

Colo. Asks Full 10th Circuit To Rehear Taxpayer Rights Case

By **Matthew Nesto**

Law360 (September 5, 2019, 8:42 PM EDT) -- Colorado's attorney general has asked the full Tenth Circuit to reconsider a July decision that allowed a group of lawmakers and local governments to proceed with a lawsuit seeking to dismantle the state Taxpayer's Bill of Rights.

Attorney General Phil Weiser filed a petition Wednesday for rehearing en banc by the federal appeals court in Denver, instead of the three-judge panel that reversed a district court decision in July and remanded the case to the district court. His filing was an attempt to extend the procedural debate over venue and standing in a case that has bounced between state and federal courts since 2011.

At stake is a 1992 constitutional amendment that prevents the legislature and other local governing bodies from raising or enacting new taxes without the popular vote backing of the public. The Taxpayer's Bill of Rights, known as the TABOR amendment, also requires the state and local governments to refund taxpayers any revenue appropriated in excess of the prior year's spending.

More than a dozen plaintiffs have long argued that the TABOR amendment usurps the guarantee clause of the U.S. Constitution and nullifies one of the most important tenets of elective government. In prior court filings, plaintiffs have also argued the TABOR amendment amounts to a substantial interference with the Colorado General Assembly's taxing power, rendering it unable to fulfill its legislative obligations.

Democratic Gov. Jared Polis and the attorney general disagree.

"Until this ruling [by the Tenth Circuit in July], the courts have consistently ruled that federal courts are not the proper place for school boards, special districts and county commissions to resolve disagreements with their parent state over state policy," Weiser said in a statement released alongside the petition for rehearing he filed on Polis' behalf.

In that filing, Weiser said that the concerns raised by the various political subdivisions were better addressed at the ballot box, rather than a federal courtroom, and that a rehearing by the full court is necessary to maintain uniformity and consistency with the Tenth Circuit's decisions.

Attorneys representing the plaintiffs said they were disappointed by the latest legal maneuvering, but not surprised.

“The AG has used every possible procedural device to delay reaching a decision on the merits of this case,” said Michael Feeley, of Brownstein Hyatt Farber Schreck LLP. “We are in year nine of this case and still arguing preliminary motions.” He called the TABOR dispute a legitimate question that Colorado needs to resolve.

Feeley also said the rules clearly disfavor en banc review, and was hopeful a string of recent successes in the long-running quest to topple TABOR would continue. Those include the July reversal by the Tenth Circuit panel, as well as a June decision by the state's Supreme Court that overturned the secretary of state's opinion that a related referendum initiative to repeal TABOR was void because it addressed more than one subject.

Polis' office said it did not comment on pending litigation.

Weiser's office said it had nothing more to say about the case.

A case manager in the Tenth Circuit clerk's office could not say when justices might address the new petition, saying only that the court could either grant or deny rehearing en banc but would answer the request either way.

The political subdivisions are represented by David E. Skaggs of Dentons, Herbert Lawrence Fenster and Shannon Tucker of Covington & Burling LLP, Michael F. Feeley, Sarah M. Clark, Carrie E. Johnson and Cole J. Woodward of Brownstein Hyatt Farber Schreck LLP and John A. Herrick.

Gov. Jared Polis is represented by Megan Paris Rundlet, Kathleen Spalding and Stephanie Lindquist Scoville of the Colorado Attorney General's Office.

The case is Andy Kerr et al. v. Jared Polis, case number 17-1192, in the U.S. Court of Appeals for the Tenth Circuit.

--Editing by John Oudens.