

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Colorado Secretary of State

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Donna R. Johnson, Objector

vs.

Kathleen Curry and Frank McNulty, Proponents.

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**MOTION FOR REHEARING ON INITIATIVE 2015-2016 #132  
("Colorado Redistricting Commission")**

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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 #132 ("Colorado Redistricting Commission").

**A. The Title Board set a title for Initiative 2015-16 #132 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 redistricting in Colorado, and, in connection therewith, replacing the Colorado reapportionment commission with a Colorado redistricting commission; directing that the commission redistrict congressional districts and state legislative districts; requiring the appointment of 12 commissioners, of whom at least 4 must be either a member of a minor political party or unaffiliated with any political party; prohibiting commissioners from being lobbyists or members of or candidates for either Congress or the state legislature; requiring the agreement of at least 8 of 12 commissioners to approve any action of the commission; adopting existing criteria for congressional districts and adding competitiveness to the criteria for state legislative and congressional districts; requiring that only the nonpartisan staff of the commission may submit plans to the commission; and requiring that the commission's work be done in public meetings?*

**B. Initiative #132 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 district boundaries, 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.<sup>1</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.”

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<sup>1</sup> *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 state legislative redistricting is placed in Article V of the Constitution dealing with the “Legislative Department” and 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.”). “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 would 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 #132 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 #132 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 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 participation in the political process – violates Article V, § 1(5.5).

#### 4. Combining legislative reapportionment and congressional redistricting

As an initial matter, the sources of authority for drawing legislative districts and congressional districts are entirely unrelated. The requirement that states address matters pertaining to federal elections, including Congressional elections, is found in the United States Constitution. U.S. Const., Art., 1, § 4. When pertinent standards for congressional redistricting were set in the Colorado constitution, they were set by an amendment to Article V, § 44 of the Colorado Constitution, adopted by voters at the 1974 general election, that revised language that had been in the Colorado Constitution since 1877.

In contrast, the provisions for legislative reapportionment spring solely from the Colorado Constitution, where the current Reapportionment Commission is authorized. *See* Colo. Const., Art. V, §§ 45-48. For much of Colorado’s first century, legislative reapportionment was a sometimes occurrence, taking place in 1881, 1891, 1901, 1909, 1913, 1932, 1953, and 1962. *See Lucas v. Forty-Fourth General Assembly of State of Colo.*, 377 U.S. 713, 723 (1964). Later amendments to the reapportionment provisions in the Constitution were adopted at the 1966 and 1974 general elections, and then the Reapportionment Commission itself was added to the constitutional scheme addressing legislative districts at the 2000 general election. *See* Colo. Const., art. V, § 48.

That these processes are addressed separately in the Constitution is one factor to be considered in this analysis. A proposal dealing with citizen-initiated rights (referendum, recall, and initiatives) was reviewed by the Supreme Court with this fact in mind, as it reinforced the fact that the measure dealt with “varied procedural and substantive provisions” affecting each right. “The Colorado Constitution treats these different citizen initiated measures in separate

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

sections. In our view, the Initiative violates the constitutional and statutory single subject requirements.” *In re Title, Ballot Title, and Submission Clause and Summary with Regard to Section 2 to Article VII (“Petition Procedures”)*, 900 P.2d 104, 109 (Colo. 1995).

Needless to say, the goals of the two processes are quite different. “By its nature, reapportionment is an inherently political endeavor. The purpose of the reapportionment process, as approved in 1974, is to promote political fairness and to reduce the gerrymandering of legislative districts.” *In re Colorado General Assembly*, 332 P.3d 108, 113 (Colo. 2011) (Bender, J. dissenting) (citing Legislative Council of the Colo. Gen. Assembly, *An Analysis of 1974 Ballot Proposals*, Research Pub. No. 206 (1974) at 29–30). Thus, the objective of reapportionment by means of a commission is to restrict political influence in the setting of legislative district lines.

As to congressional redistricting, the objective is not political balance but legal equity as a matter of constitutional law. “[W]e note the foundational goal of congressional redistricting under the United States Constitution: ‘fair and effective representation for all citizens’.... [T]his principle stems directly from the Equal Protection Clause of the Fourteenth Amendment and ‘the democratic ideals of equality and majority rule.’” *Hall v. Moreno*, 270 P.3d 961, 971 (Colo. 2012), citing *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

Further, the Colorado Supreme Court has recognized that legislative reapportionment in an initiative is its own subject. In *In re Interrogatories Propounded by the Senate Concerning House Bill 1078*, 536 P.2d 308 (Colo. 1975), the Court evaluated two initiatives dealing with changes to the process for setting legislative district boundaries.

At the general election in Colorado, held on November 5, 1974, among other propositions on the ballot were No. 6 and No. 9, being proposed constitutional amendments relating to reapportionment. Amendment No. 6 was addressed to several other subjects, while Amendment No. 9 was solely concerned with reapportionment.

*Id.* at 311. As the Court observed, “We wish to make clear that Amendment No. 6 related to many subjects other than Colo. Const. Art. V, §§ 46 and 48. Each of the subjects appears to be severable.” *Id.* at 319 (emphasis added). Thus, reapportionment was and is a unique subject.

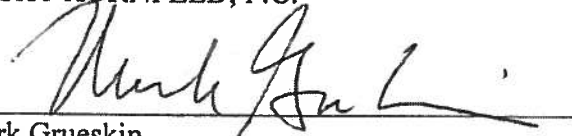
In the same sense, the topic of Congressional redistricting is distinct from the topic of legislative reapportionment. If the Board required any proof of that fact, it may be found in the Proponents’ simultaneously submitted Initiatives 2015-2016 #128 and 133, which deal with congressional redistricting and legislative reapportionment separately. Those measures contain unique standards and commission authority to draw district lines. Necessarily, then, the subjects of resetting process for drawing lines of legislative districts and the procedure for creating boundaries for congressional districts are “distinct and separate purposes which are not dependent upon or connected with each other.” *In re Proposed Initiative on “Public Rights in Water II”*, 898 P.2d 1076, 1078-79 (Colo.1995).

Thus, the two processes are unrelated in terms of their root legal authority and their legal history in Colorado, as well as their principle objectives. They cannot be part and parcel of the same subject under 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 KORNFELD, P.C.



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### CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the MOTION FOR REHEARING ON INITIATIVE 2015-2016 #132 was sent this day, April 27, 2016 via email to proponents and their counsel at:

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Erin Holweger

# Supreme Court Nominating Commission Members

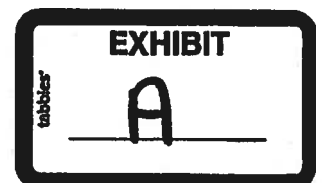
## Attorney Members

- 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

- Mbsiah 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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<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 Coalitlon	(O) 855 Broadway Denver, CO 80203	(O) 303-839-
<b>Edmiston, Robert E</b> Colorado Citiens 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 Diabillitty Coalition	(H) 735 14th Street #106 Loveland CO 80537	(H) 970-581-



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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 Joliet 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. (H) 719.495.9
<b>Rosa, Linda A</b> <b>Providing infromation on pbstroca; cpmsumer advocacy</b>	(H) 711 W 9th St. Loveland, CO 80537	(O) 970.667.:
<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.!
<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