No. 25-702

In the Supreme Court of the United States

CO2 COMMITTEE, INC.,

Petitioner,

v.

MONTEZUMA COUNTY, COLORADO, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

The Respondents are MONTEZUMA COUNTY, MONTEZUMA COUNTY BOARD OF COUNTY COMMISSIONERS, and the MONTEZUMA COUNTY ASSESSOR. All Respondents are public entities or employees. There are no corporate respondents.

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INTRODUCTION

This Court should deny certiorari to petitioner CO_2 Committee, Inc. ("CO_2 Committee") because CO_2 Committee seeks certiorari for an issue it previously forfeited in this litigation.

While CO_2 Committee appealed three issues to the Tenth Circuit, it presents only one of them to this Court for review: whether the trial court erred by failing to accept factual allegations in its complaint as true when respondent Montezuma County ("Montezuma") moved the trial court to dismiss the complaint with a facial attack. This was the least litigated issue before the Tenth Circuit, and now CO_2 Committee presents aspects of the question it could have, but did not, appeal to the Tenth Circuit. As such, it has forfeited the arguments it seeks to present to this Court, and so the Court should deny certiorari. Even if it had not forfeited the argument, the issue still falls under clear, settled law, and so it does not merit this Court's attention anyway.

I. CO_2 Committee Forfeited or Abandoned the Arguments for Which It Seeks Certiorari by Failing to Present Them to the Tenth Circuit.

The thrust of CO_2 Committee's argument is the trial court failed to take as true all factual allegations contained in its complaint when reviewing a facial attack on the sufficiency of the complaint. Clear precedent requires a trial court to do so. *E.g.*, *Holt v. United States*, 46 F.3d 1000 (10th Cir. 1995) ("In reviewing a facial attack on the sufficiency of the complaint, a district court must accept the allegations in the complaint as true."), *abrogated in part on other grounds by Central Green Co. v. United States*, 531

U.S. 425 (2001). A trial court need not, however, take as true any of the complaint's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009).

CO_2 Committee appealed to the Tenth Circuit, seeking review of this issue and two others not relevant here.[1] It claimed the trial court "supported its Order with eight references to the County's motion to dismiss," to allegations which CO_2 Committee claimed—without explanation—were "disputed." App. 147a. But CO_2 Committee did not identify any of these allegations, explain why they were disputed, or attempt to show prejudice from the trial court's alleged error. Further, CO_2 Committee claimed the trial court failed to accept allegations in its own complaint. This time it identified two of those allegations:

> that (1) Colorado's courts had denied standing to the Committee to challenge state law taxes, and as a result, (2) that the [Tax Injunction Act] could not bar its claims because, as documented by case law, there was no plain, speedy and efficient remedy for [CO_2] Committee in Colorado's courts.

App.149a–150a.

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[1] CO_2 Committee complains the Tenth Circuit bundled the first two issues into one in its decision, but did not seek certiorari on either of the two other issues, nor on the Tenth Circuit's treating them as a single issue.

CO_2 Committee concluded,

> Had the District Court construed as true the factual, jurisdictional allegation that the Colorado Supreme Court had denied the Committee's members standing, and therefore a plain, speedy and efficient remedy that comprises procedural criteria including a full hearing and judicial determination is not available to the Committee's members, it could only have found that the TIA's exception was met.

App.149a.

CO_2 Committee's argument was clear: it alleged the Colorado Supreme Court denied it a "plain, speedy and efficient remedy" in Colorado, and so, as a matter of law, the trial court could do nothing but rule the Tax Injunction Act did not divest the federal courts of jurisdiction, at least under a facial attack. It insisted again on this position in its reply brief. App.196a ("If there is no such remedy as alleged in the complaint, then the [Tax Injunction Act] does not preclude subject matter jurisdiction."). The Tenth Circuit disagreed. It held simply the allegation in question was "a legal conclusion" and so "the district court was not required to accept it as true." App.12a–13a.

Now, CO_2 Committee seeks certiorari under the same umbrella issue but has changed its position substantially since the appeal. Although its core argument below was the trial court needed to accept the allegation that it had no remedy in Colorado courts, now it accuses the Tenth Circuit of ruling only on that issue at the expense of the other, which it only hinted

at below. In its petition for certiorari, CO_2 Committee writes:

> The Tenth Circuit seemed to think it could affirm the District Court without addressing the facial attack issue and then avoided it by pointing out a few legal standards and responses to two allegations that have nothing relevant to Committee's appeal on the facial issue.

Petition at 19.

Here, the two allegations went from CO_2 Committee's sole grounds for appeal from the trial court's ruling on the facial attack issue to having "nothing relevant" to its appeal. CO_2 Committee has discarded the only argument it presented on appeal to the Tenth Circuit in favor of another it only hinted at.

That other issue was the "eight references to the County's motion to dismiss" contained in the trial court's ruling below. While CO_2 Committee did mention this to the Tenth Circuit, it did not outline the eight references, show any disputes or inaccuracies in them, nor, most importantly, did it show prejudice from the trial court's alleged error. Even in its petition for certiorari, it still has not described these aspects of the issue for which it seeks appeal.

CO_2 Committee forfeited any argument it could make about the eight citations in the trial court's ruling when it failed to present it to the Tenth Circuit in a way that allowed appellate review. Under the Tenth Circuit's precedent, it "routinely . . . decline[s] to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th

Cir. 2007). In *Bronson*, the appellants stated "in two places [of their brief]" that they challenged the constitutionality of a statute. *Id.* at 1105. "But these cursory statements, without supporting analysis and case law, fail to constitute the kind of briefing that is necessary to avoid application of the forfeiture doctrine." *Id.*

CO_2 Committee's brief, like that in *Bronson*, contained only "cursory statements" about the trial court's reliance on Montezuma County's motion to dismiss. It did not even produce a list of the allegations in question, nor did it attempt to show how the error, if any, prejudiced it. As the appellant, it had the burden of persuasion to show any error was not harmless in addition to showing error in the first instance. It was CO_2 Committee's responsibility to present any issues it had with the trial court's ruling in a way the Tenth Circuit could consider and rule on those issues. But it presented only bare statements without analysis. The Tenth Circuit acted well within reason by disregarding those statements and focusing on the arguments CO_2 Committee fleshed out, and it is too late for CO_2 Committee to try another bite at the apple here.

CONCLUSION

The Court should decline to issue a writ of certiorari in this case. CO_2 Committee seeks certiorari on only one issue, and it failed to present that issue to the Tenth Circuit in a way the Tenth Circuit could rule on it. Under The Tenth Circuit's precedent, CO_2 Committee forfeited the issue by failing to adequately brief it. This Court should not revive the issue.

Respectfully submitted,

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