

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p> <hr/> <p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #133 (“Colorado Legislative Redistricting Commission”)</p> <p><b>Petitioner: Donna R. Johnson</b></p> <p>v.</p> <p><b>Respondents: Kathleen Curry and Frank McNulty</b></p> <p><b>and</b></p> <p><b>Title Board: SUZANNE STAIERT; FREDERICK YARGER; and JASON GELENDER</b></p>	<p style="text-align: right;">DATE FILED: May 19, 2016 4:16 PM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorney for Petitioner Donna R. Johnson: Mark G. Grueskin, #14621 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1000 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: <a href="mailto:mark@rklawpc.com">mark@rklawpc.com</a></p>	<p><b>Case No. 2016SA154</b></p>
<p style="text-align: center;"><b>PETITIONER’S OPENING BRIEF ON PROPOSED INITIATIVE 2015-2016 #133 (“COLORADO LEGISLATIVE REDISTRICTING COMMISSION”)</b></p>	

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

It contains 3,095 words.

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For the party raising the issue:

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

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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.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

*s/ Mark G. Grueskin*

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Mark G. Grueskin

*Attorney for Petitioner*

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## **ISSUE PRESENTED**

Whether the Title Board erred by setting a title for an initiative that contains at least three subjects, including:

- (a) significant changes to appointments to and processes used by the existing Reapportionment Commission for setting district boundaries for state senate and state house of representative districts;
- (b) setting a limit on the political involvement of persons, including volunteers, who are registered as lobbyists by preventing this class of persons from serving on the redistricting commission; and
- (c) changing the purpose and duties of the Supreme Court Nominating Commission, a deliberately non-political entity that determines finalists for judicial positions on the state's appellate courts, to also include the politically charged responsibility to screen potential appointees to one-third (1/3) of the redistricting commission's membership and determine the finalists for those positions.

## **STATEMENT OF THE CASE**

### **A. Statement of Facts.**

Initiative #133 is one of several redistricting concepts that have been proposed by these designated representatives this election cycle. Initiative #55 was proposed and withdrawn, and Initiatives #107, #128, #132, and #133 received titles

which were appealed to this Court. Proponents then withdrew Initiatives #107 and #128. This measure vastly changes the procedures and substantive rights relating to the decennial reapportionment of the State for purposes of drawing districting lines for 35 state senate districts and 65 state house of representative districts.

**B. Nature of the Case, Course of Proceedings, and Disposition Below.**

Kathleen Curry and Frank McNulty (hereafter “Proponents”) proposed Initiative 2015-2016 #133 (“#133”). A review and comment hearing was held before representatives of the Offices of Legislative Council and Legal Services. Thereafter the Proponents submitted a final version of the Proposed Initiative to the Secretary of State for purposes of submission to the Title Board, of which the Secretary or his designee is a member.

Among its major provisions, Initiative #133: revamps and adds to the existing criteria for setting the boundaries of all state legislative districts; changes the process for arriving at and appealing state legislative districting decisions; imposes limits on who may serve on the commission, excluding any person who is a registered lobbyist, among others; and assigns a new and unrelated task to the Supreme Court Nominating Commission, giving it authority to determine finalists for positions as commissioners to fill one-third of the commission.

Like its companion proposals, Initiative #133 authorizes majority and minority legislative leaders to appoint two members of the commission. In

addition, the state's highest ranking elected officials of the two largest political parties would each appoint two more members (for a total of four) and could do so only from a list of ten (10) voters, which is to be assembled by the Supreme Court Nominating Commission. Prior to the making of appointments, the Nominating Commission would determine which applicants from across the state meet the political party affiliation requirements for these four positions (members of minor parties or unaffiliated with any political party) and then evaluate those voters on any other factors it deems appropriate to winnow the group to the only ten people who may be considered for these commission appointments.

A Title Board hearing was held on April 20, 2016 to establish the Proposed Initiative's single subject and set a title. On April 27, 2016, Petitioner filed a Motion for Rehearing, alleging that the Board did not have jurisdiction to set a title. The rehearing was held on April 28, 2016, at which time the Title Board denied the Motion for Rehearing. The Board set the following title:

*Shall there be an amendment to the Colorado constitution concerning state legislative redistricting, and, in connection therewith, restructuring the state commission that sets boundaries for state senatorial and representative districts to require at least 4 of the 12 commissioners be affiliated with a minor political party or unaffiliated with any political party; prohibiting commissioners from being registered lobbyists or members or candidates for the U.S. Congress or the Colorado legislature; requiring the agreement of at least 8 of 12 commissioners to approve any action of the commission; adding competitiveness as the final criteria to be used in drawing state legislative districts; establishing a procedure to set legislative*

*district boundaries if the commission is unable to adopt a plan; and requiring that the commission's work be done in public meetings?*

## **SUMMARY**

The Proponents violated the single subject requirement in drafting their initiative. The Title Board embraced that error by setting a ballot title.

Initiative #133 contains at least three subjects: (1) changing the existing Reapportionment Commission process for setting state legislative districts; (2) curtailing certain political involvement of all volunteer lobbyists, as well as all professional lobbyists, by prohibiting them from serving on the commission; and (3) changing the apolitical role of the Supreme Court Nominating Commission to include the political role of determining the finalists for the 4 swing votes on the Reapportionment Commission.

This Court previously has held that limiting an entire profession's political involvement, as part of a measure that changes election-related procedures, is a second subject. The prohibition on lobbyists serving on a redistricting commission is no different than the prohibition on lawyers serving on the Title Board; both are a second subject that deprives the Board of jurisdiction to set a title.

The Court also previously held that fundamentally changing a commission that is, by its nature, unrelated to the subject of an initiative comprises a second subject. Reapportionment is a legislative function; judicial nominations are a judicial function. The Nominating Commission was adopted by voters in order to



make the process apolitical; no one would argue that reapportionment is apolitical. Voters must choose whether to support changes to the reapportionment commission process or a transformation in the Nominating Commission, a divergence that goes to the heart of the evils the single subject requirement was intended to prevent: voters being surprised by an element of a measure or being forced to choose among competing provisions, both of which they would not ordinarily favor.

Thus, the Board erred, and this initiative should be returned to Proponents.

## LEGAL ARGUMENT

### **A. The Title Board lacked jurisdiction to set a ballot title because Initiative #133 violates the single subject requirement.**

#### 1. Standard of review; preservation of issue below.

The Colorado Constitution requires that any initiative must comprise a single subject in order to be considered by the Title Board. Colo. Const., art. V, § 1(5.5). Where a measure contains multiple subjects, the Board lacks jurisdiction to set a title. The Board's analysis and this Court's review is a limited one, addressing the meaning of an initiative to identify its subject or subjects. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172, No. 173, No. 174, and No. 175*, 987 P.2d 243, 245 (Colo. 1999). To find that a measure addresses only one subject, the Court must determine that an

initiative's topics are "necessarily and properly" related to the general single subject assigned to the measure by the Title Board, rather than "disconnected or incongruous" with that subject. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Adopted April 17, 1996 (1996-17)*, 920 P.2d 798, 802 (Colo. 1996).

The single subject issues raised in this appeal were presented to the Board at the rehearing and thus preserved for review. See Donna R. Johnson's Motion for Rehearing on Initiative 2015-2016 #133 at 1-3 (¶¶B.1, 2, and 3).

2. #133's first subject: changes to the state reapportionment commission

This initiative reconfigures the state legislative reapportionment mechanism in a variety of significant ways:

- assigns the task of district line-drawing to the renamed reapportionment commission, Proposed Art. V, § 45(1);
- allows the reconfigured commission to establish rules so it may remove a commissioner for cause and mandates removal of any commissioner who has prohibited communications, Proposed Art. V, §§ 45(6)(a);
- authorizes staff to draw maps to be submitted to the Supreme Court if staff cannot present a map to the commission, Proposed Article V, § 48(1)(a)(III);
- requires a 2/3 vote among commissioners to approve a reapportionment plan rather than a majority as in current law, Proposed Art. V, § 45(5);

- changes the criteria for drawing districts by adding standards, including “maximiz[ing] the number of competitive senatorial and representative districts.”<sup>1</sup> Proposed Art. V, §§ 47(4);
- requires the commission, where it cannot achieve a 2/3 consensus on its first, second, or third maps, to submit the second map to the Supreme Court for approval, Proposed Article V, § 48(1)(b)(IV); and
- changes the appellate process where the commission agrees by supermajority to a map, Proposed Art. V, § 48(3)(g), (h).

3. #133’s second subject: limits on political involvement of “lobbyists”

Initiative #133 prohibits any person who is a “registered lobbyist” from serving on the Commission. This prohibition would apply to any person who is either a professional lobbyist or a volunteer lobbyist. *See* C.R.S. § 24-6-301(3.7) (“‘Lobbyist’ means either a professional or volunteer lobbyist.”)

This single subject issue is controlled by a clear holding on another ballot initiative that sought to restrict political involvement based on a person’s profession. In *In re Title, Ballot Title and Submission Clause for 2003-2004 #32 and #33*, 76 P.3d 460, 462 (Colo. 2003), the Supreme Court considered an

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<sup>1</sup> Currently, competitiveness is not explicitly part of legislative reapportionment. “Other nonconstitutional considerations, such as the competitiveness of a district, are not per se illegal or improper; however, such factors may be considered only after all constitutional criteria have been met.” *In re Colorado General Assembly, supra*, 332 P.3d at 111.

initiative that changed the process for initiative qualification and also prohibited the Attorney General and any other lawyer from participating in the ballot title setting process as “ballot title setters.” The Court’s holding is instructive.

More generally and perhaps more importantly, however, the provision also limits the substantive rights of all attorneys. By foreclosing any possibility that an attorney could serve on the title board, **these initiatives restrict the political rights of all attorneys.** Under our prior decisions, **this exclusion from the political process is a substantive matter, not a procedural change** to the petitions process. *See Evans v. Romer*, 854 P.2d 1270 (Colo.1993), *cert. denied*, 510 U.S. 959, 114 S.Ct. 419, 127 L.Ed.2d 365 (1993)....

In the case at hand, the four initiatives propose that a specifically identifiable group, lawyers, be excluded from the ballot title board. Although this provision is much more limited than the exclusion in *Evans v. Romer*, **it does affect the substantive rights of attorneys to participate in the political process.** It has no necessary or proper connection to the purpose of the proposed measures, i.e., to liberalize the procedure for initiative and referendum petitions.... Because **these proposed measures would affect existing substantive rights in addition to the primary subject concerning the procedural mechanisms** of the initiative and referendum process, # 21 and # 22 do not comply with the single subject requirement.

#32 and #33, *supra*, 76 P.3d at 462-63 (emphasis added).

In the same way, Initiative #133 prohibits any person who lobbies, either as a professional or as a volunteer, from serving on the Commission. This is true even though a person may lobby at one level (federal vs. state) but not the other. It is also true that it is simply the fact of political participation that can disqualify one as a possible commissioner. Thus, a person who lobbies for the League of Women

Voters,<sup>2</sup> for instance, on issues such as openness in government or fairness of elections, is prohibited from also participating as a commissioner who helps draw the lines of legislative districts. *See* C.R.S. § 24-6-301(3.5)(a)(I), (II.5), (IV) (“lobbying” means communicating directly or soliciting others to communicate with a covered official on a wide variety of matters, including any legislation, report, fiscal impact statement, or agency rule or standard).

This additional subject – the exclusion of a “specifically identifiable group” from participation in the political process – violates Article V, § 1(5.5).

4. #133’s third subject: changing the mission of the Supreme Court Nominating Commission

One mandate of this initiative is to impose upon the Supreme Court Nominating Commission, for the first time, the requirements that it: “establish and announce a process for appointment” of the four redistricting commission members who must be either unaffiliated with any major political party or members of a minor political party; solicit, receive, and review applications for these redistricting commission positions; and “forward a list of 10 recommended applicants to the eight members of the (redistricting) commission.” Proposed Article V, § 45(8)(a)(III).

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<sup>2</sup> *See* Exhibit A, attached hereto (list of volunteer lobbyists for current legislative session).

As such, the Supreme Court Nominating Commission is given the task of choosing among applicant names to provide the decisive four votes on the redistricting commission. Given the Proponents' ominous warning about gerrymandering in the redistricting process, *see* Section 1, they certainly cannot deny that this redistricting task is political in nature. And to the extent that the Supreme Court Nominating Commission would provide the list of nominees to be the political balance of power on the redistricting commission, its members will have a uniquely political role to perform and can be chosen to serve with that goal in mind.

This conversion of a non-political commission, which is now charged solely with winnowing names to fill vacancies on the Colorado Court of Appeals and the Colorado Supreme Court, is a major change in mission. Not only does the Supreme Court Nominating Commission have no expertise regarding redistricting or persons suited to undertake that task, voters approved it to completely divorce political influence from the process of determining the membership of the judiciary. The 1966 voter-adopted constitutional amendment reflected “the intent of Colorado’s voters to maintain an independent judiciary by **insulating the judicial nominating process from politics.**” Formal Op. Att’y. Gen. No. 04-03 (April 12, 2004) (emphasis added).

An example of how the non-political Supreme Court Nominating Commission can easily become a partisan effort can be seen in reviewing the list of current members' terms. Non-attorney Nominating Commission members are appointed by the governor, and all of them, except for one, will turn over prior to the 2021 redistricting.<sup>3</sup> *See* Colo. Const., art. VI, § 24(4). If the Proponents are correct about the infusion of political interests by persons engaged in redistricting, then the same people who are narrowing a statewide list of redistricting commission applicants will also be nominating appellate justices, even though their primary focus is supposed to be on “insulating the judicial nominating process from politics.”

The current merit selection process for judges and justices utilizes the Supreme Court Nominating Commission to identify two or three nominees to fill a vacant position on the Supreme Court or an intermediate appellate court. The governor appoints from this list, and if he or she fails to do so within fifteen days of receiving the list, the chief justice makes the appointment. Colo. Const., art. VI, sec. 20(1).

State legislative redistricting, placed in Article V of the Constitution dealing with the “Legislative Department,” is a legislative task. Using an initiative to divest the General Assembly of this authority is still a legislative act, as the voters

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<sup>3</sup> *See* Exhibit B, attached hereto (current roster and terms of Supreme Court Nominating Commission).

are exercising that portion of their “reserved” legislative authority that they have decided not to cede to the legislature itself. Colo. Const., art. V, § 1(1); *Armstrong v. Mitten*, 37 P.2d 757, 759-60 (Colo. 1934).

However, the Supreme Court Nominating Commission is not part of the legislative branch. None of its members are legislatively appointed. *See* Colo. Const., art. VI, § 24(4) (“Members of each judicial nominating commission selected by reason of their being citizens admitted to practice law in the courts of this state shall be appointed by majority action of the governor, the attorney general and the chief justice. All other members shall be appointed by the governor.”) Moreover, the Commission does not exercise legislative powers or perform a legislative function.

Voter-proposed initiatives contain separate subjects if they: (1) alter the powers of a commission that has a particularized mission; and (2) revamp a key function of an unrelated branch of government. *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1997–1998 #64*, 960 P.2d 1192, 1199–1200 (Colo.1998). This proposed initiative both changes the focus of the Supreme Court Nominating Commission (from non-political to political and from appellate judges to legislative district boundaries) and revises the redistricting function of the legislative branch.



Additionally, this measure requires voters to accept a fundamental policy trade-off – between further de-politicizing of the body charged with legislative redistricting and re-politicizing of the body charged with appellate judicial selection. This is precisely the type of initiative that Colo. Const., art. V, § 1(5.5) was intended to prevent. “[T]he single subject requirement protects against proponents that might seek to secure an initiative's passage by joining together unrelated or even **conflicting purposes and pushing voters into an all-or-nothing decision.**” *In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2009-2010 No. 24*, 218 P.3d 350, 353 (Colo. 2009) (emphasis added).

This measure is a virtual poster-child for the concerns that led to enactment of the single subject requirement. First, the use of a generalized descriptor for the measure’s subject does not meet the constitutional standard for a “single subject.” *In re Title, Ballot Title, and Submission Clause and Summary for Proposed Initiative for 1997–1998 # 64*, 960 P.2d 1192, 1200 (Colo. 1998) (“If the entire judicial branch were regarded as a single subject, incongruous and disconnected provisions could be contained in a single initiative and the very practices the single subject requirement was intended to prevent would be facilitated.”). “State legislative redistricting” does not encompass “changes to the objective of an independent judicial nominating commission.”

Second, the single subject requirement was designed to avoid voter surprise resulting from the inadvertent passage of a surreptitious provision, concealed within an omnibus initiative. *In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2001-2002 No. 43*, 46 P.3d 438, 442-443 (Colo. 2002); C.R.S. § 1-40-106.5(1)(e)(II). Given the drastic overhaul of the redistricting process sought by this measure, it is unlikely that voters discern this initiative's actual reach to a fundamentally unrelated commission.

Therefore, the measure contains multiple subjects and deprives, solely by the decision of the Proponents, this Board of jurisdiction to set a ballot title.

### **CONCLUSION**

Petitioner respectfully requests that, after consideration of the parties' briefs, this Court determine that the Proposed Initiative violates the single subject requirement and thus the Title Board lacked jurisdiction to set such title for the Proposed Initiative, rendering the ballot title void.

Respectfully submitted this 19th day of May, 2016.

*/s Mark Grueskin*

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Mark G. Grueskin, #14621  
RECHT KORNFELD, P.C.  
1600 Stout Street, Suite 1000  
Denver, CO 80202  
Phone: 303-573-1900  
Facsimile: 303-446-9400  
Email: [mark@rklawpc.com](mailto:mark@rklawpc.com)

**ATTORNEY FOR PETITIONER**

**CERTIFICATE OF SERVICE**

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING BRIEF ON PROPOSED INITIATIVE 2015-2016 #133 ("COLORADO LEGISLATIVE REDISTRICTING COMMISSION")** was sent this day, May 19, 2016, via ICCES to counsel for the Title Board and the Proponents:

LeeAnn Morrill  
Matthew Grove  
Grant Sullivan  
Office of the Attorney General  
1300 Broadway, 6th Floor  
Denver, CO 80203

Kelley B. Duke  
Benjamin J. Larson  
Ireland Stapleton Pryor & Pascoe, PC  
717 Seventeenth Street, Suite 2800  
Denver, CO 80202

*/s Erin Holweger*

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<b>Akinahew, Serena L</b> CCDC	(H) 18224 E. Layton Pl. Aurora CO 80015	(H) 720.256.8
<b>Atwood, Frank F</b> Approval Voting	(O) 7094 South Costilla Street Littleton, CO 80120-3518	(O) 720-260-
<b>Augden, Sally</b> League of Women Voters	(H) 4482 Quitman Street Denver, CO 80212	(H) 303-455-
<b>Clinton, Carisa</b> CCDC	(O) 1121 W. Prospect Rd. Ft. Collins 80526	(O) 970.204.(
<b>Cloven, Matthew</b> ARC of Larimer County	(O) 1121 W. Prospect #140 Fort Collins CO 80526	(O) 970-204-
<b>DeBey, Kenneth</b> Colorado Alliance for Retired Americans	(H) 10650 West 87th Place Lakewood, CO 80215	(H) 303=233-
<b>Diana, Milne</b> Colorado Cross-Disability Coalition	(O) 855 Broadway Denver, CO 80203	(O) 303-839-
<b>Edmiston, Robert E</b> Colorado Citizens for Scund in Medicare	(O) 721 S Maiposa Way Denver, CO 80223	(H) 303.935.(
<b>Fahrenbruch, Karin</b> CCDC	(H) 1303 N. Wilson #102 Loveland CO 80537	(O) 970-221-
<b>Fahrenbruch, Melody L</b> CO Cross Diabilitty Coalition	(H) 735 14th Street #106 Loveland CO 80537	(H) 970-581-

Exhibit A

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<b>Fahrenbruch, Melody L</b> <b>CO Cross Disability Coalition</b>	(H) 735 14th Street #106 Loveland CO 80537	(H) 970-581-
<b>Grattet, Jean</b> <b>League of Women Voters</b>	(O) 1410 Grant Street B204 Denver, CO 80203	(O) 303-863-
<b>Hanilton, Richard G</b> <b>Action for Public Trust</b> <b>The South Park Coalition</b> <b>Citizens Progressive Alliance</b>	(O) 531 Front St Fairplay, CO 80440	(O) 720.483.:
<b>Hart, Linda K</b> <b>Colorado Federation of Dog Clubs, Inc</b>	(O) PO Box 265 Littleton, CO 80160	(O) 303.842.:
<b>Haven, Robert D</b> <b>Colorado Cross Disability Coalition</b>	(O) 655 Broadway #775 Denver, CO 80203	(O) 303-839- (H) 303-564-
<b>Hillery, Jeannette</b> <b>League of Women voters</b>	(O) 1410 Grant Street B 204 Denver, CO 80203	(O) 303-863- (H) 303-494-
<b>Hillery, Jeannette</b> <b>League of Women Voters</b>	(O) 1410 Grant St Denver, CO 80203	(O) 303.494.:
<b>Huber, Blake</b> <b>Approval Voting USA</b>	(O) 7094 S. Costilla Way Littleton, CO 80120 (H) 655 S. Clinton 655 S. Clinton St. #3B Denver, CO 80247	(H) 720.254.:
<b>Hutter, Sheryle A</b> <b>CCDC</b> <b>PAD-CO</b> <b>EJF</b> <b>S.A.V.E.</b> <b>ADAPT</b>	(H) 935 S Joliet St Aurora, CO 80012	(H) 303.364.:
<b>Hutter, Ron K</b> <b>Self</b> <b>ARC of Aurora</b>	(O) 935 S Joilet St Aurora, CO 80012	(O) 303.364.:

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<b>Hutter, Ron K</b> Self ARC of Aurora	(O) 935 S Joilet St Aurora, CO 80012	(O) 303.364.:
<b>Hutter JR., Ron</b> CCDC		
<b>Jones Glischowsky, Gregoy D</b> ERROR Incorrect data type for operator or @Function Text expected AARP	(O) 5160 S Pitkin St Centennial CO 80237	(O) 303.331.4
<b>Levine, Jonna C</b> 7859 W. 38th Ave	(O) 7859 W. 38th Ave. Wheatridge, CO 80033	
<b>Levutt, Burchan L</b> Self	(O) 2668 West Colfax Ave Denver, CO 80219	(O) 720-628-
<b>McVaney, James M</b> Industrial Hemp in Colorado LLC	(O) PO Box	
<b>Medbery, Angela</b> Colorado Pesticide Network	(O) 2205 Meade St Denver, CO 80211	(O) 303.433.:
<b>Merrill, Forrest Nicole R</b> Colorado Cross Disabilitiy Coalition	(H) 6150 W. 13th Ave Lakewood, CO 80214	(O) 720.231.:
<b>Moffatt, Ramona J</b> CO Alliance for Retired Americans	(O) 140Sheridan Blvd. Denver, CO 80226	(O) 303.980.9
<b>Nofles, Jean</b> Legislative Advocate - AARP	(O) 303 17th ST denver, CO 80203	

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<b>Nofles, Jean</b> <b>Legislative Advocate - AARP</b>	(O) 303 17th ST denver, CO 80203	
<b>Norris, Olympia</b> <b>Posterity Productions, LLC</b>	(O) 2200 Market Street Denver CO 80205	(H) 310-254-
<b>Officer, Derek R</b> <b>Social Justice and Environmental Issues</b>	(O) PO Box 876 Denver CO 80201	(O) 303-915-
<b>Pace, Carol</b> <b>League of Women Voters-----AARP</b>	(O) 1410 Grant Street B204 Denver, CO 80203	(O) 303-863-
<b>Robertson, Aaron</b> <b>The Patriot League</b>	(O) PO Box 1435 Eastlake, CO 80614	(O) 303.876.6 (H) 719.495.6
<b>Rosa, Linda A</b> <b>Providing infromation on pbstroca; cpmsumer advocacy</b>	(H) 711 W 9th St. Loveland, CO 80537	(O) 970.667.1
<b>Rosser, Edwin "Mike" M</b> <b>ERROR</b> <b>Incorrect data type for operator or @Function</b> <b>Text expected</b> <b>AARP</b> <b>Colorado Mortgage Lenders Associaiton</b>	(O) 12478 E Ameherst Cirlice bldg A, Suite 80222 Auora, CO 80014	(O) 303.887.8
<b>San Miguel, Sophia C</b>	(H) 5520 Federal Blvd. #52 Denver 80221	(H) 720-907.1
<b>Stoker, RJ</b> <b>CCDC</b>	(O) 900 Marmot Ct. Longmont 80504	
<b>Welch, Maureen P</b> <b>self</b>	(H) 4896 South Clarkson St. Cherry Hills Village, CO 80113	(H) 720.436.4

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<b>Welch, Maureen P self</b>	(H) 4896 South Clarkson St. Cherry Hills Village, CO 80113	(H) 720.436.4
<b>Whinery, Barbara League of Women Voters</b>	(H) 235 North 39th Place Gree;ey, CO 80634	(H) 970-353-
<b>Williams, Shannon M CCDC</b>	(H) 6093 S. Beeler Greenwood Village 80111	
<b>Wren, Randy M</b>		
<b>Wright, Hal V Coloradans for Alternatives to the Death Penalty</b>	(H) 7311 South Marion St Centennial, CO 80122	(H) 303-795 :
<b>Yott, Paul L CCDC, Veterans Military Affairs</b>	(H) 1203 E 108th Ave Northglenn 80233	(H) 303.254.7



# Supreme Court Nominating Commission Members

DATE REvised: May 19, 2016 4:16 PM

## Attorney Members

- Kathleen Lord (D) 1st Congressional District 01/01/14 to 12/31/19
- Shannon Stevenson (U) 2nd Congressional District 01/01/15 to 12/31/20
- Kim Childs (U) 3rd Congressional District 08/14/12 to 12/31/17
- Scott C. Johnson (U) 4th Congressional District 04/13/12 to 12/31/17
- Eric Von Levern Hall (R) 5th Congressional District 01/01/12 to 12/31/17
- Michael Burg (D) 6th Congressional District 01/01/14 to 12/31/19
- Charles Tingle (R) 7th Congressional District 09/08/11 to 12/31/16

## Non Attorney Members

- Msiah Montoya (D) 1st Congressional District 08/12/14 to 12/31/19
- Ann Hendrickson (R) 2nd Congressional District 04/06/12 to 12/31/17
- Robert Scott (R) 3rd Congressional District 01/31/14 to 12/31/19
- Tracee Marie Bentley (R) 4th Congressional District 03/16/15 to 12/31/20
- Jay Patel (R) 5th Congressional District 01/01/16 to 12/31/21
- Jim Carpenter (D) 6th Congressional District 01/01/14 to 12/31/19
- Olivia Mendoza (D) 7th Congressional District 04/06/12 to 12/31/17
- Connie McArthur (D) At Large 01/01/14 to 12/31/19

As of: 03-16-15