

# THE DENVER POST

## **The Supreme Court is considering a challenge to Colorado's TABOR law**

By Mark K. Matthews  
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If Colorado politics were like daytime TV, then the state's controversial TABOR law would be its longest-running soap opera.

Few issues can match the drama — and staying power — of the 1992 measure, which has survived repeated attempts to dismantle its requirement that lawmakers get permission from voters before raising taxes.

Now, though, the so-called Taxpayer's Bill of Rights is getting a shot at prime time. As soon as Monday, the U.S. Supreme Court is expected to decide the fate of a lawsuit against TABOR.

The court's decision, say activists involved in the case, will have huge implications — not just for Colorado and its budget, but also for the ability of all states to run their governments as they see fit.

"The People of Colorado have chosen to maintain a direct voice in the state's tax policy and overall level of appropriations. Plaintiffs here challenge that choice and ask the federal courts to undo it," wrote attorneys for the state in their filings with the high court.

"Whether the federal judiciary can interfere in this sort of intrastate governance dispute is of fundamental importance," they added.

At the heart of the case is an unusual legal question that is — depending on the observer — either a novel approach to the law or a "too cute" reading of the U.S. Constitution.

Plaintiffs in the anti-TABOR lawsuit, who include state Sen. Andy Kerr and House Speaker Dickey Lee Hullinghorst, have made the argument that the law robs state legislators and local government officials of their "authority to tax."

They contend that TABOR's requirement that all tax increases get the approval of Colorado voters is a violation of the constitutional mandate that each state have a "republican" form of government — i.e., one in which elected officials make decisions instead the masses.

By forcing the legislature to get permission through a statewide ballot question each time it wants to raise taxes, Colorado's government is no longer republican, they argue. Instead, it's a direct democracy.

"Colorado is the *only* state in the history of the Republic to strip its state and local elected officials of the power to tax and so limit their ability to spend," wrote the plaintiffs in their filing to the high court.

While odd, even opponents admit the plaintiffs' strategy has been successful so far.

Focusing on the "republican" angle is not an argument that "comes up too often" — at least not with "serious plaintiffs," said Ilya Shapiro of the Cato Institute, one of several outside groups to file briefs last year in opposition to the plaintiffs.

"The fact that it is a serious (question) with good lawyers on both sides, and that (the lawsuit) has gone this far, is notable in itself," he said.

### **Taking it to court**

First filed in 2011, the lawsuit got a major break last year when the 10th U.S. Circuit Court of Appeals ruled the plaintiffs had the right to take legal action. That was a setback for Colorado officials and Gov. John Hickenlooper, who wanted the court to kill the lawsuit on the grounds that U.S. courts generally have steered clear of these types of political questions.

If the lower-court ruling stands, the state has argued, Colorado "will be the first state in the country to be required to prove, to a federal judge's satisfaction, that it is adequately republican."

Now, Colorado is asking the Supreme Court to weigh in on that question — whether the courts should even intervene in this dispute — and the high court's response will go a long way in determining the future of the lawsuit.

On Friday, the justices were scheduled to consider the Colorado case, and an answer could come as soon as this week.

State officials are hoping the high court agrees to hear that line of attack — as it would give them another shot at killing the lawsuit. If the Supreme Court declines, however, the plaintiffs are in a strong position to move ahead with their anti-TABOR lawsuit.

Either way, a final decision will have a big impact on Colorado, as the TABOR restrictions have been a part of state canon for so long that any change would upend the way the budget works.

At the start of Colorado's legislative session last week, lawmakers already were arguing about what to do with money tied to TABOR.

In addition to its restriction on new taxes, the law also puts a cap on revenue raised by the state. If Colorado collects taxes above the TABOR limit, the state must either refund the money to residents or ask them for permission to spend it.

As much as \$200 million [could be on the line this year](#), and lawmakers are divided on whether to return the money or spend it on programs such as education.

Hickenlooper [said last month](#) that he supports a refund, but lamented the formula that allows TABOR to put a bind on Colorado's budget.

"I'm not saying we should get rid of TABOR," he said. "I think people should have the right to vote. But they need to have the facts. Inflation plus population growth doesn't solve all the fiscal challenges we need."