, but distinguishing investment contract  
2 was at issue in *Reves*, and explaining why it was not  
3 applicable in that case. The parties briefed the issue,  
4 the SEC briefed the issue as amicus took the same position  
5 it - it has taken here, and the Court in *Reves* said that  
6 is not the position we accept.

7 QUESTION: And it's - it's taken that position  
8 for a long time, Mr. Wolensky. It's not just the case law  
9 that you have to contend with, it's also - this is after  
10 all an administrative law case. The meaning of investment  
11 contract, you must admit, is at least ambiguous, and the  
12 SEC has taken the position it's taken here for a very long  
13 time.

14 MR. WOLENSKY: Well, if I can address -

15 QUESTION: Why shouldn't we defer to the F -  
16 SEC's judgement about the matter?

17 MR. WOLENSKY: If I can address that for just a  
18 moment, Justice Scalia -

19 QUESTION: That's why I asked the question. I  
20 hoped you would.

21 (Laughter.)

22 MR. WOLENSKY: Thank you, sir. With respect to  
23 the very long time, if you go back to the case the SEC has  
24 pointed to a number of times, the Universal Service case  
25 from 1939 in the Seventh Circuit, when you - and the SEC

1 talks about its position in that case - its position in  
2 that case was stated in its brief in that case, and when  
3 you look at its brief in that case, it recognizes that it  
4 is not dealing with a fixed return as we would talk about  
5 it. In fact, in the brief, the SEC says the amount  
6 ultimately credited to the contributor's account, the  
7 amount itself being dependent upon the degree of success  
8 attending the venture - and I'm reading from pages 39 and  
9 40 and footnote 10 - with respect to the Abbett, Sommer  
10 case, which is a 19 - I believe 62 decision - by the SEC,  
11 the SEC admitted in Abbett, Sommer that it wasn't looking  
12 at traditional profits analysis.

13           That was a mortgage loan servicing case and they  
14 said that what was being offered there was not just the  
15 repayment on the notes but also the services, and they  
16 found that the reduction of risk in that case was the -  
17 basically the profit. So they departed from what is a  
18 normal profit analysis and that's freely admitted.

19           In the interpretative release they've issued,  
20 the multi-level release under the 33 Act, number 5211, in  
21 there the SEC admits that Howey is an equity-type test.  
22 They specifically say that. So I think that when you look  
23 at the history of what this Court has done and what the  
24 SEC has done, when you get to - when you get to Reves and  
25 when you get to Forman, it is - there's no ambiguity left

1 as to what is meant by profits at that point. So I think  
2 a position -

3 QUESTION: I think there is. I think that in  
4 United Housing itself they spoke about profit may be  
5 derived from income yielded by an investment, income  
6 yielded by investment. That doesn't say income from  
7 earnings.

8 MR. WOLENSKY: That is correct, but in the very  
9 same area of the opinion is where the Court says by  
10 profits in the Howey analysis, we have meant a  
11 participation in earnings or capital appreciation, citing  
12 the earlier cases.

13 QUESTION: They said that in one place. They  
14 said financial returns in another place. They said income  
15 in another place. Maybe they were so incautious about the  
16 precise use of those terms because they were focusing on  
17 an investment purpose versus a - a utilitarian purpose.

18 MR. WOLENSKY: I would agree with that, but the  
19 fact that Reves concluded what it did about Forman's  
20 requirements would tend to show that that's really what  
21 Forman required. The - the court of appeals, of course,  
22 was not free to disregard what was a unanimous statement  
23 by this Court. This Court obviously can change its  
24 opinion or change its view, but there is no compelling  
25 reason to depart from what has been accepted for 25 years.

1 Other courts of appeals -

2 QUESTION: Well, why isn't there, when the SEC -  
3 let's assume that you're right about that the SEC was  
4 never crystal clear about its position. But now it says,  
5 we've looked at these schemes, payphones is a good one, a  
6 lot of elderly people are investing in these schemes  
7 because they promise a fixed return and that sounds secure  
8 to them, better than variable out of earnings and profits,  
9 so this is exactly what we should be protecting the public  
10 against. If the SEC takes that position clearly now and  
11 you're dealing with a statutory term that's in a line,  
12 some of the things are equity, some are debt, and in the  
13 middle is this term investment contract. Why should we  
14 tie it to variable versus fixed?

15 MR. WOLENSKY: Justice Ginsburg, because this  
16 Court has said more than once, every fraud is not a  
17 securities fraud. There are other avenues of protection.  
18 There are several risk-reducing factors involved in these  
19 leases. The leases themselves are covered by State law in  
20 the Uniform Commercial Code. There's other regulatory  
21 coverage, other agencies. In fact, some of the State  
22 agencies that filed amici briefs here have indicated that  
23 they believe they have coverage of those.

24 So the fact that the Federal securities laws  
25 might not cover this doesn't mean that there's not going



1 to be protection of the public. The consequence, and I  
2 think it's an important consequence that the Court has to  
3 be aware of here if it agrees with the SEC's position, is  
4 that every equipment lease can be brought under the rubric  
5 of Howey if -

6 QUESTION: Why, why, why?

7 QUESTION: That's not -

8 QUESTION: I mean, there are all kinds of other  
9 criteria, you know. I mean, you have to be putting up  
10 money, it has to be - if it is a big market - scheme  
11 marketed to the - to the public like this, yes. But if it  
12 isn't, if GM happens to buy some - a railroad car from one  
13 of its suppliers, I would think the answer's no. But  
14 there are a lot of other criteria, so why everyone?

15 MR. WOLENSKY: Well, the - it is not in the  
16 record but it is public knowledge and information that is  
17 available that some \$200 billion of equipment leasing  
18 occurs every year, and it - equipment leasing involves  
19 everything from telephone systems to computers, office  
20 equipment. It is a very, very large industry. If that  
21 applies to this large industry -

22 QUESTION: You'd have to be passive, you'd have  
23 to - you'd have to treat it as an investment. I doubt  
24 that most of that leasing is really that, but I mean, my  
25 point is, aren't there dozens of other criteria that you

1 have to satisfy, not just this fixed variable one? And  
2 that's a serious question. I'm interested.

3 MR. WOLENSKY: Well, on - Justice Breyer, there  
4 are - there essentially are four criteria that the - that  
5 the SEC would say you have to apply: an investment of  
6 money - and this Court said in Daniel that investment of  
7 money doesn't just mean money, it can mean services, it  
8 can mean assets. That's why we say in analyzing this it  
9 doesn't matter whether you bring your phone to the  
10 agreement or money to the agreement, but if you put  
11 equipment into a lease arrangement, you have an investment  
12 -

13 QUESTION: Invest money may itself refer to the  
14 thousands of public people who simply want to give money  
15 to an enterprise in contrast to General Motors that rents  
16 a railroad car as part of its business.

17 MR. WOLENSKY: I can contrast that and agree with  
18 you that in General Motors, renting a railroad car is part  
19 of its business. It is not going to be probably found to  
20 run afoul of the securities laws.

21 QUESTION: So what is the example of the bad  
22 thing that happens when we agree with the SG?

23 MR. WOLENSKY: General, broad, small item  
24 equipment leases will be covered by the Howey test.

25 QUESTION: The people who are not themselves in

1 business, by people who are not themselves in business or  
2 by people who are themselves in business?

3 MR. WOLENSKY: Well, whether they're in business  
4 or not in business the securities laws would still cover  
5 them and I don't believe there's an exemption that would  
6 be available for the ordinary business.

7 QUESTION: Why - why isn't your argument equally  
8 applicable to notes? We've been through that in Reves. I  
9 mean, you could have argued in Reves, my God, are you  
10 going to cover every note? You're making the same  
11 argument here with investment - investment contract,  
12 aren't you?

13 MR. WOLENSKY: Well, not necessarily. I think  
14 the Court did set forth some very specific criteria in  
15 Reves. The family resemblance test exempts out commercial  
16 notes that have credit risk and not investment risk.

17 QUESTION: Justice Breyer has just been applying  
18 a family resemblance test to exclude General Motors'  
19 boxcar. Why isn't that sort of thing just as feasible  
20 under investment contract as it is under note?

21 MR. WOLENSKY: It is, and if you - if you look at  
22 the criteria the Court looked to, I think you will see  
23 that several of the criteria that this Court has talked  
24 about indicate that this would not be covered. I believe  
25 it is - it's not specifically related, but the Court noted

1 four criteria, and if you apply those criteria, I think  
2 you find that they in fact -

3 QUESTION: You've come to this quite late, but I  
4 mean, it seems to me that there are other words besides  
5 working with the nature of the fixed or variable return  
6 that will draw the kind of line that you think - and I  
7 guess I would think - you should draw between an ordinary  
8 business, sale and lease-back so they can carry on their  
9 business, and some kind of general marketing to the  
10 public. And I'm actually quite interested in that.  
11 You've written about it, though, and I'll get it out of  
12 the briefs.

13 MR. WOLENSKY: We have and - and I was - have  
14 been trying to address the question that was presented  
15 although we felt a different question was involved. This  
16 Court for 60 years has set a jurisprudential standard for  
17 investment contracts and while the courts work on the  
18 habits of people, people work on the habits of courts.  
19 There are lines that have -

20 QUESTION: In those 60 years we've never said  
21 that a fixed return can never be an investment contract.

22 MR. WOLENSKY: That is correct. You've never  
23 explicitly said that, but by never explicitly saying that,  
24 that doesn't mean that it necessarily is covered. The  
25 decision of the court of appeals followed this Court's

1 precedents. It was correct and it should be affirmed.

2 QUESTION: Thank you, Mr. Wolensky.

3 General Olson, you have 4 minutes remaining.

4 REBUTTAL ARGUMENT OF GEN. THEODORE B. OLSON

5 ON BEHALF OF THE PETITIONER

6 MR. OLSON: Thank you, Mr. Chief Justice. I will  
7 try to make just three points. One, this is about  
8 securities. The statute, which is extraordinarily broad,  
9 says note, stock, treasury stock, fractional undivided  
10 interest in oil, gas, mineral rights, straddle, option.  
11 It's - there - it would be difficult to draft the statute  
12 that was intended to be more all-inclusive than the words  
13 used in these two provisions of the 33 and 34 Act. It is  
14 manifestly clear that Congress wanted to cover the  
15 waterfront, as this Court has said, everything that looks  
16 like a security, and wanted to cover the whole range from  
17 pure equity, if there is such a thing, to pure debt, if  
18 there is such a thing.

19 It would be - and then they put catch-all  
20 provisions. If the - if the words didn't cover it, there  
21 were catch-all provisions, investment contract is one. It  
22 would be irrational for Congress to say, well, we've got a  
23 catch-all for those - from A to Z - that go from A to H  
24 that look more - look like equities, but not S to Z that  
25 look more like debt, and then we're don't - not sure about

1 the ones in the middle. The purpose for the catch-all  
2 provision is to catch all. That is what this investment  
3 contract was.

4           Secondly, just two of the cases that were  
5 attempted to be distinguished by my colleague, *People v.*  
6 *White*, he said that did not involve a fixed return. Well,  
7 the language of the case - this is in 12 P.2d at 1081 -  
8 the individual promised to pay - pay - a specified sum on  
9 a specified date as principal and earnings for the stated  
10 period of time upon the investment. That's pretty much  
11 identical to what we have involved in this case. And in  
12 the *Securities and Exchange Commission v. Universal*  
13 *Services*, another one that my colleague referred to, page  
14 234 of 106 F.2d, at the end of 5 years there would be  
15 returned to each member an amount equal to total  
16 contributions plus 30 percent per annum. Now, this case  
17 is 14 percent.

18           The argument's that being made by the respondent  
19 here is an argument that the Blue Sky - a distinction that  
20 the Blue Sky Laws don't make. Congress did not make this  
21 distinction. The Court has never made this distinction.  
22 It conflicts with 70 years of consistent SEC enforcement.  
23 It is squarely inconsistent with the notion of a broad,  
24 flexible, remedial purpose of the securities statutes. It  
25 would make no sense, would create a gigantic loophole

1 where individuals, by changing the terms of - from pie in  
2 the sky to 14 percent, and they would do that immediately,  
3 and Congress would have to deal with it in a way the  
4 Congress has already dealt with, and there is no reason to  
5 change what they - what the law has been, and the Eleventh  
6 Circuit decision should be reversed.

7 CHIEF JUSTICE REHNQUIST: Thank you, General  
8 Olson. The case is submitted.

9 (Whereupon, at 11:59 a.m., the case in the  
10 above-entitled matter was submitted.)

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