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<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14<sup>th</sup> Avenue Denver, CO 80203</p>	<div data-bbox="1049 306 1442 543"><p>FILED IN THE SUPREME COURT</p><p><b>JUL 10 2009</b></p><p>OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK</p></div>
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), 1 C.R.S. (2008) Appeal from Ballot Title Board</p>	
<p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2009-2010, #22 (SECRET BALLOT VOTING)</p>	
<p>PHILIP HAYES, Petitioner,</p>	
<p>v.</p>	<p>▲ <b>COURT USE ONLY</b> ▲</p>
<p>GAIL LINDLEY AND HITESH PATEL, Proponents, and DAN CARTIN AND WILLIAM HOBBS, Title Board Respondents.</p>	<p>Case No.: 2009SA167</p>
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<p><b>OPENING BRIEF OF TITLE BOARD</b></p>	

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<p align="center"><b>CERTIFICATE OF COMPLIANCE</b></p>	

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).

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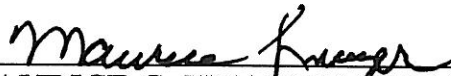
It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. \_\_\_, p. \_\_\_), not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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William A. Hobbs and Daniel L. Cartin, in their capacities as members of the Title Board (hereinafter “Board”), hereby submit their Opening Brief. The measure and the titles are attached hereto.

### **STATEMENT OF THE ISSUES**

The Board adopts the statement of issues set forth in the Objector’s Petition for Review.

### **STATEMENT OF THE CASE**

On May 22, 2009 Gail Lindley and Hitesh Patel (“proponents”) filed Proposed Initiative #22 (#22) with the Board. The Board held a hearing to set the titles on June 3, 2009. The Board concluded that #22 had a single subject and set the titles.

On June 10, 2009, Philip Hayes, (“Objector”) filed a motion for rehearing. He alleged that (1) #22 contained multiple subjects, and (2) the titles were misleading, incomplete, confusing and inaccurate. On June 17, 2009, the Board granted the motion for rehearing in part and set the titles. Objector filed this appeal.

## STATEMENT OF THE FACTS

#22 adds a new section 16 to Colo. Const. art XVIII. It provides:

**Elections for employee representation.** The right of individuals to vote by secret ballot is fundamental. Where state or federal law requires or permits elections or designations or authorizations of employee representation, the right of individuals to vote by secret ballot shall be guaranteed.

The Board set the following title:

An amendment to the Colorado constitution concerning the right to vote by secret ballot regarding employee representation, and, in connection therewith, guaranteeing the fundamental right of individuals to vote by secret ballot where state or federal law requires or permits elections or designations or authorizations of employee representation.

## SUMMARY OF THE ARGUMENT

#22 contains only one subject: the right to vote by secret ballot regarding employee representation.

The titles set by the Board are fair, clear and accurate. The titles use the operative language of the measure and express its true intent and meaning.



## ARGUMENT

### **I. #22 contains one subject: the right to vote by secret ballot regarding employee representation.**

#### **A. Standard of Review**

Objector contends that the Board should not have set titles because #22 contains more than one subject, thereby violating Colo. Const. art. V, § 1(5.5), which states:

No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

A proposed initiative violates the single subject rule if it “relate[s] to more than one subject and ... [has] at least two distinct and separate purposes which are not dependent upon or connected with each other.” *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2005-2006* #55, 138 P.3d 273, 277 (Colo. 2006) (#55) A proposed initiative that “tends to effect or to carry out one general objective or purpose presents only one subject.” *In re Ballot Title 1999-2000* #25, 974 P.2d 458, 463 (Colo. 1999). The single subject rule prevents both

joinder of multiple subjects to secure the support of various factions and voter fraud and surprise. #55, 138 P.3d at 277 *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02* #43, 46 P.3d 438, 442 (Colo. 2002)(#43).

The Court will not address the merits of a proposed measure, interpret it or construe its future legal effects. #43, 46 P.3d at 443. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000* #258(A), 4 P.3d 1094, 1097-98 (Colo. 2000). However, the Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *In re Title, Ballot Title and Submission Clause for 2001-2002* #21 and #22, 44 P.3d, 213, 216 (Colo. 2002) (#21). The single subject rule must be liberally construed to avoid unduly restricting the right of initiative. *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98* No. 74, 962 P.2d 927, 929 (Colo. 1998). Sections of a measure that include “implementation or enforcement details directly tied to the single subject will not, in and of themselves, constitute a separate subject.” *In re Title, Ballot Title and Submission Clause, and Summary for 2005-2006* #73, 135 P.3d 736, 739 (Colo. 2006) (#73).

**B. #22 Contains Only One Subject**

The measure has only one subject: the right to vote by secret ballot regarding employee representation.

Objector argues that the initiative contains “multiple subjects by establishing an overarching right to a secret ballot” for participants in employee representation elections and all other elections in which individuals have the right to vote.

(Petition, p.3.) In other words, Objector contends that the measure creates a fundamental right to a secret ballot in government elections and union elections.

Objector misreads the language of the measure. The measure addresses only employee representation elections.

The concepts recognized in #22 are not new. The right to a secret ballot in elections for political office has long been recognized as fundamental. *Taylor v. Pile*, 154 Colo. 516, 522, 391 P.2d 670, 673 (1964) (the constitutional right to secret ballot is “fundamental to our system of government”; violation of right makes an election void ab initio). The extension of this concept to employee representation elections is not novel. Under existing Colorado labor laws, a collective bargaining unit can be established only by a secret ballot. Sections 8-3-

104(4) and -107(2), C.R.S. (2008); *Communications Workers of America v. Western Electric Co, Inc.* 191 Colo. 128, 144, 551 P.2d 1065, 1076 (1976).

The statement that the right to vote is fundamental is only a constitutional directive describing how the terms within the measure must be construed. 1A, *Singer, Sutherland Statutes and Statutory Construction*, § 27:1(2002). It does not establish a separate right outside the context of employee representation elections. Rather, the statement is nothing more than an iteration of the rule which states that standards or consequences which normally attach to one circumstance can be applied to a second circumstance. *Id.* In this case, the right to vote as a right of first order is extended to employee representation elections.

The measure does not nothing more than engrave in the constitution the existing statutory right to a secret ballot in establishing a collective bargaining unit. The inclusion of a statement that the right to a secret ballot is fundamental is a directive that the same standards applied to the right to a secret ballot in elections for government office must be applied to the secret ballot to establish a collective bargaining unit. It instructs the General Assembly and the courts that the right to vote granted in #22 must be assessed in the same manner as the right to vote in

government elections. It is therefore an implementation detail tied directly to the single subject. #73, 135 P.3d at 739.

For these reasons, the Court must find that #22 contains a single subject.

## **II. The Clear Title Requirement**

### **A. Standard of Review**

Section 1-40-106(3), C.R.S. (2008) establishes the standard for setting titles.

It provides:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general effect of a “yes” or “no” vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly state the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed within two weeks after the first meeting of the title board...Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered “yes” (to vote in favor of the proposed law or constitutional amendment) or “no” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended or repealed.

The titles must be fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause and Summary for 1999-00* #256, 12 P.3d 246, 256 (Colo.

2000) (#256). However, the Board is not required to set out every detail. #21, 44 P.3d at 222. In setting titles, the Board may not ascertain the measure's efficacy, or its practical or legal effects. #256, 12 P.3d at 257; *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000* #246(e), 8 P.3d 1194, 1197 (Colo. 2000). The Court does not demand that the Board draft the best possible title. #256, at p. 219. The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will reverse the Board's decision only if the titles are insufficient, unfair or misleading. *In re Proposed Initiative Concerning "Automobile Insurance Coverage"*, 877 P.2d 853, 857 (Colo. 1994).

**B. The titles are fair, clear and accurate.**

Objector asserts that the titles are defective because they (1) imply that there is an existing right to vote by secret ballot in elections regarding employee representative language, (2) imply that a such a right to vote is fundamental, and (3) state that the fundamental right is guaranteed when fundamental rights can never be unconditionally guaranteed because they are subject to legislative qualifications or limitations.

The Court must reject Objector's contentions. The titles are adequate if they properly repeat the operative language of the measure and express its true intent

and meaning. *In the Matter of the Title, Ballot Title and Summary for Proposed Constitutional Amendment Concerning Suits Against Nongovernmental Employers Who Knowingly and Recklessly Maintain an Unsafe Workplace*, 898 P. 2d 1071, 1074 (Colo. 1995). The titles meet this standard. The disputed language, including “fundamental,” “secret ballot,” and “guaranteed,” are part and parcel of the measure.

Objector does not argue that the titles do not accurately summarize the measure. Instead, Objector’s concerns are directed to his interpretation of the impact of the measure on existing law and of its future application by the courts or the General Assembly. The titles do not purport to interpret existing law, and the impact of the measure on existing law is irrelevant to the title-setting process. Instead, the titles reflect only the content of the measure. Because Objector does not assert that the titles do not fairly and accurately describe the content of the measure, the Court must conclude that the titles are fair, clear and accurate.

Moreover, assuming that the titles purport to describe the effect of the measure on existing laws and the future impact of the laws, the Court must still find that the titles are fair, clear and accurate.

First, Objector asserts that the titles are misleading because they refer to a right to vote by secret ballot “when such constitutional right does not exist under

Colorado law”. (Objector’s Petition, p. 4.) The titles do not refer, either explicitly or implicitly, to an existing “constitutional” right. Instead, they refer to a “right” to a secret ballot. The right to secret ballot is authorized by statute. Sections 8-3-104(4) and -107(2). Thus, the titles accurately reflect the status of the existing law.

Objector’s second argument, that there is presently no “fundamental right to vote by secret ballot where state or federal law requires or permits elections or designations or authorizations of employee representations,” is without merit.

Section 8-3-106, C.R.S. (2008) provides:

In accordance with the provisions of this article, employees have the right of self-organization and the right to form, joins, or assist labor organizations, to bargain collectively through representatives of *their own free choosing*, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid and protection. *The rights of each employee are essential rights and nothing contained in this article shall be so construed as to infringe upon or have any operation against or in conflict with such rights.*

(Emphasis added.) Employees have the right to vote by secret ballot. Section 8-3-107(2). Pursuant to § 8-3-106, the right to vote by secret ballot is deemed to be “essential.”



There is no practical difference between an “essential” right and a “fundamental” right. The use of the term “essential” discloses “an intent on the part of the legislature to protect the working man’s right to freely chart his own course with regard to labor organization.” *Communications Workers of America v. Western Elec. Co., Inc.*, 198 Colo. at 142, 551 P.2d at 1075. Thus, the measure and the titles accurately reflect the present state of the law.

Objector also contends that the use of the term “guarantee” is misleading because it connotes a right which cannot be modified in any way by the General Assembly. Objector asserts “guaranteed” rights can be qualified or limited by the General Assembly and can never be “unconditionally” guaranteed. (Petition, p. 4.)

Objector’s argument must be rejected. 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. For example, Colo. Const. art. II, § 4 states that the “free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed.” Courts have interpreted this guaranteed right to allow the state to require compliance with valid, neutral laws of general applicability. *People v. LaPorte Church of Christ*, 830 P.2d 1150, 1152 (Colo. App. 1992).


The right to vote historically has been guaranteed. Thus, “both the right to vote and right of initiative have in common the *guarantee* of participation in the political process.” (Emphasis added.) *Loonan v. Woodley*, 882 P.2d 1380, 1383 (Colo. 1994). The General Assembly does not have the power to limit any constitutionally-granted right beyond the authority granted. However, it may enact laws that impose requirements facilitating a right. *Montero v. Meyer*, 795 P.2d 242, 245 (Colo. 1990).

The term “guarantee” does not preclude laws which may put certain strictures in place which ultimately enhance and protect the right. Thus, the term “guarantee” does not preclude legislative action.

### **CONCLUSION**

For the above-stated reasons, the Board respectfully requests that the Court approve the titles set by the Board.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same by United States Express Mail, postage prepaid, at Denver, Colorado, this 10<sup>th</sup> day of July, 2009 addressed as follows:

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