SUPREME COURT

STATE OF ARIZONA

CAREY D. DOBSON, WILLIAM EKSTROM, TED A. SCHMIDT, and JOHN THOMAS TAYLOR III, Petitioners, v. STATE OF ARIZONA ex rel. COMMISSION ON APPELLATE COURT APPOINTMENTS, Respondents.	Supreme Court No.: CV-13-0225

AMICUS CURIAE BRIEF OF THE ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST

DATED: August 7, 2013

Timothy M. Hogan #004567
Joy Herr-Cardillo #009718
Arizona Center for Law in the Public Interest
202 East McDowell Road, Suite 153
Phoenix, Arizona 85004
Telephone (602) 258-8850
thogan@aclpi.org

I. INTRODUCTION

This special action was filed challenging the constitutionality of HB 2600. That bill purports to amend the Arizona Constitution by requiring the Commission on Appellate Court Appointments ("Commission") to submit at least five candidates for judicial vacancies to the Governor for consideration. Indeed, HB 2600 allows the Commission to submit fewer than five names and conceivably only one to the Governor upon a two-thirds vote. *See* HB 2600 adding A.R.S. § 12-3151(A)("except that on a two-thirds vote, the Commission may reject an applicant and submit fewer than five names...."). The provisions of HB 2600 mimic the language of Article 6, Section 37 of the Arizona Constitution but change the number of nominees and add the exception for a two-thirds vote. The problem, of course, is that the legislature has no power to amend the Constitution without submitting the amendment to a vote of the people.

Because the legal issue is simple and straightforward, this Court should accept jurisdiction to resolve it quickly. HB 2600 will cast a long shadow over judicial nominees for however long it takes for this case to be litigated in the lower courts if this Court does not accept jurisdiction. During that time, the qualifications of judicial nominees submitted to the Governor will be questioned and the public's confidence in the merit selection system will erode.

II. THE COURT SHOULD ACCEPT JURISDICTION OF THIS SPECIAL ACTION

Although the Court infrequently invokes its original jurisdiction to accept jurisdiction in special actions, when it has done so, it typically cites a number of factors that it considers. Those include the presence of important issues of statewide importance and that the case can be resolved based on purely legal issues. *Randolph v. Groscost*, 195 Ariz. 423, 425 ¶ 6, 989 P.2d 751, 753 (1999).

A. This Case Involves Important Questions of Statewide Interest

This case presents a direct threat to the integrity of the judicial system and the operation of our government. The threat to the judicial system is palpable. If the Commission on Appellate Court Appointments will now be required to submit the names of five candidates instead of the three required by the Constitution, questions will inevitably arise about the qualifications of those candidates and whether the motivation for their nomination was political. That is exactly what the voters intended to prevent when they established the merit selection system in 1974.

If HB 2600 is allowed to become effective, it is conceivable that some will question whether judicial nominees selected by the Governor from a list of five will lawfully hold office if HB 2600 is later declared unconstitutional. More importantly, decisions made by judges appointed under the new system will be subject to question. The harm to the merit selection system will be irrevocable and

a declaration from this Court one or two years from now will not be able to completely repair that harm. As this Court stated long ago:

> We think the fact that two of our most important state offices are involved in this proceeding, and that it is in the interest of public business that there should be a final determination of whether the *de facto* tax commissioner are also *de jure* officers as speedily as possible, would alone justify us in exercising our jurisdiction, rather than leaving the case to the necessarily more tedious process of an original action in the superior courts, followed by an appeal to this court, which would undoubtedly be taken, no matter what the decision of the lower court.

State of Arizona ex rel. Sullivan v. Moore, 49 Ariz. 51, 59-60, 64 P.2d 809, 813 (1937).

Over and above the impact on the judicial system, this case warrants special action jurisdiction because it represents a legislative challenge to the people's sovereign power under the Arizona Constitution. The merit selection system was approved by Arizona voters in 1974. It has occasionally been an object of frustration for some in the legislature. One manifestation of that frustration was the compromise proposal to amend the Arizona Constitution which the legislature referred to the ballot in last year's election. Proposition 115, among other things, would have required the Commission to submit eight candidates to fill a judicial vacancy except on a two-thirds vote in which case the Commission could submit less than eight.

http://www.azsos.gov/election/2012/general/ballotmeasuretext/SCR_1001.pdf

Almost 1.5 million Arizonans voted against the Proposition defeating it by almost a three to one margin.

http://results.enr.clarityelections.com/AZ/42050/113875/Web01/en/summary.html

In spite of that defeat, HB 2600 was introduced in the last legislative session. The chief sponsor of the bill explained that he believes Proposition 115 was misunderstood by the voters. In committee hearings, he stated that there was little or no opposition as far as he was aware to increasing the number of judicial nominees that the Commission was required to submit. He concedes that the Constitution "establishes a floor" but that "more names should be sent up." http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=11825 at 22:25 to 26:40.

He might be correct. Had voters been asked to amend the Constitution to require that a minimum of five names be submitted to the Governor, they may well have approved such an amendment. There is no way of knowing because instead of referring such a measure to the voters, the legislature simply enacted it as statute without seeking the appropriate constitutional amendment.

However, voters most certainly did not misunderstand Proposition 115. The only evidence available about voter's intent when they rejected Proposition 115 are the ballot arguments in opposition to the Proposition. The ballot arguments uniformly decry the injection of partisan politics into an exemplary merit selection

that has worked extremely well for the last 40 years. And voters wanted to keep it that way.

http://www.azsos.gov/election/2012/info/PubPamphlet/english/prop115.htm

This Court can do its part to vindicate the will of the voters by accepting jurisdiction in this special action. That is reason enough for the Court to accept jurisdiction. Failure to do so will only embolden the legislature to launch new attacks on the merit selection system in the time that it will take to fully litigate this case in the lower courts. The Court should stop this effort now before it goes any further.

B. This Case Involves Purely Legal Questions

The issue that the Petition presents in this case is whether HB 2600 on its face violates the Arizona Constitution. It is almost too obvious for further comment that this issue requires no factual development whatsoever. In fact, it is likely that this Court has never been presented with a petition to invoke its original jurisdiction that is more devoid of factual disputes than this one.

Nevertheless, the state asserts that the Court should decline jurisdiction because this facial challenge does not allow the state to "properly develop an appropriate record demonstrating that HB 2600 was a procedural mechanism implementing the constitutional provisions." Response to Petition for Special Action at 4, fn 2. The state asserts that the Commission's practices over the years

are an essential component to the Court's consideration of how HB 2600 fits into the constitutional structure. *Id*.

That seems to be just another way of saying that the state believes that the legislature's reasons for the enactment of HB 2600 are somehow relevant to its constitutionality. The legislature's motivation is not an issue here. Nor are the Commission's past practices. The sole issue is a legal one and it is whether the legislature can fundamentally change the constitutional imperative of the Commission by changing the required number of candidates that the Commission must submit to the Governor. It is as simple as that and the suggestion that the issue requires factual development is simply an excuse for delaying resolution of that issue.

RESPECTFULLY SUBMITTED this 7th day of August, 2013.

ARIZONA CENTER FOR
LAW IN THE PUBLIC INTEREST

By: /s/Timothy M. Hogan
Timothy M. Hogan
Joy Herr-Cardillo
202 E. McDowell Road
Suite 153
Phoenix, AZ 85008