

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.

Supreme Court No.

**PETITION FOR SPECIAL ACTION**

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## **INTRODUCTION**

The Arizona Constitution, in Article VI, creates the Commission on Appellate Court Appointments (“the Commission”), and establishes the procedures by which the Commission must nominate candidates to the Governor for judicial vacancies. Article VI, § 37<sup>1</sup> requires the Commission to nominate “not less than three” candidates, but leaves to the Commission’s discretion whether to nominate more than three candidates. In 2012, the Legislature attempted to amend this constitutional scheme by referring to the People a measure (Proposition 115) that, among other things, would have amended the Constitution by changing the number of candidates the Commission must nominate. Over seventy percent of voters rejected that measure.

Not content with the People’s decision to leave Article VI, § 37 of the Constitution as it is, the Legislature, in its just-completed session, passed (and the Governor signed) House Bill 2600 (“H.B. 2600”), which purports to amend Article VI, § 37 by requiring the Commission to submit at least five candidates to the Governor, but provides that on a two-thirds vote, the Commission may reject a

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<sup>1</sup> Article VI, § 36 of the Constitution creates the Commission on Appellate Court Appointments and Article VI, § 37(A) of the Constitution sets forth the nomination procedures for the Commission on Appellate Court Appointments. Article VI, § 41 creates Commissions on Trial Court Appointments and Article VI, § 37(B) sets forth nomination procedures for the Commissions on Trial Court Appointments. Counties with populations of 250,000 or more are covered by §§ 37(B) and 41; presently Maricopa, Pima and Pinal Counties are covered by those sections.

candidate and “submit fewer than five names.”<sup>2</sup> This statute thus attempts two changes in the constitutional scheme: First, in the absence of a supermajority vote, the Commission is required to nominate five (rather than three) candidates. Second, with a supermajority vote, the Commission may nominate fewer than three candidates.

The Legislature’s attempt to amend the Constitution in these ways cannot stand. Under Article XXI, the Constitution may be amended only by vote of the People—not, as here, by legislative fiat. In addition, under Article IV, Part 1, § 1(14), the Legislature cannot supersede Proposition 115, which was defeated by the voters in 2012. Because of the frequency and importance of the Commission’s work, this Court should exercise its special action jurisdiction, declare that H.B. 2600 is unconstitutional, and enjoin and prohibit the Commission from applying H.B. 2600.

### **STATEMENT OF ISSUES**

1. Does H.B. 2600 unconstitutionally amend Article VI, § 37 by (1) requiring the Commission, in the absence of a supermajority, to nominate more than three candidates to the Governor; and (2) permitting the Commission, with a supermajority, to submit fewer than three candidates to the Governor?

2. Does H.B. 2600 violate Article IV, Part 1, § 1(14) of the Constitution

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<sup>2</sup> H.B. 2600 applies to the Appellate Court Appointment Commission and the three Commissions on Trial Court Appointments. The arguments and references made in this Petition with respect to the Commission on Appellate Court Appointments apply equally to the three Commissions on Trial Court Appointments.

by superseding Proposition 115, which was defeated by a majority of the voters in 2012?

### **JURISDICTIONAL STATEMENT**

This Court has original jurisdiction over “mandamus, injunction and other extraordinary writs to state officers.” Ariz. Const. art. VI, § 5(1). Although the Court’s decision to accept jurisdiction is discretionary, the circumstances here— involving the Legislature’s effort to amend the constitutional scheme governing the Commission’s work—cry out for the exercise of that jurisdiction.

This Petition presents two pure legal questions of first impression: Does H.B. 2600 attempt to amend Article VI, § 37 of the Constitution? Does H.B. 2600 violate Article IV, Part 1 § 1(14) of the Constitution? Whether the Legislature may rob the Commission of its discretion to nominate only three candidates, whether the Legislature may permit the Commission (on supermajority vote) to nominate fewer than three candidates, and whether the Legislature may supersede a referendum that has been defeated are issues of statewide importance that will affect every judicial vacancy that comes before the Commission. *See, e.g., Randolph v. Groscost*, 195 Ariz. 423, 425 ¶ 6, 989 P.2d 751, 753 (1999) (accepting jurisdiction because the “dispute involves a matter of substantial public importance, raises only issues of law, and requires the interpretation of a provision of the Arizona Constitution”); *Fairness and Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 586, 886 P.2d 1338, 1342 (1994) (accepting jurisdiction because the case raised “a constitutional issue of first impression and statewide importance”).



The constitutionality of H.B. 2600 requires prompt resolution because the Commission must know its constitutional duties to screen and submit nominees for vacancies that occur with great frequency.<sup>3</sup> A special action provides the only adequate remedy to Petitioners.

This action is filed directly in the Supreme Court, as permitted by Rule 7(b) of the Arizona Rules of Procedure for Special Actions, because an immediate, final decision is needed. The Commission does not have the power to determine the constitutionality of H.B. 2600. It will, rather, be obligated to follow the statute for all nominations, unless and until the statute is finally declared unconstitutional. This Court and only this Court can make that final determination.

### **STANDING**

There can be no serious question about the Petitioners' standing to bring this Petition. They are all current members of the Commission. They have the constitutionally delegated discretion to nominate as few as three judicial candidates, and they have the constitutional obligation to nominate at least three candidates. H.B. 2600 transforms the scheme that they have taken an oath to uphold. As such, they have the "interest in the outcome" of this litigation that standing requires. *See Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985).

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<sup>3</sup> Since January 2013, there have been three vacancies on the Superior Courts and one vacancy on the Court of Appeals, Division One. In 2012, there were six vacancies on the Superior Courts, two vacancies between Division One and Two on the Court of Appeals, and one vacancy on the Supreme Court. [Media Room, Arizona Judicial Branch, <http://www.azcourts.gov/mediaroom/PressReleasesNews.aspx> (last visited July 8, 2013)]

## STATEMENT OF FACTS

Until 1974, Arizona voters elected judges to the appellate courts. [See Arizona Secretary of State, Publicity Pamphlet for Proposition 108, attached as Appendix (“App.”) 1 at 29] In a dramatic change to the system, voters approved Proposition 108, which introduced the merit selection process. [Id.] The stated purpose of Proposition 108 was to ensure that judges “are selected solely on the basis of competency and capability.” [Id.] Parts of Proposition 108 became Article VI, §§ 36 and 37 of the Constitution. See Ariz. Const. art. VI, §§ 36, 37, attached as App. 2 at 21-22.

Article VI, § 36 establishes the Commission on Appellate Court Appointments, which is composed of fifteen members (five attorneys and ten non-attorneys) and a chairman. According to Article VI, § 37, the Commission is responsible for screening and nominating judicial candidates. [Id.] The Commission must submit to the Governor “not less than three” nominees for a judicial vacancy, and the submission of any additional nominees is entirely within the discretion of the Commission. *Id.* § 37.<sup>4</sup> After the Commission screens and nominates the judicial candidates, the Governor must fill a judicial vacancy from among those candidates. [Id.]

On April 4, 2013, the Fifty-first Legislature passed H.B. 2600, which purports to amend the nomination scheme specified in Article VI, § 37. [H.B.

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<sup>4</sup> As a result of a 1992 amendment to Article VI, § 37, the Commission’s voting on candidates is open to the public. The amendment requires that the Commission hold public meetings and vote in a public hearing. [Arizona Secretary of State, Publicity Pamphlet for Proposition 109, attached as App. 3 at 53]

2600, Ch. 23 of Laws, 51st Leg., 1st Reg. Sess. (Ariz. 2013), attached as App. 4] H.B. 2600 requires that the Commission submit at least five nominees “except that on a two-thirds vote, the Commission may reject [a candidate] and submit fewer than five.” [Id. at 1] Governor Brewer signed H.B. 2600 into law on April 5, 2013. [Id.] As a result, the legislative change in the minimum requirement of nominees will become effective on September 13, 2013, ninety days after the Legislature adjourned. See Ariz. Const. art. IV, pt. 1, § 1(3). As of the effective date, the Commission must choose between following the statute or the Constitution. The table below compares Article VI, § 37 with H.B. 2600.

<b>Article VI, § 37</b>	<b>H.B. 2600</b>
<p>“[T]he commission on appellate court appointments . . . shall submit to the governor the names of not less than three persons nominated by it to fill such vacancy, no more than two of whom shall be members of the same political party unless there are more than four such nominees, in which event not more than sixty per centum of such nominees shall be members of the same political party”</p> <p>[App. 2 at 21-22]</p>	<p>“The commission shall submit to the governor the names of at least five persons nominated by it to fill the vacancy, except that on a two-thirds vote, the commission may reject an applicant and submit fewer than five names. If the commission submits five or more nominees, not more than sixty per cent of the nominees shall be from the same political party. If the commission submits fewer than five nominees, no more than two nominees may be from the same political party.”</p> <p>[App. 4 at 1]</p>

H.B. 2600 was not the Legislature’s first attempt to change the minimum requirement of nominees in Article VI, § 37. [See Arizona Secretary of State, Publicity Pamphlet for Proposition 115, attached as App. 5] In 2011, the

Legislature adopted Senate Concurrent Resolution 1001, which was referred to the Arizona voters as Proposition 115. [S. Con. Res. 1001, 50th Leg., 1st Reg. Sess. (Ariz. 2011), attached as App. 6] Proposition 115 proposed to amend Article VI, § 37 by changing the merit selection process as follows:

- Require the Commission to submit eight candidates to fill a judicial vacancy, “except that on a two-thirds vote, the Commission may reject an applicant and submit less than eight names[;]”
- Lengthen terms for judges;
- Raise retirement age for judges;
- Give the Governor more power to select Commissioners who nominate judges; and
- Allow one group of candidates for consideration to fill two vacancies.

[App. 5] Like H.B. 2600, Proposition 115 attempted to increase the minimum number of candidates the Commission would have been required to nominate, and, in the case of a supermajority, would have permitted the Commission to nominate fewer than the three candidates required by Article VI, § 37 . Over seventy percent of the voters rejected Proposition 115 in the 2012 general election. [State of Arizona Official Canvass, attached as App. 7]

### **ARGUMENT**

H.B. 2600 should fall both because it impermissibly attempts to change the constitutional scheme set forth in Article VI, and because it attempts to supersede the will of the People, as expressed in the voter’s rejection of Proposition 115.

**I. H.B. 2600 VIOLATES ARTICLE XXI OF THE CONSTITUTION BECAUSE IT PURPORTS TO AMEND THE CONSTITUTION BY STATUTE.**

**A. Only the People May Amend the Constitution.**

Article XXI of the Constitution provides the exclusive means by which to amend the Constitution; a majority of qualified electors must approve a proposed amendment, or the People must approve laws providing for a state convention. Ariz. Const. art. XXI, §§ 1, 2 [*see* App. 2 at 58]. By voting, citizens of Arizona retain “the power to propose laws and amendments to the [C]onstitution and to enact or reject such laws and amendments.” Ariz. Const. art. IV, pt. 1, § 1(1) [*id.* at 7]. This Court has consistently upheld this basic principle stating:

The Legislature are but representatives delegated to perform duties in subordination to the will of the people. The Legislature speaks for the people. The sovereign people speak in the language of their Constitution. Their will expressed in the Constitution is the will of the sovereign itself. The legislature may speak **but only within the limitations of the fundamental law.**

*State ex rel. Davis v. Osborne*, 14 Ariz. 185, 191, 125 P. 884, 886–87 (1912) (emphasis added) (holding that a legislative act setting an election date that differs from the constitutionally mandated election date violated “the fundamental law”); *see also State v. Roscoe*, 185 Ariz. 68, 72–73, 912 P.2d 1297, 1301–02 (1996) (the Legislature’s authority is subordinate to the People). Any legislation that purports to change the Constitution trespasses upon the fundamental rights of the People. H.B. 2600 is just such a trespass.

**B. Increasing the Required Minimum Number of Nominees, and Permitting the Commission to Submit Fewer than Three Nominees, Changes the Constitutional Scheme.**

H.B. 2600 purports to amend Article VI, § 37 in two fundamental ways.

First, whereas Article VI only requires the Commission to nominate three candidates to the Governor, H.B. 2600 would require the Commission to nominate at least five candidates (absent a supermajority vote). In so doing, the legislation would strip the Commission of its constitutionally delegated discretion to nominate as few as three candidates.

Second, whereas Article VI requires the Commission to nominate at least three candidates, H.B. 2600 would permit the Commission to nominate fewer than three. After a two-thirds vote against a particular candidate, nothing in H.B. 2600 would prohibit the Commission from merely submitting one or two nominees to the Governor, provided that “no more than two nominees may be from the same political party.” [App. 4 at 1 (H.B. 2600)]

Whatever the wisdom of these changes, Article XXI forbids the Legislature from making them. Through Article VI, § 37, the People have decided the appropriate minimum number of candidates that should be referred to the Governor, to ensure that judges “are selected solely on the basis of competency and capability.” [See App. 1 at 29 (Proposition 108)] The Legislature may not now substitute its view on the appropriate minimum for the will of the People.

As expected, Arizona appellate courts have repeatedly stricken legislation that would alter or conflict with the Constitution. *See, e.g., Roscoe*, 185 Ariz. at 74, 912 at 1303; *Harris v. Maehling*, 112 Ariz. 590, 591, 545 P.2d 47, 48 (1976)

(holding that a statute providing an exception to the Senate approval for appointments could not apply to Article XI, § 3 of the Constitution because the constitutional provision explicitly required Senate approval for an appointment to the Board of State Education); *Turley v. Bolin*, 27 Ariz. App. 345, 349–50, 554 P.2d 1288, 1292–93 (1976).

*Turley* is instructive. There, the Legislature enacted A.R.S. § 19-121(D), which required an initiative to be filed not less than five months preceding the date of the election. *Id.* at 347, 554 P.2d at 1290. Article IV, Part 1, § 1(4) of the Constitution, however, provides that an initiative “shall be filed . . . **not less than four months** preceding the date of the election.” *Id.* (quoting Ariz. Const. art. IV, pt. 1, § 1(4)) (emphasis added). In analyzing the legislation’s constitutionality, the court agreed that lengthening the minimum filing time would serve the concerns that motivated the constitutional framers—namely, to ensure that the electorate would have sufficient time to understand and become familiar with the proposed ballot measure. *Id.* at 348-49, 554 P.2d. at 1291-92. Nonetheless the court held that the legislation could not be justified as a mere attempt to “implement[]” or “supplement[]” the Constitution—rather, its attempt to change the constitutional minimum “unreasonably hinder[ed] or restrict[ed] the constitutional provision.” *Id.* at 348, 554 P.2d at 1291. In so holding, the court “necessarily reject[ed] appellants’ contention that by using the words ‘. . . not less than four months . . .’ the framers of the constitution intended to provide a flexible filing standard subject to change at will by the legislature, whenever changing conditions might appear to the legislature to justify a departure from the initially mandated constitutional

standard.” *Id.* at 350; 554 P.2d at 1293. As a result, the court invalidated the statute because “the constitutional provision must be construed as reserving a minimum filing right in the people, not subject to future derogation by the legislature.” *Id.*

As in *Turley*, H.B. 2600 does not merely supplement or implement the Constitution; rather, it purports to change it. In adopting Article VI, § 37, the People choose three as the ideal minimum number to ensure that the Commission nominated qualified candidates but also to limit the Governor’s discretion.<sup>5</sup> Plainly it was not the People’s intent to leave the minimum requirement to the discretion of the Legislature.<sup>6</sup>

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<sup>5</sup> In May 2013 and July 2011, there were six applicants for a vacancy on the Court of Appeals. [Press Release, Comm’n on App. Ct. Appointments, Six Applicants Being Considered (May 31, 2013) (on file with the Ariz. Sup. Ct.); Press Release, Comm’n on App. Ct. Appointments, Six Applicants Being Considered (July 26, 2011) (on file with the Ariz. Sup. Ct.), attached collectively as App. 8] Under H.B. 2600, the Commission may have been forced to submit the entire applicant pool to fulfill the minimum of five and the political distribution requirement. Due to the dearth of applicants, H.B. 2600 effectively eliminates the duties of the Commission. Because a supermajority may be difficult to obtain, any vote to submit fewer than five candidates is an inadequate safeguard of these duties.

<sup>6</sup>In analogous cases, this Court has prohibited the Legislature from adding requirements to governmental offices. *State ex rel. Sawyer v. LaSota*, 119 Ariz. 253, 256, 580 P.2d 714, 717 (1978) (holding the Legislature has no power to add specifications for positions in the executive office if the constitution describes the specifications); *Whitney v. Bolin*, 85 Ariz. 44, 47, 330 P.2d 1003, 1005 (1958) (holding that “constitutional specifications are exclusive and the legislature has no power to add new or different ones”); *Campbell v. Hunt*, 18 Ariz. 442, 453, 162 P. 882, 886 (1917) (holding that the Legislature could not add or detract to the constitutionally prescribed qualifications for Governor); *cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800–01 (1995) (“[W]e conclude that the Framers



In sum, H.B. 2600 is unconstitutional because it both (1) requires the Commission to nominate at least five candidates absent a supermajority vote; and (2) permits the Commission to nominate fewer than three candidates with a supermajority vote, all contrary to the constitutional language contained in Article VI, § 37.

## II. H.B. 2600 VIOLATES ARTICLE IV, PART 1, § 1(14) OF THE CONSTITUTION.

Not only does H.B. 2600 conflict with the plain language of the Constitution but also it unconstitutionally supersedes the People's defeat of Proposition 115 in the 2012 election. Article IV, Part 1, § 1(14) states:

This section shall not be construed to deprive the legislature of the right to enact any measure except that the legislature shall not have the power to adopt any measure that supersedes, in whole or in part, any initiative measure approved by a majority of the votes cast thereon or any referendum measure **decided by a majority of the votes cast thereon** unless the superseding measure furthers the purposes of the initiative or referendum measure and at least three-fourths of the members of each house of the legislature, by a roll call of ayes and nays, vote to supersede such initiative or referendum measure.

[See App. 2 at 9 (emphasis added)]

Based on the ordinary definition of “decided,” the Legislature may not supersede a referendum decided—that is, either approved or rejected—by the People. In construing the Constitution, “‘words are to be given their natural, obvious and ordinary meaning.’” *Brewer v. Burns*, 222 Ariz. 234, 239, 213 P.3d

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intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby ‘divested’ States of any power to add qualifications.”).

671, 676 (2009) (citation omitted). In ordinary use, “decid[ed]” means “[t]o determine (a question, controversy, or cause) by giving victory to one side or the other.”<sup>7</sup> In 2012, Arizona voters “decided” against the adoption of Proposition 115, which would have changed the minimum number of nominees from five to eight. Thus, H.B. 2600 supersedes a “decided” referendum because a majority of the voters rejected Proposition 115.

Second, based on the distinction between “approved” and “decided,” the drafters intentionally sought to prevent the Legislature from enacting statutes that supersede a referendum rejected by the voters. When construing Article IV, the Court must “ascertain and give effect to the intent and purpose of the framers.” *Brewer*, 222 Ariz. at 240, 213 P.3d at 676 (citation omitted). A marked distinction exists between the phrases “approved by a majority of the votes cast” and “decided by a majority of the votes cast.” Although Proposition 115 increased the minimum requirement to eight nominees, rather than five, what is important is that the voters overwhelmingly rejected an increase from three. Article IV, Part 1, § 1(14) protects the legislative power of the People, and the People’s mandate must be enforced. The value of the Constitution is that it places limits on legislative action unless the People amend the Constitution in an approved method. For this Court to find that five nominees is sufficiently different from eight nominees to avoid Article IV, would be to eliminate the essential legislative power of the People.

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<sup>7</sup> Decide, Oxford English Dictionary, <http://www.oed.com/view/Entry/48173?rskey=VzAkG0&result=1&isAdvanced=false#eid> (last visited July 8, 2013).

Because the People defeated Proposition 115, whatever its merits may have been, H.B. 2600 unconstitutionally supersedes a referendum “decided” by a majority.

### **III. PETITIONERS ARE ENTITLED TO ATTORNEYS’ FEES.**

Given the significance of the issues presented in this special action, Petitioners request an award of attorneys’ fees under the private attorney general doctrine, as adopted in *Arnold v. Ariz. Dep’t of Health Servs.*, 160 Ariz. 593, 609, 775 P.2d 521, 537 (1989) (citation omitted). This vindication of the rights in this action (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance. As a result, this special action meets all the conditions of the private attorney general doctrine. Alternatively, Petitioners request an award of reasonable attorneys’ fees under A.R.S. § 12-348(A)(4).<sup>8</sup>

### **CONCLUSION**

The Constitution expresses the will of the People and limits the power of the Legislature. Despite the clear requirements of Article XXI to amend the Constitution, the Legislature passed H.B. 2600 in attempt to amend Article VI, § 37 of the Constitution by statute. Additionally, H.B. 2600 violates Article IV, Part 1, § 1(14) because it supersedes Proposition 115 defeated by a majority of the voters in 2012.

For these reasons, Petitioners respectfully request that this Court (1) issue an order declaring H.B. 2600 unconstitutional and (2) enjoin the Commission from

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<sup>8</sup> The cap in A.R.S. § 23-348(E)(2) does not apply because several special factors exist, such as the novelty of a key legal issue and the number of people impacted by the Court’s decision.

applying H.B. 2600 and (3) award reasonable Petitioners' attorneys' fees.

Dated: July 12, 2013

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