

10th Circuit Set to Hear Constitutional TABOR Challenge

Hearings scheduled for May range from TABOR to excessive force

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The 10th Circuit Court of Appeals is preparing to hear oral arguments in May for cases ranging from constitutional challenges on Colorado's Taxpayer Bill of Rights and a jury's conclusion in a case dealing with qualified immunity.

One of the most noteworthy cases for Colorado is *Kerr v. Polis*, which has gone up and down through the state and federal courts for a decade. The crux of the case deals with the question of whether the creation of TABOR was in violation of state and federal constitutional requirements to provide a "republican form of government."

KERR V. POLIS

Originally *Kerr v. Hickenlooper*, the suit was filed in federal district court in 2011 by former Sen. Andy Kerr. The plaintiffs in the case, which now include eight boards of education, a set of county commissioners, a special district board, current and past state legislators, public officials and private citizens.

TABOR, a 1992 amendment to the state constitution, removed from all levels of Colorado state government the ability to enact tax legislation, instead requiring any new tax measures to go to a vote of the people. TABOR also requires refunds of tax revenues that exceed an annually adjusted cap on state spending unless voters approve keeping the excess. This in turn also limits or eliminates essential fiscal powers of the state general assembly and political subdivisions.

The plaintiffs claim that TABOR has "fundamentally undermined the ability of Colorado's representative democracy

to function. As a result, the state no longer has a 'republican form of government.'" But the U.S. Constitution guarantees all states a republican form of government, which is also required in the state constitution. "TABOR thus violates Article IV, section 4, and the requirements of the Statehood Act, and should be invalidated by the court," according to the plaintiffs.

Different aspects of the case have been discussed by the courts several times, but the 10th Circuit is now prepared to resolve questions about constitutional requirements.

After the case was first filed, then-Attorney General John Suthers said the plaintiffs didn't have standing before the court over TABOR, and the challenge to TABOR was a political question — not one for the courts.

A district court ruling in 2012 rejected the AG's position, finding that standing members of the state General Assembly had a right to bring the action, and allowed the case to move forward. In 2014, the state appealed to the 10th Circuit, which ruled that the case was indeed justiciable. However, the 10th Circuit denied a petition for rehearing en banc in July of that year and ruled the original plaintiffs in the case didn't have standing.

By 2016, the suit had gone through the Colorado Supreme Court and back to the 10th Circuit, where the appellate court sent it back down to district court to determine if the other plaintiffs in the case had standing. Other plaintiffs were added, including several school districts and county commissioners, according to Ballotpedia. The district court dismissed the case saying the additional plaintiffs lacked standing.

In 2019, the 10th Circuit ruled 2-1 to

reverse the district's dismissal of the suit saying the plaintiffs did have standing and remanded the case back to the district for further consideration. Then, in October of last year, the 10th Circuit agreed to review the legal challenge against TABOR.

NOSEWICZ V. JANOSKO

Qualified immunity, a topic of interest around the country in cases regarding law enforcement accountability, plays a small role in the case *Nosewicz v. Janosko*. Jeffrey Janosko, a deputy in the Adams County Detention Facility, and Edward Nosewicz got into a physical altercation in a jail pod, which led to Nosewicz sustaining injuries.

According to September 2020 order from Colorado district court, Nosewicz had been arrested the night before the 2014 incident and was held in an intake pod. He became "irate," and Janosko entered the cell to move him to a different location.

Janosko stated in court that as he attempted to move Nosewicz from the cell, Nosewicz began to pull his arm away and turn to Janosko. As a result, Janosko used "an arm-bar takedown to bring Nosewicz to the ground." Janosko consistently stated in court that Nosewicz didn't ball up his fists or take a step toward him before the takedown. However, a superior officer in the jail testified that Janosko had reported to his superior that before the altercation, Nosewicz was agitated, raised his voice, started yelling and screaming, balled up his fists and stepped toward the deputy.

Nosewicz filed a suit in 2016, claiming that Janosko used excessive force and deliberate indifference to his medical needs. In an incident report that be-

came significant in discovery, nothing was mentioned about Nosewicz making actions such as balling up his fists or taking a step toward Janosko before the deputy forced him to the floor. Instead, the report stated, Nosewicz pulled his arms away and tried to turn and face the deputy before being forced to the floor. When he was deposed, Janosko testified consistently with the report.

The court granted summary judgment to Janosko on both claims against him on the basis of qualified immunity, but, on the case's prior trip to the 10th Circuit, the higher court reversed the district court's decision on the excessive force claim, concluding there was a disputed fact as to whether Nosewicz had "actively resisted" Janosko's use of force, according to the order. This was stated in an unpublished opinion of the court.

On remand, a jury unanimously found in favor of Janosko on the excessive force claim. But then, in November 2019, Nosewicz moved for a new trial, amending his motion several days later, based on the discrepancy between Janosko's testimony and his superior.

Nosewicz contends that at least some of the testimony was "false and/or perjured" and seeks a new trial on that basis.

However, the district court found that Nosewicz's motion failed all prongs of the test for a new trial. The order states that Nosewicz provided no additional evidence explaining why the contradictory testimony was proof of deliberately being false by either officer. The court was also unsure a jury would've given a different verdict based on a false testimony, and Nosewicz failed to show that the testimony was allegedly falsified. •

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