No. 19-241

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

REPLY BRIEF FOR PETITIONERS

NEIL L. ARNEY
Counsel of Record
MIA K. DELLA CAVA
KUTAK ROCK LLP
1801 California Street, Suite 3000
Denver, CO 80202
(303) 297-2400
Neil.Arney@KutakRock.com
Mia.DellaCava@KutakRock.com

Counsel for Petitioners
UMB Bank, N.A. and Colorado Bondshares

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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REPLY BRIEF

A. COURT HAS JURISDICTION TO CONSIDER PETITION.

Landmark argues that the Petition should be denied because Petitioners purportedly lack standing, arguing that the Injunction applies only to the District. This argument is disingenuous and wrong as a matter of law.

Standing focuses "almost invariably on the plaintiff." 13A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3531 (3d ed. 2008). By way of background, "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982). That judicial power "is the power of a court to decide and pronounce a judgment and carry it into effect *between persons and parties who bring a case before it for decision*." *Toth v. United Auto. Aerospace & Agric. Implement Workers of Am. UAW*, 743 F.2d 398, 404 (6th Cir. 1984). Therefore, "at an irreducible minimum, Article III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury *as a result of the putatively illegal conduct of the defendant*,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Id*. at 404.

Petitioners have found no cases where this Court has held that a <u>*defendant*</u> lacked standing to defend

claims, and Landmark cites none in its Opposition. If a defendant asserts a counterclaim, then standing is "likely to be measured by the same tests as apply to plaintiff claimants." WRIGHT & MILLER, *supra*, § 3531 (3d ed. Supp. 2019). But, "affirmative defenses against the claims of others are not likely to raise 'standing' concerns." *Id*. In the rare cases where courts have focused a standing inquiry on defendants, the "inquiry implicates questions related to whether the defendant has a sufficient interest to present a justiciable controversy with the plaintiff." WRIGHT & MILLER, *supra*, § 3531 (citing *Natural Res. Def. Council, Inc. v. Jamison*, 787 F. Supp. 231, 235, n.1 (1990)). This Court has defined a justiciable "controversy" as a controversy that is "definite and concrete, touching the legal relations of parties having adverse interests." *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937). "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id*. at 241.

Petitioners are here because Landmark sued them. In its Verified Petition, Landmark specifically named Petitioners as defendants/respondents, alleging that Colorado Bondshares, as owner of the Bonds, "is the real party in interest" with respect to Landmark's claims. Further, Petitioners did not assert any counterclaims, the Injunction was entered on a claim asserted by Landmark, and the Injunction prevents the District from levying property taxes which are necessary to pay the Bonds, essentially rendering the Bonds worthless.

In a September 10, 2014 order, the trial court even recognized that its rulings caused Colorado Bondshares to suffer "millions of dollars in losses by reason of purchasing the bonds issued by Marin." As such, Petitioners – as the bondholder and trustee of the Bonds – have a "direct stake in the outcome" of this case. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013).

Thus, Petitioners have a justiciable controversy with Landmark, and this Court has jurisdiction over the Petition.

B. LANDMARK ATTEMPTS TO ERASE DISTINCTION BETWEEN TAXES AND SPECIAL ASSESSMENTS.

Landmark lays bare its legal strategy when it claims that, "it is incorrect to say that there is a separate line of 'special assessment' cases that differ from 'tax' cases," and that *Myles Salt Co. v. Iberia & St. Mary Drainage District*, 239 U.S. 478 (1916), fits "within the continuum of this court's precedent" regarding taxes and special assessments. (Opposition, pp. 12-13.) Landmark goes on to cite *Myles Salt* as an example of a special assessment case (*id*., p. 19) *and* as a tax case. (*id*., p. 24).

It is clear that Landmark is attempting to erase the distinction between taxes and special assessments in an effort to defeat the Petition. However, Landmark's arguments illustrate precisely why *Myles Salt* is untenable, has been called into question by several courts and authorities, and is no longer good law today.

(Petition, pp. 17-21.) Unchecked, *Myles Salt* will threaten public finance unless clarified or overruled.

1. Difference Between Taxes and Special Assessments Is Well-Drawn.

Taxes and special assessments are distinct governmental powers. 14 EUGENE MCQUILLIN, LAW OF MUN. CORP. § 38:2 (3d ed. 2019). On one hand, sovereigns impose taxes on citizens for the support of government. *Id*.; *Houck v. Little River Drainage Dist*., 239 U.S. 254, 265 (1915) (taxes compel citizens to "bear the burdens both of the successes and of the failures of local administration"). Notwithstanding Landmark's claim that taxes must confer a direct or indirect benefit on taxpayers, this Court has previously held that, a "tax is not an assessment of benefits" under the Due Process Clause. *Commonwealth v. Montana*, 453 U.S. 609, 622-26 (1981); *accord* MCQUILLIN, *supra*, § 38:2. Further, taxes may be imposed statewide, or they may be confined within a limited geographic area, like the District here. *Memphis & Charleston Ry. Co. v. Pace*, 282 U.S. 241, 245-46 (1931). Although there are several different types of taxes, the most common taxes imposed by local districts are *ad valorem* property taxes. 4 JOHN MARTINEZ, LOC. GOV'T LAW § 23:3 (Oct. 2019).

In contrast, special assessments are charges imposed on property owners within a limited geographic area to help pay the cost of a local improvement that specially benefits their property. MARTINEZ, *supra*, § 23:3. The nexus between special assessments and

private benefits "fundamentally distinguishes special assessments from general property taxes." *Id*. In addition, special assessments are distinct from taxes under the Constitution. MCQUILLIN, *supra*, § 38:2. Consequently, they are not subject to the same restrictions imposed on general taxes, such as a debt ceiling, referenda, and uniformity requirements. 4 JOHN MARTINEZ, LOC. GOV'T LAW § 24:1 (Oct. 2019); *see also* MCQUILLIN, *supra*, § 38:2. Generally, special assessments are not imposed in proportion to the value of the thing assessed but are rather imposed in "proportion to position, frontage, area, market value, or to benefits estimated . . . " *Houck*, 239 U.S. at 265.

2. *De Novo* Review Applies in Determining Whether District Imposed Tax or Special Assessment.

Landmark does not address the federal case law setting the standard for evaluating whether an imposition is a "tax" or a "special assessment." Instead, Landmark erroneously relies on a special assessment treatise, and advocates for this Court's acceptance of the lower courts' holding under a clear error standard of review. Opposition, p. 20 (citing 70C AM. JUR. 2D SPECIAL OR LOCAL ASSESSMENTS § 26 (2019)).

However, this Court has no obligation to defer to the Colorado Court of Appeals' conclusion that the District's tax was a "special assessment." It is well-settled that, where federal rights are concerned (such as the

finding that the District imposed a "special assessment" in violation of the Due Process Clause), whether an imposition is a tax or a special assessment is a question of federal law. *See Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). Further, as this Court recognized in *Macallen Co. v. Massachusetts*, 279 U.S. 620, 626 (1929), *de novo* review applies to this analysis:

> [T]he 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.

(Emphasis added); *see also Salve Regina Coll. v. Russell*, 499 U.S. 225 (1991) (*de novo* review requires independent review that is nondeferential).

Further, the treatise cited by Landmark *assumes* the existence of a special assessment and merely provides that clear error review applies in determining whether and to what extent property is specially benefitted by an assessment. 70C AM. JUR. 2D, *supra*, § 26; *see also Briscoe v. Rudolph*, 221 U.S. 547, 551 (1911). It does not address the legal standard for determining whether an imposition is a "tax" or a "special assessment" under federal law. 70C AM. JUR. 2D, *supra*, § 26.

3. District Imposed Tax, Not Special Assessment.

Landmark makes a variety of arguments that the tax imposed by the District was a "special assessment," but none of those arguments has any basis in fact or law. First, Landmark argues that, pursuant to *Myles Salt*, this Court should look "at the purpose of the imposition," not the label. (Opposition, p. 19.) However, the purpose the District's tax was clearly to benefit the public. Indeed, the Service Plan provides as follows:

> The 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, as well as the public generally.
>
> * * *
>
> The organization of the District to finance, acquire, construct, complete, operate and maintain the Improvements will assure the provision of enhanced public infrastructure and other attractive amenities that are planned and expected by future residents of the Development. Thus, the organization of the District will promote the interests of future residents, property owners and taxpayers within the District as well as the general interests of the City.

(App. 181-82.) The Service Plan also authorizes the District to issue general obligation debt and to levy property taxes to repay such debt. (App. 185-92.) In adopting the Service Plan, the City took legislative

action (App. 173-76), and determined that there was a general benefit to residents of the Landmark and the District from the organization of the District and from the District's financing of improvements, including the imposition of property taxes. The finding of a general public benefit supports the conclusion that the District imposed a tax.

Landmark argues that, under the Supplement to the Service Plan, the City purportedly found that Landmark could never benefit from the District or its taxes and, as a result, the District must be imposing an unlawful special assessment. However, the Supplement to the Service Plan makes no such finding. (Supp. App. 1-3.) In the Supplement, the City provides that the District is not permitted to finance infrastructure improvements that were previously financed under the Sales Tax Rebate Agreement. (Supp. App. 1-2, 4-25.) However, the Supplement does not change the City's findings that Landmark and the public generally will benefit from the District and from the District's taxes and improvements. Therefore, the Supplement to the Service Plan does not change the analysis that the District imposed a tax.

Moreover, as Landmark points out in its Opposition, courts "must defer to legislative statements about the benefit a property will receive from a local improvement." (Opposition, p. 25 (citing *Branson v. Bush*, 251 U.S. 182, 189 (1919).) Thus, in determining whether the District imposed a tax or a special assessment, this Court should defer to the legislative act of the City and the City's stated purpose for the District and the taxes.

The City obviously concluded that the District and its taxes were for the general benefit of Landmark and the public.

Further, Landmark disregards the tax bill attached to Petitioners' appendix, which shows that District taxes were levied on the Landmark property based on assessed value. (App. 177.) Without addressing the bill, Landmark makes the incorrect claim that special assessments may also be collected on an *ad valorem* basis. (Opposition, p. 16.) While the "classic method" of calculating property taxes is *ad valorem*, special assessments are imposed in "proportion to position, frontage, area, market value, or to benefits estimated . . . " *Houck*, 239 U.S. at 265; *see DeVilbiss v. Matanuska-Susitna Borough*, 356 P.3d 290, 296 (Alaska 2015) (cited in Opinion, ¶ 27.) Therefore, the District imposed a tax, not a special assessment.

Landmark also focuses on the limited size and local nature of the District, but this argument ignores this Court's precedent that a local taxing district has the power to tax without regard to its size. *Pace*, 282 U.S. at 245-46. Merely because a district is limited in size does not convert its tax into a special assessment.

C. UNLESS CLARIFIED OR OVERRULED, *MYLES SALT* WILL DETRIMENTALLY IMPACT PUBLIC FINANCE.

Litigants like Landmark will continue to exploit *Myles Salt* to unwind public finance in Colorado and in many other states that allow special district

infrastructure financing. Although Landmark attempts to downplay the significance of extending *Myles Salt* by arguing that the two cases were based on unusual facts that are unlikely to be repeated, the special district financing model utilized here is common to special districts throughout the country. The errant extension of *Myles Salt* in a published decision has breathed new life into the case and given taxpayers the right to challenge taxes in a common factual scenario – where taxes are pledged for repayment of public infrastructure bonds in a planned multi-phased development. Where, such as here, homeowners pay taxes that finance public infrastructure that will be built in a later phase of development within a special taxing district, those taxpayers could, on the basis of *Myles Salt* and the published Opinion, challenge those taxes for lack of benefit to the taxpayers. Indeed, Landmark does not dispute that, since the Opinion, there has been at least one other taxpayer challenge that relies on *Myles Salt* to invalidate special district taxes, with more likely to come.

D. NO ADEQUATE AND INDEPENDENT STATE GROUNDS.

This Court will not hear a case if it appears that a state court judgment rests upon an independent non-federal ground, which is adequate to sustain the judgment. *Michigan v. Long*, 463 U.S. 1032, n.4 (1983). Stated differently, the Court must decline to hear the case if reversal of the state court's federal ruling will not change the outcome of the case, because the result is independently supported by the state court's

decision on state law grounds. *Id*. However, the Court favors the acceptance of jurisdiction where the state and federal grounds for the judgment are interwoven. *Id.* at 1040-41 (providing that the Court will accept jurisdiction when "a state court decision appears to rest primarily on federal law, or to be interwoven with federal law").

Landmark argues that the Court should decline review, because the Opinion found violations of both the federal and state due process clauses. Thus, Landmark argues that reversal of the federal due process holding will not change the outcome of the Opinion. However, the adequacy and independence of the state due process holding is not clear from the face of the Opinion. Instead of conducting a separate analysis of the District's violations under the Fourteenth Amendment and under Article II, Section 25 of the Colorado Constitution, the Colorado Court of Appeals simply grouped the due process holdings together. (App. 14, ¶ 29.) Further, even though the Opinion cites to Colorado cases in support of its finding that the District's "special assessment" violated the Landmark property owners' right to due process, a closer examination of those cases reveals that they cite interchangeably to the federal and state constitutions without separately analyzing due process violations. *See Reams v. City of Grand Junction*, 676 P.2d 1189, n.2 (Colo. 1984); *Ochs v. Town of Hot Sulphur Springs*, 407 P.2d 677, 680 (Colo. 1965).

In any event, as Landmark acknowledges, the Colorado Court of Appeals expressly stated that the

"federal constitutional violation trumps any possible incidental violation of the state constitution." (App. 26, n.12.) Accordingly, the Court should accept review, because the decision rests primarily on federal law and any state law basis is, at a minimum, interwoven with federal law such that the acceptance of jurisdiction is favored. *Michigan*, 463 U.S. at 1040-41.

Landmark also incorrectly argues that the Court of Appeals' decision that the District imposed an excessive mill levy is an independent state law ground for the Opinion. The Court of Appeals held that the District's Service Plan limited the District's property tax to 49.5 mills and that any mill levy in excess of 49.5 mills was illegal. The Court of Appeals did not hold that the excess mill levy supported the Injunction that is the subject of this Petition. That is because the Injunction entered and affirmed by the lower courts was based entirely on the due process holdings, not the excessive mill levy holding. (App. 150.) To this point, there is no reference to the Injunction in the entire section of the Opinion regarding the excess mill levy. (App. 26-29.) Thus, the excessive mill levy holding has no bearing on the Injunction or this Petition.

E. NO ALTERNATIVE FEDERAL GROUNDS.

Landmark argues that this Court should review a Colorado Supreme Court decision from an earlier, related case (*Landmark II*), conclude that the decision is incorrect under federal law, and use that earlier incorrect decision as a basis for denying the Petition. (Opposition, pp. 29-33 (citing to App. 36-53).) The

argument is faulty for several reasons. First, Landmark cites no precedent for this argument.

Second, the issue decided in *Landmark II* was whether Landmark was time-barred from challenging state election results more than three years after the results were certified. The Colorado Supreme Court held that the challenge was barred under C.R.S. § 1-11-213. It did not decide the due process issues that are the subject of the Petition. Thus, *Landmark II* cannot be a basis for denying the Petition.

Third, if Respondent thought that *Landmark II* was contrary to federal law, it had every opportunity to petition this Court for review, but it did not.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NEIL L. ARNEY
Counsel of Record
MIA K. DELLA CAVA
KUTAK ROCK LLP
1801 California Street,
Suite 3000
Denver, CO 80202
(303) 297-2400
Counsel for Petitioners

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