No. _____

In The
Supreme Court of the United States

IN RE UMB BANK, N.A., and
COLORADO BONDSHARES, a Tax-Exempt Fund,

Petitioners,

v.

LANDMARK TOWERS ASSOCIATION, INC., a Colorado nonprofit corporation, by Miller Frishman Group, LLC as Receiver for 7677 East Berry Avenue Associates, L.P., its Declarant,

Respondent.

On Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

It is a long-standing principle of this Court that the Due Process Clause does not require a specific benefit to taxpayers who are levied a general tax for funding government services or public improvements.

Based on this principle, local governments in Colorado and throughout the country have funded public infrastructure through the creation of infrastructure taxing districts, which sell municipal bonds that are repaid by general *ad valorem* property taxes imposed on residents of the districts.

Relying on an unusual fact pattern in this Court's century-old decision in *Myles Salt v. Board of Commissioners*, 239 U.S. 478 (1916) ("*Myles Salt*"), the Colorado Court of Appeals jeopardized this crucial financing mechanism by concluding that the Due Process Clause requires taxpayers within a public infrastructure taxing district to derive a special benefit from the general *ad valorem* property tax imposed.

The question presented is:

Should the Court remove the cloud over local governments and the national public finance industry by overruling or clarifying *Myles Salt* to confirm that the Due Process Clause does *not* require general *ad valorem* property taxes imposed by an infrastructure taxing district to provide a special benefit to taxpayers within the district?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner UMB Bank, N.A. ("UMB Bank") is a national banking association organized under the laws of the United States with its principal place of business in Missouri. UMB is the trustee for Bonds issued by the District as described herein, was a defendant in the trial court below, and was a cross-appellant in the Colorado Court of Appeals.

Petitioner Colorado Bondshares – a Tax-Exempt Fund ("Colorado Bondshares") is a Massachusetts business trust with its principal place of business in Denver, Colorado. Colorado Bondshares is a regulated investment company registered with the Securities and Exchange Commission. Colorado Bondshares was a defendant in the trial court below and a cross-appellant in the Colorado Court of Appeals.

Respondent Landmark Towers Association, Inc., a Colorado non-profit corporation, by EWG-GV, LLC, as receiver for 7677 East Berry Avenue Associates, L.P., its declarant (collectively, "Landmark") is a Colorado nonprofit corporation organized as a common-interest community association pursuant to the Colorado Common Interest Ownership Act, C.R.S. §§ 38-33.3-101, *et seq*. Landmark was a plaintiff in the trial court below and a cross-appellant in the Colorado Court of Appeals.

The Marin Metropolitan District (the "District") is a Colorado metropolitan district organized pursuant to the Colorado Special District Act, C.R.S. §§ 32-1-101, *et*

PARTIES TO THE PROCEEDINGS BELOW – Continued

seq. The District's board is currently comprised of owners in Landmark. The District was a defendant in the trial court below and a cross-appellant in the Colorado Court of Appeals. The District is not participating in this Petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner UMB states that it is owned by UMB Financial Corporation, which is publicly traded on NASDAQ.

Pursuant to Rule 29.6, Petitioner Colorado Bondshares is publicly traded and states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED CASES

Landmark Towers Association, Inc., a Colorado nonprofit corporation, by EWG-GV, LLC, as receiver for 7677 East Berry Avenue Associates, LP, its declarant, Plaintiff-Appellee and Cross-Appellant v. UMB Bank, N.A., Colorado Bondshares, a tax exempt fund; and Marin Metropolitan District, a Colorado special district, Defendants-Appellants and Cross-Appellees, 14CA2099 & 14CA2463, Colorado Court of Appeals. Judgment entered May 31, 2018 (on remand from Colorado Supreme Court), reported at 436 P.3d 1139 (Colo. App. 2018).

STATEMENT OF RELATED CASES – Continued

UMB Bank, N.A., Colorado Bondshares – a tax exempt fund, and Marin Metropolitan District, a Colorado Special District, Petitioners v. Landmark Towers Association, Inc., a Colorado nonprofit corporation, by EWP-GV, LLC, as receiver for 7677 East Berry Avenue Associates, LP, its Declarant, Respondent, 16SC455, Colorado Supreme Court, State of Colorado. Judgment entered December 11, 2017 (reversing Colorado Court of Appeals judgment and remanding to Colorado Court of Appeals), reported at 408 P.3d 836 (Colo. 2017).

In re Organization of Marin Metropolitan District, 07CV1793, District Court Arapahoe County, State of Colorado. Judgment entered December 7, 2007 (affirmed by Colorado Court of Appeals, 13CA0211 & 13CA0751, March 27, 2014), reported at 412 P.3d 620 (Colo. App. 2014).

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Colorado Court of Appeals is reported at 436 P.3d 1139 (Colo. App. 2018), and reprinted at App. 1-35 (the "Opinion"). The order by the Supreme Court of Colorado denying the Petition for Writ of Certiorari is not reported but is available at No. 18SC507, 2019 WL 1321166 (Mar. 25, 2019) and reprinted at App. 172. The trial court's September 6, 2013 Order, as modified by its October 31, 2013 Order, is unreported and reprinted at App. 107-171.

A prior opinion of the Supreme Court of Colorado is reported at 408 P.3d 836 (Colo. 2017), and reprinted at App. 36-53. Another prior decision by the Colorado Court of Appeals is reported at 436 P.3d 1126 (Colo. App. 2016), and reprinted at App. 54-84.

Additionally, another prior decision by the Colorado Court of Appeals in a separate but related case is reported at 412 P.3d 620 (Colo. App. 2014) and reprinted at App. 85-106.

STATEMENT OF JURISDICTION

On March 25, 2019, the Colorado Supreme Court issued an order denying Petitioners' Petition for Writ of Certiorari, leaving in place the Colorado Court of Appeals' decision finding that the District violated the Due Process Clause by levying *ad valorem* property taxes against Landmark property owners. The

Colorado Court of Appeals announced its Opinion on May 31, 2018.

On June 18, 2019, Justice Sotomayor extended the time to file this petition until August 22, 2019. *UMB Bank, N.A., et al, Applicants v. Landmark Towers Association, Inc.*, No. 18A1318 (U.S. June 18, 2019).

This Court has jurisdiction under 28 U.S.C. § 1257(a), because the Due Process Clause of the Fourteenth Amendment to the United States Constitution is not subject to further review in the Colorado courts. *See Cox Broad. Corp v. Cohn*, 420 U.S. 469, 479-85 (1975).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1 provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

INTRODUCTION

The Due Process Clause does not require a specific benefit to taxpayers who are levied a general tax for funding government services or public improvements. That principle is so often repeated that it has become a fundamental precept of taxation.

Based on this well-settled principle, local governments in Colorado and throughout the country have funded infrastructure through the creation of public infrastructure taxing districts. These districts are general purpose local governments and are generally responsible for the installation and maintenance of all public infrastructure within the district area, including streets, sidewalks, street lighting, traffic control, water and sewer facilities, parks, and related public infrastructure. The districts generally fund infrastructure construction within their boundaries by selling municipal bonds that are repaid by general *ad valorem* property taxes imposed on the district residents. Not every taxpayer within these districts is necessarily specifically benefitted by each infrastructure improvement, but the Due Process Clause does not so require.

At least that was the common understanding. Relying on an unusual fact pattern in *Myles Salt* – which on its face holds that *ad valorem* property taxes must confer a special benefit on taxpayers – the Colorado Court of Appeals jeopardized this crucial financing mechanism by concluding that the Due Process Clause requires taxpayers within a public infrastructure taxing district to derive a special benefit from the general *ad valorem* property tax imposed.

The Court of Appeals – potentially recognizing the weakness of its reliance on *Myles Salt* – attempted to bolster its holding by alternatively stating that the District's *ad valorem* tax was a special assessment on the grounds that it did not individually benefit the

residents. Further to this point, the Court of Appeals held that the purported special assessment violated the Due Process Clause because special assessments indeed must provide special benefits to the residents assessed. By converting an *ad valorem* tax into a special assessment simply because it failed to provide a special benefit, the court engaged in wholly circular reasoning and ran afoul of this Court's long-established holdings that the Due Process Clause does not require a specific benefit to taxpayers who are levied a general tax for funding government services. Moreover, for purposes of the Due Process Clause, federal law determines whether a particular charge is a tax or a special assessment, and the determining factor obviously is not whether the charge provides a special benefit to the taxpayer; otherwise, all taxes not specially benefiting the taxpayer would violate the Due Process Clause. Under federal law, a charge is determined to be a tax, fee or special assessment based on the operation or purpose of the charge. Here, the District's tax was imposed to fund public infrastructure and thus is a tax.

The Colorado Court of Appeals' misapplication of the Due Process Clause to a public infrastructure taxing district is alarming. For purposes of this case, the decision effectively makes the District's municipal bonds worthless by invalidating the taxes pledged for repayment of the bonds. More broadly, the decision casts a long shadow on public financing of infrastructure districts generally, and it encourages taxpayers to invoke the Due Process Clause whenever a legally

imposed tax does not specifically benefit their property. This has potentially disastrous consequences for local governments and the public finance industry throughout the United States because it makes taxes susceptible to challenge, creating uncertainty about repayment of bonds.

It has been over a century since *Myles Salt* was decided, and almost eighty years since this Court last decided the limitations imposed by the Due Process Clause on *ad valorem* property taxes.[1] During that time, the use of public infrastructure taxing districts has grown exponentially, as many local governments have adopted the reasonable philosophy of "making growth pay for itself." Respectfully, it is time for this Court to revisit *Myles Salt* and either: (1) overrule *Myles Salt*, which on its face holds that *ad valorem* property taxes must confer a special benefit on taxpayers; or (2) clarify that *Myles Salt*, which involved a special purpose improvement (drainage) district, holds that special assessments (not taxes) must confer a special benefit on taxpayers, confirm that *Myles Salt* is limited to special purpose property improvement districts (like drainage districts), and that *Myles Salt* has no bearing on taxes imposed by public infrastructure districts. No single state can resolve this confusion about how the Due Process Clause applies to state

[1] Since the enactment of the Tax Injunction Act, 28 U.S.C. § 1341 in 1937, litigation of this federal constitutional question has concentrated in the state courts. *Kerns v. Dukes*, 153 F.3d 96, 101-102 (3d Cir. 1998) (citing *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 108, n.6 (1981)).

taxation, and the problems of unequal application of the Due Process Clause to public infrastructure taxing districts will worsen without this Court's intervention. Absent clarification, state courts such as Colorado here, will continue to misapply the Due Process Clause and hamper the ability of local governments to generate support for essential government infrastructure.

Accordingly, this Court should remove the cloud over local governments and the national public finance industry by overruling or clarifying its century-old *Myles Salt* decision to confirm that the Due Process Clause does not require general *ad valorem* property taxes imposed by public infrastructure taxing districts, like the District in this case, to provide special benefits to taxpayers.

STATEMENT OF THE CASE

This case was initiated by Landmark, which is an association of home owners of luxury condominium units within the District. The Landmark property owners were subject to *ad valorem* property taxes necessary to repay the municipal bonds issued by the District for the purpose of financing public infrastructure within the District. The Landmark property owners have alleged that the Due Process Clause prohibits the District's levy of an *ad valorem* property tax, because the District allegedly has not provided a special benefit to each property owner within the District.

The District is a public infrastructure taxing district, which in 2008 issued $30,485,000 in Bonds (the "Bonds") to fund infrastructure within the District. Those Bonds were subsequently sold to Colorado Bondshares, which is a mutual fund that invests in tax-exempt securities issued by local governments and political subdivisions in the U.S., with an emphasis on Colorado. Its portfolio is comprised primarily of tax-exempt bonds issued to finance local infrastructure, and the vast majority of its shareholders are individuals.[2] UMB Bank is the trustee of the Bonds.

Siding with Landmark on the Due Process Clause issue, the trial court in 2013 imposed an injunction prohibiting the District from levying any further *ad valorem* property taxes necessary to pay the Bonds (the "Injunction"). This appeal arises out of the findings and conclusions of law related to the Injunction.

A. The District Is a Public Infrastructure Taxing District That Was Organized for the Express Purpose of Constructing Various Forms of Public Infrastructure.

The District is a political subdivision and a special district of the State of Colorado. *See S. Fork Water & Sanitation Dist. v. Town of S. Fork*, 252 P.3d 465, 468 (Colo. 2011) (holding that special taxing districts established pursuant to C.R.S. §§ 32-1-101, *et seq.* are

[2] The District currently owes Colorado Bondshares the principal amount of the Bonds, which is $17,485,000, plus continually accruing interest.

"political subdivisions of the state," intended to "promote the health, safety, prosperity, security and general welfare" of their inhabitants) (citing C.R.S. § 32-1-102(1)).

Many states, especially ones with high population growth, have some form of special taxing district similar to Colorado, which districts have the power to finance public infrastructure through the issuance of bonds secured by taxes, fees, or special assessments. *See* Carter T. Froelich & Lucy Gallo, *An Overview of Special Purpose Taxing Districts*, NAT'L ASS'N OF HOME BUILDERS 2 (Sept. 2014) (discussing special districts in nineteen states, including Colorado) ("*NAHB Overview*");[3] *see also* Barbara Coyle McCabe, *Special-District Formation Among the States*, 32 ST. & LOCAL GOV'T REV. 121, 122 (Spring 2000) ("*Special-District Formation*") (identifying 47 states with special districts).

In Colorado, statutes govern the creation of local public infrastructure taxing districts, referred to as "special districts." *See* C.R.S. §§ 32-1-101, *et seq*. Metropolitan districts, such as the District, are a type of special district that must provide several governmental functions, including public infrastructure. Such infrastructure includes parks or recreational facilities, street improvements, mosquito control, sanitation, water, drainage, *etc*. C.R.S. §§ 32-1-103(10), 32-1-1004(2). Colorado metropolitan districts have the statutory authority to levy *ad valorem* taxes on property within the

[3] *Available online at* www.NAHB.org.

district. C.R.S. §§ 32-1-1001(1)(e), 32-1-1101(1)(a), 32-1-1201.[4]

As required by state law, the City of Greenwood Village (the "City") approved the organization of the District after public hearings. (App. 86, ¶ 2; App. 4-5, ¶¶ 7-9; App. 113; *see also* C.R.S. §§ 32-1-202(2), 32-1-204.5.) The City specifically approved the District's Service Plan, authorizing the District to organize as a metropolitan district with the public purpose of providing "certain enhanced street, traffic and safety control, storm water drainage, water, sanitation, park and recreation, and other public infrastructure improvements and related facilities and services commensurate with the quality of the Development." (App. 180.) The Service Plan provides that these improvements "will be completed for the integrated use and benefit of the property owners and taxpayers within, and residents of both the Landmark and Marin towers, *as well as for the public generally*." (App. 181 (emphasis added); App. 182 ("[T]he organization of the District will promote the interests of future residents, property owners and taxpayers within the District as well as the general interest of the City.").) The Service Plan expressly authorized the District to finance such public improvements through the issuance of bonds secured

[4] Colorado special districts had no authority to impose special assessments until 2009, a year after the Bonds were issued. H.B. 09-1005, 67th Gen. Assem., First Reg. Sess. (Colo. 2009) (*amending* C.R.S. § 32-1-1101(1)(g) and adding C.R.S. § 32-1-1101.7 to permit special districts to impose special assessments).

by property tax revenues. (App. 113-114; App. 182, 183-189.)

After the public hearings, the City passed a resolution approving the Service Plan, finding that the proposed District would have the public purpose of enhancing infrastructure and services to the area served by the District:

> [T]he existing level of service and facilities within the area to be served by the proposed District, including facilities and services furnished by the City and existing special districts, does not meet the present and projected needs of this unique transportation-oriented residential development with respect to the enhanced level of public infrastructure facilities and services provided by the proposed District. . . .
>
> The City Council finds that the proposed District is capable of providing economical and sufficient service to the area within its proposed boundaries and that the area to be included in the proposed District has, or will have, the financial ability to discharge the proposed indebtedness on a reasonable basis.

(App. 174.)

As required by state law, District organizers held an election on the organization of the District, issuance of the Bonds and imposition of property taxes for payment of the Bonds. (App. 37, ¶ 1; App. 115; *see* COLO. CONST. art. X, § 20(4); C.R.S. § 32-1-803.5.) At the time of the election in November 2007, approximately 130

condominiums were under contract, but no sales had been completed. (App. 86-87, ¶ 4; App. 41, ¶ 11.) None of these individuals were property owners within the District at the time of the election. (App. 103, ¶ 47; App. 115, 123.) Therefore, as permitted by state law, District organizers qualified themselves as eligible electors, and the ballot issues passed, thereby approving the organization of the District, the issuance of the Bonds, and the imposition of *ad valorem* property taxes necessary to pay the Bonds. (App. 115.)

Pursuant to the election, the District issued Limited Tax General Obligation Bonds, Series 2008, which Colorado Bondshares purchased for $30,485,000. (App. 115-116, 142-143; App. 42, ¶ 14.) The Bonds were secured by the District's pledge of revenues from *ad valorem* property taxes to be imposed on taxpayers within the District. (App. 118, 135-136; App. 55, ¶ 1; App. 182, 183-189.)

B. The District Levied *Ad Valorem* Taxes Necessary to Pay the Bonds, which the Landmark Property Owners Initially Paid.

In or about July 2008 (which was approximately six months after the election), individuals who held purchase contracts for condominiums in the Landmark towers began closing on their properties. (App. 123.) Thereafter, in January 2009, the Landmark property owners began receiving property tax bills from the Arapahoe County Treasurer based on the assessed value of their properties. (App. 43, ¶ 17; App. 123-124.)

Those tax bills specifically included a line item for *ad valorem* taxes levied by the District. (App. 177.) The property taxes levied by the District were paid by the Landmark property owners beginning in 2009 through 2013, when the Injunction was entered.

C. Landmark's Challenge to the District's Property Tax.

In 2011, three years after the Bonds were issued and *ad valorem* property taxes approved, Landmark filed this lawsuit against the District, Colorado Bondshares, and UMB, as trustee. Landmark claimed, among other things, that the District violated the Due Process Clause by including the Landmark property owners in the District and taxing their property without providing taxpayers a special benefit from the taxes imposed. (App. 43, ¶ 18.)[5]

After a bench trial, the trial court sided with Landmark. Relying on *Myles Salt*, the trial court held that *ad valorem* property taxes must confer a special

[5] Landmark's primary contention was that the developer's managing partner, Zachary M. Davidson, misappropriated Bond proceeds, *i.e.*, that approximately $8,000,000 in Bond proceeds were used for private, not public improvements. (App. 118.) The trial court, however, concluded that only $384,611 of the Bond proceeds were misappropriated, used for private not public purposes. (App. 122.) Stated differently, over $7,600,000 was supported as public expenditures. These claims arose because the Developer abandoned the project in the wake of the 2008 economic crisis and eventually filed for bankruptcy. (App. 6-7, ¶ 12; App. 42, ¶ 15.) Mr. Davidson subsequently committed suicide. (App. 6, ¶ 12, n.3; App. 42, ¶ 15.)

benefit on taxpayers and, in the absence of any special benefit, "the levy would amount to a confiscation without due process of law." (App. 148.) The trial court imposed the Injunction, which prevented the District from levying *ad valorem* property taxes necessary to pay the Bonds. (App. 154; App. 83, ¶ 70.)

In a subsequent order, the trial court reaffirmed the Injunction but further confused the issues. In particular, the trial court acknowledged in its Oct. 31, 2013 Order that its earlier Sept. 6, 2013 Order misapplied special assessment law to the District's *ad valorem* property tax. But, the trial court nonetheless held that, under *Myles Salt*, the Due Process Clause requires both taxes *and* special assessments to confer a benefit on taxpayers: "From [*Myles Salt*] it is seen that it is not the label of the tax or assessment which controls but rather whether an unconstitutional taking has occurred." (App. 164.)

Both sides appealed. In its first published decision, reported at 436 P.3d 1126 (Colo. App. 2016), the Court of Appeals granted Landmark's cross-appeal and held that the District's imposition of *ad valorem* property taxes was invalid under state election law. The Colorado Supreme Court reversed that decision in *UMB Bank, N.A. et al. v. Landmark Towers Association, Inc. et al.*, 408 P.3d 836 (Colo. 2017), and directed the Court of Appeals to decide the issues that were not previously addressed on appeal, including Landmark's argument that the District violated the Due Process Clause.

On remand, the Colorado Court of Appeals, invoking *Myles Salt*, held in the Opinion that the District violated the Due Process Clause by including Landmark property owners in the District and levying *ad valorem* property taxes without a special benefit to the Landmark property owners. (App. 12, ¶ 25.) Based on this lack of benefit, the Court of Appeals also wrongly concluded that the District's *ad valorem* property tax was in effect a special assessment. (App. 14-18, ¶¶ 29-33.)[6]

The Colorado Supreme Court denied the Petition for Certiorari filed by the District, Colorado Bondshares, and UMB Bank.

REASONS FOR GRANTING THE WRIT

A. The Colorado Court of Appeals Constitutionally Erred in Applying *Myles Salt* Contrary to Long-Established Federal Law Holding That *Ad Valorem* Property Taxes Do Not Violate the Due Process Clause for Failure to Benefit the Taxpayer.

The Colorado Court of Appeals erred in applying *Myles Salt* in a manner contrary to long-established federal law that general *ad valorem* property taxes do

[6] The Court of Appeals purported to identify two violations of the Due Process Clause – one based on inclusion of the property and one based on imposition of the tax – but both holdings rely on the same argument, namely, that the property owners did not receive a special benefit from the taxes imposed.

not violate the Due Process Clause for failure to benefit the taxpayer.

This Court has long held that taxes imposed by local governments need not benefit taxpayers in order to satisfy the Due Process Clause. In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-26 (1981), this Court stated:

> [T]here is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Instead our consistent rule has been:
>
> "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government – that it exists primarily to provide for the common good."

(quoting *Carmichael v. S. Coal & Coal Co.*, 301 U.S. 495, 521-23 (1937)); *see also St. Louis & Sw. Ry. Co. v. Nattin*, 277 U.S. 157, 159 (1928) ("As the assailed tax was general and *ad valorem*, its legality does not depend upon the receipt of any special benefit by the taxpayer."); *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 429-30 (1935) ("While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment."); 16 EUGENE MCQUILLIN, LAW OF MUN. CORP. § 44:58 (3d ed. 2019) ("Property may be taxed although it receives no benefit from the taxes.").

On its face, *Myles Salt* involved what was labeled as an *ad valorem* tax and required that the tax provide a special benefit to the taxpayer included in the district. *Myles Salt Co.*, 239 U.S. at 482 (finding that election to issue bonds approved the imposition of "an ad valorem tax of 5 mills for a period of forty years upon which to predicate an issue of bonds"). A closer examination of *Myles Salt*, however, reveals that the *ad valorem* tax was imposed by a special purpose district solely for improving particular property. 239 U.S. at 485. Specifically, this Court held: "It is to be remembered, that a drainage district has the *special purpose* of the improvement of particular property, and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation." *Id*. at 485 (emphasis added).

Thus, setting aside the reference to an *ad valorem* tax, *Myles Salt* is more properly viewed as a special assessment case, because the Court in *Myles Salt* essentially treated the *ad valorem* tax as an "*ad valorem* special assessment." Indeed, the "tax" was imposed by a district that was formed for the sole and special purpose of improving the property of the owners within the district, and most drainage districts impose special assessments, which must provide a specific benefit in relation to the amount imposed. 11 EUGENE MCQUILLIN, LAW OF MUN. CORP. § 31:6, n.7 (3d ed. 2019); 14 EUGENE MCQUILLIN, LAW OF MUN. CORP. § 38:32 (3d ed. 2019); *id*., § 38:2; *see also Pac. Gas & Elec. v. Sacramento Mun. Util. Dist*., 92 F.2d 365, 373 (9th Cir. 1937) (observing that drainage districts involve local improvements, which "directly benefits real property," and distinguishing *Myles Salt* on that basis). That is why this Court and many others have cited *Myles Salt* as an example of a special assessment case, not a tax case. *Ga. Ry. & Elec. Co. v. City of Decatur*, 295 U.S. 165, 170 (1935); *Nashville, Chattanooga & St. Louis Ry*., 294 U.S. at 430; *Creason v. City of Wash*., 435 F.3d 820, 825 (8th Cir. 2006); *Pac. Gas & Elec.*, 92 F.2d at 373; *Morton Salt Co. v. City of S. Hutchinson*, 177 F.2d 889, 892 (10th Cir. 1949); *People ex rel. Averna v. City of Palm Spring*s, 51 Cal. 2d 38, 47 (Cal. 1958).

Myles Salt even relied on special assessment case law. 239 U.S. at 485 (citing *Village of Norwood v. Baker*, 172 U.S. 269, 278-79 (1898) (holding that a special assessment substantially in excess of special benefits was, to the extent of the excess, a taking of property in

violation of Due Process Clause)). As discussed below, special assessments indeed must benefit the property assessed in order to satisfy the Due Process Clause. But taxes do not, as this Court has held.[7]

The drainage district's use of an *ad valorem* tax (which by definition will not relate the amounts paid to the benefits received) was unusual, and apparently confused the Colorado Court of Appeals into believing special district taxes must provide a special benefit, even public infrastructure taxing districts like the District here. However, properly read, *Myles Salt* should not stand for the proposition that *ad valorem* property taxes imposed by public infrastructure districts must provide a specific benefit to each taxpayer. To the extent that it does, *Myles Salt* should be overruled as inconsistent with long-standing Due Process Clause case law.

Myles Salt has never been meaningfully applied to anything other than a special purpose property improvement district, like a drainage district. To this point, the vast majority of cases that have addressed *Myles Salt* are other cases involving special purpose

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[7] A further distinction between *Myles Salt* and the present case is that the plaintiff in *Myles Salt* was an existing landowner at the time the district was formed. In this case, no resident in the Landmark complex owned her/his property at the time the District was organized. To the contrary, the only property owner was the developer. Creation of the District, and the adoption of the *ad valorem* property taxes, did not "confiscate" any person's property because no one owned property in the District at the time other than the developer, which approved the inclusion of its property into the District.

property improvement districts, such as drainage, sewer, irrigation, or flood control districts. *See*, *e.g.*, *Adam Schumann Assocs. v. City of N.Y.*, 40 F.2d 216, 217, 219 (2d Cir. 1930) (drainage district); *Fed. Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610, 611, 614, n.5 (5th Cir. 1991) (street and sewer district); *Cosby v. Jumper Creek Drainage Dist.*, 3 So. 2d 356, 357-59 (Fla. 1941); *Burt v. Farmers' Co-op Irrigation Co.*, 168 P. 1078, 1083-84 (Idaho 1917); *Clinton v. Spencer*, 229 N.W. 609, 611, 615 (Mich. 1930) (drainage district); *Seidlitz v. Faribault County*, 55 N.W. 2d 308, 310-11 (Minn. 1952) (drainage district); *Rauch v. Himmelberger*, 264 S.W. 658, 662 (Mo. 1924) (drainage district); *In re Mossmain Drainage Dist.*, 300 P. 280, 283 (Mont. 1931); *In re Scappoose Drainage Dist.*, 237 P. 684, 688 (Or. 1925); *Madsen v. Bonneville Irrigation Dist.*, 239 P. 781, 782-84 (Utah 1925); *Weyerhaeuser Timber Co. v. Banker*, 58 P.2d 285, 286, 289 (Wash. 1936) (flood control district); *see also Creason*, 435 F.3d at 822 (road improvements); *Bush v. Delta Road Improvement Dist.*, 216 S.W. 690, 691-92 (Ark. 1919) (road improvement district); *Von Damm v. Conkling*, No. 960, 1916 WL 1459, *1-2 (Haw. Aug. 24, 1916) (highway improvement); *People ex rel. Hanrahan v. Caliendo*, 277 N.E.2d 319, 321, 323 (Ill. 1971) (transportation district); *Newson v. City of Wichita*, 351 P.2d 10, 12-13, 16 (Kan. 1960) (road improvement). Certainly, there are seemingly no other cases in which *Myles Salt* has been applied to invalidate the *ad valorem* property taxes imposed by a public infrastructure taxing district, like the District in this case.

In fact, *Myles Salt* appears to be the *only* instance in which this Court probed the benefits required of a purported tax under the Due Process Clause. Mark G. Yudof, *Property Tax in Texas under State and Federal Law*, 51 TEX. L. REV. 885, 913 (1973). As a result, several authorities and courts have called into question whether it remains good law. Yudof, *supra*, 914; FRANK I. MICHELMAN & TERRANCE SANDALOW, MATERIALS ON GOV'T IN URBAN AREAS 523-24 (West Publishing 1971); *see Furey v. City of Sacramento*, 780 F.2d 1448, n.5 (9th Cir. 1986) (observing that *Myles Salt* has "rarely been invoked in the federal courts in the past seventy years," and its continuing validity "as a matter of federal constitutional law has been questioned"), abrogated on other grounds, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *State ex rel. Angel Fire Home & Land Owners Ass'n, Inc. v. S. Cent. Colfax County Special Hosp. Dist.*, 797 P.2d 285, 287 (N.M. Ct. App. 1990). That is likely because the "tax" assailed in *Myles Salt* would be better characterized as a special assessment today, because it was designed to finance improvements to specific property by constructing a drainage system. There was no benefit for the "common good" as associated with taxes. *See Commonwealth Edison Co.*, 453 U.S. at 622-26.

It also should be noted that, at the time *Myles Salt* was decided, the distinction between taxes and special assessments was not as well-drawn as it is today, leading to the conclusion that the *ad valorem* "tax" referenced in *Myles Salt* would have been better

characterized as an "special assessment." For example, in *Village of Norwood v. Baker*, 172 U.S. at 280, which is widely regarded as a special assessment case, the Court described special assessments as a "peculiar species of taxation." *See Kan. City S. Ry. Co. v. Road Improvement Dist. No. 3*, 266 U.S. 379, 381 (1924) (referring to special assessment as a "special tax"); *Kan. City S. Ry. Co. v. Road Improvement Dist. No. 6*, 256 U.S. 658, 660 (1921) (referring to a special assessment as a tax); *French v. Barber Asphalt Paving Co.*, 181 U.S. 324 (1901) (repeatedly referring to an assessment imposed for street paving as a "tax"); *Illinois Cent. R.R. Co. v. City of Decatur*, 147 U.S. 190, 198 (1893) (referring to special assessments as a "peculiar species of taxation"); *Morton Salt Co.*, 177 F.2d at 892 (referring to special assessment as a "special tax").

In an effort to analogize the case to *Myles Salt*, the Court of Appeals placed an inordinate amount of emphasis on the alleged motives for including the Landmark property in the District, finding that the Landmark property was included in the infrastructure district without any benefit to its residents. Such an analysis runs counter to the case law, which eschews this inquiry. It also belies the very purpose of public infrastructure taxing districts, which is to provide general benefits to the community rather than provide specific benefits to individual property owners. Moreover, even assuming the geographical area of the District was drawn with the intent to include the Landmark complex to maximize available tax revenues, the District boundaries were approved by the

District organizers, who owned the property at the time the District was organized, and the City, which is the District's oversight body. It is natural to draw boundaries in order to best ensure the bonds used to finance public infrastructure within the District would be repaid. The taxpayers who subsequently purchased units in the Landmark complex were on notice that they were buying into an infrastructure district in which tax revenues would not necessarily be evenly applied across all property within the District, which is not unusual for a phased-in development district.

B. The Colorado Court of Appeals Erred in Alternatively Holding that an *Ad Valorem* Tax Imposed by a Public Infrastructure Taxing District Is a Special Assessment for Purposes of the Due Process Clause.

The Colorado Court of Appeals also erred in its alternative holding, that the District's *ad valorem* tax was a special assessment. Essentially, the Court of Appeals concluded the tax was a special assessment solely because it provided no special benefit to the Landmark property owners. That, of course, is faulty and circular logic, for if every tax that failed to specially benefit the taxpayer were re-labeled a "special assessment," the Due Process Clause would effectively require general *ad valorem* taxes to specially benefit taxpayers, which is contrary to all holdings of this Court.

Moreover, the District's *ad valorem* tax plainly is not a special assessment under federal law. Where the Due Process Clause is concerned, the issue of whether an assessment is a tax is a matter of federal rather than state law. In *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930), the Court considered a tax exemption claimed by members of the Choctaw tribe under the Atoka Agreement. In holding that the petitioners were entitled to the tax exemption, the Court stated: "Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Id*. at 367-68; *see Soc'y for Savings v. Bowers*, 349 U.S. 143, 151 (1955) (following this holding in determining that state tax on banks was an illegal tax on obligations of federal government).

Similarly, in rejecting an argument that certain intellectual property is immune from state taxation, the U.S. Supreme Court held that whether an assessment is a "tax" is subject to independent inquiry:

> But the nature of a tax must be determined by its operation rather than by particular descriptive language which may have been applied to it . . . neither state courts nor Legislatures by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. This court must determine for itself by independent inquiry whether the tax here is what, in form and by the decision of the state court, it is declared to be.

Macallen Co. v. Massachusetts, 279 U.S. 620, 626 (1929) (in considering abatement suit over excise tax, holding that "this court must determine for itself by independent inquiry whether the tax here is what, in form and by the decision of the state court, it is declared to be, namely, an excise tax on the privilege of doing business, or, under the guise of that designation, is in substance and reality a tax on the income derived from tax-exempt securities"); *Educ. Films Corp. of Am. v. Ward*, 282 U.S. 379, 387-88 (1931); *see also Wright v. McClain*, 835 F.2d 143, 144 (6th Cir. 1987) (in considering an assessment under the Tax Injunction Act, 28 U.S.C. § 1341, observing that it is "elemental, we think, that the label given an assessment by state law is not dispositive of whether the assessment is a 'tax under state law' under the statute. Rather, the definition of the term 'tax' is a question of federal law, and the issue here is whether the assessment in question is a tax. . . .").

In *Houck v. Little River Drainage District*, 239 U.S. 254, 265 (1915), this Court defined a "tax" as an "enforced contribution for the payment of public expenses," specifying:

> It is laid by some rule of apportionment according to which the persons or property taxed share the public burden, and whether taxation operates upon all within the state, or upon those of a given class or locality, its essential purpose is the same. The power of segregation for taxing purposes has every-day illustration in the experiences of local

> communities, the members of which, by reason of their membership, or the owners of property within the bounds of the political subdivision, are compelled to bear the burdens both of the successes and of the failures of local administration.

In *Illinois Central Railroad Co. v. City of Decatur*, the Court elaborated that taxes need not provide any special benefit, as explained above:

> Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of these various schemes which have for their object the welfare of all.

147 U.S. at 197-98; *accord St. Louis & S.W. Ry. Co.*, 277 U.S. at 159; *Thomas v. Gay*, 169 U.S. 264, 279-80 (1898); *Morton Salt Co.*, 177 F.2d at 892 ("When, however, the tax is levied upon all the property for public use . . . the tax need not, and in fact seldom does, bear a just relationship to the benefits received. Thus the property of a corporation may be taxed for the support of public schools, asylums, hospitals, and innumerable public purposes, although it is impossible for it to derive any benefits other than privileges which come from living

in an organized community. The benefits are intangible and incapable of pecuniary ascertainment, but it is constitutionally sufficient if the taxes are uniform and are for public purposes in which the whole city has an interest.").

Additionally, this Court has recognized that local taxing districts, such as the District in this case, have the power to levy property taxes. *See Memphis & Charleston Ry. Co. v. Pace*, 282 U.S. 241, 245-46 (1931) (holding that taxes may be "confined to the county or local district" providing the local government service). "Whether the tax shall be state wide or confined to the county or local district wherein the improvement is made, and whether it shall be laid generally on all property or all real property within the taxing unit, or shall be laid only on real property specially benefitted, are matters which rest in the discretion of the state, and are not controlled by either the due process or the equal protection clause of the Fourteenth Amendment." *Id*. at 245. Thus, the District is constitutionally permitted to levy property taxes without automatically converting such taxes into "special assessments." Further, the District has inherent power to levy taxes without any regard for the size of the District. *Id*.; *but see* App. 17-18, ¶ 33, n.6 (basing its finding that the tax is a special assessment based, in part, on the size of the District relative to the City).

On the other hand, special assessments "are imposed upon property within a limited area, for the payment for a local improvement, supposed to enhance the value of all property within that area." *Ill. Cent. R.R.*

Co., 147 U.S. at 197. Be it for special lighting, seawalls, drainage, or other special purpose, special assessments are "made upon the assumption that a portion of the community is to be especially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the person receiving it." *Id.* at 199; *Houck*, 239 U.S. at 265; *Louisville & Nashville R.R. Co. v. Barber Asphalt Paving Co.*, 197 U.S. 430, 433-34 (1905). Generally, special assessments are intended to increase the value of the subject property by the expenditure. *Ill. Cent. R.R. Co.*, 147 U.S. at 199. However, "there is no requirement of the Federal Constitution that for every payment there must be an equal benefit." *Houck*, 239 U.S. at 265. Further, benefits need not be direct, but may be indirect and intangible. *N.C. Elec. Membership v. White*, 722 F. Supp. 1314, 1336 (D.S.C. 1989). The state may, in its discretion, "lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners." *Houck*, 239 U.S. at 265.

In this case, the evidence overwhelmingly supports that the District imposed a tax, not a special assessment, as a matter of federal law. *Carpenter*, 280 U.S. at 367. As an initial matter, the Service Plan expressly provides that "the organization of the District will promote the interests of future residents, property owners, and taxpayers within the District as well as

the public generally." (App. 181.) In approving the Service Plan, the City found that the improvements and services to be provided by the District would benefit all persons and properties within the District. (*Id*.; *see* App. 174.) That is, residents of the proposed District should bear the public burden of the infrastructure and services provided by the District. *Houck*, 239 U.S. at 265. Therefore, property tax revenues would finance the District's proposed infrastructure and services. (App. 182, 183-189.)

Nowhere do the Service Plan or City Resolution suggest that such public infrastructure and services would be supported by "special assessments"; neither would special assessments appropriately support improvements and services meant to benefit "the public generally." (App. 182.) *See* McQUILLIN, *supra*, § 38.2 (providing that funds generated by a special assessment cannot be diverted to other purposes, such as for general governmental spending, because a special assessment can only be justified to the extent it is equivalent to the benefits conferred).

Moreover, for over four years, the District imposed and collected *ad valorem* property taxes, *i.e*., taxes based on the assessed value of the property located within the District. (App. 43, ¶ 17; App. 123-124; App. 177.) The record is replete with property tax bills like the one included with the Appendix, with a line item for the District's property tax levy. (App. 177.)

Additionally, there is nothing in the record to suggest that the District ever attempted to impose a

special assessment. Moreover, at the time the District's Bonds were approved and issued, and at the time the District's *ad valorem* property taxes were approved and first levied, Colorado law did not allow special districts to impose special assessments. C.R.S. § 32-1-1101(1)(g) (amended by H.B. 09-1005, 67th Gen. Assem., First Reg. Sess. (Colo. April 2, 2009); C.R.S. § 32-1-1101.7 (2009).

In short, there is no support for the Colorado Court of Appeals' judicial expansion to find that the District's tax was a special assessment. Colorado Bondshares and UMB respectfully request that this Court grant this Petition in order to independently review the nature of the District's imposition, which was very clearly a tax under federal law.

C. The Errors by the Colorado Court of Appeals Jeopardize Taxation by Public Infrastructure Taxing Districts Across the Country.

The decision by the Colorado Court of Appeals cannot be discounted as isolated legal errors that will have no impact outside of Colorado. That is because of the extensive use of public infrastructure taxing districts across the country. According to the Bureau of the Census in 2012, there were 37,203 special districts out of a total of 89,004 local governments in the United States. *See* U.S. BUREAU OF THE CENSUS, CENSUS OF GOVERNMENTS, LOCAL GOVERNMENTS BY TYPE AND STATE: 2012,

Table 2.[8] Further, as reported by the NAHB, local jurisdictions in many states have increasingly turned to public infrastructure financing districts to finance infrastructure for new developments. *NAHB Overview*, p. 3; *see also* Janice C. Griffith, *Annual Review of the Law: Recent Developments in Public Finance Law: Special Tax Districts to Finance Residential Infrastructure*, 39 URBAN LAW 959, 960 (Fall 2007) ("*Special Tax Districts*"). Indeed, special district infrastructure financing is popular in many states, including Alabama, Arizona, California, Delaware, Florida, Georgia, Hawaii, Idaho, Maryland, Nevada, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Utah, Virginia, Washington and Colorado. *NAHB Overview*, pp. 6-8;[9] *see also Special-District Formation*, p.

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[8] *Available at* https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.

[9] *See, e.g.*, ALA. CODE §§ 11-99B-7 & 11-99B-8 (authorizing bonds for capital improvement cooperative districts); ARIZ. REV. STAT. ANN. §§ 48-709 & 48-719 (authorizing general obligation bonds for community facilities districts); CAL. GOV'T CODE §§ 53345, *et seq.* (authorizing issuance of bonds for community improvement districts); DEL. CODE ANN. tit. 22, § 1802 (authorizing special taxes and the issuance of bonds for special development districts); FLA. STAT. §§ 190.011 & 190.016 (authorizing the issuance of bonds for community development districts); GA. CONST. art. IX, § 7 ¶¶ 1, 3-4 (authorizing the General Assembly to create community improvement districts and for the administrative body of a community improvement district to incur debt and levy taxes and assessments); HAW. REV. STAT. §§ 46-80.1 & 46-80.5 (authorizing special tax assessments and bonds for community facilities districts and special improvement districts); IDAHO CODE ANN. § 50-1703 (authorizing municipalities to levy assessments and issue local improvement bonds for local improvement districts); MD. CODE ANN., LOCAL GOV'T § 21-417 (authorizing bonds

122. "[M]ost Special Districts are allowed to finance public water and sewer systems, public roadways and other transportation improvements, drainage projects, public safety as well as public parks and recreational facilities." *NAHB Overview*, p. 4; *Special Tax Districts*, pp. 964-65.

These districts often are created to issue tax-exempt bonds to fund public infrastructure, and the districts pay off the bonds either through taxes or fees imposed on future residents within the district. *NAHB Overview*, pp. 4-5; *Special Tax Districts*, pp. 964-67. A property tax, such as the one levied by the District

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for special taxing districts); NEV. REV. STAT. § 318.275 (authorizing forms of borrowing, including general obligation bonds, revenue bonds, and special assessment bonds, for general improvement districts); N.M. STAT. §§ 5-11-17 & 5-11-19 (authorizing financing of public improvement districts with bonds, special tax levies, and other sources); N.M. STAT. §§ 5-15-4 & 5-15-18 (authorizing bonds for tax increment development districts); N.C. GEN. STAT. §§ 160A-542 & 160A-543 (authorizing a city to levy property taxes and issue bonds to finance municipal service districts); OHIO REV. CODE ANN. §§ 1710.02 & 1710.12 (authorizing assessments and the issuance of bonds for special improvement districts); 53 P.A. CONS. STAT. ANN. § 5608 (authorizing bonds for municipal authorities); S.C. CODE ANN. § 6-35-60 (authorizing the issuance of special district bonds in the Residential Improvement District Act); TEX. LOCAL GOV'T CODE ANN. § 372.024 (authorizing general obligation and revenue bonds for improvement districts); UTAH CODE ANN. § 17B-1-103(2) (authorizing local districts to issue bonds and levy and collect property taxes); VA. CODE ANN. §§ 15.2-2403 & 15.2-2404 (authorizing service districts and local improvement districts to levy and collect tax assessments on property); WASH. REV. CODE § 36.145.090 (authorizing community facilities districts to levy and enforce special assessments against property and issue revenue and assessment bonds).

here, is the primary source for raising revenues at the local government level. *See* 4 JOHN MARTINEZ, LOC. GOV'T LAW § 23:10 (May 2019) (citing U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL REL., SIGNIFICANT FEATURES OF FISCAL FEDERALISM – REVENUE AND DEBT, 26, 41-42 (1977)). This financing method has the benefit of both limiting the debt obligation to the residents of the affected geographical area and spreading the taxes/fees out over time. *NAHB Overview*, pp. 4-5; *Special Tax Districts*, pp. 964-67.

The Court of Appeals' Opinion unfortunately stands as an invitation and a road map for individuals buying property within public infrastructure districts to avoid paying property taxes by arguing that they are not being directly benefitted by such taxes. That is not mere speculation, but a reality in Colorado, where property owners are relying on the underlying Opinion to undermine public finance. Specifically, owners of property located within a special district in El Paso County, Colorado recently filed a lawsuit against the special district and bondholder, alleging that the special district violated the Due Process Clause by imposing property taxes necessary to fund public infrastructure and services that allegedly do not benefit the property owners. (*See BLH #1, LLC, a Colorado limited liability company, and BLH #3, LLC, a Colorado limited liability company v. Falcon Highlands Metropolitan District, a Colorado special district, and Archie Dennis et al.*, District Court, El Paso County, Colorado, Case No. 2019CV31830). The property owners expressly rely on the Court of Appeals' incorrect

interpretation of *Myles Salt* in an attempt to invalidate taxes pledged to repay approximately $20 million in debt. If these and other owners can establish that taxes being levied are not funding public infrastructure that directly benefit their property, the Court of Appeals' errant extension of *Myles Salt* has provided a new claim that the Due Process Clause was violated, contrary to the well-settled law of this Court. *Commonwealth Edison Co.*, 453 U.S. at 622-26.

Thus, the Court of Appeals' decision has created great uncertainty in the public financing market in Colorado by giving taxpayers a right to challenge the legitimacy of taxes that were pledged for repayment of public infrastructure bonds. The resulting uncertainties increase risk of investments in municipal bonds and drive up interest rates, thus making new projects less likely to be developed. This is a particular problem to the Colorado housing market, where demand continues to outpace supply.

These concerns are just as relevant in other states that rely on bonds issued by public infrastructure districts to finance public infrastructure development in that the Colorado Court of Appeals' decision is a natural next step in the irrational extension of *Myles Salt* to public infrastructure taxing districts. Petitioners respectfully submit that if this Court does not intervene to reverse the decision below, Colorado will serve as the epicenter in upending special district financing around the country.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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