IN THE 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 Respondent.	No. CV-13-0225-SA

BRIEF OF AMICI CURIAE BRENNAN CENTER FOR JUSTICE AND JUSTICE AT STAKE IN SUPPORT OF PETITION FOR SPECIAL ACTION

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Amici curiae are national, non-partisan organizations that work to promote fair and impartial courts. *Amici* respectfully submit this brief because this case presents questions of overriding public importance that involve threats to the independence and impartiality of Arizona's judiciary.

Amicus curiae the Brennan Center for Justice at N.Y.U. School of Law[2] is a non-profit, non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center recognizes that fair and impartial courts are the ultimate guarantors of liberty in our constitutional system and conducts empirical research, public education, and advocacy focused on improving and de-politicizing state judicial selection systems and maintaining the independence of state courts. The Brennan Center believes that merit commission systems like Arizona's are an effective way to reduce the influence of special interests and political partisans on the courts and thereby to increase judicial quality and independence.

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[1] This *amicus curiae* brief is filed with the consent of all parties to this proceeding. No counsel to any party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief.

[2] This brief contains only the position of the Brennan Center and does not purport to represent the position of N.Y.U. School of Law.

Amicus curiae Justice at Stake[3] is a nonpartisan nonprofit leading a national partnership of more than 50 organizations dedicated to keeping America's courts fair and impartial. Justice at Stake and its partners educate the public and work for reforms to keep special interest pressure and the pervasive influence of money out of the courtroom.

Amici have an interest in this case because it raises serious issues of judicial independence and separation of powers. *Amici* have read the relevant pleadings, and submit this brief to explain to the Court that, in addition to the clear constitutional violation explained by petitioners, H.B. 2600 presents further constitutional harm by arrogating to the legislature powers that the people of Arizona, through their constitution, have lodged in the judicial branch. *Amici* respectfully submit that it would be desirable for the Court to read this *amici curiae* brief because it will help elucidate the breadth of the legislature's unconstitutional power grab that H.B. 2600 represents.

All parties have consented to the filing of this *amicus curiae* brief.

[3] The arguments expressed in this brief do not necessarily express the opinion of every Justice at Stake partner or board member. Members of Justice at Stake's board of directors who are sitting judges did not participate in the formulation or approval of this brief. Additionally, Justice at Stake Chairperson Mark Harrison and Director Ruth McGregor serve in their personal, non-Justice at Stake capacities as counsel to the petitioners in this action, and did not participate in the formulation or approval of this brief.

ARGUMENT

IN ENACTING H.B. 2600, THE LEGISLATURE VIOLATED THE WILL OF ARIZONA'S CITIZENS AS REFLECTED IN THE CONSTITUTION AND VIOLATED CONSTITUTIONALLY VITAL SEPARATION OF POWERS PRINCIPLES BY ENCROACHING ON THE INDEPENDENCE OF ARIZONA'S JUDICIARY.

A fair, impartial, and independent judiciary is a cornerstone of American democracy. *See, e.g., Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (it is "axiomatic that a fair trial in a fair tribunal is a basic requirement of due process"); Federalist 78 (Hamilton) ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution."). For the judiciary to operate fairly and effectively, it is imperative that judges make appropriate decisions under the law, not based on political pressure. If allowed to stand, H.B. 2600 will politicize the system of judicial selection that Arizona's voters established and have sought to strengthen and protect for nearly four decades.

In seeking to protect the independence of the judiciary, the different states have chosen a variety of different methods for selecting their judges, ranging from partisan and non-partisan elections to executive or legislative appointments and the type of merit selection systems employed in Arizona. Beginning three-quarters of a century ago, numerous states have chosen to rely on some form of such a merit-based selection system—in which a non-partisan commission considers judicial applicants and recommends the most qualified candidates for appointment,

ordinarily by the governor. Arizona joined the group of states using a merit selection system to select its judges in 1974.

The American Bar Association supports merit selection of judges,[4] as do other national, nonpartisan groups dedicated to promoting fair and impartial courts. The American Judicature Society, which has worked for one hundred years to protect the integrity of the American justice system, advocates for the adoption of merit selection system in states with other judicial systems,[5] as does the Institute for the Advancement of the American Legal System at the University of Denver.[6]

I. Arizona voters have repeatedly affirmed their choice to use a merit selection system to ensure an independent, impartial judiciary.

Since even before Arizona became a state, the importance of ensuring the impartiality and independence of its judiciary has been a pressing political issue. As a territory, Arizona elected its judges, and authorized recall elections by

[4] *See* ABA Policy on Legislative and National Issues 130, *available at* http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2012_2013_greenbook_ch_13_contains_updates_after_2013_midyear_meeting_web_version.authcheckdam.pdf

[5] *See* American Judicature Society Action Alert, March 8, 2011, *available at* https://www.ajs.org/files/4713/6456/9190/AJSActionAlert.pdf (describing legislative attacks on merit selection).

[6] *See* IIALS Quality Judges Initiative, at http://iaals.du.edu/initiatives/quality-judges-initiative/recommended-models/the-oconnor-judicial-selection-plan-how-it-works-why-it-matters.

popular vote.[7] At the time it sought statehood, President Taft vetoed a joint Congressional resolution admitting Arizona to the union because of Arizona's authorization of recall elections, stating that the "provision is so pernicious in effect, so destructive of the independence of the judiciary, that it is likely to subject the rights of individuals to possible tyranny."[8] To gain admission, Arizona eliminated the recall elections, underscoring that the constitutionally vital interest in protecting judicial independence has been recognized since Arizona joined the United States.[9]

Arizona voters adopted merit selection by referendum in 1974.[10] Before then, Arizona elected its judges and the governor had unchecked authority to appoint judges to fill unexpired terms when interim vacancies occurred.[11] Though the constitution required elections, in practice, the majority of judges in Arizona were appointed by the governor before ever standing for election.[12] Critics worried that voters were not well-informed regarding judicial candidates, that highly

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[7] *See* John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L. J. 837, 844 (1990).

[8] *Id.*

[9] However, after gaining admission, Arizona reinstated recall judicial elections. *Id.*

[10] *See* Sandra Day O'Connor & RonNell Andersen Jones, *Reflections on Arizona's Judicial Selection Process*, 50 ARIZ. L. REV. 15, 19-20 (2008).

[11] Roll, *supra* note 7, at 845.

[12] *Id.* (noting that of the 210 judges in office between 1912 and 1974, 113 were first appointed).

qualified candidates were reluctant to participate in political campaigns, and that the system in practice granted too much authority to the governor.[13] By the 1960's, there were concerns that Arizona's system was in need of reform.

In the early 1970s, under the leadership of the Honorable Sandra Day O'Connor, then a member of the Arizona legislature, supporters of reform put the question to the voters, who approved merit selection via Proposition 108.[14] In doing so, voters protected the impartiality of Arizona's courts by ensuring that judges underwent thorough vetting before taking office, and that they were not beholden to the interests of major campaign contributors or politicians.

Proposition 108 amended Arizona's constitution and established merit selection for all appellate judges and for superior court judges in counties larger than 150,000—at the time, Maricopa and Pima counties.[15] Under the merit selection system, each nominating commission was composed of:

- three attorneys selected by the board of governors of the state bar of Arizona and appointed by the governor with the advice and consent of the senate;
- five non-attorney members appointed by the governor with the advice and consent of the senate; and

[13] *See* O'Connor & Jones, *supra* note 10, at 18-19.

[14] *Id*. at 19-20.

[15] *See* Roll, *supra* note 7, at 855. The 150,000 population threshold was raised to 250,000 with the 1992 passage of Proposition 109.

- the chief justice of the supreme court.

See Proposition 108 (1974), Appendix 1 to Petition. The constitution also provides for geographic and political diversity among the members of the commission.

Significantly, the constitution also requires that "the supreme court shall adopt rules of procedure for the commission[s] . . . ."[16] Pursuant to this grant of authority, the supreme court has promulgated uniform rules of procedure for the nominating commissions. These rules govern, *inter alia*, commissioner impartiality, the conduct of commission meetings, the recruitment of judicial candidates, the method of judicial candidate application, the screening and interviews of candidates, the selection of nominees, and the transmittal of the nominees to the governor.[17] Rule 9(d)(7) of the uniform rules provides that the commission shall list a nominee for consideration of the governor by a majority vote of the commissioners present.

While the constitution grants the supreme court the power to promulgate the rules of the commissions, it explicitly requires that for any judicial vacancy, the commission "shall submit to the governor the names of not less than three persons nominated by it to fill such vacancy . . ." ARIZ. CONST. art. VI § 37(A).

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[16] ARIZ. CONST. art. VI § 36(E).

[17] *See* Uniform Rules of Procedure for Judicial Nominating Commissions, *available at* http://www.azcourts.gov/jnc/UniformRulesofProcedure.aspx

Building on the successful merit selection system established by Proposition 108, Arizona's citizens voted in 1992 to improve and strengthen the program by approving Proposition 109, which amended several of the merit selection provisions of the Arizona constitution. These amendments increased public participation and transparency in the merit selection process by opening up nominating commission hearings to the public and establishing a judicial evaluation system to assess judges before retention elections.[18] The measure also increased the number of attorney commission members from three to five; doubled the number of non-lawyer members appointed by the governor from five to ten; and instituted an expanded process, including citizen committees, to recommend potential members to the governor.

Arizona's merit selection system is widely regarded as succeeding in producing excellent judges.[19] In its guide for best practices in merit selection, the U.S. Chamber of Commerce's Institute for Legal Reform identifies Arizona as "lead[ing] the nation with the procedures it has put in place to fulfill the promise of

[18] *See* Arizona Secretary of State, 1992 Ballot Propositions (Publicity Pamphlet), at 51-59, *available at* http://azsos.gov/election/1992/Info/PubPamphlet/PubPam92.pdf (explaining proposed changes).

[19] *See* O'Connor & Jones, supra note 10, at 20.

true nonpartisan 'merit' selection."[20] Arizona minimizes politics and political considerations in the judicial selection process. Under the system, Arizona's judges do not run in partisan elections, reducing the influences and campaign contributions and special interest groups.[21] Similarly, because the governor cannot simply appoint political supporters unless their experience and qualifications have been assessed—and endorsed—by the nominating commissions, Arizona's system reduces the risks of political patronage.

In addition to protecting the judicial selection process from partisan politics and political patronage, Arizona's merit selection functions effectively by providing meaningful input from a variety of individuals and groups to participate

[20] *See* U.S. Chamber Institute for Legal Reform, *Merit Selection: A Best Practices Guide to Commission-Based Judicial Selection*, October 2009, at 2, *available at* http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/research/meritselectionbooklet.pdf

[21] Partisan judicial elections are characterized by markedly high spending. From 2000-2009, all of the eight states that elect supreme court justices in partisan races were among the ten highest states for total supreme court fundraising. *See* James Sample *et al.*, *The New Politics of Judicial Elections 2000-2009: Decade of Change* 6-7, 12 (2010), available at http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpgv.pdf. And spending in partisan judicial races is increasing at a faster rate than nonpartisan judicial races. Between 1990 and 2004, average campaign spending in nonpartisan races doubled, from approximately $300,000 to $600,000, while average campaign spending in partisan races increased more than 250%, from approximately $450,000 to $1.5 million. *See* Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 83-84 (2011).

in the judicial selection process.[22] For example, the governor actively participates by appointing the non-attorney members of the nominating commissions and by selecting and appointing the judges from the lists of nominees. The citizens of Arizona participate in the process both directly by voting for or against judges in non-partisan retention elections and indirectly through their votes for governor and their legislators; they also participate in citizen committees and in the public evaluation of judges seeking retention. And Arizona lawyers—who, of course, routinely practice before Arizona's judiciary and therefore have a direct stake in ensuring its quality—participate by voting for the members of the State Bar Board of Governors and by serving on the nominating commissions.

Despite its success in selecting high quality jurists—and its national recognition for doing so—opponents of merit selection have challenged the system repeatedly since 1974.[23] Among the attacks they have levied against the system have been efforts to reinstate judicial elections; to move to a system of gubernatorial nomination and senate confirmation; to remove the chief justice from the nominating commissions; to increase the number of lay members of the

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[22] *See* ARIZ. CONST. art. VI § 36(A).

[23] *See* Roll, *supra* note 7, at 884-90 (describing efforts to change or eliminate merit selection in 1978, 1981, 1982, 1984, 1986, 1987, and 1998); Daniel Becker & Malia Reddick, Judicial Selection Reform: Examples from Six States, at 38-39 (2003), *available at* http://www.judicialselection.com/uploads/Documents/jsreform_1185395742450.pdf.

commission; and to have the supreme court rather than the State Bar select the attorney members of the commission.[24] Most recently, in 2012, the Arizona legislature placed a proposal, Proposition 115, on the ballot that would have changed the composition of the nominating commissions and involved legislators in assessing judges up for retention. With 72.4 percent voting against it, Arizona's voters decisively rejected this attempt to politicize and weaken the system.

Attacks on merit selection are not limited to Arizona; rather there are efforts nationwide to undermine merit selection of judges and to make judges more responsive to political influence and special interests. Many of these attacks have come through legislative initiatives and proposed constitutional amendments.[25] In Arizona in 2011 alone, legislators proposed 11 measures to change the merit selection system, including proposals to end the system entirely and move to gubernatorial appointment with senate confirmation; to strip the bar of its authority to appoint members of the nominating commission; to replace retention elections with legislative reconfirmation; and to allow the governor to ignore the nominating commission's candidates and appoint any candidate. These 11 proposals resulted in the failed Proposition 115 being placed on the ballot.

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[24] *Id*.

[25] *See* Adam Skaggs *et al*., *The New Politics of Judicial Elections 2009-10* (2012), at 23-26 (discussing attacks on merit selection in 7 states in 2011).

Similar measures were put forward in Florida, Iowa, Kansas, Missouri, Oklahoma, and Tennessee.[26] Proposed constitutional amendments emerged from two of these state legislatures—Florida and Missouri—and were placed on the 2012 ballot. Voters rejected both efforts to undermine their state's merit selection system, with 76 percent voting against the amendment in Missouri, and 63 percent voting against it in Florida.

Opponents of merit selection have also unsuccessfully sought to have merit selection struck down as an unconstitutional violation of the one person one vote principle established by the United States Supreme Court in *Reynolds v. Sims*. These litigation attacks on merit selection have thus far been rejected by the Eighth, Ninth, and Tenth Circuits,[27] and, with limited exceptions, legislative challenges and referenda to eliminate merit selection have also failed.[28]

II. H.B. 2600 purports to arrogate to the legislature powers constitutionally reserved to the judiciary, violating fundamental separation of powers principles.

As petitioners have explained, this Court should take jurisdiction of this dispute because it involves a matter of great public importance. The Court should grant the petition because it purports to amend the Arizona constitution by statute

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[26] *Id*.

[27] *See Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010); *Carlson v. Wiggins*, 675 F.3d 1134 (8th Cir.), *cert. denied*, 133 S. Ct. 312 (2012); *Dool v. Burke*, 2012 WL 4017118 (10th Cir. Sept. 13, 2012), *cert. denied*, 133 S. Ct. 992 (2013).

[28] *See* Skaggs, *supra* note 25, at 24-25.

and represents a legislative attempt to supersede the will of Arizona's citizens as expressed by their clear rejection of Proposition 115.

This Court should strike down H.B. 2600 for the additional reason that it encompasses an unconstitutional violation of basic separation of powers precepts. Separation of powers is a foundational principle of our republican democracy. The Framers "knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 468 (1989); *see also* Federalist No. 51 (Madison) the "separate and distinct exercise of the different powers of government" was "admitted on all hands to be essential to the preservation of liberty"); Federalist No. 78 (Hamilton) ("there is no liberty, if the power of judging be not separated from the legislative and executive powers" (internal quotation marks and citation omitted)). The U.S. Supreme Court has recognized that a "Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 217-18 (1980).

Judicial intervention is particularly appropriate in this case. "[I]t is well settled that when one with standing challenges a duly enacted law on constitutional grounds, the judiciary is the department to resolve the issue even though

promulgation and approval of statutes are constitutionally committed to the other two political branches. *Ariz. Indep. Redistricting Com'n v. Brewer*, 229 Ariz. 347, 353 (2012) (*citing Forty–Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 485 (2006) ("To determine whether a branch of state government has exceeded the powers granted by the Arizona Constitution requires that we construe the language of the constitution and declare what the constitution requires.")) By constitutionalizing the merit selection process, the citizens of Arizona elected to protect the process of selecting judges from legislative interference. In adopting H.B. 2600, the legislature brushed aside the will of Arizona's citizens in a brazen, unlawful attempt to inject the political dynamics of the legislature into the apolitical process of judicial selection.

The constitutional provisions establishing merit selection are analogous to those that govern Arizona's independent redistricting commission, regarding which this Court has interceded to thwart improper political interference. In establishing an independent redistricting commission, those provisions of the Arizona constitution "were designed to *remove* redistricting from the political process by extracting this authority from the legislature and governor and instead granting it to an independent commission of balanced appointments." *Ariz. Indep. Redistricting Com'n*, 229 Ariz. at 353 (quotation and citations omitted) (emphasis original) (holding that the Governor exceeded her constitutional authority in removing the

chairwoman of the independent commission). This case presents an analogous situation, in which the legislature has attempted to shift the power balance between coequal branches of government to grant more authority to the political branches. And in this case, as in the redistricting litigation, this Court can identify a constitutional breach and enforce the separation of powers chosen by the citizens of Arizona and written into the constitution.

Last year, the legislature attempted to change the merit selection system via constitutional referendum. That effort failed when Arizona's voters resoundingly defeated the effort, confirming for a third time their support for the merit selection system, previously expressed through the passage of Propositions 108 and 109. Petitioners correctly argue that H.B. 2600 violates Article IV, Part 1, § 1(14) of the constitution because it unconstitutionally supersedes the citizens' overwhelming rejection of Proposition 115 in the 2012 election, *see* Petition at 12-14, and that alone is reason to grant the petition.

But there are additional, compelling reasons why petitioners must prevail here. In addition to the constitutional harm caused by overriding the voters' clearly-expressed wishes, the enactment of legislation increasing the governor's influence over the makeup of the judiciary risks violating fundamental separation of powers precepts. It also risks undermining the public's confidence in the independence of the judiciary in the process—which itself raises independent

constitutional concerns. The judicial system must not only render fair and impartial justice; public confidence in a fair and impartial judiciary is itself a core principal of due process. *See Offut v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."); *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) (For litigants, "the appearance of evenhanded justice . . . is at the core of due process."); *Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). If the system were changed via referendum, there would be far less concern that the change will negatively impact the public's faith that the judiciary is impartial and free from excessive political influence. That risk is heightened here, where the public has just rejected an effort to grant the governor more authority over the judiciary. Notably, in the 2012 Publicity Pamphlet, every one of the nineteen arguments in opposition to Proposition 115 that were presented to the voters urged defeat of the measure because it would result in more political control over the appointment of judges.[29]

[29] These include ""Proposition 115 does not improve the current system but rather, is an attempt to transfer more power over the courts to the politicians." "Proposition 115 will give politicians too much power over the judicial system." "Proposition 115 would increase partisan political influence and could reduce the quality of our judges." "Proposition 115 extends the governor's control over judicial selection and eliminates important checks and balances that protect judicial independence." *See* Arizona Secretary of State, 2012 Ballot Propositions

As petitioners explain, H.B. 2600 changes the constitutional scheme in two important ways. First, it raises the constitutional floor, stripping the nominating commission of its constitutionally-provided discretion to nominate as few as three candidates. Second, H.B. 2600 allows the commission, upon a two-thirds vote, to nominate fewer than the constitutionally-mandated three candidates.

In addition to those constitutional intrusions, H.B. 2600 further alters the separation of powers in the constitution by intruding on the constitutional authority of this Court. While the constitution requires at least three nominees be sent to the governor, it does not dictate the method by which the commission selects the nominee. Rather, Article 6, §36(E) provides that the supreme court "shall adopt rules of procedure" for the judicial nominating commissions. These Uniform Rules, adopted by the supreme court, provide that the commission shall forward nominations to the governor upon a majority vote of the commissioners present. *See* Rule 9(d)(7), Judicial Nominating Commissions Uniform Rules of Procedure. By requiring a supermajority vote to forward the constitutionally-required three (or four) nominees to the governor, H.B. 2600 intrudes into this Court's authority over the rules of procedure for the nominating commissions.

The constitution clearly withholds from the legislature the authority to proscribe the number of judicial candidates. Compare Section 36 of Article 6 with

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(Publicity Pamphlet), at 27-31, *available at* http://www.azsos.gov/election/2012/info/PubPamphlet/english/e-book.pdf.

Section 2, which fixes the number of supreme court justices as "not less than five justices." The provision further specifies that "the number of justices may be increased or decreased by law, but the court shall at all times be constituted of at least five justices." Unlike Section 36, Section 2 explicitly grants the legislature the authority to alter the number of justices. When the writers of a constitutional provision intend to grant the legislature the authority to increase a constitutionally-set number, they know how to do so. They chose not to do so in Section 36.

This Court should view the legislature's intrusion into the merit selection process with great skepticism. If raising the required number of nominees from three to five does not violate the constitution, the logical consequence would be that the legislature could further increase the number to ten, or 20. And if the legislature could constitutionally make such changes, what would prevent it from changing the composition of the Committee, replacing the Chief Justice with the President of the Senate, or decreeing that—contrary to the 1992 amendments—commission meetings must be held in secret?

To allow the changes included in H.B. 2600 to stand would be to shift selection based on merit toward selection based on partisanship, and would shift the balance of power away from the commission and toward the governor. As Article III of Arizona's Constitution requires:

> The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the

> judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

And as this Court explained more than 50 years ago:

> It is very essential that the sharp separation of powers of government be carefully preserved by the courts to the end that one branch of government shall not be permitted to unconstitutionally encroach upon the functions properly belonging to another branch, for only in this manner can we preserve the system of checks and balances which is the genius of our government.

Giss v. Jordan, 82 Ariz. 152, 164 (1957) (quashing writ of mandamus seeking to compel payment for legislative expenses incurred in functions constitutionally delegated to executive branch). So too here.

CONCLUSION

For the foregoing reasons, the Court should declare H.B. 2600 unconstitutional and enjoin the Commission from applying H.B. 2600.

DATED this 7th day of August, 2013.

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/s/ Jeff A. Siatta

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the accompanying brief complies with ARCAP 13, 14, 16 and this Court's July 25, 2013 Order. The brief is double-spaced, utilizes 14-point proportionally spaced Times New roman typeface, and contains 4,280 words.

s/ Jeff A. Siatta