

Certification of Word Count: 1,300

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, CO 80203</p>	<p>FILED IN THE SUPREME COURT</p> <p>AUG 18 2009</p> <p>OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK</p> <p>▲ COURT USE ONLY ▲</p>
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), 1 C.R.S. (2008) Appeal from Ballot Title Board</p>	<p>Case No.: 2009SA165</p>
<p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2009-2010, #24 (SECRET BALLOT VOTING)</p> <p>PHILIP HAYES, Petitioner,</p> <p>v.</p> <p>GAIL LINDLEY AND HITESH PATEL, TITLE BOARD, and DAN CARTIN AND WILLIAM HOBBS, Title Board Respondents.</p>	
<p>JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, Deputy Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 (303) 866-5380 Registration Number: 05264 *Counsel of Record</p>	
<p>REPLY BRIEF OF TITLE BOARD</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply 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 1300 words. Further, the undersigned certifies that he complied with Rule 28(k) in his Opening Brief by providing a concise statement of the applicable standard of review and citations to the precise locations in the record.

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Maurice G. Knaizer

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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 Reply Brief.

THE MEASURE CONTAINS ONLY ONE SUBJECT.

The Petitioner asserts that the measure contains two subjects: (1) the right to a secret ballot in Colorado and (2) the right to a secret ballot in employee representation elections. (Petitioner’s Opening Brief, p. 10). Petitioner reads this measure to incorporate all elections, ranging from federal and state candidate elections to ballot measure elections to corporate elections. (Petitioner’s Opening Brief, pp. 10-11)

When analyzing the language of a measure for purposes of a single subject challenge, the Board and this Court must read the measure as a whole. *In the Matter of the Title, Ballot Title and Submission Clause and Summary for 1999-2000 #235(a)*, 3 P.3d 1219, 1223-24 (Colo. 2000) (interpreting broad introductory language in measure more narrowly in light of subsequent, more specific language). In this case, the first sentence of the measure states, “The right of individuals to vote by secret ballot is fundamental.” The second sentence states, “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 first sentence is modified by the second sentence.

As such, the measure covers only the right to vote in employee representation elections.

This conclusion is supported by the heading of the provision. When proponents specifically select a heading the Board and this Court may consider it as an aid in construing the proposal. See, *U.M. v. District Court, County of Larimer*, 631 P.2d 165, 167 (Colo. 1981) (heading selected by General Assembly deemed a proper aid.) The proponents submitted a draft of the measure. The heading is “Elections for employee representation.” Thus, the heading indicates that the right to vote identified in the measure applies only to elections for employee representatives.

Petitioner cites *In re Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871 (Colo. 2007) (#17). This case is inapposite. In #17, the measure purported to establish a new environmental department. The measure included details outlining the establishment of the department. In addition to procedural details, it also included a substantive standard altering the public trust doctrine. This Court concluded that the alteration of the public trust doctrine constituted a subject distinct from the establishment of a new department. *Id.* at 874.

This measure does not combine procedural and substantive matters. It simply provides the persons have a fundamental right to vote in employee representation elections.

THE TITLES ACCURATELY REFLECT THE MEASURE.

Petitioner next asserts that the titles are misleading because they do not state that the proposal “creates” a new right or fundamental right. (Petitioner’s Opening Brief, pp. 14-16). The Court must reject this assertion.

The use of the term “creates,” or a variant thereof, would be superfluous. “All proposed constitutional amendments or laws have the effect of changing the status quo in some respect if accepted by the voters.” *In re Title, Ballot Title and Submission Clause for 1999-2000*, 4 P.3d 1194, 1197 (Colo. 2000). The Board is not required to discuss how a proposed measure would change existing laws. *In the Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000* 246(e), 8 P.3d 1194, 1197 (Colo. 2000).

By stating that the measure is “[a]n amendment to the Colorado constitution,” the titles inform the voter that measure will change existing laws and standards. The issue of whether the change creates a new right out of whole cloth

or alters an existing right is not relevant to title-setting. It is the fact of the change, rather than the type of change, that is pertinent.

Moreover, as noted in the Board's Opening Brief at p. 10, there is a strong argument that the General Assembly has established a right, if not a fundamental right, to vote in employee representative elections. Thus, a statement that the measure creates such a right would be incorrect or inaccurate.

Finally, Petitioner asserts that the term "guarantee" is misleading because it connotes an "absolute", that is a fundamental right that can never be restricted. (Petitioner's Opening Brief, p. 16) Petitioner is asking the Court to interpret a word and construe its future legal effects. *Blake v. King*, 185 P.3d 142, 145 (Colo. 2008). The Court may conduct this type of review and analysis only after the voters have enacted the measure. *Id.*

The Court must reject Petitioner's argument if it analyzes the word "guarantee." The definitions of "guarantee" cited by Petitioner do not support his argument. The legal definition of "guarantee" is: "The assurance that a contract or legal act will be duly carried out." *Black's Law Dictionary*, 723 (8th Ed. 1999) (Emphasis added.) The common definition of "guarantee" in this context means "the protection of a right afforded by legal provision (as in a constitution) (constitutional guarantees of personal liberty)." *Webster's Third New*

International Dictionary 1007 (1999). A “guarantee” is synonymous with “assurance” or “protection.”

Petitioner’s argument is flawed because it conflates the protection of the right with the right itself. A “guarantee” does not define the scope of a constitutional right. A guarantee merely protects the right to the extent that the right exists.

This Court uses the word “guarantee” to state that constitutional rights are protected but not to define the scope of the right. *In re Title, Ballot Title and Submission Clause, and Summary for the Proposed Initiated Constitutional Amendment 1996-3*, 917 P.2d 1274, 1276 (Colo. 1996)(“both the right to vote and the right of initiative have in common the guarantee of participation in the political process”); *People v. Shari*, 204 P.3d 453, 457 (Colo. 2009) (“The Sixth Amendment’s guarantee of effective assistance of counsel encompasses a defendant’s right to conflict-free counsel.”); *People v. Segovia*, 196 P.3d 1126, 1133 (Colo. 2008) (“Double jeopardy is a constitutional guarantee”.)

In this case, the guarantee is only an assurance that the right to vote in employee representation elections will be protected. It does not define the right. Therefore, the use of the word “guarantee” is not misleading.

The definition of “political subdivision” includes “any entity that independently exercises governmental authority.” (Measure, § 16(4)). Petitioner interprets this phrase to cover all private entities contracting with the government. (Petitioner’s Brief, pp. 21-23) Petitioner states that this portion of the definition of “political subdivision” constitutes a significant departure from the commonly-accepted definition of “political subdivision”.

The Court must reject this argument. The argument fails because it ignores the plain language of the definition. The definition does not cover any entity exercising government authority. Instead, it includes only those entities “that *independently* exercise[] governmental authority.” (Emphasis added.) A typical government contractor does not exercise any authority independent of the government executing the contract. The contractor’s authority is subject to the terms of the contract, and their activities are not independent.

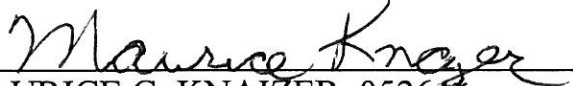
Moreover, entities that independently exercise government functions have long been recognized by the Colorado legislature. Colorado regulates and monitors non-profit entities created by or on behalf of state agencies. Section 24-1-107.5(1)(d), C.R.S. (2008). These entities have identities separate from state agencies, § 24-1-107.5(d)(II), C.R.S. (2008), but carry out governmental functions. Thus, contrary to the Petitioner’s view, these types of entities are not novel or new.

Petitioner asserts that voters would not know that the measure relates to private sector employees. (Petitioner's Opening Brief, p.22) This argument ignores the fact that private sector employees are covered by prior sections of the measure. The right authorized by the measure encompasses both government employees and private sector employees. (Measure, § § 16(2) and (3)). The titles reflect that all individuals have the right to vote by secret ballot.

CONCLUSION

For the reasons stated in the Board's briefs, the Court must affirm the decision of the Board.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **REPLY BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 18th day of August, 2009 addressed as follows:

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A handwritten signature in cursive script, appearing to read "Samuel Dorden", is written over a horizontal line.