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# Standing Requirements in Federal Court

**The majority opinion in 'Kerr v. Polis' provided clarity on two issues regarding standing.**

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Few legal doctrines confound federal courts and litigants more than those governing the issue of standing. One of the requirements to bring a claim in federal court is the establishment of Article III standing—that is, a would-be plaintiff must establish at the outset of a case that he or she has suffered (or imminently will suffer) a concrete, particularized “injury in fact” to a legally protected interest, that the injury is fairly traceable to the defendant’s challenged action, and that a favorable judgment would likely redress the injury.

Yet even if a plaintiff satisfies these criteria, other standing doctrines may still prevent a federal court from hearing his or her case. Among these are the doctrines of prudential standing and political subdivision standing. The U.S. Court of Appeals for Tenth Circuit recently addressed both of these doctrines in a case the court has now heard three times on issues of standing—and likely will again.

The case, *Kerr v. Polis*, 930 F.3d 1190 (10th Cir. 2019), considered a constitutional challenge to Colorado’s Taxpayer’s Bill of Rights, commonly known as TABOR. Adopted by Colorado voters in 1992, TABOR restricts state and local governments from levying new taxes or increasing tax rates without voter approval. TABOR has sparked heated debate over the years with strong voices on both sides, and opponents have repeatedly looked to the judiciary for resolution.

The plaintiffs in *Kerr*, which was originally filed back in 2011, seek to challenge TABOR on the theory that its delegation of taxing authority to the voters denies them a “republican form of government” in violation of the Guarantee Clause (article IV, §4 of the U.S. Constitution) and the Enabling Act of 1875, which granted Colorado statehood. The case was initially brought primarily by several state legislators; but after a series of prior decisions established the legislators’ lack of standing to assert an institutional injury, new plaintiffs were added, including several school boards, a county board of commissioners, and a special district board.

Following amendment of the complaint to include these new plaintiffs, the state defendants again sought dismissal for lack of standing. The district court agreed, concluding that while these new plaintiffs had Article III standing, they lacked prudential standing and political subdivision standing. The Tenth Circuit disagreed on both counts.

## Prudential Standing

Prudential standing requires plaintiffs to raise claims based on individual, as opposed to generalized grievances. This doctrine, unlike Article III standing, is based on prudential rather than constitutional constraints. It embodies the federal judiciary's self-imposed limits on the exercise of its jurisdiction, so as to avoid judicial intervention on abstract questions of public significance that might be more competently addressed by other governmental institutions. Thus, for instance, the doctrine commands that a party cannot raise another person's legal rights, cannot adjudicate generalized grievances that could more appropriately be addressed by the representative branches of government, and cannot raise claims falling outside the "zone of interests" protected by the law providing the plaintiff's right of action.

On this issue, the Tenth Circuit noted that under more recent Supreme Court precedent the label "prudential standing" is "misleading" and "inapt." Indeed, that precedent suggests that some of the limitations that have been applied under the label of "prudential standing" (like the zone of interests test) are not standing limitations so much as requirements that a plaintiff state a claim under the statute invoked.

But rather than weighing in any further on these issues or their application to the *Kerr* case, the Tenth Circuit summarily determined that under its own precedent prudential standing was not a jurisdictional limitation. Thus, without further analysis, the court held that the complaint should not have been dismissed on a Rule 12(b)(1) motion for lack of subject matter jurisdiction on the basis of prudential standing. Any further analysis of these issues will therefore have to wait.

## Political Subdivision Standing

Political subdivision standing allows local governments to sue their creating state under a limited set of circumstances. What those precise circumstances are, though, is unclear.

The plaintiffs in *Kerr* argued, based on circuit precedent, that standing exists when the federal provision a political subdivision seeks to vindicate is intended to protect individual rights as opposed to collective or structural rights. The government, as well as the district court and the dissenting Tenth Circuit judge, urged that standing requires that the federal provision be directed at protecting political subdivisions.

The Tenth Circuit majority considered but ultimately punted on this issue, determining that under either test the claims should go forward. If the plaintiffs' theory were correct, then they certainly had standing because the "republican form of government" clause is intended to protect individual rights. And if the government's theory were correct, the question of whether this clause was intended to protect political subdivisions was too intertwined with the merits of the case to resolve on a motion to dismiss.

As the majority opinion authored by Judge Seymour reasoned, "Establishing who was intended to benefit from the Enabling Act's

'republican in form' requirement necessarily begs the question of what a 'Republican Form of Government' is, which is the issue ultimately to be resolved if any court ever succeeds in reaching the merits of this case." In other words, the majority concluded that under the circumstances of this case, it was impossible to analyze the standing issue without reaching the merits of the plaintiffs' challenges to TABOR—something the court couldn't do on a motion to dismiss. Accordingly, the court reversed the dismissal of the plaintiffs' claims.

Judge Holmes dissented from the majority's decision on this issue, explaining that he would have required the plaintiffs to show "as part of a *threshold jurisdictional standing* inquiry ... that [they] seek[] enforcement of a federal statute directed at protecting or specifically providing rights to political subdivisions like [them]," irrespective of whether such an inquiry might at times resemble an analysis of the merits.

### What's Next

Despite Judge Holmes' criticisms, the majority opinion in *Kerr* provided clarity on two issues regarding standing. First, it definitely resolved the question of whether prudential standing is a jurisdictional limitation in the Tenth Circuit (it isn't). Second, it expanded the ability of political subdivisions—and plaintiffs more generally—to bring federal claims challenging state action. Plaintiffs in other cases will now surely argue that their claims similarly "present[] a rare instance in which the standing issue is intertwined and inseparable from the merits of the underlying claim." But *Kerr* did little to clarify the uncertainties surrounding the scope of either prudential standing or political subdivision standing. Those uncertainties will have to remain for another day.

The *Kerr* case itself is far from over. The defendants have indicated a likelihood of seeking rehearing en banc, and could seek further review by the Supreme Court. If the Tenth Circuit's decision stands, no doubt the defendants will continue to raise these same standing limitations as the case proceeds. And the plaintiffs ultimately might not be able to establish standing. There is little legal guidance on the Guarantee Clause and the Enabling Act, and even less in the context of political subdivisions like the plaintiffs. It was this legal "uncertainty," in part, that the majority looked to in holding that "[b]ecause these political subdivision plaintiffs have Article III standing and cannot be *irrefutably* barred by alternative standing doctrines, the district court should not have dismissed the complaint for a lack of subject matter jurisdiction." Thus, while the Tenth Circuit's decision has revived their claims for now, the plaintiffs' victory may yet be short-lived.

Yet an upcoming ballot initiative could also provide some relief to the plaintiffs. Next year, Colorado voters will decide the fate of Initiative 2019-2020 #3, which—if passed—would repeal TABOR. If voters approve Initiative #3 and repeal TABOR, *Kerr* will become moot. But the complex issues of standing it raises will be far from resolved.

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