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BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Colorado Secretary of State

Donna R. Johnson, Objector

vs.

Kathleen Curry and Frank McNulty, Proponents.

**MOTION FOR REHEARING ON INITIATIVE 2015-2016 #128
("Colorado Congressional Redistricting Commission")**

Donna R. Johnson, a registered elector of the State of Colorado, through legal counsel, Recht Kornfeld P.C., objects to the Title Board's title and ballot title and submission clause set for Initiative 2015-16 #128 ("Colorado Redistricting Commission").

A. The Title Board set a title for Initiative 2015-16 #128 on April 20, 2016.

At the hearing held in connection with this proposed initiative, the Board designated and fixed the following ballot title and submission clause:

Shall there be an amendment to the Colorado constitution concerning congressional redistricting, and, in connection therewith, transferring authority to establish congressional districts from the general assembly to a newly created twelve-member Colorado congressional redistricting commission; requiring at least four commissioners to be either affiliated with a minor political party or unaffiliated with any political party; prohibiting commissioners from being registered lobbyists or members of or candidates for the U.S. Congress or the Colorado legislature; specifying that all actions of the commission must be agreed to by at least eight of the twelve appointed commissioners; adopting existing criteria to be used in setting boundaries of congressional districts and adding competitiveness to the criteria; providing for judicial review of an adopted redistricting map; and requiring that the commission's work be done in public meetings?

B. Initiative #128 contains multiple subjects, contrary to Colo. Const., art. V, sec. 1(5.5).

1. Changes to the process used for congressional redistricting

Among other things, the initiative creates a commission for congressional redistricting, sets up a hearing process concerning congressional districts, allows for judicial review, sets standards for members of the commission (both as to party affiliation and communications about redistricting that do not occur in a commission meeting), sets standards for commission staff,

authorizes certain actions to be undertaken by staff, establishes timelines for commission actions, and summarizes criteria to be used in districting decisions.

2. Changes to the constitutional objective 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:

- (a) “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;
- (b) solicit, receive, and review applications for these redistricting commission positions; and
- (c) “forward a list of 10 recommended applicants to the eight members of the (redistricting) commission.”

As such, the Supreme Court Nominating Commission is given the task under this initiative 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 will be among the most politically charged undertakings performed by any commission in the State. 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.¹ *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.”

¹ *See* Exhibit A, attached hereto (current roster and terms of Supreme Court Nominating Commission).

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).

Redistricting is a legislative task, a fact made clear given that congressional redistricting is assigned to the legislature by the U.S. Constitution. U.S. Const., Art., 1, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof”). Use of the initiative process to divest the General Assembly of this authority is still a legislative act, as the voters 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 de-politicizing the body charged with congressional redistricting and re-politicizing 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.”). “Congressional

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.

3. Limits on political involvement for any person who is a “registered lobbyist”

Initiative #128 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 matter 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 addressed an initiative that both changed the process around initiative qualification for the ballot and also prohibited the Attorney General and any other lawyer from participating in the ballot title setting process as a “ballot title setter.” The Court’s holding there is instructive in this matter.

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).

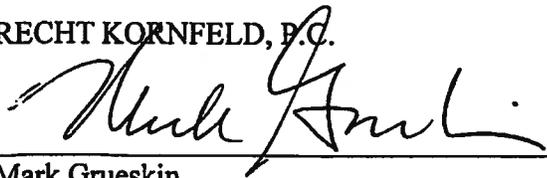
In the same way, Initiative #128 prohibits any person who lobbies, either as a professional or as a volunteer, from serving on the Commission. This is true even though a person may lobby at one level (federal vs. state) but not the other. It is also true that the mere frequency of this type of political participation is enough to disqualify one as a possible commissioner. Thus, a person who lobbies for the League of Women Voters,² for instance, on issues such as openness in government or fairness of elections is prohibited, from also participating in the political line drawing process for legislative and congressional 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 certain political involvement – violates Article V, § 1(5.5).

WHEREFORE, the titles set April 20, 2016 should be reversed, due to the single subject violations addressed herein.

RESPECTFULLY SUBMITTED this 27th day of April, 2016.

RECHT KORNFIELD, P.C.



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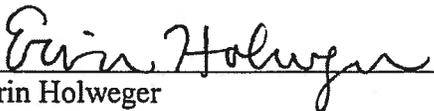
² *See* Exhibit B, attached hereto (list of volunteer lobbyists for current legislative session).

CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the MOTION FOR REHEARING ON INITIATIVE 2015-2016 #128 was sent this day, April 27, 2016 via email to proponents and their counsel at:

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Supreme Court Nominating Commission Members

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

- Mesiah 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



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 Next 

Akinahew, Serena L CCDC	(H) 18224 E. Layton Pl. Aurora CO 80015	(H) 720.256.8
Atwood, Frank F Approval Voting	(O) 7094 South Costilla Street Littleton, CO 80120-3518	(O) 720-260-
Augden, Sally League of Women Voters	(H) 4482 Quitman Street Denver, CO 80212	(H) 303-455-
Clinton, Carisa CCDC	(O) 1121 W. Prospect Rd. Ft. Collins 80526	(O) 970.204.0
Cloven, Matthew ARC of Larimer County	(O) 1121 W. Prospect #140 Fort Collins CO 80526	(O) 970-204-
DeBey, Kenneth Colorado Alliance for Retired Americans	(H) 10650 West 87th Place Lakewood, CO 80215	(H) 303=233.
Diana, Milne Colorado Cross-Disability Coalition	(O) 855 Broadway Denver, CO 80203	(O) 303-839-
Edmiston, Robert E Colorado Citizens for Scund in Medicare	(O) 721 S Maiposa Way Denver, CO 80223	(H) 303.935.0
Fahrenbruch, Karin CCDC	(H) 1303 N. Wilson #102 Loveland CO 80537	(O) 970-221-
Fahrenbruch, Melody L CO Cross Diabilitly Coalition	(H) 735 14th Street #106 Loveland CO 80537	(H) 970-581-



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

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

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Nofles, Jean Legislative Advocate - AARP	(O) 303 17th ST denver, CO 80203	
Norris, Olympia Posterity Productions, LLC	(O) 2200 Market Street Denver CO 80205	(H) 310-254-
Officer, Derek R Social Justice and Environmental Issues	(O) PO Box 876 Denver CO 80201	(O) 303-915-
Pace, Carol League of Women Voters-----AARP	(O) 1410 Grant Street B204 Denver, CO 80203	(O) 303-863-
Robertson, Aaron The Patriot League	(O) PO Box 1435 Eastlake, CO 80614	(O) 303.876. (H) 719.495.9
Rosa, Linda A Providing information on pbstroca; cpmsumer advocacy	(H) 711 W 9th St. Loveland, CO 80537	(O) 970.667.0
Rosser, Edwin "Mike" M ERROR Incorrect data type for operator or @Function Text expected AARP Colorado Mortgage Lenders Associaiton	(O) 12478 E Ameherst Cirlice bldg A, Suite 80222 Auora, CO 80014	(O) 303.887.8
San Miguel, Sophia C	(H) 5520 Federal Blvd. #52 Denver 80221	(H) 720-907.0
Stoker, RJ CCDC	(O) 900 Marmot Ct. Longmont 80504	
Welch, Maureen P self	(H) 4896 South Clarkson St. Cherry Hills Village, CO 80113	(H) 720.436.4

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Welch, Maureen P self	(H) 4896 South Clarkson St. Cherry Hills Village, CO 80113	(H) 720.436.4
Whinery, Barbara League of Women Voters	(H) 235 North 39th Place Gree;ey, CO 80634	(H) 970-353-
Williams, Shannon M CCDC	(H) 6093 S. Beeler Greenwood Village 80111	
Wren, Randy M		
Wright, Hal V Coloradans for Alternatives to the Death Penalty	(H) 7311 South Marion St Centennial, CO 80122	(H) 303-795.!
Yott, Paul L CCDC, Veterans Military Affairs	(H) 1203 E 108th Ave Northglenn 80233	(H) 303.254.;