Certification of Word Count: 6,829

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:
WILLIAM A. HOBBS and DAN CARTIN

ΔCOURT USE ONLYΔ

Case Number: 09SA167

Attorneys for Respondents :
Scott E. Gessler, Reg. No. 28944
Mario D. Nicolais, II, Reg. No. 38589
Hackstaff Gessler LLC
1601 Blake Street
Suite 310
Denver, Colorado 80202
Telephone: (303) 534-4317
Fax: (303) 534-4309
E-mail: sgessler@hackstaffgessler.com
mnicolais@hackstaffgessler.com

RESPONDENTS' OPENING BRIEF

Table of Contents

Table of Authorities

Cases

I. ISSUES PRESENTED FOR REVIEW

The Hitesh Patel and Gail Lindley (the "Proponents") base this *Opening Brief* on the issues raised by Philip Hayes ("Hayes") in his challenge to the Title Board's single-subject determination and his challenges to the accuracy and fairness of the title and submission clause.

II. STATEMENT OF THE CASE

A. Nature of the Case

This case is one of three related challenges to the titles and submission clauses set for *Proposed Ballot Initiatives 2007-2008 #22, #23, and #24* (referred to as "Proposed Initiatives #22, #23 or #24," respectively). Proposed Initiatives #22 and #23 are, for purposes of Hayes' challenges to those proposals, identical in all relevant parts. Proposed Initiative #24 is also identical in all relevant parts, except that it includes one additional section that serves as the basis for an additional challenge brought by Hayes. For the Court's convenience, the differences between the three initiatives and the three challenges follow:

Proposed Initiative #22 amends Article XVIII of the Colorado Constitution. It states, in full:

> **Section 16. Elections for employee representation.** THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT IS FUNDAMENTAL. WHERE STATE OR FEDERAL LAW REQUIRES OR PERMITS ELECTIONS OF, OR

DESIGNATIONS OR AUTHORIZATIONS OF, EMPLOYEE REPRESENTATION, THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT SHALL BE GUARANTEED.

Hayes has brought one challenge to the single-subject determination, and three challenges to the accuracy and fairness of the title and submission.

Proposed Initiative #23 also amends Article XVIII of the Colorado Constitution, but it differs slightly from Proposed Initiative #22 by removing two words. Proposed Initiative #23 is reproduced below, with deletions from Proposed Initiative #22 struck out:

> **Section 16. Elections for employee representation.** THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT IS FUNDAMENTAL. WHERE STATE OR FEDERAL LAW REQUIRES ~~OR PERMITS~~ ELECTIONS OF, OR DESIGNATIONS OR AUTHORIZATIONS OF, EMPLOYEE REPRESENTATION, THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT SHALL BE GUARANTEED.

Hayes's challenges to Proposed Initiative #23 are identical to his challenges to Proposed Initiative #22.

Proposed Initiative #24 also amends Article XVIII. Its language includes all of Proposed Initiative #22 but adds three clauses. It is reproduced in full below, with the additions to Proposed Initiative #22 underlined:

> **Section 16. Elections for employee representation.** (1) THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT IS FUNDAMENTAL. WHERE STATE OR FEDERAL LAW REQUIRES OR PERMITS ELECTIONS OF, OR DESIGNATIONS OR AUTHORIZATIONS OF, EMPLOYEE

REPRESENTATION, THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT SHALL BE GUARANTEED.

(2) THE RIGHT OF EMPLOYEES TO CHOOSE REPRESENTATIVES BY SECRET BALLOT SHALL INCLUDE EMPLOYEES OF THE STATE OF COLORADO AND ALL OF ITS POLITICAL SUBDIVISIONS.

(3) THE RIGHT OF EMPLOYEES TO CHOOSE REPRESENTATIVES BY SECRET BALLOT SHALL INCLUDE EMPLOYEES OF ANY ORGANIZATION THAT IS NOT THE STATE OF COLORADO OR A POLITICAL SUBDIVISION.

(4) FOR PURPOSES OF THIS SECTION, "POLITICAL SUBDIVISION" SHALL INCLUDE A COUNTY, CITY AND COUNTY, CITY, TOWN, HOME RULE COUNTY, CITY AND COUNTY, CITY OR TOWN, SERVICE AUTHORITY, SCHOOL DISTRICT, CHARTER SCHOOL, LOCAL IMPROVEMENT DISTRICT, SERVICE DISTRICT, LAW ENFORCEMENT AUTHORITY, CITY OR COUNTY HOUSING AUTHORITY, WATER, SANITATION, FIRE PROTECTION, METROPOLITAN, IRRIGATION, DRAINAGE, OR OTHER SPECIAL DISTRICT, ANY OTHER KIND OF MUNICIPAL, QUASI-MUNICIPAL, OR PUBLIC CORPORATION ORGANIZED PURSUANT TO LAW, OR ANY ENTITY THAT INDEPENDENTLY EXERCISES GOVERNMENTAL AUTHORITY.

Hayes has brought the same four challenges against Proposed Initiative #24 as he has brought against Proposed Initiatives #22 and #23. In addition, he has brought one additional challenge to the accuracy and fairness of the title for Proposed Initiative #24.

The titles for Proposed Initiatives #22, #23, and #24 are very similar. The proponents have, however, committed to the Title Board that they will only seek to certify one of the Proposed Initiatives for inclusion in the 2008 general election ballot. They also make that commitment before this Court.

Finally, for the Court's convenience the *Respondents' Opening Brief* for Proposed Initiative #24 contains all of the analysis and argument that appear in the *Opening Briefs* for Proposed Initiatives #22 and #23. It is not necessary, therefore, for this Court to review *Respondents' Opening Brief* for Proposed Initiatives #22 and #23. Proponents have, nonetheless, submitted *Opening Briefs* for each of the three proposed initiatives, because this Court has not consolidated the three matters.

B. Course of Proceedings and Disposition Below

On April 24, 2008, the Proponents submitted to the Board *Proposed Ballot Initiative 2007-2008 #15*, which Amended Section 8 of Article VII of the Colorado Constitution, by adding the following subsection:

> (1) THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT IS FUNDAMENTAL. WHERE STATE OR FEDERAL LAW REQUIRES ELECTIONS FOR PUBLIC OFFICE OR PUBLIC VOTES ON INITIATIVES, REFERENDA, OR DESIGNATIONS OR AUTHORIZATIONS OF EMPLOYEE REPRESENTATION, THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT SHALL BE GUARANTEED.[1]

On May 6, 2008, the Title Board refused to set a title, holding that the measure constituted more than one subject; one subject was the establishment of the right to secret ballot for votes for public office and initiatives and referenda,

---

[1] *See* **Exhibit A.**

and another subject was the establishment of a right to secret ballot for designations or authorizations of employee representation.[2]

Rather than petition this Court for review, the Proponents instead submitted Proposed Initiatives #22, #23, and #24, all of which removed the language that established the right to secret ballot for "elections for public office or public votes on initiatives, referenda . . . ." The Proponents also moved the proposed changes from Article VII to Article XVIII of the Colorado Constitution.

The Board heard the three new Proposed Initiatives on June 3, 2008, and set titles for all three measures. On June 10, 2008, Hayes filed one *Motion for Rehearing* ("*Motion*") for all three Proposed Initiatives. The *Motion* contained two single subject challenges that applied to all three Proposed Initiatives, and it listed five challenges to the fairness and accuracy of the titles and submission clauses. The first title challenge applied to all three Proposed Initiatives. The remaining four challenges applied to Proposed Initiative #24 only. The Board accepted two of the remaining four challenges. It did not limit its consideration of those challenges to Proposed Initiative #24, but rather it revised the title and submission clauses for all three ballot initiatives.

---

[2] *See* **Exhibit B**.

On June 24, 2008, Hayes sought review of the titles and submission clauses for all three Proposed Initiatives.

C. Statement of the Facts

The facts of this case and the content of Proposed Initiatives #22, #23, and #24 are stated above.

III. SUMMARY OF ARGUMENT

The initiative contains a single subject. On the face of his petition, Hayes does not allege a single subject challenge, because he identifies a single subject connected to other parts of the initiative. Nonetheless, Hayes incorrectly identifies the single subject, which is the establishment of a right to a secret ballot in employee representation elections or authorizations or designations (referred to as employee representation elections). This is a single subject because it establishes the right to a secret ballot for employee representation elections only. The history and the plain text of the Proposed Initiative show that it only applies to employee representation elections. It is further limited as a matter of statutory interpretation, and as a matter of law it cannot extend to public elections, because the right to a secret ballot for public elections already exists, and that right has already been characterized as fundamental.

The Proposed Initiative does not misleadingly imply that the right to a secret ballot for employee representation elections already exists. Hayes is barred from raising this issue for the first time in his petition, but in any event the title does not create such an inference on its face. Further, a title need not anticipate and express all potential inferences.

The title also does not misleadingly state that the Proposed Initiative creates an "unconditional" guarantee. Rather, the title accurately reflects the Proposed Initiative's use of the term "guarantee," which courts frequently use to discuss rights protected by the United States and Colorado constitutions. Both the Proposed Initiative and the title reflect this common usage.

Finally, the title properly identifies "political subdivision" without qualification and without an extended definition. Titles need not include expansive definitions, and the term "political subdivision" properly reflects the common understanding of the term as used in Colorado law. There is no surprise or inaccuracy, because the Proposed Initiative draws its definition of "political subdivision" from well-established legal definitions.

IV. ARGUMENT

A. The initiative has one subject – the fundamental right to a secret ballot for representation elections.

In his petition, Hayes claims that the initiative "addresses multiple subjects" by "establishing an overarching right to a secret ballot," that applies to employee representation elections, but is not limited to all other elections.[3] This argument fails for three reasons. First, on its face Hayes' claim does not allege a single subject violation. Second, the initiative does *not* establish an "overarching" right to a secret ballot beyond employee representation elections. Third, the provisions in the initiative are both connected to, and logically dependent upon, one another.

1. Single subject test and standard of review.

This Court has previously articulated the standards for determining whether an initiative contains a single subject. The single-subject mandate stems from Colo. Const. art. V, § 1(5.5), which states that "no measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title." This standard reflects the same-single subject standard used for legislative bills.[4] Accordingly, this Court has looked to the single-subject standards in *In re Breene*,

---

[3] Petition at 3-4.

[4] C.R.S. § 1-40-106.5(3); *In re Proposed Initiative "Public Rights in Waters II"*, 898 P.2d 1076, 1078 (Colo. 1995); *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #25*, 974 P.2d 458, 460 (Colo. 1999).

which held that the single subject requirement forbade "the union of separate and distinct subjects in the same proposed initiative."[5]

This Court first applied the single subject test to initiatives in *In re Proposed Initiative "Public Rights in Waters II"*, holding that "in order to constitute more than one subject under our caselaw pertaining to bills, the text of the measure must relate to more than one subject and it must have at least two distinct and separate purposes which are not dependent upon or connected with each other." [6] Likewise, there must be a "unifying or common objective" in an initiative's provisions.[7]

Since then, this Court has articulated the single-subject test under Section 1(5.5) in several ways. The single-subject test is designed to prevent joining subjects having no "necessary or proper connection,"[8] and "[a]n initiative violates the single subject requirement when it (1) relates to more than one subject and (2) has at least two distinct and separate purposes that are not dependent upon or

---

[5] *In re Breene*, 24 P.3, 3 (Colo.1890).

[6] *In re Proposed Initiative "Public Rights in Waters II"*, 898 P.2d 1076, 1079-80 (Colo. 1995).

[7] *Id.* at 1080.

[8] *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #227 and #228*, 3 P.3d 1, 4 (Colo. 2000).

connected with each other."[9] Further, a measure violates the single subject requirement if it encompasses matters that are "disconnected or incongruous."[10]

In summary, this court has used two alternative tests – whether provisions are "connected" to one another, or whether provisions are "logically dependent" upon one another. In determining whether provisions are "connected" with one another, the Proponents respectfully submit that the Arizona Supreme Court recently provided a useful framework in *Arizona Together v. Brewer*. There, the court declined to adopt "a strict rule that all components of a provision be logically dependent on one another."[11] Instead the court established a "common purpose or principle" test that looked to whether provisions were topically related and sufficiently interrelated."[12]

Finally, the single subject rule "must be liberally construed."[13] In reviewing action by the Title Board, the Court "will engage in all legitimate presumptions in

---

[9] *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2006).

[10] *See, e.g. In re Title, Ballot Title and Submission Clause for 2005-2006 #74*, 136 P.3d 237, 239 (Colo. 2006)(citations and quotations omitted).

[11] *Arizona Together v. Brewer*, 149 P.3d 742, 746 (Ariz. 2007).

[12] *Id.* at 745.

[13] *Blake v. King*, 185 P.3d 142, 145 (Colo. 2008).

favor of the propriety of the Board's actions."[14] The Court does not "address the merits of a proposed initiative," nor does the Court "interpret [the initiative's] language or predict its application."[15]

2. Hayes does not allege a single-subject violation.

Hayes brings one single-subject challenge. Specifically, he claims:

> The initiative addresses multiple subjects by establishing an overarching right to a secret ballot, which does specifically apply to employee representation elections, but is not otherwise limited in its application to all other elections in which individuals have the right to vote.

As an initial matter, the Proponents submit that aside from a conclusory statement at the beginning, this challenge does not, on its face, allege a single-subject violation. It is impossible to precisely identify the multiple subjects that Hayes protests. Indeed, the Proponents are unable to discern whether Hayes believes that the Proposed Initiative contains two, three, or more subjects. And Hayes does not describe each separate subject. In short, it is difficult to fashion this *Opening Brief* in a way that fairly discusses unidentified multiple subjects.

---

[14] *In re Title, Ballot Title and Submission Clause for 2005-2006 #74*, 136 P.3d 237, 239 (Colo. 2006).

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

Although the Proponents disagree with Hayes' characterization of the initiative (as discussed below), on its face Hayes' challenge states a single subject. Specifically, the challenge states that the initiative establishes a "right to a secret ballot." This is a single subject. The remaining part of Hayes' challenge describes the implementation of this single subject. According to Hayes, the right to a secret ballot (1) applies to employee representation elections, "but" (2) is not limited to all other elections. By using the word "but," Hayes seems to imply that the Proposed Initiatives creates two separate subjects in its implementation of the "overarching right to a secret ballot." Under this assumption, Hayes' objections go to implementation details – its application to both employee representation elections and to all other elections. Hayes does not challenge the subject matter of a "right to a secret ballot," but rather objects that this right applies to two different categories of elections. But when analyzing single subject challenges, however, this Court generally does not "address the merits of a proposed initiative," or "interpret [the initiative's] language or predict its application."[16]

In Hayes' view, the right to a secret ballot specifically applies to "employee representation elections," and it also applies to "all other elections in which

---

[16] *Id.*

individuals have the right to vote." As a matter of logic, "all other elections" and "employee representation elections" are both "elections" in which one has a right to vote. The subject of "overarching right to a secret ballot" (as described by Hayes) applies equally to both types of elections.

3. The Proposed Initiative only establishes a right to secret ballot for employee representation elections.

Hayes is wrong in claiming that the Proposed Initiative has a single subject that "establishes an overarching right to secret ballot." On its face, the Proposed Initiative only establishes a right to secret ballot for "elections of, or designations or authorizations of, employee representation."[17] It does not create a right to secret ballot for other types of elections. Indeed, the right to a secret ballot for public elections already exists in the Colorado Constitution, which states that:

> "All elections by the people shall be by ballot, and in case paper ballots are required to be used, no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it [but nothing shall] prevent the use of any machine or mechanical contrivance . . . provided that secrecy in voting is preserved.[18]

---

[17] Proposed Colo. Const. art. XVIII, § 16(1).

[18] Colo. Const. art. VII, §8.

And this Court has recognized that the Colorado Constitution already guarantees a secret ballot.[19]

The history of this Proposed Measure reinforces its limited nature. Prior to submitting the current Proposed Initiative, the Proponents submitted Proposed Initiative #15, which explicitly established a right to secret ballot in public elections that did not involve employee representation.[20] The Board refused to set a title for this proposal, and accordingly the proponents deleted language that established a right to secret ballot for elections other than those involving employee representation. Hayes is, therefore, simply wrong when he states that the Proposed Initiative creates an "overarching right to secret ballot." That statement may have been accurate for Proposed Initiative #15. It is not accurate for this Proposed Initiative.

Hayes' challenges to the accuracy of the title also show that, in fact, the single subject is the creation of a fundamental right to a secret ballot for employee representation elections. Specifically, the title expresses the single subject as "the right to vote by secret ballot regarding employee representation." In contrast,

---

[19] *Taylor v. Pile*, 391 P.2d 670, 673 (Colo. 1964).

[20] *See* **Exhibit A**.

Hayes claims that the single subject is an "overarching right to secret ballot." Under Hayes' reasoning, the single subject expressed by the Board is inaccurate, because it limits the right to secret ballot to employee representation. But Hayes does not challenge the accuracy of the title on these grounds. The failure to bring this obvious challenge (under Hayes' reasoning) to the title's accuracy is powerful evidence that Hayes has mischaracterized the Proposed Initiative's single subject.

4. The provisions in the Proposed Initiative constitute a single subject.

a. The term "fundamental" provides heightened protection to the right to secret ballot in employee representation elections.

The Proposed Initiative only encompasses a single subject. In one sentence, the initiative establishes a right to secret ballot for employee representation elections. Further, the initiative states that this right to a secret ballot is "fundamental." These two provisions are connected to one another, because the term "fundamental" establishes the importance of the right to a secret ballot and the level of judicial protection afforded that right. This level of judicial protection is critical to the operation of the Proposed Initiative.

The term "fundamental right" is critically important, because fundamental rights receive greater protection than other types of rights. Colorado courts have

frequently used the adjective "fundamental" to describe and give heightened protection to constitutional rights. For example, in striking down restrictions on participation in the political process, this Court held that "the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny."[21] Likewise, this Court used a "fundamental rights" analysis when applying equal protection rights to state employee salary levels.[22] Thus, "fundamental rights" draw strict scrutiny, whereas governmental infringement on other rights is only subject to rational basis review.

This Court has also used a "fundamental rights" analysis in contexts outside the equal protection clause. For example, the Court refused to mandate an attorney-fee shifting provision under Colo. Const. art. X, § 20, because the fee shifting provision was not a fundamental right.[23] In the election context, the Colorado Court of Appeals upheld mail ballot elections, in part to encourage the fundamental right

---

[21] *Evans v. Romer*, 854 P.2d 1270, 1276 (Colo. 1993), *cert. denied Romer v. Evans*, 510 U.S. 959 (1993).

[22] *Dempsey v. Romer*, 825 P.2d 44, 57 (Colo. 1992).

[23] *City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1115 (Colo. 1996).

to vote,[24] while this Court has used a substantial compliance standard in reviewing initiative petitions because the power of initiative and referendum under Article V(1) is a fundamental right.[25] And relevant to these current proceedings, this Court has refused to review the merits of an initiated measure because the right to initiative is a fundamental right to be liberally construed.[26]

In short, the Proposed Initiative forthrightly states that the right to a secret ballot is "fundamental," because the term "fundamental" is a common standard that courts use to interpret and apply constitutional rights. In this way, the term "fundamental" is closely bound to the establishment of the right to a secret ballot for employee representation elections.

b. Use of the term "fundamental" does not create a second subject.

This Court should generally not, as noted earlier, "interpret [the initiative's] language or predict its application."[27] But even if this Court chooses to interpret the Proposed Initiative as designating all rights to a secret ballot as "fundamental," that

---

[24] *Bruce v. City of Colorado Springs*, 971 P.2d 679, 684 (Colo. App. 1998).

[25] *Loonan v. Woodley*, 882 P.2d 1380, 1386-1388 (Colo. 1994).

[26] *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980).

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

interpretation does not break the connection between the "fundamental" designation and the right to secret ballot for employee representation elections. Indeed, this Court has recognized that a proposed constitutional initiative may impact other, pre-existing constitutional provisions, without altering the connections among an initiative's provisions:

> [t]he mere fact that a constitutional amendment may affect the powers exercised by the government under pre-existing constitutional provisions does not, taken alone, demonstrate that a proposal embraces more than one subject. All proposed constitutional amendments or laws would have the effect of changing the status quo in some respects if adopted by the voters.[28]

At most, use of the term "fundamental" provides a guide for implementing the newly created right to a secret ballot for employee representation elections. This rule of interpretation cannot form a second subject, because "[m]ere implementation or enforcement details directly tied to the initiative's single subject will not, in and of themselves, constitute a separate subject."[29] Accordingly, if this Court interprets the Proposed Initiative in a manner that designates all secret ballot rights as "fundamental," this interpretation does not create two separate subjects.

---

[28] *In re Ballot Title 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000).

[29] *See., e.g., In Re Title, Ballot Title and Submission Clause and Summary for 2005-2006 #73*, 135 P.3d 736, 739 (Colo. 2006).

Furthermore, the first sentence does not create a second subject, because the term "fundamental" is limited to employee representation elections. As a matter of statutory interpretation, the "fundamental" guidance appears within the new section entitled "Elections for employee representation," and this section heading guides the court in applying the "fundamental"right to elections for employee representation.[30] Further, when interpreting specific phrases, courts look at the "overall textual context"[31] of the Proposed Initiative. Here, the term "fundamental" immediately follows the title that establishes the parameters of the Proposed Initiative, and the term "fundamental" immediately precedes the specific and narrow grant of a new right to secret ballot for employee representation elections. Finally, in addition to the Proposed Initiative's plain language, it is the Proponent's intent that the Proposed Initiative only apply to employee elections or designations or authorizations. This Court may accept statements from the Proponents when interpreting an initiative.[32]

---

[30] *See e.g., People v. Madden*, 111 P.3d 452, 457 (Colo. 2005); *People v. Flippo*, 159 P.3d 100, 104 (Colo. 2007).

[31] *Flippo*, 159 P.3d at 104; *see also Stamp v. Vail Corporation*, 172 P.3d 437, 443 (Colo. 2007).

[32] *See In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #227 and #228*, 3 P.3d 1, 6 (Colo. 2000).

In addition to statutory interpretation, the use of the term "fundamental" does not establish a new fundamental right to vote by secret ballot in public elections. As noted above, Colo. Const. art. VII, § 8 already establishes the right to vote by secret ballot. Furthermore, this Court has already characterized that particular right to secret ballot as "fundamental to our system of government."[33] Finally, the United States Supreme Court has continuously emphasized the importance of a secret ballot. While not using the word "fundamental" that Court has nonetheless functionally treated the right to a secret ballot as fundamental. For example, it has stated that "[t]he tradition of anonymity in the advocacy of political causes . . . is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation."[34] Likewise, "[t]he very purpose of the secret ballot is to protect the individual's right to cast a vote without explaining to anyone for whom, or for what reason, the vote is cast,"[35] and "one of the great political reforms was the advent of the secret ballot as a universal

---

[33] *Taylor v. Pile*, 391 P.2d 670, 673 (Colo. 1964).

[34] *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 343 (1995).

[35] *Rogers v. Lodge*, 458 U.S. 613, 647 n. 30 (1982).

practice. . . ."[36] Accordingly, the Proposed Initiative's establishment of a "fundamental" right is limited, as a practical matter, to employee representation elections.

B. The ballot title correctly and fairly expresses the central features of the initiative.

1. Standard for correct and fair titles and submission clauses.

The Colorado Constitution requires that a proposed initiative's subject "be clearly expressed in its title."[37] The legislature has provided additional detail, stating that ballot titles must (1) "correctly and fairly express the true intent and meaning" of an initiative, and (2) "unambiguously state the principle of the provision sought to be added, amended or repealed."[38]

In *In re Breene*, this court discussed the test for setting titles, stating that "[t]he matter covered . . . is to be clearly, not dubiously or obscurely indicated by the title. Its relation to the subject must not rest upon a merely possible or doubtful inference."[39]

---

[36] *Buckley v. Valeo*, 424 U.S. 1, 237-38 (1976) (Burger, C.J., concurring in part and dissenting in part).

[37] Colo. Const. art. V, § 1(5.5).

[38] C.R.S. § 1-40-106(3)(b).

[39] *In re Breene*, 24 P. 3, 4 (Colo. 1890).

Most recently, this Court stated that it will "uphold the Board's choice of language if it clearly and concisely reflects the central features of the initiative. Accordingly, the Board is not required to provide specific explanations of the measure or discuss its every possible effect. Therefore, we will reject the Board's language only if it is so inaccurate as to clearly mislead the electorate."[40]

As a general matter, the Court gives great deference to title and submission clauses set by the Board and will only reverse if the titles are insufficient, unfair. or misleading.[41] The Court does not rewrite titles or submission clauses, and it will reject a title only if the title and submission clause "contain[s] a material and significant omission, misstatement, or misrepresentation."[42] As with its single-subject review, the Court will not "address the merits of a proposed initiative, nor . . . interpret its language or predict its application if adopted by the electorate."[43]

---

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

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

[42] *In re Proposed Initiative "Public Right in Waters II"*, 898 P.2d 1076, 1082 (Colo. 1995)

[43] *In re Proposed Initiative for 1997-1998 #64*, 960 P.2d 1192, 1197(Colo. 1998); *see also In re Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008).

2. The title does not misleadingly imply or create an inference that a constitutional right already exists.

In his first challenge to the ballot title, Hayes claims that the initiative creates the impression that the right to vote by secret ballot for employee representation currently exists, and the initiative "does not clarify the inference" that such a right does not exist. In other words, Hayes assumes that people reading the Proposed Initiative will infer that a right to secret ballot already exists.

Likewise the second challenge claims that the measure "implies" a pre-existing right to vote by secret ballot, when such a right does not currently exist. In both challenges, Hayes claims that the title misleadingly implies a pre-existing right to secret ballot.

As a procedural matter, Hayes did not raise either objection in his *Motion for Rehearing* before the Board, and accordingly the Proponents submit that he is barred from raising the matter in this Court. Specifically, Colorado law allows "any registered elector who filed a motion for a rehearing . . . or any other registered elector who appeared before the title board in support of or in opposition to a motion for rehearing" to file a petition with this Court.[44] A protestor's motion for

[44] C.R.S. § 1-40-107(2).

rehearing, therefore, establishes the scope of the protest before the Board, and it likewise establishes the scope of this Court's review.

The statutory framework also establishes a deadline for objecting to Board action. Here, Hayes' deadline for framing his challenges to the Proposed Initiative was June 10, 2008, the deadline for submitting his *Motion for Rehearing*. To allow Hayes to informally add to his *Motion for Rehearing* sidesteps the well-established deadlines for challenging Board action. Under C.R.S. §1-40-107 this Court exercises a "narrow scope of review of the Board's actions"[45] and that limitation applies to the issues framed by Hayes in his *Motion for Rehearing*. Hayes should not be allowed to add new challenges as he sees fit after he has submitted a motion for rehearing. Likewise, the *Motion for Rehearing* serves as a written record for this Court's review, to ensure Hayes properly raised issues before the Board under Section 107.

Turning to the merits of Hayes' objections, the title is not misleading because it does not imply any existing rights. Rather, the title is silent on the matter. It declares "[a]n amendment to the Colorado constitution concerning the right to vote by secret ballot regarding employee representation." It does not state

---

[45] *In re Title, Ballot Title and Submission Clause and Summary for 1997-1998 # 105*, 961 P.2d 1092, 1099 (Colo. 1998).

"an amendment to the Colorado constitution concerning the *existing* right . . . ." Further, it identifies an "amendment to the Colorado constitution," not an "amendment to the right to vote by secret ballot regarding employee representation." Accordingly, the single subject designation does not imply, nor does it give rise to an inference, that any current rights exist. Instead, the title properly reflects the central features of the initiative – namely, the right to vote by secret ballot in employee representation elections. When reading the initiative, voters will not be mislead that they are voting on something other than the right to vote by secret ballot for employee representation.

And the Proposed Initiative's title formulation is well established. The single subject is the establishment of a new right, and the title states the single subject as "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." In *In re Title, Ballot Title, and Submission Clause for 2007-2008 #62*, this Court found that the single subject was "the establishment of a just cause requirement of discharging or suspending an employee."[46] There, the title identified the single subject as "just cause for action against an employee by an

---

[46] *In re Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 59 (Colo. 2008).

employer, and in connection therewith, prohibiting the discharge or suspension . . . defining "just cause, [and] requiring an employer to provide . . . written documentation . . . ."[47] By identifying the single subject as "just cause," that title did not misleadingly imply that such a "just cause" standard already existed.

Likewise, in *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #227 and #228* the title stated the single subject as "expressing the public policy of the state of Colorado that the social institution of Marriage be between a man and a woman."[48] Although the Court analyzed this in the framework of a "catch phrase" it should be noted that the title did not create any inference that such a policy already existed. Indeed, the Court recognized that the initiatives "change[d] the different forms of marriage by adding a requirement that the marriage must be between a man and a woman."[49]

Finally, at most Hayes argues that the title "implies" or "creates an inference." Even if one accepts Hayes conclusion, an "inference" or "implication" does not rise to the level of "a material and significant omission, misstatement, or

---

[47] *Id.* at 63.

[48] *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #227 and #228*, 3 P.3d 1, 7 (Colo. 2000).

[49] *Id.* at 4.

misrepresentation"[50] that would "clearly mislead the electorate."[51] An "inference" is "a conclusion reached by considering other facts and deducing a logical consequence from them."[52] Rather than limit the title to the Proposed Initiative's central features, Hayes instead demands the title include a conclusion based on facts outside the Proposed Initiative. Furthermore, Hayes' argument runs afoul of *Breen*, which warned against titles that "rest upon a merely possible or doubtful inference."[53] In short, the Board is not required to anticipate or dispel every possible inference when setting a title.

3. The title and submission clause do not state that the state must "unconditionally guarantee" a fundamental right.

In his next challenge to the title, Hayes claims that the title is misleading because fundamental rights may be subject to "legislative qualification or

---

[50] *In re Proposed Initiative "Public Right in Waters II"*, 898 P.2d 1076, 1082 (Colo.,1995).

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

[52] Black's Law Dictionary 793 (8th ed.).

[53] *In re Breene*, 24 P. 3, 4 (Colo. 1890).

limitation and thus are never, in fact, unconditionally guaranteed."[54] This challenge fails for three reasons.

First, the title does not use the term "unconditionally guarantee." Accordingly, the title does not state that the fundamental right to vote by a secret ballot is "unconditionally guaranteed," as argued by Hayes.

Second, use of the term "guarantee" reflects the language of the Proposed Initiative. Accordingly, it accurately and fairly summarizes the Proposed Initiative. In challenging the initiative, Hayes asks this Court to (1) anticipate how the new right to vote by secret ballot may be limited or qualified, and then (2) rewrite the title to indicate how the right will be limited or qualified in the future. In short, Hayes asks this Court to "interpret [the Proposed Initiative's] language or predict its application if adopted by the electorate."[55] The Court should reject this invitation.

Finally, courts regularly use the word "guarantee" when describing the protection of constitutional rights. Examples abound. With respect to the First

---

[54] *Petition for Review* at 4.

[55] *In re Proposed Initiative for 1997-1998 #64*, 960 P.2d 1192, 1197 (Colo. 1998); *see also In re Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008).

Amendment, the United States Supreme Court has stated that "[i]t is clear that the Government may not prohibit or control the conduct of a person for reasons that infringe upon constitutionally guaranteed freedoms."[56] The same Court has held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[57] And the Fifth Amendment contains a "guarantee against self-incrimination," while the Sixth Amendment guarantees the right to confront witnesses.[58]

Accordingly, the Proposed Initiative uses the term "guarantee" in the same way courts have described constitutional protections for many years. Courts construe terms according to their "commonly accepted understood meaning,"[59]and the term "guarantee" is commonly understood to provide very strong protection for constitutional rights, but not unlimited or unqualified protection. Accordingly, the Proposed Initiative's use of the term "guarantee" indicates that courts will give the right to vote by secret ballot strong protection, just like the strong protection given to other rights.

---

[56] *Smith v. U.S.*, 502 F.2d 512, 516 (1974).

[57] *District of Columbia v. Heller*, 128 S.Ct. 2783, 2798 (2008).

[58] *Mayle v. Felix*, 545 U.S. 644, 673 (2005).

[59] *Beeghley v. Mack*, 20 P.3d 610, 612-613 (Colo. 2001).

4. The title and submission clauses need not incorporate details of the term "political subdivision."

Hayes' final challenge states that the ballot title fails to inform voters of the "novel and expansive" definition of "political subdivision." First, the title is not required to list the details of defined terms, but rather only reflect the central features of an initiative. Thus, the Board is not required to provide specific explanations of the measure or discuss its every possible effect. Here, the title states that it applies to "political subdivisions" thus indicating a legal term within the initiative. The Board is not required to include the many different definitions of "political subdivision."

Second, the title is not misleading, because the definition of political subdivision is not novel. The definition of political subdivision in the Proposed Initiative accurately captures the common conception of a political subdivision – specified governmental entities, or organizations independently exercising governmental authority. It does not apply to private organizations that do not exercise governmental authority.

Further, the Proposed Initiative's definition of "political subdivision" merely draws from existing Colorado law, which contains multiple definitions of "political subdivision." Unfortunately, there is no a "standard" or "typical" definition of

"political subdivision" in Colorado. Current definitions differ from and occasionally conflict with one another. Accordingly, the Proposed Initiative's definition of "political subdivision" draws from the following, established definitions of "political subdivision" that already exist in current law:

- C.R.S. § 24-6-402(1)(c): "Political subdivision of the state" includes, but is not limited to, any county, city, city and county, town, home rule city, home rule county, home rule city and county, school district, special district, local improvement district, special improvement district, or service district;[60]
- C.R.S. § 24-34-401(3): "Employer" means the state of Colorado or any political subdivision, commission, department, institution, or school district thereof, and every other person employing persons within the state;[61]
- C.R.S. § 24-37.5-702(6): "Political subdivision" means a municipality, county, city and county, town, or school district in this state;[62]

---

[60] C.R.S. § 24-6-402(1)(c).

[61] C.R.S. § 24-34-401(3).

[62] C.R.S. § 24-37.5-702(6).

- C.R.S. § 24-53-101(5): "Political subdivision" includes an instrumentality of this state, or of one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or subdivision and only if its employees are not, by virtue of their relations to such juristic entity, employees of the state or subdivision. "Political subdivision" does not include a school district;[63]
- C.R.S. § 24-54-101(2.7)(c): "Political subdivision" means any district, special district, improvement district, authority, council of governments, governmental entity formed by an intergovernmental agreement, or any other kind of municipal, quasi-municipal, or public corporation organized pursuant to law;[64]
- C.R.S. § 24-72-202(5): "Political subdivision" means and includes every county, city and county, city, town, school district, special district, public highway authority, regional transportation authority, and housing authority within this state;[65]

---

[63] C.R.S. § 24-53-101(5).

[64] C.R.S. § 24-54-101(2.7)(c).

[65] C.R.S. § 24-72-202(5).

- *Dawson v. State Compensation Ins. Authority*: applied the term "political subdivision" as used in the Open Records Act to a Compensation Insurance Authority that exercised governmental powers.[66]
- *Denver Post Corp. v. Stapleton Development Corp.*: applied the term "political subdivision" as used in the Open Records Act to a nonprofit exercising governmental control over the development of government property.[67]

Accordingly, the term "political subdivision" in the title accurately captures the common view of specified governmental entities and entities that exercise governmental powers. Further, the definition of political subdivision merely draws from existing, well-established law. Accordingly, the title need only refer to "political subdivision" and need not provide a separate explanation of the term.

---

[66] *Dawson v. State Compensation Ins. Authority*, 811 P.2d 408, 409 (Colo. App. 1990).

[67] *Denver Post Corp. v. Stapleton Development Corp.*, 19 P.3d 36, 41 (Colo. App. 2000).

V. CONCLUSION

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

Respectfully submitted this 14th day of July, 2009.

By: _____

Scott E. Gessler, Reg No. 28944
Mario D. Nicolais, II, Reg. No. 38589
Hackstaff Gessler LLC
1601 Blake Street, Ste 310
Denver, Colorado 80202

Attorneys for Hitesh Patel and Gail Lindley

CERTIFICATE OF SERVICE

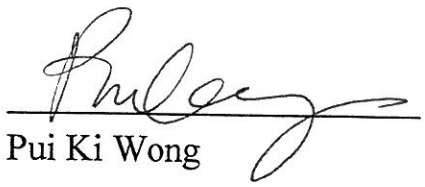
I certify that on this 14th day of July, 2009, the foregoing **RESPONDENTS' OPENING BRIEF** was served on all parties and other interested persons by US Mail properly addressed to:

Mark G. Grueskin
Isaacson Rosenbaum P.C.
633 17th Street, Suite 2200
Denver, Colorado 80202

Hitesh Patel
6778 Bronzite Way
Castle Rock, Colorado 80108-7810

Gail Lindley
4545 Grove Street
Denver, Colorado 80211

Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 6th Floor
Denver, Colorado 80203



Pui Ki Wong

RECEIVED Final Text #15
APR 2 4 2009 9:54 A.M.
ELECTIONS
SECRETARY OF STATE (G Km

Be it enacted by the People of the State of Colorado:

Section 8 of article VII of the constitution of the state of Colorado is amended to read:

SECTION 1.

Section 8. Elections by ballot or voting machine. (1) THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT IS FUNDAMENTAL. WHERE STATE OR FEDERAL LAW REQUIRES ELECTIONS FOR PUBLIC OFFICE OR PUBLIC VOTES ON INITIATIVES, REFERENDA, OR DESIGNATIONS OR AUTHORIZATIONS OF EMPLOYEE REPRESENTATION, THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT SHALL BE GUARANTEED.

(2) All elections by the people shall be by ballot, and in case paper ballots are required to be used, no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it. The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted. In all cases of contested election in which paper ballots are required to be used, the ballots cast may be counted and compared with the list of voters, and examined under such safeguards and regulations as may be provided by law. Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting is preserved.

(3) When the governing body of any county, city, city and county or town, including the city and county of Denver, and any city, city and county or town which may be governed by the provisions of special charter, shall adopt and purchase a voting machine, or voting machines, such governing body may provide for the payment therefor by the issuance of interest-bearing bonds, certificates of indebtedness or other obligations, which shall be a charge upon such city, city and county, or town; such bonds, certificates or other obligations may be made payable at such time or times, not exceeding ten years from date of issue, as may be determined, but shall not be issued or sold at less than par.

EXHIBIT
A

Ballot Title Setting Board

Proposed Initiative 2009-2010 #15[1]

Hearing May 6, 2009:
Board member representing Attorney General recused himself from participation.
Title setting denied – lack of single subject.
Hearing adjourned 11:37 a.m.

[1] Unofficially captioned **"Voting by Secret Ballot"** by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.