Supreme Court, State of Colorado Colorado State Judicial Building 2 East 14th Avenue, Suite 400 Denver, CO 80203	FILED IN THE SUPREME COURT AUG 19 2009 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2009) Appeal from the Ballot Title Setting Board IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2009-2010 #22	
Petitioner: PHILIP HAYES **Respondents:** HITESH PATEL and GAIL LINDLEY And **Title Board**: WILLIAM A. HOBBS and DAN CARTIN	**▲COURT USE ONLY▲**
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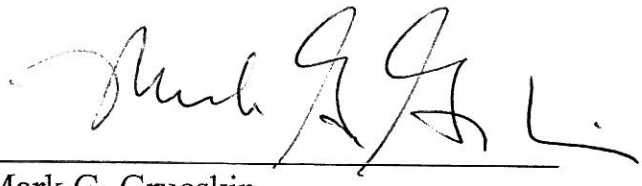
PETITIONER'S ANSWER BRIEF **(Proposed Initiative 2009-2010 #22)**	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 2,950 words. Further, the undersigned certifies that the brief complies with C.A.R. 28(k). It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.



Mark G. Grueskin

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Petitioner Philip Hayes (hereafter "Petitioner"), a registered elector of the State of Colorado, hereby submits his Answer Brief as follows:

LEGAL ARGUMENT

A. Standard of Review for Review of Single Subject Challenges

Proponents advance a test for single subject adherence that has nothing to do with the clear and usable standard established by this Court under Colorado law: whether an initiative has distinct and separate purposes that are not dependent upon or necessarily connected to one another. Instead, Proponents suggest that the Arizona Supreme Court has a better approach, namely, an evaluation of whether provisions are "topically related and sufficiently interrelated." Respondents' Opening Brief at 10, *citing Arizona Together v. Brewer*, 149 P.3d 742, 746 (Ariz. 2007).

Arizona law is not analogous to Colorado law on this subject. Arizona treats the single subjects of legislation and initiatives very differently. Because of the very distinctive wording that applies to the subjects of Arizona ballot measures,[1] initiatives in that state must meet a "stricter" test for single subject compliance than

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[1] "If more than one proposed amendment shall be submitted at any election, such proposed amendments shall be submitted in such manner that the electors may vote for or against any such measure separately." Ariz. Const., art. XXI, sec. 1.

is required of legislation. *Clean Elections Inst., Inc. v. Brewer*, 99 P.3d 570, 572-573 (Ariz. 2004).

In contrast, Colorado law expressly subjects these two forms of law-making to precisely the same standard. The commonality of that standard has been embraced by the General Assembly, C.R.S. § 1-40-106.5(e)(3), as well as by this Court. *In the Matter of Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 441 (Colo. 2002). There are not two different tests in Colorado, and this Court should not now change the direction of single subject law, based solely on the Arizona Constitution.

B. This measure addresses separate subjects.

Hayes argued before the Title Board and to this Court that the measure applies the right to a secret ballot to every election that is sanctioned by state law in providing, "The right of individuals to vote by secret ballot is fundamental." Proposed Colo. Const., art. XVIII, § 16(1).

The Proponents seemed to concede this point. They acknowledge that their measure does, in fact, apply to all elections held in the state. "Specifically, the challenge states that the initiative establishes a 'right to a secret ballot.' This is a single subject.... As a matter of logic, 'all other elections' and 'employee representation elections' are both 'elections' in which one has a right to vote."

Respondents' Opening Brief at 12-13. Because any exercise of any right to vote would be subject to a secret ballot mandate, all elections can be conducted only if they adhere to this across-the-board secret balloting requirement. The array of Colorado elections is diverse and includes those that occur within the General Assembly for purposes of determining legislative leadership, C.R.S. § 2-2-302, within nonprofit groups to elect members of boards of directors, C.R.S. § 7-22-105(1)(a), and within a homeowners association in order to elect the organization's leaders, C.R.S. § 38-33.3-310(a), to name just a few. This spectrum is so broad as to trigger the very concerns that were the basis for the single subject requirement in the first place: forcing voters to weigh one policy objective in an initiative that they support against another one that they oppose, and concealing elements of the a measure from public view which results in fraud (or at least surprise) for voters. C.R.S. § 1-40-106.5(e).

In another part of their brief, Proponents contend that the measure specifically affects employee representation elections. Respondents' Opening Brief at 13-14. Proponents note that existing law already requires secrecy of ballots for one category of elections – candidate/ballot issue elections. Colo. Const., art. VII § 8. They do not, however, respond to the concern that various other types of elections would be subject to this newly created authority for secret ballots.

The Title Board does not take the position that all elections are affected by this measure. Instead, the Board argues that the measure applies only to employee representation elections. Title Board's Opening Brief at 6-7. Yet, this Court has been clear: it is the "actual wording" and the "plain language" of the measure that establishes the proponents' meaning and intent and thus also governs this Court's inquiry. *In the Matter of Title, Ballot Title and Submission Clause for 2005-2006 #75*, 138 P.3d 267, 272 (Colo. 2006) (verbal statement of proponents could not contradict the specific text of the measure for purposes of establishing an appropriate ballot title). Here, the language extending the fundamental right to a secret ballot is unqualified. But in light of the significant numbers of public and private elections conducted in Colorado, this measure is clearly not limited to considerations (i.e., elections) that have a "necessary or proper connection" with one another. C.R.S. § 1-40-106.5(e)(1), (2).

Therefore, the Board erred, and this multi-subject initiative should be returned to the Proponents to be more narrowly worded.

C. Timeliness of claim that title set is inaccurate, misleading, and confusing.

Proponents argue that any issue not raised in the written motion for rehearing, filed with the Title Board, cannot be raised at the rehearing or before

this Court, even if the point was advanced orally at hearing. Respondents' Opening Brief at 23-24.

This suggestion is inconsistent with Colorado case law on the subject. For many years, objectors to ballot titles could raise in proceedings before this Court any issue – even those that were never raised before the Board. However, in 2000, the Court curtailed that practice and required objections before the Board so the Board could correct its mistakes and develop the best title possible. The Court did not require that the issue be addressed in writing – only that it be raised by objectors "**either** in their motion for rehearing **or** at the rehearing before the Board." *In the Matter of Title, Ballot Title & Submission Clause for Initiative 1999-2000 #265*, 3 P.3d 1210, 1216 (Colo. 2000) (emphasis added). Proponents do not question that this matter was raised at the rehearing, and therefore, cannot claim that this Court is divested of the jurisdiction to consider this issue.

Proponents' position would mean that an objector – or any other interested citizen – could not object to changes that the Board makes on its own motion or in response to the proponents' own concerns. The statutory process was never intended to limit review of the Board's handiwork in this manner. The Board's process is more like a legislative committee, debating a public policy issue after

taking public testimony, than it is a process to which strict pleading requirements apply.

> The public meeting [of the Title Board] is not an adversarial proceeding designed to adjudicate the legal rights or duties of specific individuals vis-a-vis other parties through the application of legal norms to past or present facts developed through sworn testimony and other evidence. Nor is the Board acting as an administrative agency functioning in a rulemaking proceeding. The public meeting is akin to a public forum in which interested persons can present their views on a proposed measure for the purpose of enhancing the accuracy, clarity, and impartiality of the text ultimately selected by the Board for the title, ballot title and submission clause, and summary. Far from being designed either to further the adjudication of legal rights and duties or to implement a rulemaking function, the statutory provisions of sections 1-40-101 and -102, 1B C.R.S. (1991 Supp.), create a specific process and distinctive procedures applicable only to the unique functions of the Board.

In the Matter of Title, Ballot Title & Submission Clause Pertaining to Proposed Initiative Entitled W.A.T.E.R., 831 P.2d 1301, 1306 (Colo. 1992). The Board is not treated as an administrative agency but operates under its own "specific process and distinctive procedures," *id.*, and that process and those procedures do not require all arguments raised on appeal to have been raised in writing before the Title Board. June 17 Tr., 28:8-12. Therefore, this Court may consider all arguments raised in Hayes' Opening Brief.

Notably, the Title Board does not argue that the arguments made here are defective because of the breadth of Hayes' motion for rehearing. If the proceedings

below did not offend the Board in depriving it of the ability to correct its mistakes, the Court should not yield to the proponents' concerns in this regard.

D. The title set is inaccurate, misleading, and confusing.

1. The title fails to state that a fundamental right to a secret ballot in employee representation elections is created by this initiative.

This ballot title refers to the right to a secret ballot in employee representation elections and states, specifically, that this initiative guarantees the fundamental right to vote by secret ballot in such elections. It does not alert voters to the fact that this ballot measure also **creates** this fundamental right.

The Title Board's mission is clear. The Board must "correctly and fairly" reflect "the true intent and meaning" of the measure. In doing so, it must avoid "the public confusion that might be caused by misleading titles." C.R.S. § 1-40-106(3)(b).

Even the Proponents agree that the thrust of this measure is the establishment of this new fundamental right to a secret ballot. Respondents' Opening Brief at 6.[2] Yet, the title does not state this fact, and it is no defense that

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[2] The Title Board maintains that existing law provides an "essential right" to voting by secret ballot in employee representation elections, which is the functional equivalent to a "fundamental right." *See* Title Board's Opening Brief at 11. No court has equated the two, and such a finding is most likely beyond the limited analysis permitted in reviewing the adequacy of an initiative's ballot title.

the word "create" or "establish" is not used in the measure itself. A ballot title does not reflect a clear, concise summary of an initiative where it "fails to convey the fact that the Initiative **creates** numerous fundamental rights." *In the Matter of Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colorado Adding Section 2 to Article VII (Petition Procedures),* 900 P.2d 104, 109 (Colo. 1995) (emphasis added).

As it is the Board's obligation to provide voters with a comprehensible title, the Board can use clarifying language to ensure that the true intent and meaning of the measure are apparent. In the case of *In the Matter of Title, Ballot Title & Submission Clause for Proposed Initiated Constitutional Amendment Concerning "Fair Fishing,"* 877 P.2d 1355, 1361 (Colo. 1994), the Board employed its own wording, outside of the text of the initiative, which provided "sufficient clarity to apprise the electorate that the amendment would create an exception to the law of trespass" in non-navigable streams. Where such ballot title wording utilizes plain language for voters to evaluate, the "specificity… added by the clarification" is appropriate to the Board's mission of setting understandable titles. *Id.* It is the mission of the Title Board, after all, to set ballot titles that "**unambiguously** state the principle of the provision to be added." C.R.S. § 1-40-106(3)(b) (emphasis

added). Because it did not clarify that this fundamental right is created by this initiative, the Board did not meet that test.

Proponents suggest that the Title Board has not used "create" in past titles and point to *In the Matter of the Title, Ballot Title and Submission Clause for 2007-2008 #62*, 184 P.3d 52 (Colo. 2008) regarding a just cause standard for discharge or suspension from employment. But the adequacy of the ballot title there was not contested on this ground, and thus, the Court's did not decide that the statement of the measure's subject was sufficient for this purpose. The word "establishing" is an element of a ballot title that clearly and fairly describes a new parameter of the law. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #62*, 961 P.2d 1077, 1083 (Colo. 1998).

Proponents also suggest that there are no grounds for using the implications or inferences left by the title as the basis for this challenge. Respondents' Brief at 26-27. In fact, the Court has used precisely this reasoning in invalidating earlier titles. For instance, where "voters could **assume** that parents of non-English speaking students will have a meaningful choice between an English immersion program and a bilingual program, and, thus, favor the proposal as assuring both programs," the effect was the voter confusion that the law prohibits. *In the Matter of the Title, Ballot Title and Submission Clause for Initiative 1999-2000 #258(A)*, 4

P.3d, 1094, 1100 (Colo. 2000) (emphasis added). As such, the title set by the Board was invalid.

Here, the Proponents admitted that their measure "certainly establishes this right" to a secret ballot. June 17 Tr., 24:24-25. More importantly, the Board knew that it was not communicating to voters that this fundamental right was created by the initiative. *Id.* at 40:10-23. Yet, the Board did nothing to add just one word that would address this problem. In fact, it insisted upon using the term "guaranteeing," which implies that the fundamental right exists but the exercise of which is not assured. That was error, and the Board's decision should be reversed.

2. The title is misleading in informing voters that the new fundamental right would be "guaranteed."

Both the Proponents and the Title Board argue that the term "guarantee," as used in conjunction with a fundamental right, is a well-understood legal term, one that is comprehended and often interpreted by the courts. Respondents' Opening Brief at 29 ("the Proposed Initiative uses the term 'guarantee" in the same way courts have described constitutional protections for many years"); Title Board's Opening Brief ("A right which is guaranteed is not necessarily inviolate or absolute. Colorado courts have not interpreted the word 'guarantee' in a manner suggested by Objector"). Assuming that to be so, their point is irrelevant in determining whether the Title Board achieved its primary objective.

Ballot titles should not meet the interpretative demands of a law professor. They are written, instead, to provide a brief but meaningful glimpse into the measure for a voter "quickly scanning" a petition, someone "of average intelligence," whether that person is "familiar or unfamiliar with the subject matter of a particular proposal." *In the Matter of Title, Ballot Title & Submission Clause Respecting the Proposed Constitutional Amendment Limited Gaming in the City of Antonito,* 873 P.2d 733, 742 (Colo. 1994); *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 446 (Colo. 2002); *In the Matter of Title, Ballot Title and Submission Clause, and Summary of Proposed Initiative Concerning "State Personnel System,"* 691 P.2d 1121, 1123 (Colo. 1984). Or put differently, a ballot title should not require "ingenious reasoning, aided by superior rhetoric" in order for a registered voter to understand it. *In the Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #25,* 974 P.2d 458, 469 (Colo. 1999), *citing In re Breene*, 24 P. 3, 4 (Colo. 1890).

Accordingly, ballot titles must not rely on delicate legal parsing. A ballot title is supposed to easily and effectively impart to voters an understanding of the measure. In fact, ballot titles are legally deficient where their key terms are a matter of legal jargon. *Howard v. City of Boulder*, 290 P.2d Colo. 237, 240 (Colo.

1955). The importance of using plain language applies with the greatest force to the Board's choice of language in the ballot title. After all, the title must be posed in "plain, understandable, accurate language," because it is only such wording that "enable[es] informed voter choice in pursuit of the initiative rights of Colorado citizens." *#62, supra*, 961 P.2d at 1083.

Therefore, the interpretation used by the legal profession, which is embraced here by the Proponents and the Title Board, is not the clear ballot title language that is required by law. The standard for a ballot title's adequacy is its clarity and ease of understanding – at least on the part of the ordinary voter, who is introduced to the initiative's topic while emerging from a supermarket with an armful of groceries. That individual, however well-intentioned, is unlikely to read the word "guarantee" and ascribe to it anything but its commonly understood meaning, which is to ensure a particular outcome. *See* Hayes' Opening Brief at 17. Such voters of average intelligence are unlikely to know that this word is a term of art that serves to trigger heightened scrutiny as part of judicial review of any implementing legislation. *See In the Matter of Title, Ballot Title and Submission Clause for 2003-2004 #32 and #33*, 76 P.3d 460, 462 (Colo. 2003) (citation

omitted). Because this title obfuscates the true meaning of the initiative, the Board erred by using the term "guarantee."[3]

CONCLUSION

The Title Board erred by setting a title, given the single subject concern outlined above, and it erred by setting this particular title, given that the language it used will confuse and mislead the electorate. The Court should set aside the Board's decision.

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[3] The fact that the word "guarantee" is plucked from the initiative's text is of no moment if it misleads voters. "While it is true that the title and submission clause read, virtually word for word, the same as the Initiative, this fact does not establish that the title and submission clause fairly and accurately set forth the major tenets of the Initiative." *In re Title, Ballot Title, Submission Clause, & Summary Pertaining to a Proposed Initiative on "Obscenity,"* 877 P.2d 848, 851 (Colo. 1994).

Respectfully submitted this 19th day of August, 2009.

ISAACSON ROSENBAUM P.C.

By: _____
Mark G. Grueskin

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of August, 2009, a true and correct copy of the foregoing was served either via hand delivery or via overnight courier to the following:

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