Supreme Court, State of Colorado
2 East 14th Avenue, Suite 400
Denver, Colorado 80203

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 #24

Petitioner:
PHILIP HAYES

Respondents: HITESH PATEL and GAIL LINDLEY

Title Board:
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Case Number: 09SA165

RESPONDENTS' ANSWER BRIEF

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I. SUMMARY OF ARGUMENT

The petitioner ("Hayes") claims that the proposed initiative has two subjects because it contains an "overly broad" grant with an additional, specific application. But this argument rests upon a misreading of the proposed initiative. The initiative does not create a new right to secret ballot for different types of elections. Rather, it establishes the right to secret ballot only for employee representation elections (or designations or authorizations) if those elections are authorized by federal law. Accordingly, it has one subject – secret ballots for employee representation elections only.

Hayes reliance upon *In the Mater of Title, Ballot Title and Submission Clause for 2007-2008 #17* also fails. That case involved the creation of a new department, along with a new legal standard for resolving disputes. This proposal does not create a new department. It focuses solely upon the right to secret ballot in employee representation elections.

The title and submission clause as set by the Title Board are not misleading. First, the title and submission clause do not require use of the word "create." The current title and submission clause unambiguously state the single subject, and they

also adequately explain that current law is being amended. In practice, the Title Board has not been required to use the term "create" for other initiatives that create new rights, prohibitions, or requirements. And the transcript of proceedings show that the Title Board carefully crafted a title and submission clause to avoid even potentially confusing language.

Second, the initiative properly uses the verb "guarantee." It reflects the common understanding that a government will promise to protect a right – but does not connote an absolute outcome. Indeed, any prediction of an absolute outcome – or lack thereof – is premature at this point. Finally, the title and submission clause use the same words that appear in the initiative itself. At most, Hayes quibbles about the extent of protection created by the word "guarantee," but that quibble goes to the substance of the initiative, not the accuracy of the title and submission clause. There is no doubt that a "yes" vote will result in government guaranteeing the right to a secret ballot in employee representation elections.

Third, the Title Board was not required to include every element of the definition of "political subdivision." As commonly understood, that term includes entities that independently exercise governmental power. And the initiative on its face applies to employee representation elections for all entities – both public and private.

II. ARGUMENT

A. Standard of Review

The proponents Patel and Lindley set forth the standard of review in the *Respondents' Opening Brief.*

B. The right to secret ballot for employee representation elections is a single subject.

The petitioner's single subject argument rests entirely on a misreading of the ballot language. On multiple occasions, Hayes erroneously claims that the initiative establishes a right to secret ballot for *all* elections, not merely elections for employee representation. In characterizing the measure, Hayes erroneously claims:

- "the grant of a secret ballot is triggered wherever individuals vote;"[1]
- "all elections – not just employee representation elections – would be subject to the newly created right to secret ballots in all elections;[2]
- "The elections affected comprise an exceedingly broad and unrelated grouping, including" candidate elections, ballot elections, home owners association elections, board of director elections for stock companies, and private associations, and corporations, as well as

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[1] *Petitioner's Opening Brief* at 10.

[2] *Id.* at 10-11.

employee representation elections;[3] and

- "all elections in the State of Colorado are subject to the mandate of a secret ballot."[4]

These statements reflect a fundamental misunderstanding of what the ballot measure does. The measure establishes a new right to secret ballots for employee representation elections (or authorizations or designations). Furthermore, this right is only triggered when federal law requires or permits such employee representation elections. Accordingly, the measure applies only to one very narrow and focused form of elections. It is incorrect to argue otherwise.

Indeed, the proponents originally submitted a proposed ballot initiative that established the right to a secret ballot for employee representation elections, as well as other types of elections.[5] The Title Board struck the proposal down, because the different types of elections constituted separate subjects. As a result, the proponents pared down the initiative to apply only to employee representation elections. The ballot measure does not, therefore, create an overarching right to secret ballot for all elections in Colorado. Indeed, the measure has nothing to do with corporate

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[3] *Id.* at 11-12.

[4] *Id.* at 14.

[5] Proposed Ballot Initiative 2009-2010 #15.

elections, or homeowners association elections, or any other type of election. The measure establishes a new right in one instance only. Accordingly, Hayes is mistaken when he claims that the measure is "overly broad" yet has "a specific, textual application."[6] The measure creates one new right only – the right to a secret ballot for certain types of employee representation elections.

As precedent, Hayes relies upon one case – *In the Matter of Title, Ballot Title and Submission Clause for 2007-2008 #17* ("*In re 2007-2008*").[7] This case, however, does not support his position. First, Hayes mischaracterizes the current measure – there is no "overlap between the general standard and [a]specific application."[8] Accordingly, his analogy fails.

Second, there is no parallel between this measure and the one in *In re 2007-2008*. In that case, this Court found two subjects – the creation of a new department, and the creation of a new legal standard that was not connected to the establishment, mission, and operation of the new department.[9] By contrast, the

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[6] *Petitioner's Answer Brief* at 12.

[7] *In the Matter of Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871 (Colo. 2007).

[8] *Petitioner's Opening Brief* at 12-13.

[9] *In re 2007-2008*, 172 P.3d at 874.

current measure does not create a new department, governmental agency, or any other type of institution. Rather it focuses only on a legal right – it affirms a right to secret ballot in for employee representation elections, when those elections are required or permitted by federal law.

C. The title and submission clause accurately describe the subject of the measure.

1. The title and submission clause do not require the word "create."

Hayes argues that the title and submission clause should include the word "create." His argues that the title and submission clause misleadingly imply "that the right, as a fundamental right, already exists."[10] He also asserts, through use of a rhetorical question, that the title and submission clause misleadingly imply the "creation of a right."[11] These seem to be contradictory claims, but the heart of Hayes' argument, is that the title and submission clause must contain the word "create."

The word "create" is not necessary. The title and submission clause forthrightly state that the initiative will amend Colorado law. And they both describe how that new amendment will operate. As required by law, the title and

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[10] *Petitioner's Opening Brief* at 14-15.

[11] *Petitioner's Opening Brief* at 16.

submission clause "unambiguously state the principal of the provision sought to be added, amended, or repealed."[12] Here, the principal is "the right to vote by secret ballot regarding employee representation," and the Title Board carefully described the operation of the ballot initiative, stating that it guaranteed the fundamental right of the secret ballot in employee representation elections.[13]

Hayes asks this Court to effectively create a new standard for the Title Board that would change the manner in which it has set titles. Every ballot initiative changes Colorado law in some way, generally by creating new rights, obligations, or prohibitions. But the Title Board has not, in practice, included the term "create" or "establish." For example, in 2008 the Title Board set a title "concerning a safe workplace for employees, and, in connection therewith, requiring employers to provide safe and healthy workplaces."[14] It did not set a title "concerning the creation of a safe workplace . . . ." Likewise, in 2008 it set a title "concerning the manner in which the state funds public education from preschool through the twelfth grade, and, in connection therewith . . . requiring that any revenue . . . be transferred."[15] It

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[12] C.R.S. § 1-40-106(3)(b).

[13] Proposed Ballot Title and Submission Clause 2009-2010 #24.

[14] 2008 State Ballot Information Booklet (Blue Book) at 57(2008).

[15] *Id.* at 59

did not set a title "concerning the creation of a requirement." And finally, in 2008 the Title Board set a title "concerning a prohibition against discrimination by the state, and, in connection therewith, prohibiting the state from discriminating against or granting preferential treatment. . . . ."[16] It did not set a title "concerning the creation of a prohibition." All of these initiatives created a new right or prohibition, but none contained the word "create" or "establish." None of these titles and submission clauses was misleading, because the Title Board "unambiguously state[d] the principal of the provision sought to be added, amended, or repealed."[17] The word "create" is simply not required.

Finally, Hayes cites statements from the Title Board deliberations in an attempt to show that the Board believed the title and submission clause were confusing. These statements show no such thing. Rather, they show careful deliberation by board members as they worked to develop an accurate and informative title. At most, Hayes reference to the transcript shows that the chair of the Title Board in fact modified the language of the title and submission clause in order to clarify any language that could be "*potentially* confusing."[18] And this Court

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[16] *Id.* at 37.

[17] C.R.S. § 1-40-106(3)(b).

[18] *Petitioner's Opening Brief* at 15.

properly defers to the Board's careful deliberations and carefully crafted language.[19]

2. The verb "guarantee" accurately describes what the initiative does.

Hayes also argues that the title and submission clause are misleading because they include the word "guaranteeing." To do so, Hayes first argues that the common meaning of a guarantee is "an absolute,"[20] and in contrast he argues that there can never be any "absolute certainty."[21] Ergo, he claims, the common meaning of "guaranteeing" cannot reflect the use of the word "guaranteed" as used in the initiative.

This logical syllogism rests on several faulty assumptions. First, Hayes misapprehends the common meaning of "guarantee." He relies in large part on two dictionary definitions, but misleadingly cites the definition of guarantee when used as a noun. But the initiative uses the word "guarantee" as a verb, in the phrase "to be guaranteed."[22] This is an important difference. The common meaning of "guarantee" when used as a verb is "[t]o promise that a contract or legal act will be

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[19] *In re Proposed Initiative for 1999-2000 #256*, 12 P.3d 246, 255 (Colo. 2000).

[20] *Petitioner's Opening Brief* at 17.

[21] *Id.*

[22] Proposed Colo. Const. art. XVIII.

duly carried out."[23] This is exactly what the initiative contains – a promise to protect the right to secret ballot in employee representation elections. It is not an "absolute" protection that ensures a specific outcome. Rather, it is a promise.

Second, Hayes' argument is self-contradictory. He argues that the term "guarantee" as used in the law "allows for no middle ground."[24] But two sentences later, he says that "a guarantee of a fundamental right carries with it no absolute certainty."[25] He cannot have it both ways. He cannot argue that legally "guarantee" means an absolute, and then claim the opposite.

Third, the word "guarantee" is commonly understood to promise something. That promise does not connote the absolute certainty of an outcome. As pointed out in the *Proponents' Opening Brief*, it is commonly understood that neither the state nor the federal government "absolutely" guarantees certain rights. Rather, it is commonly understood that when guaranteed rights clash with other important principals, the courts, governmental agencies, and private citizens all engage in a balancing test of one type or another. For this reason, the title and submission clause properly contain the word "guaranteeing."

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[23] Black's Law Dictionary at 723 (8th ed. 2004).

[24] *Petitioner's Opening Brief* at 17.

[25] *Id.*

Fourth, Hayes presumes that the proposed law will be applied in a way that is different from the common meaning of "guarantee." In Hayes' current construction, he presumes that the initiative will be applied in a way that is less than "absolute." But this Court should not "address the merits of a proposed initiative," nor should it "interpret [the initiative's] language or predict its application."[26]

The use of the word "guarantee" is accurate for another reason – it reflects the language of the initiative itself. The initiative uses the word "guarantee" as a verb (the actual variation is "to be guaranteed") and the title and submission clause do the same (the actual variation is "guaranteeing"). If Hayes complains that there is some ambiguity in the exact level of protection of the new right, then Hayes' complaints go to the ballot initiative itself – not to the title and submission clause.

Anticipating this argument, Hayes cites on *In the Matter of Title, Ballot Title, Submission Clause, & Summary pertaining to a Proposed Initiative on "Obscenity"*. But his reliance on that case is misplaced. There, the Court found that the result of a "yes" or "no" vote would be unclear, because the title and ballot clause merely contained a legal standard, without any explanation as to how that

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[26] *In re Title, Ballot title and Submission Clause, and Summary for 1999-2000 #25*, 974 P.2d 458, 465 (Colo. 1999).

legal standard affected current law.[27] The court found that even though the legal standard was contained in the text of the initiative, repeating the language in the initiative did not remove this ambiguity.[28]

In contrast, the effect of a "yes" or "no" vote in the current measure is clear and unambiguous. A "yes" vote would amend the constitution to guarantee a right to a secret ballot in employee representation elections. A "no" vote would not establish this new right to a secret ballot in employee representation elections. As noted above, Hayes manufactures two separate meanings of the word "guarantee" to quibble about the level of protection afforded to the right of a secret ballot in employee representation elections. But there is no doubt that the initiative establishes a fundamental right to a secret ballot in employee representation elections. Although Hayes can argue about how strongly courts will protect that right in the future, that is an argument better reserved for practical controversies in the future. At this stage, a "yes" vote establishes this new right. A "no" vote does not.

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[27] *In the Matter of Title, Ballot Title, Submission Clause, & Summary by the Title Board pertaining to a Proposed Initiative on "Obscenity"*, 877 P.2d 848, 850 (Colo. 1994).

[28] *Id.*

3. The term "political subdivision" accurately describes entities that independently exercise governmental authority.

Hayes argues that the term "political subdivision" in the title and submission clause means the "inclusion of all entities, including private companies."[29] This again misstates the text of the initiative. The definition only includes entities "that independently exercise[] governmental authority."[30]

The title and ballot clause are not required to list the particulars of the definition of "political subdivision," because the definition is not novel. As noted in *Respondents' Opening Brief*, the term includes well-recognized entities, as well as new entities that can independently act as a government. This is not new or unusual.

Finally, the title and submission clause do not mislead voters. Both make clear that the initiative applies to both private and public entities – it applies to private companies as well as state government. The nuances of "political subdivision" only matter if, at some point in the future, federal law preempts the right as it applies to employees working for private employers. This is a detail far removed from the operation of the initiative. The Title Board is only required to

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[29] *Petitioner's Opening Brief* at 21.

[30] Proposed Art. XVIII, § 16(4).

describe the initiative's central features – not describe all details.[31] A detailed explanation of the term "political subdivision" adds nothing to voters' understanding of the initiative. The initiative applies to employees of public and private entities alike. Including a more detailed explanation of "political subdivision" does not change that central feature.

III. CONCLUSION

This Court should affirm the title and submission clause set by the Title Board.

Respectfully submitted this 19th day of August, 2009.

By: _____

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[31] *In re Title, Ballot Title, Submission Clause for 2007-2008 #61*, 184 P.3d 747, 752 (Colo. 2008)(citations and quotations omitted).

CERTIFICATE OF SERVICE

I certify that on this 19th day of August, 2009, the foregoing **RESPONDENTS' ANSWER BRIEF** was served on all parties and other interested persons by US Mail properly addressed to:

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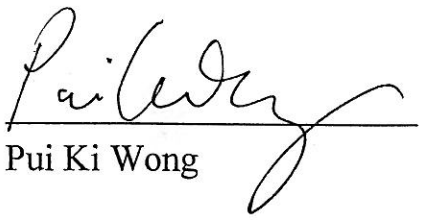

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