TABOR lawsuit case statement[1]

In May, 2011, a bipartisan coalition, including state legislators, local elected leaders, and education officials, filed a landmark lawsuit asking the United States District Court for Colorado to overturn Colorado's Taxpayer Bill of Rights amendment, known as TABOR. The principle argument of the complaint is that TABOR restructured state government in ways that violate the core principles of representative government guaranteed to every state under the U. S. Constitution.

The Framers of the Constitution included in Article IV Section 4 a guarantee that all the states, like the nation, would be *representative* democracies. That means government by elected representatives responsible to the people for making laws and handling budget matters. Under TABOR, Colorado is the *only* state where the authority of the legislature to make fundamental decisions about fiscal policy has been completely eliminated – crippled by TABOR requirements for a plebiscite on any revenue proposal.

Article IV, Section 4 of the U.S. Constitution, known as the "Guarantee Clause," provides that "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." The suit seeks to restore to the state legislature the responsibility and accountability required by the Guarantee Clause. The lawsuit also relies on requirements of the Colorado Statehood Enabling Act of 1875 in which Congress set the requirements for Colorado statehood. It included the requirement that the new State must establish and maintain a Republican Form of Government.

Budget analyses done by the Center for Colorado's Economic Future projects that within a decade the state will be unable to fund anything except education, Medicaid and prisons – *unless* it can raise revenue. (See www.du.edu/economicfuture.) That option is not available to the legislature under TABOR.

States from coast to coast have considered proposals modeled after TABOR, but rejected them because of the bad consequences they see for economic development and education. When Arizona's Republican Gov. Jan Brewer vetoed similar legislation in April, 2012, she cited TABOR as Colorado's "failed experiment."

The nominal defendant in the case is Governor John Hickenlooper. He is represented by Colorado Attorney General Cynthia Coffman. In August, 2011, the Attorney General filed a motion to dismiss the case, arguing that the plaintiffs do not have standing to bring the case and that the case raises issues that courts should refrain from deciding under what is called the "political question doctrine." The issues raised by the motion to dismiss were briefed by both sides, and U. S. District Judge William Martinez heard oral argument on the motion on February 15, 2012. Additional briefs were ordered and filed March 16, 2012.

On July 30, 2012, Judge Martinez issued an opinion and order denying the motion to dismiss on all but the plaintiffs' 14th Amendment Equal protection claim. The opinion found that the legislator plaintiffs do have standing, that the constitutional claims in the case are justiciable, and that the claim under the statehood Enabling Act invoked regular federal court jurisdiction to interpret and apply federal statutory law.

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[1] : All pleadings and court orders are posted on the case website: http://taborcase.org.

On August 10, 2012, the Attorney General filed a motion requesting Judge Martinez to certify the case for an "interlocutory" appeal to the U. S. Court of Appeals for the 10th Circuit under a provision of the United States Code (28 U.S.C. § 1292(b)). Plaintiffs' attorneys filed a brief opposing the motion on August 24, 2012. While appeals at this stage are treated as "exceptional," on September 21, 2012, Judge Martinez certified – i.e., granted his permission – for appeal under 1292(b).

Under the applicable procedure, the Attorney General on September 28, 2012, filed with the Court of Appeals a petition (and brief) asking the 10th Circuit to accept the case on appeal under 1292(b). Plaintiffs filed a brief opposing the petition on October 12, to which the Attorney General responded on October 19. On November 6, the "motions panel" of the 10th Circuit issued an order granting the petition.

On September 23, 2013, a three-judge panel of the 10th Circuit (Chief Judge Briscoe, Senior Judge Seymour and Judge Lucero) heard oral argument on the issues raised in the appeal. On March 7, 2014, the panel issued it opinion and judgment affirming the District Court's decision on the defendant's motion to dismiss and remanding the case to the District Court for further proceedings. In the meantime, the District Court case has been reassigned from Judge Martinez to Judge Raymond Moore.

On April 4, 2014, the Attorney General filed a petition requesting the full 10th Circuit bench to rehear the appeal "*en banc*." The plaintiffs field a response May 7, 2014, opposing an *en banc* rehearing. On July 22, 2014, the 10th Circuit announced that the petition for rehearing had been denied by a vote of six to four, with three dissenting opinions. The Attorney General then (July 25, 2014) filed a motion asking the 10th Circuit to issue a stay of further proceedings in the case while he prepared a petition to the U. S. Supreme Court for a *writ of certiorari* to review the 10th Circuit's decision. On July 28, 2014, the 10th Circuit granted a stay through October 20, 2014, to permit the petition for *certiorari* to be filed.

On October 17, 2014, the Attorney General filed a petition the Attorney General filed a petition for *certiorari* with the U. S. Supreme Court. The Supreme Court considered the petition at its Conference on January 9, 2015, but deferred action. On June 30, 2015, the Court issued an order known as a GVR (Grant, Vacate, Remand) by which it returned the case to the 10th Circuit to reconsider its prior ruling in light of the Court's decision in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. ___ (2015).

On July 1, 2015, a panel of the 10th Circuit issued an order for the parties and *amici* to submit briefs by July 31 (and responses by August 10, later extended to July 20, 2015) "addressing solely the issue of whether the Supreme Court's decision in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. ___ (2015)*, requires the panel to reconsider its holding." On November 12, 2015, the 10th Circuit scheduled oral argument on the pending issues for January 21, 2016.

After oral argument on January 21, 2016, the same three-judge panel of the 10th Circuit (Judge Briscoe, Senior Judge Seymour and Judge Lucero) took the matter under advisement. The panel issued an opinion on June 3, 2016, construing the decision in *Arizona State Legislature* as requiring the entire legislature to bring a case in order for there to be standing, and therefore denying standing to the legislator-plaintiffs in this case. The panel remanded the case to district court for

determination of other plaintiffs' standing. The plaintiffs' July 8, 2016, petition for rehearing was denied by the panel on July 19, 2016.

On remand to the U. S. District Court, Judge Raymond Moore held a status conference on August 23, 2016, and entered an order allowing an amended complaint to be filed by plaintiffs and a motion to dismiss that complaint to be filed by the defendant; a subsequent order limited the pending question to the standing of the plaintiffs. On October 3, 2016, and again on December 6, 2016, plaintiffs filed amended complaints, adding as plaintiffs eight boards of education, one county commission and one special district board. The defendant filed his motion to dismiss for lack of standing on December 16, 2016; briefing in support of and in opposition to the motion was completed March 7, 2017.

On May 4, 2017, Judge Moore issued an opinion and order granting the defendant's motion to dismiss. Plaintiffs have filed a Notice of Appeal, and their opening brief on appeal to the 10th Circuit is due August 28, 2017. Briefing on appeal to the 10th Circuit was completed in January, 2018, and the case was argued May 15, 2018, to a panel consisting of Circuit Judges Briscoe, Seymour and Holmes.

On Jul 22, 2019, a panel of the 10th Circuit issued a majority opinion by Judge Seymour, determining the plaintiff governmental entities have standing, reversing and remanding the case to the District Court; Judge Holmes dissenting. Due to the change in the office of Governor after the 2018 election, the case was recaptioned *Kerr v. Polis*.

The case is being litigated on a pro bono basis by a team of lawyers from the law firms: Dentons US LLP (lawyers formerly with McKenna Long & Aldridge LLP, which merged with Dentons July 1, 2015); Brownstein Hyatt Farber Schreck LLP; Covington & Burling LLP; and John Herrick, private practitioner.