No. 19-241

IN THE

Supreme Court of the United States

UMB BANK, N.A., ET AL.,
Petitioners,

v.

LANDMARK TOWERS ASS'N, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Including property in a special taxing district solely to tax it, when it never could benefit from any public improvements in the district, is a confiscation of property in violation of the Due Process Clause. *Myles Salt Co. v. Board of Commissioners of the Iberia & St. Mary Drainage Dist.*, 239 U.S. 478 (1916).

The question presented is:

1. Should the Court overrule or limit *Myles Salt* by holding that levying property that was included in a special taxing district solely to tax it to pay for improvements for property in a neighboring subdivision, but without the possibility that it could ever receive any benefits from district improvements, does not violate those taxpayers' Due Process rights?

PARTIES TO PROCEEDINGS BELOW

The parties' roles require clarification. Petitioners UMB Bank, N.A. and Colorado Bondshares were not cross-appellants below. Neither was the Marin Metropolitan District.

UMB and Colorado Bondshares, along with the District, were all *defendants* in the trial court, *appellants* and *cross-appellees* in the Colorado court of appeals, and *petitioners* before the Colorado supreme court in two actions, first, a 2016-17 petition (where that court granted certiorari, reversed the judgment of the Colorado court of appeals, and remanded to the court of appeals for further proceedings), and second, a 2018 petition that the Colorado supreme court denied. The District did not join UMB and Bondshares' petition for a writ of certiorari in this Court.

Respondent, Landmark Towers Association, Inc. is a Colorado non-profit corporation in good standing. On behalf of its members, Landmark was the *plaintiff* in the trial court, the *appellee* and *cross-appellant* in the Colorado court of appeals, and the *respondent* in both Colorado supreme court cases. Landmark now appears before this Court on behalf of its members.

CORPORATE DISCLOSURE STATEMENT

Landmark is a non-profit homeowners association organized under Colorado law for common interest communities. It is not publicly traded and has no parent corporations. No publicly held corporations own 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

This Court has long recognized that the power to tax is not unlimited and, when abused, can amount to a confiscation of private property in violation of the Due Process Clause. When land is in a local improvement district solely to tax it and without any benefit from the improvements, taxing it just to improve different property violates due process. In other words, the lack of direct or indirect benefit from the tax on that property transfers wealth from the property burdened with the tax (which cannot benefit from the improvements) to other property (which benefits from the improvements).

Here, a developer first developed the Landmark towers, which are two high-rise condominium buildings near Denver, Colorado. Amid the Landmark's initial success, the developer decided to develop a separate subdivision, the European Village, on nearby vacant property. The developer lacked funds to install water, sewer, roads, and landscape improvements for the European Village. So the developer organized a special district, the Marin Metropolitan District, to fund improvements for the European Village. The European Village lacked a sufficient tax base to support the District's improvement bonds. The nearby Landmark properties were put in the District solely to tax them to repay the bonds. Under the Service Plan Supplement (approved with the Service Plan),[1] the Landmark properties could never benefit from District improvements. Only the European Village would benefit from District improvements (which were never completed).

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[1] This is not in petitioner's appendix, nor mentioned in the petition.

Faced with these extreme facts, petitioners attempt to justify the illegal imposition on Landmark properties solely for the benefit of the European Village. This Court's precedent holds that in deciding a due process challenge of a state tax, the Court first looks past labels and jargon to identify the nature of the imposition (general taxes indirectly benefit the general public and special assessments directly benefit specific private property). Despite this well-established law, petitioners have latched onto the phrase *ad valorem tax*, a label used in the Service Plan and state statute, to argue that the levy in question is a general tax and not a special assessment. Doing so, they ask the Court to ignore that the District exists only to provide local improvements to specific property and that the Landmark properties could never benefit and were only included to pay to improve the resale value of European Village properties.

No compelling reasons support certiorari review. First, *Myles Salt* comfortably fits within this Court's longstanding state-tax due process jurisprudence. It also does not conflict with federal Circuit Court opinions and rests well among state due process opinions.

Second, the opinion below correctly applies *Myles Salt*. The evidence-based fact-finding affirmed below is not clearly erroneous. And no rational reason exists to reconsider this Court's state-tax due process precedent or overrule *Myles Salt* to reach a contrary result on virtually identical facts.

Third, there are independent grounds upon which to affirm. (1) *Landmark III* held that under Colorado law, the tax was a special assessment and violated the Due Process Clause of the Colorado Constitution. (2) *Landmark III* upheld the trial court's ruling that

the 2019 to 2013 levies on District properties illegally exceeded a 49.5-mill-levy limit and injunction barring future taxation at the excessive rate. (3) In *Landmark II*, the Colorado supreme court applied a non-claim statute to reverse Landmark's successful challenge of the sham election that allowed the District to issue bonds and impose taxes. But *Landmark II* did not address the deprivation of Due Process through fraudulent concealment of the election from the qualified electors.

Fourth, the petition broadly overstated the reach and impact of *Landmark III*, which did not announce new law. *Myles Salt* compelled the outcome here on nearly identical facts. *Myles Salt* and *Landmark III* are unlikely to have great repetition. And even if the Colorado court of appeals somehow misapplied these facts to *Myles Salt*, a misapplication of a properly stated rule of law is not a compelling reason for certiorari review.

PRIOR RELATED DECISIONS

Landmark Towers Ass'n v. UMB Bank, 436 P.3d 1126 (Colo. Ct. App. 2016) (*Landmark I*), Pet. App. 54, *r'hrg den*. 2016 Colo. App. LEXIS 663 (May 12, 2016); *UMB Bank v. Landmark Towers Ass'n*, 408 P.3d 836 (Colo. 2017) (*Landmark II*), Pet. App. 36, *r'hrg den*. 2018 Colo. LEXIS 49 (Jan. 22, 2018). Landmark's rehearing petition requested a ruling on a preserved and argued procedural due process question left undecided in *Landmark II*. *See* 2018 CO S. CT. BRIEFS LEXIS 304 (Jan. 8, 2018). The court denied rehearing without addressing due process. 2018 Colo. LEXIS 49. On remand the lower court considered issues left undecided in *Landmark I*. Pet. App. 8 (¶16); 53 (¶42).

Landmark Towers Ass'n v. UMB Bank, 436 P.3d 1139 (Colo. Ct. App. 2018) (*Landmark III*), Pet. App. 1, *cert. den.*, Pet App. 172. (Now before this court.)

Marin Metro. Dist. v. Landmark Towers Ass'n, 412 P.3d 640 (Colo. Ct. App. 2014) (*Marin*), *r'hrg den*. 2014 Colo. App. LEXIS 755 (May 1, 2014), *cert. den.*, *sub nom.*, 2014 Colo. LEXIS 1117 (Dec. 22, 2014). *Marin* involved the District's formation and did not concern the issues decided here. *See Landmark I*, Pet. App. 59 ¶14, 67-68 ¶¶35-40 (*Marin* had no preclusive effect here).

STATEMENT ON JURISDICTION

The petition did not address standing. And it appears that without the District, the petitioners lack standing for certiorari review.

Bondshares and UMB have only an indirect interest in the declaratory judgment and injunction at issue in this petition. They had a direct interest in Landmark's fraudulent transfer and unjust enrichment claims. Landmark lost those claims and did not appeal that ruling.

A party asserting jurisdiction must establish standing. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). To show Article III standing, the proponent "must show that the conduct of which he complains has caused him to suffer an 'injury in fact' that a favorable judgment will redress." *Id.* at 12.

"A party may suffer cognizable injury but still not possess a right to relief." *Wilderness Soc'y v. Kane Cty.*, 632 F.3d 1162, 1171 (10th Cir. 2011). Prudential limitations to standing include a "general prohibition" against litigants asserting others' legal rights. *Allen v. Wright*, 468 U.S. 737, 751 (1984). This Court generally

disfavors third-party standing. *Kowalski v. Tesmer*, 543 U.S. 125, 129–130 (2004).

This Court has been reluctant to recognize third-party standing outside the context of situations where the rule challenged below would be enforced *against* the party invoking standing. *Id.* at 130 (discussing cases). A party has only a third-party interest when the trial court did not order it to do or refrain from doing anything. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (party that did not represent the state could not represent its interests); *Diamond v. Charles*, 476 U.S. 54, 65-72 (1986) (similar); *Wilderness Soc'y*, 632 F.3d at 1171-72 (no standing to allege injury from government project where plaintiff lacked right to manage the project and government's absence indicated a disinclination to assert its own rights); *c.f. United States v. Windsor*, 570 U.S. 744, 757-63 (2013) (third-party standing allowed when Executive Branch did not assert government's rights and third party capably represented those rights). Typically, when third-parties are bound to a government entity, they still must assert a genuine obstacle to asserting their own rights. *Wilderness Soc'y*, 632 F.3d at 1172 (quoting *Singleton v. Wulff*, 428 U.S. 106, 116 (1976)).

This judgment and injunction will be enforced against the District, not the petitioners. The petition did not argue the petitioners have standing to assert the District's rights, and the District did not appear here—indicating its disinclination to do so. Nor have petitioners asserted that a "genuine obstacle" barred them from asserting their rights, if any, elsewhere (for instance against bond counsel or the District). Since petitioners did not allege or address standing, and apparently lack standing, the Court should deny the petition.

STATEMENT OF THE CASE

1. The facts are restated here to include important facts.[2]

The trial court made extensive findings of fact and conclusions of law, which the court of appeals affirmed.

The unique and extreme circumstances of this case were noted in prior opinions and the trial court's orders. *See* Pet. App. 3-7 (¶¶4-13), 12 (¶25), 40-43 (¶¶8-17), 56-60 (¶¶5-16). *Also*, Order of Sep. 6. 2013 (Sep. 2013 Order), *Id.* 108-124, 128-29, 133, 135-38; 144-147, 151-152. Order of Oct. 31, 2013 (Oct. 2013 Order), *Id.* 158-59, 160-62, 164-65.

The Landmark Project

The Landmark project includes two high-rise residential condominium towers (the Landmark Towers) and retail space. *Id.* 56 (¶5), 109. Landmark Towers Association (Landmark) is a homeowner's association for the property owners (Landmark Owners). *Id.* 107-08. Landmark represents the Landmark Owners in this case. *Id.* 55 (¶1). Landmark's infrastructure was fully funded from condominium sales proceeds, a development improvement agreement (DIA), and a sales tax rebate agreement (STRA) with the City of Greenwood Village. *Id.* 3-5 (¶¶5, 6, 8), 12 (¶25), *also* Pet. App. 110-111, 114, 144-45, 146-47; EX, pp 2-14, 15-29; TR 7/30/13, pp 31-44, 46-52; R. TR 8/1/13, pp 39-42.[3] So Landmark did not need a special district. *Id.*

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[2] The petition omitted pertinent facts necessary to the decision below and essential to understanding this case.

[3] Citations to the appellate record follow Colorado appellate specifications, avail. http://bit.ly/coloappcitations referring to . pdf files with standardized identifiers (CF for Court File, EX for

The Marin Metropolitan District.

Landmark towers pre-sales in 2005 went well and construction began in 2006. Pet. App. 111; EX, p 1427. In 2007, the developer proposed the Marin Metropolitan District to finance (with bonds) infrastructure for a second, independent subdivision south of the Landmark, known as the European Village or Marin.[4] Pet. App. 4 (¶6), 40-41 (¶10), 112-113. The European Village would not provide a sufficient tax base to repay those bonds. *Id.* So, only to boost the tax base, the developer included Landmark in the District (without notifying purchasers already under contract to purchase the property). *Id.*

The developer proposed a Service Plan to the City. *Id.* 4 (¶7), 41 (¶13). City staff expressed concerns that (1) the developer could use District-related funds to pay for improvements that were already provided for in the DIA, and (2) Landmark was included "to support the mill levy for facilities and services that appear to principally benefit the development of structures associated with the Marin Development." EX, pp 262-64; also Pet. App. 113. City staff recommended excluding Landmark from the District. EX, p 265; *also* Pet. App. 5 (¶9), 113.

The City approved the *amended* Service Plan, along with a Service Plan Supplement. Pet. App. 5 (¶¶8-9), 17-18 (¶33), 113-14. The Supplement prohibited the District from funding any Landmark infrastructure, including that already funded by the DIA or STRA. *Id.* 17 (¶33 & n.6), 114, 144-45, 146-47; EX, pp 2-13, 15-23, 90. It is

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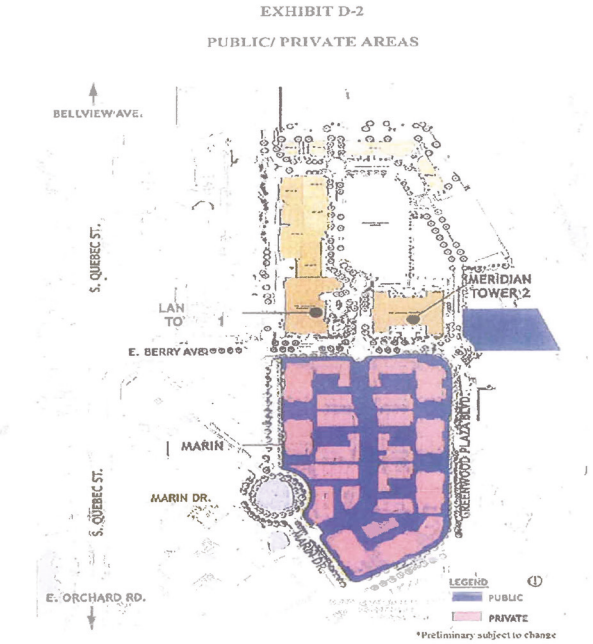
Exhibits, TR(date) for Transcripts).

[4] Trial court orders called this the *Marin project* and the District either *Marin* or *Marin district*. Pet. App. 108, 112. The Colorado appellate courts used *District* and *European Village*.

undisputed that the construction loan, DIA, and STRA completely funded Landmark's infrastructure (streets, water, sewer, landscaping) before the Marin District was ever conceived. Pet. App. 3-5 (¶¶5, 6, 8), 17 (¶33 & n.6), 114, 144-45, 146-47; TR 7/29/13, pp 70:22-71:25.

"The Service Plan doesn't show any area of the Landmark Project that would benefit from the proposed improvements; to the contrary, the maps included in the Service Plan show that all improvements are separated from the Landmark Project by existing streets." Pet. App. 5 (¶8), 12 (¶25), 114, 146-47. For example, the District's proposed public infrastructure (blue/purple) is completely outside the Landmark subdivision (yellow):

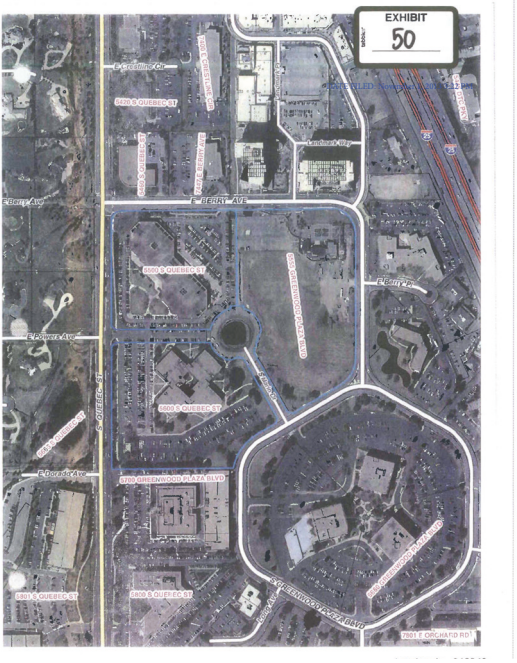


Trial Exhibit 1, EX, p 740; [5] TR 7/29/13, pp 77:3-78:23; Pet. App. 114, 146; see also EX, pp 731-742; TR

[5] This map labeled, "Exhibit D-2, Public/Private Areas," was

7/29/13, pp 66-79. All of "the infrastructure is internal to the European Village Project: it provides *no benefit . . . to the surrounding community*." Pet. App. 5 (¶8), *also id.* 114, 144-45, 146-47.

The only streets and infrastructure in the District's service area were South of Berry Avenue. *Id.*; EX, pp 741-742; TR 7/29/13, pp 79:2-80:2. Trial exhibit 50 shows the then-existing Landmark towers, shopping center, and common areas are all North of Berry Avenue; the vacant European Village site is entirely to the South:



Trial Exhibit 50, EX, p. 146; TR 7/29/13, pp 66:7-69:8.[6]

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one of the attachments (or "Exhibits") attached to the Service Plan.

[6] The Landmark HOA provides the Landmark properties' water service, plumbing, sewers, heating, cooling, landscaping, and maintenance. TR 7/29/13, pp 90:3-91:13. The District provides none of these. *Id.*

In sum, "as the district court found, with record support, the Landmark receives no benefit, direct or indirect, from [the District's proposed] improvements." Pet. App. 12 (¶25) (citing cases explaining this is a finding of fact, not a legal conclusion), 147 ("no actual benefit of any kind"; Landmark "received absolutely nothing"), 162 (District never provided any improvements to Landmark), 165 ("[D]istrict never has, and foreseeably never will provide any benefit or service to [Landmark]"). The Landmark properties were included solely to benefit the European Village subdivision. *Id.*, also *id.* 164-65 (Landmark properties were "included . . . with the predetermined purpose[s] of . . . increasing the tax base so as to obtain the bond revenues needed for the European Village project and . . . granting a special benefit to those other lands without any actual or needed benefit to the [Landmark] propert[ies]"). Also, "the tax imposed was not, in any significant way, to defray the general expenses of [the District] as a governmental entity." *Id.* 161.

No District improvements were ever constructed. *Id.* 147; TR 7/29/13, pp 79, 12-12, 84:16-85:2; TR 7/30/13, p 73:18-22. The area remains blighted. EX, pp. 243, 244, 249, 251 (photos of blight); TR 7/29/13, pp 80-84.

Levy Exceeding 49.5-Mill Limit

The District issued limited-mill-levy bonds, for which the mill levy could not exceed 49.5 mills. Pet. App. 6 (¶11), 28 (¶56 & n.13). The District's levy of 59.5 mills exceeded that limit from 2009 to 2013, so the trial court found the levy illegal and enjoined further taxation by the District. *Id.* 26-29 (¶¶50-56).

Bondshares' Due Diligence.

The trial court and court of appeals both then made independent findings on the balancing of the equities. *See Id.* 20-23 (¶¶38-41 & n.8). The appellate panel noted that petitioners' entire argument on the equities before the court below consisted of this statement: "the court misapplied the law, and thus also the equities." *Id.* 21 (¶38 n.8). But, "leaving nothing to chance," the appellate panel agreed with the trial court's finding (*see Id.* 150-52) and listed additional "undisputed evidence" supporting its conclusion that the equities favor the Landmark owners over Bondshares. *Id.* 21-22 (¶¶39-40).

2. The sham election, the Landmark owners as electors, and the Colorado supreme court's ruling that a procedural bar precluded an election challenge.

The petition misleadingly says the developers and his consorts properly approved the debt in an election. Pet. 10-11. "This 'election' was planned and conducted using what could be charitably described as dubious means." Pet. App. 6 (¶10) (citing *Id.* 58 (¶10), 74-76 (¶¶54-55, 57), 79-81 (¶63). The Landmark buyers were the correct electors, and it is undisputed that they never received notice of the debt election, so none of them voted. *Id.* 6, 81-83 (¶¶65-70), *rev'd on other grounds*, *Id.* 36-53,[7] *r'hrg denied*, 2018 Colo. LEXIS 49. The election was fraudulently concealed from the Landmark owners, who never had notice of the election until long after the election. So Landmark's briefs,

[7] The Colorado supreme court reversed on other grounds and did not reach the merits of Landmark's bond-election challenge, nor the holdings that the Landmark owners were the proper electors, who were deprived of their rights to vote in the sham election.

oral argument, and rehearing petition in the Colorado supreme court asserted Due Process objections to the application of a 10-day non-claim statute.

3. Rulings below

After a bench trial, the trial court concluded that (1) the District's 59.5-mill debt service levy exceeded its 49.5-mill limit, and (2) taxing the Landmark properties violated the Landmark owners' due process rights. Pet. App. 134-41, 145-52, 157-65. The trial court "ordered the District to refund Landmark buyers the property taxes collected in excess of the . . . Service Plan [limit]" and "enjoined the District from levying further illegal taxes on Landmark." Pet. App. 60 (¶16), 141, 150, 153-54.

The court of appeals affirmed and upheld the injunctions. Creation of the District to include the Landmark properties and resulting levying of those properties, violated the Landmark owners' due process rights under the United States and Colorado Constitutions, *id.* 25-26 (¶49 & n.12), and the District's mill levy exceeded applicable limits, *see id.* 10-18 (¶¶23-33) (due process violation), 20-23 (¶¶37-41) (equities favor Landmark), 26-29 (¶¶50-56) (mill levy exceeded limits).

REASONS TO DENY CERTIORARI REVIEW

1. *Myles Salt* fits comfortably in this Court's state-tax due process jurisprudence and does not conflict with other courts' decisions.

Petitioners illogically seek to impose a divide between the Court's state-tax due process cases. But the cases almost uniformly start by stating the legal principles differentiating general taxes from special as-

sessments before determining which type of tax (general or special assessment) is at issue. Next, they turn to whether the tax or assessment passes constitutional muster. Without regard to the first step, it is incorrect to say that there is a separate line of "special assessment" cases that differ from "tax" cases. (More so, since a special assessment is a type of tax.) Instead, *Myles Salt* fits within the continuum of this court's precedent that consider whether state general tax and special assessment laws comply with Federal constitutional provisions, most prominently, the Due Process and Commerce Clauses.

A. All taxes must provide some indirect or potential benefit to the taxpayer, even if that benefit is simply the protection of an organized society.

The Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Amdt. 14, § 1. The state taxing power can be asserted only for public purposes, *not private ones*. *Carmichael v. S. Coal & Coal Co.*, 301 U.S. 495, 514 (1937). "'In the context of state taxation, the Due Process Clause limits States to imposing only taxes that "bea[r] fiscal relation to protection, opportunities and benefits given by the state.'" *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213, 2219-20 (2019) (quoting *Wisconsin v. J.C. Penny Co.*, 311 U.S. 435, 444 (1940)).

"The power to tax is, of course, 'essential to the very existence of government,'" *Id.* (quoting *McCulloch v. Maryland*, 17 U.S. 316 (1819)), "but the legitimacy of that power requires drawing a line between taxation and mere unjustified 'confiscation.'" *Id.* (quoting *Miller Brothers Co. v. Maryland*, 347 U. S. 340, 342 (1954)). "That boundary turns on the '[t]he simple but control-

ling question . . . whether the state has given anything for which it can ask return.'" *Id.* (quoting *Wisconsin*, 311 U.S. at 444). Local improvement tax districts "may fix the basis of taxation without encountering the Fourteenth Amendment unless [the] action is palpably arbitrary or a plain abuse." *Gast Realty Co. v. Schneider Granite Co.*, 240 U.S. 55, 58-59 (1916) (citing *Houck v Little River Drainage Dist.*, 239 U.S. 254, 262 (1915)).

The precedent cited in the petition that discusses benefits uniformly supports the proposition that all taxes must always provide something in return—either a general (often indirect) or specific (direct) benefit: *e.g., Commonwealth Edison v. Montana*, 453 U.S. 609 (1981) (general taxes, imposed for the common good under the police power, need not provide a *direct* benefit, implying an indirect benefit). And, while the petition relies on *Walters* for the idea that a tax could constitutionally exist without providing a benefit and even imposing a detriment, the decision rests on the notion implicit in all of the state general tax decisions that general taxes imposed under the police power to support the common good pass muster because they benefit society in general and the taxpayer gets to be part of that society. *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 429-30 (1935) (*Walters*). Indeed, *Walters* explains (like *Myles Salt*) that "so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them." *Id.*

B. In state tax cases, the Court looks past labels and jargon to find the levy's practical application, purpose, and natural and reasonable effect.

State law determines whether a tax should be laid on all real property in a taxing unit or just on special-

ly-benefited property. Pet. at 26 (citing *Memphis & Charleston Ry. Co. v. Pace*, 282 U.S. 241, 245-46 (1931) (*Memphis*)).

To ascertain the constitutionality of a state tax or tax law, the Court looks past the rigid categories, descriptive labels, and technical phrasing used to describe an exaction and focuses on the practical application of the tax—its scope and natural and reasonable effect. *Wisconsin*, 311 U.S. at 443-44; *also*, *Int'l Harvester Co. v. Wis. Dep't of Taxation*, 322 U.S. 435, 441 (1944) (citing cases) (the Court looks at a tax's "practical operation, and not its characterization by state courts"); *Carmichael*, 301 U.S. at 508-09 ("particular name" a state court gives to a levy does not control when its constitutionality is in question); *Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930) (characterization state courts give to a tax not binding; the Court must consider "the real nature of the tax and its effect upon the federal right asserted"); *Soc'y for Savings v. Bowers*, 349 U.S. 143, 151 (1955) (similar). However, the Court defers to state court construction of state law while sifting through the jargon. *Compare Id.* with *Ga. Ry. & Elec. Co. v. Decatur*, 295 U.S. 165, 170 (1935) (*Decatur*) (Court bound by the state court's construction of state law).

C. Well-recognized factors differentiate general taxes from special assessments in applying Due Process analysis.

The petition's invocation of the definition of the term *general tax* for the phrase *ad valorem tax* leads petitioners' argument astray. This Court and others have long recognized and discussed a difference between general taxes and special assessments. *E.g.*, *Walters*, 294 U.S. at 429-30 (discussing differences between general taxation and "so-called assessments for

public improvements laid upon particular property owners" and holding a tax unconstitutional). Numerous cases describe the differences between general taxes and special assessments. *See Carpenter*, 280 U.S. at 366-67; *Ill. Cent. R.R. Co. v. Decatur*, 147 U.S. 190, 197-98 (1893); *Morton Salt Co. v. Hutchinson*, 177 F.2d 899, 892 (10th Cir. 1949) (collecting cases).

This court has described a tax as being both "general" and "ad valorem." *St. Louis & Sw. Ry. Co. v. Nattin*, 277 U.S. 157, 159 (1928) (*Nattin*) ("assailed tax was general **and** ad valorem"). But the phrase *ad valorem tax* is not a synonym for *general tax*. Instead, the adjective *ad valorem* merely modifies the noun *tax* and can also modify the nouns *assessment* and *special assessment*. This semantic distinction is crucial to understanding the faulty premises that support the petition. Definitions of key terms used in the petition and here will help clear the confusion:

- *Ad valorem*, an adjective, means, "according to value." BLACK'S LAW DICTIONARY (Deluxe 4th ed. 1951) 58.
- *Tax* "[m]ost broadly . . . embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people, and incudes duties, imposts, and excises." BLACK'S LAW DICTIONARY (Deluxe 10th ed. 2014) 1685.
- *Ad valorem tax* means "a tax imposed proportionally on the value of something (esp. real property), rather than on its quantity or some other measure." *Id.*
- *Special assessment* means an "assessment of a *tax* on property that benefits in some independent way from a public improvement." *Id.* at 140 (emphasis added); *see also* Pet. 21 (quoting decisions of this Court that explain that special assess-

> ments are a form of tax);[8] Pet. 27 ("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.'"); Pet. 27-28 (quoting *Ill. Cent. R.R.*, 147 U.S. at 199); Pet. 28 ("Generally, special assessments are intended to increase the value of the subject property by the expenditure.").

One commentator explains differences between taxes and assessments:

> There is a distinction between public improvements, which benefit the entire community, and local improvements, which benefit particular real estate or limited areas of land. The latter improvements are usually financed by means of special, or local, assessments. These assessments are, in a certain sense, taxes. But an assessment differs from a general tax in that an assessment is levied only on property in the immediate vicinity of some local municipal improvement and is valid only where the property assessed receives some special benefit differing from the benefit that the general public enjoys. Robert Kratovil, Real Estate Law 465 (6th ed. 1974).

BLACK'S (10th) at 139; *accord.*, *Pac. Gas & Elec. v. Sacramento Mun. Util. Dist.*, 92 F.2d 365, 371-72 (9th Cir. 1937) (general taxes okay for general benefits, but not okay to pay for improvement to particular property).

Some courts drop the adjective *general* and refer to general taxes as simply *ad valorem taxes*. At times

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[8] *Ill. Cent. R.R.*, 147 U.S. at 198 (special assessments are a "peculiar species of taxation"); *Norwood v. Baker*, 172 U.S. 269, 280 (1898) ("peculiar species of taxation."); *French v. Barber Asphalt Paving Co.*, 181 U.S. 324 (1901) (refers to assessment as a tax); *Kan. City S. Ry. Co. v. Road Improvement Dist. No. 3*, 266 U.S. 379, 381 (1924) (special assessment is a "special tax").

this Court uses *general taxation*, *general tax,* or *general levy* to refer to that same type of tax. *E.g.*, Pet. 16 (quoting *Walters*, 294 U.S at 429-30), 25 (quoting *Ill. Cent. R.R.*, 147 U.S. at 197-98), 27 (same). Courts' fuel confusion by using the inexact phrase *ad valorem tax* to describe a *general tax* that happens to be collected according to value. Usage of varying jargon for state taxing schemes underscores the need to look past labels to determine the nature of an exaction. *E.g.*, *Walters*, 294 U.S. 405, 429-30.

But the trial court exhibited its understanding of the difference between the nouns, *tax* and *assessment*, and the modifying adjectives applied to them, *ad valorem*, *general*, and *special*. Thus, it explained, its use of the term *ad valorem* referred to "the fact that the charged imposed was based on the value of the property owned by the taxpayers." Pet. App. 159. The appellate panel likewise explained the differences between general taxes and assessments and concluded the levy in this case was a special assessment. *Id.* 14-18 ¶¶29-33. The courts below followed similar precedent to that cited in the petition, which agree with the above definitions and distinctions between assessments and general taxes.

This tax was not imposed for "general" government purposes. It was imposed exclusively to finance specific public improvements benefiting only the European Village.

D. *Myles Salt* does not stand-alone, it fits within the continuum of this Court's state-tax, due process precedent.

This Court's decisions and others cited in the petition almost uniformly fit a particular pattern. First, the reviewing court asks the purposes of the levy and

the taxing entity. From that inquiry, the court determines whether the exaction is a general tax or a special assessment. Then the courts apply the applicable due process holdings for the type of tax (general tax or special assessment). *Myles Salt* fits that same rubric. There, the Court looked at the purpose of the imposition, not the *ad valorem tax* label. Since the purpose of the tax fit the Court's definition of special assessments, it concluded that due process barred taxation of the salt company, which could never benefit from the special district's improvements. The same holds true here.

In sum, *Myles Salt* does not stand alone. Instead, it is an important part of the overall jurisprudence construing state taxes under the Due Process Clause.

E. The case presents no conflicts between lower courts, nor any conflict between the state-court decision and any decision or decisions of this Court.

A quick search of the petition reveals that it does not contain the word *conflict*. This stands to reason, since the petition does not argue, nor could it argue that a conflict exists between circuit decisions, state court decisions, or the lower court's decision and this Court's precedent.

The trial court explained that *under Colorado law*, when the nature of a levy is at issue, courts "may evaluate the circumstances and operative aspects of the charge to determine its actual nature." Pet. App. 159 (citing *Bloom v. Fort Collins*, 784 P.2d 304 (Colo. 1990); *Littleton v. State*, 855 P.2d 448 (Colo. 1993). The court of appeals applied the same legal standard, citing a string of holdings from this Court and other states, *Id.* 13-14 ¶27, and a string of Colorado holdings including *Bloom* and *Littleton*, *Id.* 14-18 (¶¶29-33) (citing and applying

numerous opinions from this Court, Colorado, Federal Circuit Courts of Appeal, other states, and treatises). The court of appeals carefully distinguished general improvements from local ones and explained why this the improvements here were local. *Id.* 16-18 (¶¶32-33).

2. The opinion below faithfully applied Myles Salt, which correctly states that due process does not allow a special district to tax one property solely to benefit another

A. On review for clear error, the Court should accept the trial court's evidence-based fact-findings, which were affirmed below.

The unique and extreme facts of this case necessarily make the Court's decision a fact-bound determination. "Whether, and to what extent, property to be assessed has specially benefited by an improvement is a question of fact." 70C Am. Jur. 2d *Special or Local Assessments* § 26 at n.1 (citing *Briscoe v. Rudolph*, 221 U.S. 547, 550-51 (1911)). Unless the petitioners can overcome the evidence-based fact-finding below,[9] they cannot prevail here.

Petitioners do not specifically advocate for any review of the facts. Instead, the petition mentions irrelevant facts, misstates facts and indirectly challenges some of the fact-finding. *See, e.g.,* Pet 18 n.7 (says developer owned the land when the District formed, but this is irrelevant to the taxation of the Landmark owners), Pet. 21 ("Court of Appeals placed an inordinate amount of emphasis on the alleged motives for

[9] E.g., Pet. App. 109 ("All findings of fact have been proved by a preponderance of the evidence . . ."); 5 (¶8) (mentioning maps); 12 (¶25) ("And, as the district court found, with record support, the Landmark Project receives no benefit, direct or indirect."); 22 (¶40) (listing facts from record).

including the Landmark property in the District . . ."), Pet. 27-28 (addressed below).

This Court typically defers to state court fact-finding, except in "exceptional circumstances." *Hernandez v. New York*, 500 U.S. 352, 366 (1991). Absent such circumstances, the Court defers "to state-court factual findings, even when those findings relate to the constitutional issue before this Court." *Id.* Even if there were "two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Id.* at 369 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). Finally, this is a court of law and not a fact-correction court, so after an appellate panel has already concurred in the trial court's fact-finding, the Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Exxon Co. v. Sofec*, 517 U.S. 830, 841 (1996) (quoting and citing cases).

Without attempting to challenge head-on the extensive fact-finding below, the petition claims the facts in this case differ from those in *Myles Salt*. But the trial court expressly found, as a matter of fact, that "[i]n this case, a situation fundamentally identical to *Myles Salt* exists." Pet. App. 164.

The petition repeatedly cites to the truncated part of the Service Plan included in the petitioners' appendix for factual assertions that contradict the unmistakable fact-finding below. For instance, without regard to the trial and appellate courts' fact-finding (referring to the Supplement and maps), the petition quotes the Service Plan to falsely say that the District provided public benefits. Pet. 27-28. Rather, the District did not provide a general public benefit. *Id.* 5 (¶8). It was a local taxing district, *id.*, conceived to provide a "special benefit" to the European Village, *id.* 164-65, and "to en-

hance the value of [that] privately owned property for later resale to the public," *id.* 160-162.

Additionally, to the extent the petition implies that Bondshares' customers may suffer from the injunction, the courts below refuted that argument and concluded, based on the evidence, that Bondshares had a vastly inferior equitable position to the Landmark owners. *Id.* 20-23 (¶¶38-41), 150-52.

In each of these attempts at an end-run around the fact-finding below, the petition fails to overcome the clear error standard. Petitioners make no direct assertion of errors in the findings of fact below, let alone a "very obvious and exceptional showing of error." *Id.*

The Court should reject these efforts to avoid the findings of fact by the courts below.

B. As a Colorado special district, this District was intended to provide public improvements only to Marin subdivision, and was restricted by its service plan from providing improvements to Landmark.

Colorado special districts, including the District in this case, are virtually identical to the types of districts for which the petition says courts properly apply what petitioners call "special district law."

Colorado special districts are creatures of state law, designed to provide limited public improvements and services with, as important here, special assessments or tax levies also governed by state law. *See* Colo. Rev. Stat. §§ 32-1-101 (2007), *et seq.* Metropolitan districts are not general governmental entities such as states, counties, or municipalities. *Id.* 33-34 (¶66). They do not have plenary government powers. Colo. Rev. Stat. §§ 32-1-1001, -1004 (2007). App. 13a, 17a. Instead, they

are limited to providing the improvements and services allowed under the district's service plan that must be approved by either a county or a municipality.

The District in this case, is a metropolitan district, which is a Colorado special district that provides two or more of the services that a single-purpose district would provide. Colo. Rev. Stat. § 32-1-103(10) (2007) App. 9a. (listing types of services). The District is just 15 acres, comprising about 0.3 percent of the city. Pet. App. 17 (¶33 n.6). Its "central purpose was not to create a public entity providing services for residents of the district. The area to be serviced as very small and local . . . The special district was created to enhance the value of the developer's privately owned property . . ." *Id.* 161. The City approved the District to provide local improvements, including streets, sidewalks, curbs and gutters, water and sanitation lines, and landscaping." *Id.* 112. The District never provided these or any other improvements to the Landmark, *Id.* 144-46. The District was barred from doing so. *Id.* 160-62.

In sum, just like the "service districts" that the petition attempts to distinguish, this District existed only to provide specific improvements for particular property (the European Village) in a small geographic area. The District did not provide general public improvements.

C. *Myles Salt* is indistinguishable from the facts here and clearly supports the opinion of the Colorado court of appeals.

Recall that the evidence showed: (1) Landmark's improvements were already publicly-funded through an STRA and DIA; (2) the Service Plan Supplement precluded the District from providing infrastructure to Landmark; (3) The Service Plan maps showed no District improvements benefited Landmark; and (4)

only the European Village would ever benefit from the District.

The principle that confiscation of property through taxation deprives property owners of due process is well established in both federal and Colorado law. *Myles Salt*, *supra*; *N.C. Dep't of Revenue*, 139 S. Ct. at 2219-20; *Denver v. Greenspoon*, 344 P.2d 679 (Colo. 1959); *Reams v. Grand Junction*, 676 P.2d 1189, 1194-95 (Colo. 1984). If this were an ordinary district, where all the property owners or the general public could benefit from the public improvements or services, there would be no due process issue.

As the petition admits, in *Myles Salt* "[t]here was no benefit for the 'common good.'" Pet. 20. The same holds true here. "In this case," explained the trial court, "a situation fundamentally identical to *Myles Salt* exists." Pet. App. 164. The appellate panel affirmed that finding, since these facts "can't be distinguished from those in *Myles Salt* in any principled way." *Id.* 14 (¶28).

The linchpin of the trial court's orders and the opinion below is that it violates due process to tax one person's property with no possibility of benefitting that property and solely to improve another property. This is particularly true when the taxed property owners were intentionally excluded from notice of proceedings that could subject their property to taxation and were not notified of a privately-conducted election. Not surprisingly, well-established U.S. Supreme Court and Colorado precedent holds this amounts to confiscation and violates due process. *E.g.*, *Myles Salt*, 239 U.S. at 485; *Greenspoon*, 344 P.2d at 681; *Reams*, 676 at 1194-95.

In *Myles Salt*, commercial property was included in a district and subjected to a 5-mill ad valorem tax levy for 40 years to support bonds "solely with the view of deriv-

ing revenues from the assessment . . . and only for the benefit of the other properties." 239 U.S. at 482. Inclusion of that property in the district was a "usurpation of authority and an effort to take plaintiff's property without due process of law." *Id.* at 483. "A like charge is made as to the assessment of the tax and its collection." *Id.*

Courts must defer to legislative statements about the benefit a property will receive from a local improvement. *Branson v. Bush*, 251 U.S. 182, 189 (1919). Such determinations are presumed to have a rational basis if conceivable facts support them, *Decatur*, 295 U.S. at 170, and can only be assailed if they are arbitrary, wholly unwarranted, or result from a flagrant abuse of discretion. *Branson*, 251 U.S. at 189-90 (citing cases). This rule "compliments" the holdings in *Norwood*, *Myles Salt,* and *Gast*. *Id.* at 190.

Here, the City approved the Service Plan—the District's charter—with clear findings that cabined this case. *See Decatur*, 295 U.S. at 170 (court must consider the evidence of no benefits). The *undisputed* relevant facts here directly correlate to the facts in *Myles Salt*. The District's Service Plan identified no public improvements that could be constructed in the Landmark subdivision. Maps attached to the Service Plan showed the Landmark properties would not benefit from inclusion in the district. And the Service Plan Supplement prohibited the District from funding Landmark infrastructure—meaning the Landmark could not benefit directly or indirectly from its inclusion in the District. Landmark was included solely to be taxed to improve another subdivision. Thus, the situation here is extreme and unusual. This is precisely the case that was before the U.S. Supreme Court in 1916 when a small district in Louisiana included Myles Salt Company in a drainage district to impose an ad valorem tax on it even though it could not benefit.

Petitioners also challenge the application of *Myles Salt* on the basis that the Landmark purchasers were only under contract to purchase their properties at the time the developers surreptitiously created the District. That is a distinction without a difference. The Landmark owners had a contractual interest in that property, and equitable title. *See Brush Grocery Kart, Inc. v. Sure Fine Mkt., Inc.*, 47 P.3d 680, 683 (Colo. 2002) (contract purchaser considered to be equitable owner); Pet. App. 81 (¶65), overruled on other grounds.

Myles Salt is settled law on point. No compelling reason exists for this Court to grant certiorari review to upend the holding in *Myles Salt*.

Finally, petitioners argue that the District could not legally impose an assessment until 2009. The court of appeals readily dispensed with that argument, explaining, that "doesn't mean it didn't do so. As discussed, the nature of a levy is determined by its purpose and characteristics. If [those] show that it's an assessment, then that's what it is." Pet. App. 18 (¶34 n.7). "[E]ven if the defendants are right about the state of the law at the time of the election," the panel concluded, "that only means that there's another reason for declaring the special assessment invalid." *Id.*

3. Alternative grounds exist upon which to affirm the decision below.

A. Reversal of the holding that the tax violated the federal Due Process Clause would not reverse the alternative holding that the tax also violated Colorado's Due Process Clause.

Colorado's Due Process Clause says: "No person shall be deprived of life, liberty, or property, without due process of law." COLO. CONST., art. II Sec. 25.

States' interpretations of their own due process clauses may differ from federal interpretations of the Due Process Clauses of the Fifth and Fourteenth Amendments. *People ex rel. Juhan*, 439 P.2d 741, 745 (Colo. 1968). Colorado's "due process clause . . . requires at a minimum the same guarantees as those protected by the due process clause of the United States Constitution." *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 191 Colo. 455, 461, 553 P.2d 811, 816 (1976). "The state may enlarge the federal concept of due process, but it may not abridge those rights." *Vega v. People*, 893 P.2d 107, 110 (1995) (citing *Juhan* 439 P.2d at 745. If a "state action does not deny a right protected under the federal concept of due process, or impose a liability prohibited thereby, the federal power will not nullify the rights and protections which, within the state, are recognized as part and parcel of due process under the state constitution." *Juhan*, 439 P.2d at 745-46 ("that is exactly what happened in *Leland v. Oregon*, 343 U.S. 790 [(1952)]. *See Snyder v. Mass.*, 291 U.S. 97 [(1934)]. *Id.* at 745-46.)"

Under Colorado law, this was a special assessment. Pet. App. 15 (¶30) (citing *Littleton*, 855 P.2d at 453; *Bloom*, 784 P.2d at 307-08); 159 (same), 17-18 (¶33) (citing *Bloom*, 784 P.2d at 307). As the court of appeals explained: "Colorado law makes clear that imposing a special assessment on property that doesn't specially benefit from the funded improvements violates those property owners' rights to due process." Pet. App. 14 (¶29) (citing *Reams*, 676 P.2d at 1194-95; *Ochs v. Hot Sulphur Springs*, 407 P.2d 677, 780 (1965); *Greenspoon*, 344 P.2d at 681). The District's taxation of the Landmark properties violated both the federal and Colorado Due Process clauses. Pet. App. 25-26 (para. 49 & n.12).

The court of appeals correctly notes that violation of the federal constitution trumps a state constitutional violation. *Id.* (Citing cases). But if the Court were to reverse the holding that the tax violated the federal Due Process Clause, the Colorado constitutional violation would stand. *See Juhan*, 439 P.2d at 745-46; *Vega*, 893 P.2d at 110.

The petition does not address this fatal problem. Certiorari should be denied.

B. The Colorado court of appeals also affirmed the trial court's declaratory judgment and injunction against further taxation on independent state law grounds.

The Colorado court of appeals also affirmed the trial court's declaratory judgment finding that the District's 59.5-mill levy violated the Service Plan since the mill levy illegally exceeded the financial plan's mill levy limit. The trial court's injunction against further taxation in violation of the 49.5-mill limit stands and precludes the District from further taxation of any property in the district at the 59-5-mill rate. The petition omits this alternative state-law ground for relief.

"[A] special district's mill levy . . . must comply with the applicable Service Plan." Pet. App. 27 (¶54). The Service Plan's financing plan, which had binding effect, limited the district's levy to 49.5 mills. *Id.* 6 (¶11), 28 (¶56), 137.[10] Another section of the Service Plan required City approval for debt service that does not

[10] Another section of the Service Plan said the limitation was 50 mills. *See* Pet. App. 26 (¶51), 135, 137; 188-89 (§ VIII.D.9). But the court of appeals concluded the 49.5-mill-limit applied. Pet. App. 6 (¶11), 28 (¶56).

generally conform to the terms of the financial plan, *Id.* 28 (¶55). Despite the 49.5-mill limitation, *Id.* 6 (¶11), 28 (¶¶55-56), the District imposed a mill-levy of 59.5 mills in 2009 to 2013, which was "'a substantial and significant variance from the pro forma model materially affecting' the Landmark owners . . ." *Id.* 28 (¶56) (quoting *Id.* 137).

Affirming the trial court, the appellate panel concluded, "its undisputed the bonds were issued as 'limited tax' bonds, not 'unlimited tax bonds.'" *Id.* 28 (¶54 n. 13). Also, "the district court correctly found that the Service Plan doesn't permit a levy of 59.5 mills." *Id.* 27 (¶53). "And it's undisputed that the District didn't obtain [the City's] approval to impose the 59.5-mill-levy rate. It necessarily follows that the District violated the Service Plan, and it then follows that the 59.5-mill-rate levy is illegal." *Id.* 29 (¶56)

The petition to this Court fails to address this alternative state-law grounds for affirming the holding below.

C. Alternative federal law grounds for affirmance exist.

In *Landmark II*, *Id.* 36-53, the Colorado supreme court held that 1) Colo. Rev. Stat. § 1-11-213(4) (2007) (App. 1a) was a non-claim statute that jurisdictionally barred Landmark's challenge of election results approving the District's bonds more than 10 days after the results were certified; 2) as a non-claim statute, it was not subject to equitable tolling; and 3) the exception in *Cacioppo v. Eagle County School Dist. RE-50J*, 92 P.3d 453 (Colo. 2004) did not apply.

Landmark petitioned for rehearing since the Court did not address in its opinion whether constitutional

due process could mandate a remedy where an election was intentionally conducted so as to disenfranchise the electorate and prevent the electorate from learning of the election before the 10-day time limit for a challenge expired.

Landmark argued that the jurisdictional bar of § 1-11-213(4) was not absolute where foreclosing an election challenge would result in an intentional deprivation of substantive constitutional rights for which there was no remedy.

Colorado allows two types of special district elections: coordinated elections, conducted by County Clerks, and non-coordinated (private) elections, independently conducted by a district's board-appointed DEO. In coordinated elections, the County Clerk ensures and protects due process by mailing ballots or providing notice to all eligible electors. In private elections, due process guarantees may fall upon the developer/DEO, who under Colorado's Constitution must provide notice to all eligible electors and ensure their right to vote on measures seeking approval of taxes levied on the district.

This election was not a coordinated election (as most are). That distinction matters. It narrows the holding.

Here, in a privately-conducted election, the District's developer was the DEO and he ensured that only he and his affiliates received notice and were allowed to vote to approve debt after he fraudulently replaced the eligible electors (the Landmark buyers) with ineligible electors (the Developer's cronies). This switch allowed the District to impose taxation without representation on the Landmark buyers. Pet. App. 74-81 (¶¶54-64).

By applying the § 1-11-213(4) time-bar here, *Landmark II* means that even when a DEO fraudulently denies all eligible electors their due process rights and substantive rights to vote, and then keeps the election results secret for just 10 days, those secretly disenfranchised voters have no recourse under the U.S. or Colorado Constitutions.

Neither *Landmark II*, nor *Cacioppo*, addresses the unique due process concerns courts face in reviewing challenges to private elections like this one versus what occurs in public coordinated elections. This case provides a good vehicle for providing clear guidance for explaining those differences and ensuring constitutional rights are protected, while addressing a constitutional, as-applied challenge to the jurisdictional bar in § 1-11-213(4).

Longstanding precedent recognizes that Constitutional guarantees, such as due process and other constitutional rights, cannot give way to application of a statutory enactment that fully denies those rights. *See Passarelli v. Shoettler*, 742 P.2d 867, 872 (Colo. 1987) (when in conflict, the "constitution is paramount law"); *White v. Davis*, 428 P.2d 909, 910 (Colo. 1967) ("elementary that the requirements of due process of law under both the United States and Colorado Constitutions takes precedence over statutory enactments. . . . This, of necessity, includes any bar to inquiry as may be provided in the statute, to those essential elements of due process including proper notice . . .").

Other Colorado opinions recognize that although non-claim statutes similar to § 1-11-213(4), are not subject to equitable tolling, they allow exceptions when intentional fraud deprives a person's due process rights *See, e.g., In re: CLS*, 252 P.3d 556, 560, 561-62 (Colo. Ct. App. 2011) (holding a statutory time-

bar affecting parental rights, which cannot be challenged on any basis, including fraud, must yield to due process requirements); *Burns v. Dist. Ct.*, 356 P.2d 245, 266 (Colo. 1960) (time restriction limiting election challenges is proper unless it is so unreasonably short as to destroy the substance of a constitutionally guaranteed remedy).

In the face of an as-applied constitutional challenge, *Landmark II* applies a non-claim statute to bar all equitable defenses and prohibit initiation of litigation after the prescribed date. Pet. App. 47-48 (¶¶27-31). To reach that result, the Opinion rests on an interpretation of § 1-11-213(4) that would clearly apply to an equitable defense if the contestor (a) knew of the election, (b) could have met the 10-day time-bar, (c) failed to do so, and (d) thus, had sufficient process in application of the non-claim statute.

But the facts here contrast with that analysis. In this constitutional, as-applied defense to § 1-11-213(4), the contestor (a) did not know of the election because the Developer/DEO purposely and fraudulently deprived the contestor of that knowledge or concealed it in violation of due process, (b) could not possibly have met the 10-day time bar, (c) failed to do so, and (d) thus, had no due process in application of the non-claim statute.

In bond elections like this, any restriction of the franchise on grounds other than residence, age, and citizenship cannot stand absent a compelling state interest. *Hill v. Stone*, 421 U.S. 289, 297 (1975). Here, the Colorado court of appeals reversed the trial court's finding that the Landmark owners were not qualified electors. Pet. App. 81-83 (¶¶66-70). In doing so, the panel rejected findings that they were unqualified due

to residence issues. *Id.* The electors' ages and citizenship were never factors here.

By treating this situation as analogous to an equitable challenge where contestors knew of an election but slept on their rights, *Landmark II* elevates the statute as paramount over constitutional guarantees. This result runs contrary to both *Passarelli* and *White*.

The court denied the rehearing petition.

4. The petition overstates the reach of the Colorado opinion, which is limited to the unique facts in Myles Salt and this case.

Myles Salt has stood for over 100 years and has not created havoc. Its sound reasoning and application protect property owners from illegal confiscations. *Landmark III* merely applied that holding to invalidate an illegal tax.

Due to the unique and unusual facts of this case and *Myles Salt*, there is no danger of incorrect application of either case to other local improvement taxing districts throughout Colorado or the United States. Since fall 2013, when the district court entered its injunctions, bonds have regularly issued throughout Colorado without a known impact due to the rare issues in this case. In Colorado since Landmark, the creation of special districts and their bonded indebtedness have rapidly expanded and there is no indication that this is anything more than an unusual "one-off" case. E.g., Schrader, Megan, *Colorado Keeps Allowing Developers to Tax Homeowners for Infra-structure—and it's Out of Control*, DENVER POST, Feb. 22, 2019, https://www.denverpost.com/2019/02/22/Colorado-taxingdistricts-out-of-control. And petitioners cite just one re-

cently-filed case that has raised similar objections to taxation by a special district.

The petition asks for an exception for *ad valorem taxes*. But such an "exception" would swallow the Court's state law due process jurisprudence whole. It would enable abusive transfers of wealth by allowing the inclusion of high-value property (skyscrapers, office parks, shopping centers) in special improvement districts, simply to tax that property to pay for improvements benefiting other private property.

The decision below merely applies principles previously approved by this Court and applies them correctly. And even if the Court could conclude that the Colorado courts incorrectly applied the facts in this case to *Myles Salt*, that is not a good reason for review since this court typically does not review incorrect application of facts to correct statements of law.

Additionally, the problem asserted in the petition is, at best, episodic or academic in nature. While understandably important to these parties, it simply applies *Myles Salt* and will have no great public impact.

CONCLUSION

The petitioners acknowledge that *Myles Salt* was an unusual "one-off" case with unique facts. So is this case. The comparison between the two is apt. And the application of *Myles Salt* was sound. For the reasons set forth above, the petition lacks the gravitas necessary for this Court's discretionary review. So this Court should deny the petition.

Respectfully submitted,

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Date: October 22, 2019.

APPENDIX A

Colo. Rev. Stat. 1-11-213(4) (2007)

1-11-213. Rules for conducting contests in district court

(1) The style and form of process, the manner of service of process and papers, the fees of officers, and judgment for costs and execution shall be according to the rules and practice of the district court.

(2) Change of venue may be taken from any district court for any cause in which changes of venue might be taken in civil or criminal actions. The decisions of any district court are subject to appellate review as provided by law and the Colorado appellate rules.

(3) Before the district court is required to take jurisdiction of the contest, the contestor shall file with the clerk of the court a bond, with sureties, running to the contestee and conditioned to pay all costs in case of failure to maintain the contest. The judge shall determine the sufficiency of the bond and, if it is sufficient, approve it.

(4) The contestor, within ten days after the official survey of returns has been filed with the designated election official, shall file in the office of the clerk of the district court a written statement of the intention to contest the election, setting forth the name of the contestor, that the contestor is an eligible elector of the political subdivision, the name of the contestee, the office or ballot issue or ballot question being contested, the time of the election, and the particular grounds for the contest. The statement shall be verified upon information and belief by the affidavit of the contestor or of an eligible elector of the political subdivision. If the contest is based upon a ballot issue or ballot question, the political subdivision or

subdivisions for which the ballot issue or ballot question was decided shall be named as a contestee. If a written statement of intent to contest the election is filed more than ten days after the completion of the official survey of returns, no court shall have jurisdiction over the contest.

(5) The clerk of the district court shall then issue a summons in the ordinary form, in which the contestor shall be named as plaintiff and the contestee as defendant, stating the court to which the action is being brought, the political subdivision for which the contest is filed, and a brief statement of the grounds for contest as set forth in the contestor's statement. The summons shall be served upon the contestee and political subdivision in the same manner as other district court summonses are served in this state, within ten days after the statement of intention is filed.

(6) The contestee, within ten days after the service of the summons, shall file an answer with the clerk of court, which admits or specifically denies each allegation of the statement and asserts any counterstatement on which the contestee relies as entitling him or her to the office to which elected.

(7) If a contestor alleges the reception of illegal votes or the rejection of legal votes as the grounds for the contest, a list of the eligible electors who so voted or offered to vote shall be set forth in the statement of the contestor and likewise in the answer of contestee if the same grounds are alleged in the counterstatement.

(8) When the answer of the contestee contains a new matter constituting a counterstatement, within ten days after the answer is filed, the contestor

shall file a reply with the clerk of court admitting or specifically denying, under oath, each allegation contained in the counterstatement.

APPENDIX B

Colo. Rev. Stat. 32-1-103(10) (2007)

32-1-103. Definitions

As used in this article, unless the context otherwise requires:

(1) "Ambulance district" means a special district which provides emergency medical services and the transportation of sick, disabled, or injured persons by motor vehicle, aircraft, or other form of transportation to and from facilities providing medical services. For the purpose of this subsection (1), "emergency medical services" means services engaged in providing initial emergency medical assistance, including, but not limited to, the treatment of trauma and burns and respiratory, circulatory, and obstetrical emergencies.

* * *

(2) "Court" means the district court in any county in which the petition for organization of the special district was originally filed and which entered the order organizing said district or the district court to which the file pertaining to the special district has been transferred pursuant to section 32-1-303 (1) (b).

* * *

(3) "Director" means a member of the board.

(4) "Division" means the division of local government in the department of local affairs.

(5) (a) "Eligible elector" means a person who, at the designated time or event, is registered to vote pursuant to the "Uniform Election Code of 1992", articles 1 to 13 of title 1, C.R.S., and:

(I) Who has been a resident of the special district or the area to be included in the special district for not less than thirty days; or

(II) Who, or whose spouse, owns taxable real or personal property situated within the boundaries of the special district or the area to be included in the special district, whether said person resides within the special district or not.

(b) A person who is obligated to pay taxes under a contract to purchase taxable property situated within the boundaries of the special district or the area to be included within the special district shall be considered an owner within the meaning of this subsection (5).

(c) Repealed.

(d) For all elections and petitions that require ownership of real property or land, a mobile home as defined in section 38-12-201.5 (2) or 5-1-301 (29), C.R.S., or a manufactured home as defined in section 42-1-102 (106) (b), C.R.S., shall be deemed sufficient to qualify as ownership of real property or land for the purpose of voting rights and petitions.

(e) In the event that the board, by resolution, ends business personal property taxation by the district pursuant to subsection (8) (b) of section 20 of article X of the state constitution, persons owning such property and spouses thereof shall not be eligible electors of the district on the basis of ownership of such property.

(6) Repealed.

(6.5) "Financial institution or institutional investor" means any of the following, whether acting for itself or others in a fiduciary capacity:

(a) A depository institution;

(b) An insurance company;

(c) A separate account of an insurance company;

(d) An investment company registered under the federal "Investment Company Act of 1940";

(e) A business development company as defined in the federal "Investment Company Act of 1940";

(f) Any private business development company as defined in the federal "Investment Company Act of 1940";

(g) An employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of five million dollars or its investment decisions are made by a named fiduciary, as defined in the federal "Employee Retirement Income Security Act of 1974", that is a broker-dealer registered under the federal "Securities Exchange Act of 1934", an investment adviser registered or exempt from registration under the federal "Investment Advisers Act of 1940", a depository institution, or an insurance company;

(h) An entity, but not an individual, a substantial part of whose business activities consists of investing, purchasing, selling, or trading in securities of more than one issuer and not of its own issue and that has total assets in excess of five million dollars as of the end of its last fiscal year; and

(i) A small business investment company licensed by the federal small business administration under the federal "Small Business Investment Act of 1958".

(7) "Fire protection district" means a special district which provides protection against fire by any available means and which may supply ambulance and emergency medical and rescue services.

(7.5) "Forest improvement district" means a special district created pursuant to article 18 of this title that protects communities from wildfires and improves the condition of forests in the district.

(8) "Governing body" means a city council or board of trustees and includes a body or board where the operation and management of service is under the control of a municipal body or board other than a city council or board of trustees.

(8.5) "Health assurance district" means a special district that is created to organize, operate, control, direct, manage, contract for, furnish, or provide, directly or indirectly, health care services to residents of the district and family members of such residents who are in need of such services.

(9) "Health service district" means a special district that may establish, maintain, or operate, directly or indirectly through lease to or from other parties or other arrangement, public hospitals, convalescent centers, nursing care facilities, intermediate care facilities, emergency facilities, community clinics, or other facilities licensed or certified pursuant to section 25-1.5-103 (1) (a), C.R.S., providing health and personal care services and may organize, own, operate, control, direct, manage, contract for, or furnish ambulance service.

(9.5) "Mental health care service district" means a special district created pursuant to this article to provide, directly or indirectly, mental health care services to residents of the district who are in need of mental health care services and to family members of such residents.

(10) "Metropolitan district" means a special district that provides for the inhabitants thereof any two or more of the following services:

(a) Fire protection;

(b) Mosquito control;

(c) Parks and recreation;

(d) Safety protection;

(e) Sanitation;

(f) Solid waste disposal facilities or collection and transportation of solid waste;

(g) Street improvement;

(h) Television relay and translation;

(i) Transportation;

(j) Water.

(11) "Municipality" means a municipality as defined in section 31-1-101 (6), C.R.S.

* * *

(14) "Park and recreation district" means a special district which provides parks or recreational facilities or programs within said district.

(14.5) "Property owners' list" means the list furnished by the county assessor in accordance with section 1-5-304, C.R.S., showing each property

owner within the district, as shown on a deed or contract of record.

* * *

(17) "Regular special district election" means the election on the Tuesday succeeding the first Monday of May in every even-numbered year, held for the purpose of electing members to the boards of special districts and for submission of other public questions, if any.

(17.5) (Deleted by amendment, L. 92, p. 874, § 105, effective January 1, 1993.)

(18) "Sanitation district" means a special district that provides for storm or sanitary sewers, or both, flood and surface drainage, treatment and disposal works and facilities, or solid waste disposal facilities or waste services, and all necessary or proper equipment and appurtenances incident thereto.

(19) "Secretary" means the secretary of the board.

(19.5) "Solid waste" shall have the same definition as specified in section 30-20-101 (6), C.R.S.

(20) "Special district" means any quasi-municipal corporation and political subdivision organized or acting pursuant to the provisions of this article. "Special district" does not include any entity organized or acting pursuant to the provisions of article 8 of title 29, article 20 of title 30, article 25 of title 31, or articles 41 to 48 of title 37, C.R.S.

(21) "Special election" means any election called by the board for submission of public questions and other matters. The election shall be held on the first Tuesday after the first Monday in Febru-

ary, May, October, or December, in November of even-numbered years or on the first Tuesday in November of odd-numbered years. Any special district may petition a district court judge who has jurisdiction in such district for permission to hold a special election on a day other than those specified in this subsection (21). The district court judge may grant permission only upon a finding that an election on the days specified would be impossible or impracticable or upon a finding that an unforeseeable emergency would require an election on a day other than those specified.

(22) "Taxable property" means real or personal property subject to general ad valorem taxes. "Taxable property" does not include the ownership of property on which a specific ownership tax is paid pursuant to law.

(23) (a) "Taxpaying elector" means an eligible elector of a special district who, or whose spouse, owns taxable real or personal property within the special district or the area to be included in or excluded from the special district, whether the person resides within the special district or not.

(b) A person who is obligated to pay taxes under a contract to purchase taxable property within the special district shall be considered an owner within the meaning of this subsection (23).

(c) For all elections and petitions that require ownership of real property or land, a mobile home as defined in section 38-12-201.5 (2) or 5-1-301 (29), C.R.S., or a manufactured home as defined in section 42-1-102 (106) (b), C.R.S., shall be deemed sufficient to qualify as owner-

ship of real property or land for the purpose of voting rights and petitions.

* * *

(23.5) "Tunnel district" means a special district which provides a tunnel.

(24) "Water and sanitation district" means a special district which provides both water district and sanitation district services.

(25) "Water district" means a special district which supplies water for domestic and other public and private purposes by any available means and provides all necessary or proper reservoirs, treatment works and facilities, equipment, and appurtenances incident thereto.

APPENDIX C

Colo. Rev. Stat. 32-1-1001 (2007)

32-1-1001. Common powers—definitions

(1) For and on behalf of the special district the board has the following powers:

(a) To have perpetual existence;

(b) To have and use a corporate seal;

(c) To sue and be sued and to be a party to suits, actions, and proceedings;

(d)

(I) To enter into contracts and agreements affecting the affairs of the special district except as otherwise provided in this part 10, including contracts with the United States and any of its agencies or instrumentalities. Except in cases in which a special district will receive aid from a governmental agency or purchase through the state purchasing program, a notice shall be published for bids on all construction contracts for work or material, or both, involving an expense of sixty thousand dollars or more of public moneys. The special district may reject any and all bids, and, if it appears that the special district can perform the work or secure material for less than the lowest bid, it may proceed to do so.

(II) No contract for work or material including a contract for services, regardless of the amount, shall be entered into between the special district and a member of the board or between the special district and the owner of twenty-five percent or more of the territory

within the special district unless a notice has been published for bids and such member or owner submits the lowest responsible and responsive bid.

(e) To borrow money and incur indebtedness and evidence the same by certificates, notes, or debentures, and to issue bonds, including revenue bonds, in accordance with the provisions of part 11 of this article, and to invest any moneys of the special district in accordance with part 6 of article 75 of title 24, C.R.S.;

(f) To acquire, dispose of, and encumber real and personal property including, without limitation, rights and interests in property, leases, and easements necessary to the functions or the operation of the special district; except that the board shall not pay more than fair market value and reasonable settlement costs for any interest in real property and shall not pay for any interest in real property which must otherwise be dedicated for public use or the special district's use in accordance with any governmental ordinance, regulation, or law;

(g) To refund any bonded indebtedness as provided in part 13 of this article or article 54 or 56 of title 11, C.R.S.;

(h) To have the management, control, and supervision of all the business and affairs of the special district as defined in this article and all construction, installation, operation, and maintenance of special district improvements;

(i) To appoint, hire, and retain agents, employees, engineers, and attorneys;

(j)

(I) To fix and from time to time to increase or decrease fees, rates, tolls, penalties, or charges for services, programs, or facilities furnished by the special district; except that fire protection districts may only fix fees and charges as provided in section 32-1-1002 (1) (e). The board may pledge such revenue for the payment of any indebtedness of the special district. Until paid, all such fees, rates, tolls, penalties, or charges shall constitute a perpetual lien on and against the property served, and any such lien may be foreclosed in the same manner as provided by the laws of this state for the foreclosure of mechanics' liens.

(II) Notwithstanding any other provision to the contrary, the board may waive or amortize all or part of the tap fees and connection fees or extend the time period for paying all or part of such fees for property within the district in order to facilitate the construction, ownership, and operation of affordable housing on such property, as such affordable housing is defined by resolution adopted by the board.However, the board shall have the authority to condition such waiver, amortization, or extension upon the recordation against the property of a deed restriction, lien, or other lawful instrument requiring the payment of such fees in the event that the property's use as affordable housing is discontinued or no longer meets the definition of affordable housing as established by the board.

(k) To furnish services and facilities without the boundaries of the special district and to establish

fees, rates, tolls, penalties, or charges for such services and facilities;

(l) To accept, on behalf of the special district, real or personal property for the use of the special district and to accept gifts and conveyances made to the special district upon such terms or conditions as the board may approve;

(m) To adopt, amend, and enforce bylaws and rules and regulations not in conflict with the constitution and laws of this state for carrying on the business, objects, and affairs of the board and of the special district;

(n) To have and exercise all rights and powers necessary or incidental to or implied from the specific powers granted to special districts by this article. Such specific powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of this article.

(o) To authorize the use of electronic records or signatures and adopt rules, standards, policies, and procedures for use of electronic records or signatures pursuant to article 71.3 of title 24, C.R.S.

APPENDIX D

Colo. Rev. Stat. 32-1-1004 (2007)

32-1-104. Metropolitan districts—additional powers and duties

(1) In addition to the powers specified in section 32-1-1001, the board of any metropolitan district has the following powers for and on behalf of such district:

(a) To enter into contracts with public utilities, cooperative electric associations, and municipalities for the purpose of furnishing street lighting service;

(b) To erect and maintain, in providing safety protection services, traffic and safety controls and devices on streets and highways and at railroad crossings and to enter into agreements with the county or counties in which a metropolitan district is situate or with adjoining counties, the department of transportation, or railroad companies for the erection of such safety controls and devices and for the construction of underpasses or overpasses at railroad crossings;

(c) To finance line extension charges for new telephone construction for the purpose of furnishing telephone service exclusively in districts which have no property zoned or valued for assessment as residential;

(d) To finance payment of incremental directional drilling costs for oil and gas wells drilled within the district's service area.

(2) A metropolitan district shall provide two or more of the following services:

(a) Fire protection as specified in section 32-1-103 (7);

(b) Elimination and control of mosquitoes;

(c) Parks or recreational facilities or programs as specified in section 32-1-103 (14);

(d) Safety protection through traffic and safety controls and devices on streets and highways and at railroad crossings;

(e) Sanitation services as specified in section 32-1-103 (18);

(f) Street improvement through the construction and installation of curbs, gutters, culverts, and other drainage facilities and sidewalks, bridges, parking facilities, paving, lighting, grading, landscaping, and other street improvements;

(g) Establishment and maintenance of television relay and translator facilities;

(h) Transportation as specified in subsection (5) of this section;

(i) Water and sanitation services as specified in section 32-1-103 (18), (24), and (25);

(j) Water as specified in section 32-1-103 (25);

(k) Solid waste disposal facilities or collection and transportation of solid waste as specified in section 32-1-1006 (6) and (7).

(3) Any metropolitan district providing services specified in paragraph (a), (c), (e), (i), or (j) of subsection (2) of this section shall have all the duties, powers, and authority granted to a fire protection, park and recreation, sanitation, water and sanitation, or water district by this article, except as provided in subsection (4) of this section.

(4) A metropolitan district may have and exercise the power of eminent domain and dominant eminent domain and, in the manner provided by article 1 of title 38, C.R.S., may take any property necessary to the exercise of the powers granted, both within and without the special district, only for the purposes of fire protection, sanitation, street improvements, television relay and translator facilities, water, or water and sanitation, except for the acquisition of water rights, and, within the boundaries of the district, if the district is providing park and recreation services, only for the purpose of easements and rights-of-way for access to park and recreational facilities operated by the special district and only where no other access to such facilities exists or can be acquired by other means.

(5) The board of a metropolitan district has the power to establish, maintain, and operate a system to transport the public by bus, rail, or any other means of conveyance, or any combination thereof, and may contract pursuant to the provisions of part 2 of article 1 of title 29, C.R.S. The board of a metropolitan district may not establish, maintain, or operate such a system of transportation in a county, city, city and county, or any other political subdivision of the state empowered to provide a system of transportation except pursuant to a contract entered into pursuant to the provisions of part 2 of article 1 of title 29, C.R.S. The board of a metropolitan district not originally organized as having the power granted in this subsection (5) may exercise its power upon compliance with the provisions of part 2 of this article. Notwithstanding any other provision of this subsection (5), the board of a metropolitan district shall not exercise the power under this subsection (5) until approved by the district

court in compliance with the provisions of part 2 of this article and unless authorized, at a regular special district election or a special election held and conducted pursuant to articles 1 to 13 of title 1, C.R.S., by a majority of the eligible electors of the district voting on the question of whether the board should exercise such power. The board of a metropolitan district which exercises the power granted in this subsection (5) shall provide transportation services only in the county or counties within which the boundaries of the metropolitan district lie.

(6) Notwithstanding anything in this article or any other law to the contrary:

(a) A metropolitan district may be formed within any part of the area within the regional transportation district, as described in section 32-9-106.1, for the single service of financing a system to transport the public by bus, guideway, or any other means of conveyance, or any combination thereof.

(b) A district created pursuant to paragraph (a) of this subsection (6) may be formed wholly or partly within an existing special district which provides or is authorized to provide the service of mass transportation if the improvements or facilities to be financed by such a district do not duplicate or interfere with any other improvements or facilities already constructed or planned to be constructed within the limits of the existing special district.

(c) The intergovernmental contract required by subsection (5) of this section shall not be required for such a district except where the county, city, or city and county or any other political subdivision of the state within which a system of trans-

portation is to be financed is actually operating a system of transportation.

(d) Except as specifically modified by this subsection (6), all other provisions of this article shall apply to such a district.

(7) The board of a metropolitan district has the power to furnish security services for any area within the special district. Such power may be exercised only after the district has provided written notification to, consulted with, and obtained the written consent of all local law enforcement agencies having jurisdiction within the area and any applicable master association or similar body having authority in its charter or declaration to furnish security services in the area. Any local law enforcement agency having jurisdiction within the area and any applicable master association or similar body having authority in its charter or declaration to furnish security services in the area may subsequently withdraw its consent after consultation with and providing written notice of the withdrawal to the board.

(8) (a) The board of a metropolitan district has the power to furnish covenant enforcement and design review services within the district if:

(I) The governing body of the applicable master association or similar body and the metropolitan district have entered into a contract to define the duties and responsibilities of each of the contracting parties, including the covenants that may be enforced by the district, and the covenant enforcement services of the district do not exceed the enforcement powers granted by the declaration, rules and regula-

tions, or any similar document containing the covenants to be enforced; or

(II) The declaration, rules and regulations, or any similar document containing the covenants to be enforced for the area within the metropolitan district name the metropolitan district as the enforcement or design review entity.

(b) The board of a metropolitan district shall have the power to furnish covenant enforcement and design review services pursuant to this subsection (8) only if the revenues used to furnish such services are derived from the area in which the service is furnished.

(c) Nothing in this subsection (8) shall be construed to authorize a metropolitan district to enforce any covenant that has been determined to be unenforceable as a matter of law.

(9) Except as limited by the service plan of the district, the board of a metropolitan district has the power to provide activities in support of business recruitment, management, and development within the district if the valuation for assessment of the commercial property within the district is more than one and one quarter billion dollars. For purposes of this subsection (9), "commercial property" means any taxable real or personal property that is not classified for property tax purposes as either residential or agricultural. A metropolitan district meeting the qualifications of this subsection (9) shall neither have nor exercise the power of eminent domain or dominant eminent domain for the purposes set forth in this subsection (9).