

## Colorado: United States Supreme Court decision precludes progression of legislator-plaintiffs' lawsuit after all



David M. Kall | Thursday, June 16, 2016

### Background

Standing, a procedurally important doctrine that requires a plaintiff to have a concrete injury, caused by the defendant, for which the court can provide relief, is one factor in determining whether a lawsuit can proceed on its merits. The U.S. Court of Appeals for the Tenth Circuit recently considered standing in its second look at the case *Kerr, et al. v. Hickenlooper* (Hickenlooper II), made necessary by the United States Supreme Court's June 29, 2015 holding in *Arizona State Legislature v. Arizona Independent Redistricting Commissioning* (Arizona).

### Kerr v. Hickenlooper, 2014

In its [first look](#) (Hickenlooper I), released on March 7, 2014, the Tenth Circuit identified its job as determining not the merits of the case, but “whether these plaintiffs have suffered a particularized injury not widely shared by the general populace that entitles them to have their case heard by the federal courts....” The court concluded that the plaintiffs could bring their claims.

The plaintiffs were current and former government officials in Colorado, parents of school-aged children, and educators. They challenged Colorado's Taxpayer Bill of Rights, or TABOR, as set forth in section 20 of the state [Constitution](#), contending that it violates the clause of the United State Constitution that guarantees a republican form of government, among other things. TABOR requires voter approval in

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advance of any new tax, tax increase or other measure that has the effect of “causing a new tax revenue gain.”

The language of the provision at issue reads as follows:

(4) Required elections. Starting November 4, 1992, districts must have voter approval in advance for:

(a) [...]any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district.

”

(b) Except for refinancing district bonded debt at a lower interest rate or adding new employees to existing district pension plans, creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years.

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The crux of the legislator-plaintiffs’ suit was that TABOR limits the revenue-raising power of state and local governments. They argued that TABOR deprives them of their ability to perform the legislative core functions of taxation and appropriation, while also taking away the General Assembly’s taxing power.

Before any court could reach that question, it had to address Governor Hickenlooper’s motion to dismiss, lodged in part on the grounds that the plaintiffs lacked standing to bring the case in the first place.

The district court agreed with the legislator-plaintiffs that they did have standing. This led to an appeal, and the Hickenlooper I decision affirming that holding.

### **Kerr v. Hickenlooper, 2016**

After Hickenlooper I, the United States Supreme Court decided *Arizona State Legislature v. Independent Redistricting Commission*, a case that the *Hickenlooper II* court described as germane because it confronted many of the same standing issues that existed in *Hickenlooper I*. In *Arizona*, the Supreme Court concluded that the Arizona State Legislature, the plaintiffs in the case, did not need to identify a specific legislative act that was unable to take effect because of the challenged initiative, Proposition 106 (Prop 106). Prop 106 was an amendment to Arizona’s Constitution designed to solve the problem of gerrymandering by removing redistricting authority from the Arizona Legislature and vesting it in an independent commission.

Adhering to the *Arizona* holding, the *Hickenlooper II* court considered the threshold question of whether the legislator-plaintiffs asserted an institutional injury. This mattered, the court reasoned, because an alleged diminution of legislative power is an institutional rather than an individual injury, because it does not “zero in on any individual [m]ember” of the legislature. Instead, an institutional injury is widely disbursed, and impacts all members equally. Under *Arizona*, “individual legislators may not support standing by alleging only an institutional injury.”

Acknowledging that *Arizona* had “materially altered the law on legislature standing,” the *Hickenlooper II* court ultimately justified its conclusion by pointing out that the legislator-plaintiffs had brought their suit in their individual capacities, not as representatives for the General Assembly.

### **Next steps**

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As a result of institutional nature of the injury they alleged, the legislator-plaintiffs, as individuals, lacked the requisite standing. The Tenth Circuit vacated the district's order, and remanded for a determination with respect to the non-legislator-plaintiffs. Should the outcome of that inquiry be that they, too, lack standing, the remaining issue invoking the political question doctrine, whether the matter is purely political and so not resolvable by the courts, will be moot.

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