

In the
Supreme Court of the United States



CO2 COMMITTEE, INC.,
A COLORADO NONPROFIT CORPORATION,

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

REPLY BRIEF OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

CO₂ COMMITTEE, INC. (“Committee”) is a non-profit corporation authorized by its Articles of Incorporation approved by the U.S. District Court by order dated May 6, 2002 in Civil Action No. 96-CV-02451-ZLW-MJW to act, on behalf of approximately 135 out of 151 working interest owners today, known as small share working interest owners (“SSWIOs”), in their best interests in the McElmo Dome Unit. The Petitioner has no parent company and no public company owns 10% or more of it.

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INTRODUCTION

The Respondents (“the County”) oppose the Petition for a Writ of Certiorari (“Petition”) of the Petitioner CO2 Committee, Inc., (“Committee”) for the reasons which have no merit for the reasons which follow.

The Petition’s question is did the Tenth Circuit err in not reversing the District Court’s Order which accepted a facial attack standard but used factual allegations in the County’s Motion to Dismiss. The essence of the Petition is that the County filed a motion to dismiss under Rule 12(b)(1) by the facial attack standard by stating (“ . . . this motion presents ‘a facial attack on the complaint’s allegations as to subject matter jurisdiction’, the Court [District Court] may accept the factual allegations in the complaint as true” App.85a)

The Committee confirmed the facial attack standard in its Response to the Motion to Dismiss because the County questioned the sufficiency of the complaint so the Court [District Court] *must* accept as true the factual allegations in the complaint”. App.95a.

The District Court also confirmed the facial attack standard because the County had the right to use the facial attack standard “Where, as here, a Rule 12(b)(1) motion constitutes a facial attack on the allegations of subject matter jurisdiction, the court presumes all the allegations contained in the complaint to be true”. App.21a.

The facial attack standard is a rule. It’s a method for reaching a conclusion. If the County or District Court wanted a factual attack, then the method is

similar to Rule 56 where the parties can do discovery, present their facts to the court and see if the court can reach a decision if the movant shows there is no genuine dispute as to any material fact.

The County's reasons for opposing the Petition have no merit because it and the District Court violated the facial attack standard by using facts from the County's motion to dismiss.

I. County's Introduction

The County claims the Committee previously forfeited the issue (the facial attack standard) in this case because (1) the issue was the “least litigated issue before the Tenth Circuit” and (2) the Committee “did not, appeal [the issue] to the Tenth Circuit.” And even if the Committee had not forfeited the issue, the issue still falls under clear, settled law . . .” Brief in Opposition at 1.¹

The Committee admits that the facial attack issue was little litigated by the Tenth Circuit. Petition at i. The County's statement that the Committee did

¹ This Court deals with the forfeit of an issue as an “issue-exhaustion”. *Sims v. Apfel*, 530 U.S. 103, 108-109 (2000) (“ . . . appellate courts will not consider arguments not raised before trial court as the Court explained in *Hormel v. Helvering*, 312 U.S. 552 . . . (1941)“) In *Hormel*, this Court said: “Rules of practice and procedure are devised to promote the ends of justice, not to defeat them . . .” – “In accordance with this principle, we are of opinion that the court below should have given and properly did give consideration to section 22(a) in determining petitioner's tax liability.” *Id.* at 557, 559. In this case, the Tenth Circuit gave consideration to facial attack issue but it was not proper.

not appeal the issue to the Tenth Circuit is false as shown below.

II. The County’s Primary Argument That the Committee “Forfeited or Abandoned the Arguments for Which It Seeks Certiorari by Failing to Present Them to the Tenth Circuit” Is Without Merit as Shown Below

Contrary to the County, the Committee did not fail to present its appeal to the Tenth Circuit challenging the County’s violation of the facial attack issue.

First, the Committee’s Opening Brief in its “Statement of Issue Presented for Review and Applicable Standard of Review” listed in its paragraph 3 “Whether the District Court erred in failing to apply the facial attack standard . . . ” App.124a.

Second, the Committee’s Opening Brief in the last paragraph of its “Summary Argument” stated that:

Finally, the District Court erred when it failed to construe the Committee’s factual, jurisdictional allegations as true when considering the County’s motion to dismiss for lack of subject matter jurisdiction. The District Court was required to take the Committee’s allegations as true because, as the District Court acknowledged, the County brought a facial attack to subject matter jurisdiction. Instead, the District Court largely relied on the County’s motion to dismiss when framing the factual background for its Order, which was improper.

App.133a.

Third, the Committee in its “Argument VI. C.” brought up the issue that the District Court could not rely on factual allegations in the County’s motion to dismiss and was obligated to rely on the factual allegations in the Committee’s Complaint. App.146a-149a.

Lastly, the Committee in its “Conclusion” addressed the facial attack requirements when it stated “Finally, the District Court erred by failing to apply the standard applicable to a facial attack on subject matter jurisdiction, and instead supported its Order by citation to the County’s Motion to Dismiss.” App.150a.

Ironically, the County in its Appellees’ Brief admitted the Committee was correct that “under a facial attack on the sufficiency of a compliant, the trial court must accept the allegations as to material facts in that complaint as true”, citing *Holt v. United States*, 46 F.3d 1000, 1002 (Tenth Circuit 1995). App.168a The County argued that the Committee’s complaint allegations had no remedies because the Colorado Supreme Court held it had no standing, and that this was a conclusion. The District Court did not need to accept a conclusion as true. App.169a.

The Committee, in its “Appellant’s Petition for Rehearing En Banc” filed with the Tenth Circuit on August 29, 2025, referred the facial attack standard to the Tenth Circuit in the first paragraph of Rule 40 (App.200a) and Point 1 (App.203a-208a) This petition was denied. App.33a.

Based on the foregoing, the County’s statement that the Committee failed to present the facial attack issue to the Tenth Circuit is not true and its argument is without merit.

III. Despite the Foregoing and the Committee’s Disagreement with Issues Raised by the County in Sections I and II, the Committee Now Shows That the County’s Other Arguments Are Also Without Merit

A. The County Does Not Understand the Facial Attack Standard Issue Compared to the Two Other Issues Involving the Tax Injunction Act (“TIA”) in the Committee’s Appellant Brief

The County is concerned that the Committee sought the facial attack standard by itself and did not seek review before this Court of the other two issues involving the TIA. The reason is the facial attack standard is part of the method of making a decision and limits the allegations of fact to the complaint just like Rules 12(b)(1) and 12(b)(6). This is why the Committee stated the TIA issues were not relevant when the District court violated the facial attack standard.

The District Court violated the facial attack standard when it used facts from the County’s motion to dismiss. If the Committee proved this, the Tenth Circuit was obligated to reverse the District Court’s Order. The Committee further proved a violation of the facial attack standard by referring the Tenth Circuit to the District Court’s Order which shows use of the County’s facts by referring to the filing number used in the District Court proceeding. The County’s motion to dismiss was the number “ECF No. 17”. The ECF No. 17 is confirmed by the District Court in its first sentence in the Order, i.e., “Before the Court is Defendants’ Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). ECF. No. 17” App.14a At least eight facts all in the Order showing ECF No. 17.

In its Opening Brief, the Committee showed that factual allegations from the County’s motion to dismiss were included in the District Court’s Order. The specific allegations of the County are listed in the Appellant Brief as follows:

In this case, the District Court supported its Order with eight references to the County’s motion to dismiss. *See Order at 1-4, 4 n.4* (referencing ECF No. 17). The truthfulness of allegations in the motion to dismiss are disputed, and the Committee responded by correcting the truthfulness of the County’s version of events. Aplt. App. 53-57.² The County may have lured the District Court in relying on allegations in its motion to dismiss by arguing that the District Court “may” rather than “must” accept factual allegations in the complaint as true. Aplt. App. at 8 ¶ 33. If the District Court should be allowed to use a few references to the County’s motion to dismiss, the standard evaporates, and the reviewing court would be faced with a tremendous effort, especially where, as here, there were factual disputes. The burden would be overwhelming. If the County wanted to deal

² Aplt. App. at 53-57 refers to the Appellant’s Appendix which is the Committee’s “Response to Defendants’ Motion to Dismiss (January. 8, 2024 at pgs. 1-5). App.94a-99a The Appellant’s Appendix was a record filed by the Clerk of the District Court in the District Court on July 24, 2024 and this record was again filed in the Tenth Circuit by the Committee as the Appellant’s Appendix on December 13, 2024 by the Committee and that one was covered by the “Appellant’s Appendix”. It was 91 pages and not included in the Petition.

with additional, disputed facts, it could have filed a motion for summary judgment. App.147a-148a.

The Committee showed that the District Court relied on many facts in the County's motion to dismiss. This violates the facial attack rule whether those facts are true or not is irrelevant. Nonetheless, the Committee is motivated by the inequity of it all, the falsity of some of the County's allegations and just a worry that the falsity is disclosed.

None of the cases cited by the Committee have had a rule that true facts from the defendants' motion to dismiss (or other cases) and outside materials satisfy the facial attack standard. Petition at 13-15. The Tenth Circuit should have reversed the District Court's Order when it used facts from the County's motion to dismiss.

B. The County Misunderstands the Conclusion Rules of *Ashcroft v. Iqbal*, 556 U.S. 662, 678-9 (2009)

The Committee alleged in its Complaint that it had no remedy because it had no standing. App.46a The Committee argued this allegation in its Opening Brief. App.134a-137a The County in its Appellees' Brief argued that "because the alleged lack of remedy is not a factual assertion, but instead a legal conclusion", the District Court need not accept that the Committee had no remedies. App.168a The County then argued that "Even if the alleged lack of remedy were a factual assertion rather than a legal conclusion, the trial court would still have had no obligation to accept it as true, because in that case the Motion was not a facial attack on the complaint but rather a factual

attack.” This argument is without merit because it conflicts with the County’s facial attack rule. App.169a.

The County then argued that “If the lack of remedy is a factual assertion, those pages challenging it make the motion a factual attack”. App.169a This is a new theory that a plaintiff’s complaint allegation of a fact automatically changes a motion to dismiss from facial attack to factual attack. This argument is without merit.

The Tenth Circuit cited *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) which said “[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions”. The Tenth Circuit then stated that the Committee’s allegation that it had no TIA remedies was a conclusion. The Tenth Circuit also said, “As a result, the district court was not required to accept it as true”, citing *Iqbal* at 678³, and then said, “We therefore find no error in the district court’s analysis of the facial attack on the complaint . . . ”. App.12a-13a The District Court did not even raise the conclusion issue. It was the Tenth Circuit which made the argument based on the County’s Appellees’ Brief. What if the District Court had rejected the County’s conclusion argument and not put it in its Order? The Tenth Circuit should not do this.

The Tenth Circuit supported the County’s argument. App.12a It is clear in paragraph 6 of the com-

³ *Iqbal* at 678 also stated, “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.[citation omitted] Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement’.”

plaint that the Committee alleged that it would have no remedies in Colorado courts because of the no standing decision (¶ 50 of Complaint, App.62a) of the Colorado Supreme Court. App.46a Yet, the Tenth Circuit misread the *Iqbal* decision. In *Iqbal* at 669 this Court said:

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

It is clear that Committee's paragraph 6 in the complaint, if a conclusion, when integrated with the balance of the complaint, is a framework of a complaint and "must be supported by factual allegations. It is further clear that the Tenth Circuit's "conclusion" is far from being a "labels and conclusions", "naked assertions" "devoid of further factual enhancement".

The Tenth Circuit did not ask itself as to whether one's absence of standing deprived one of remedies. This issue was in the Committee's Opening Brief. App.131a-132a, 134a-137a The Tenth Circuit not only failed to analyze *Iqbal* as shown above, it did not determine whether the balance of allegations in the complaint showed that the Committee had no remedies in Colorado courts. Moreover, the existence of a conclusion in this case is not an exception from the

County's violation of the facial attack standard and its requirements without a review of the Committee's factual allegations and without any of the County's factual allegations.

C. The County's Claims That the Committee Is Obligated to Respond to Numerous Burdens Are Not Required and Unsupported by Any Law

The Committee is not obligated to do more than show the County and the District Court violated the facial attack standard. Yet, the County complained that the Committee, having raised the eight references used by the District Court, should have responded to the following phrases: (1) disputing them without explanation, (2) did not identify any of these allegations, (3) show prejudice from the District Court's usage of the allegations, (4) failed to accept allegations in its own complaint, (5) show inaccuracies in them, (6) most importantly show prejudice from the District Court's alleged error, (7) failed to present the eight references to the Tenth Circuit such that under those circumstances the Tenth Circuit's precedent is to routinely decline to consider arguments, (8) produce a list of the allegations in questions, (9) show any error was not harmless, and (10) failed to present issues in a way the Tenth Circuit could consider and rule on issues.

The Committee has responded to most of the above subjects. Many of them are false and most are not required nor supported by law.



CONCLUSION

Both the County and District Court accepted the facial attack standard and then decided to use factual allegations in the County's motion to dismiss in violation of the facial attack standard.

The County's effort to circumvent the facial attack rule is without any merit as shown above. The Committee has not forfeited or abandoned any of its rights. The Tenth Circuit erred in affirming the District Court's Order by an improperly applied legal conclusion. The Court should reverse the Order of the Tenth Circuit and reverse the Order of the District Court and tell these courts what to do next.

Respectfully submitted,

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