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. CV-13-0225

RESPONSE TO PETITION FOR SPECIAL ACTION

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INTRODUCTION

This case concerns the merit selection system set forth in the Arizona Constitution, which is used to vet judicial candidates based upon their competence and capability. At the heart of merit selection are the nonpartisan Commissions on Appellate and Trial Court Appointments that provide the definitive gatekeeping function upon which merit selection turns – the merit screen.

House Bill 2600 ("H.B. 2600") does nothing to hinder the merit selection system or harm its important and worthy contribution to judicial competence. It does not reintroduce elections, politics or private interest into the judicial selection process. Nor does it harm the essential principle of judicial independence. To the contrary, H.B. 2600 represents a thoughtful procedural supplement to merit selection that (i) accounts for the proliferation of prospective judicial candidates, while simultaneously (ii) preserving, if not amplifying, the critical, dispositive role of the Commission on Appellate Court Appointments (the "Commission")—*i.e.*, to screen a universe of candidates for merit, unshackled from political pressure and private interest, and compile a discrete menu of qualified attorneys for the Governor's consideration.

Since merit selection was introduced in 1974, the number of licensed attorneys in Arizona has increased from less than 4,000 to more than 17,000—an increase of more than 425 percent. Despite this tremendous growth in the pool of

potential judicial candidates, the number of candidates submitted for the Governor's consideration has remained virtually static at three. Aside from disregarding population realities and attendant qualitative considerations, a fixed adherence to three candidates, which the Arizona Constitution does not mandate, also operates to dampen interest for open positions among those not eager to be summarily rejected.

Article VI, § 37 of the Arizona Constitution requires that the Commission present "not less than three" candidates to the Governor for every available position. H.B. 2600 simply provides a few *procedural* details to this constitutional requirement by requiring the Commission to normally present at least five candidates to the Governor, but at the same time allowing the Commission the necessary flexibility to submit three or four candidates if two-thirds of the Commission agrees to do so.[1] The Arizona Constitution allows the Legislature to adopt statutes and rules that do not conflict with it.

H.B. 2600 neither unconstitutionally amends nor unreasonably hinders the merit selection system, but instead constitutes a reasonable supplement to its constitutional purpose. There is no merit to the Petitioners' claim that H.B. 2600, a simple procedural supplement the Legislature enacted concerning the number of candidates the Commission should submit to the Governor, is unconstitutional.

[1] H.B. 2600 does not displace section 37's requirements for the political party affiliation of candidates.

Since H.B. 2600 does not conflict with Article VI of the Constitution, it is valid and enforceable. *Citizens Clean Elections Commission v. Myers*, 196 Ariz. 516, 520, 1 P.3d 706, 710 (2000).

However, before ever reaching the merits, this Court should dismiss this special action on jurisdictional grounds because Petitioners do not bring their claims against a State officer against whom a writ can issue. In addition, without a majority of Commission members on board, the Petitioners lack standing to assert organizational claims that appropriately belong to the Commission rather than to its individual members.

JURISDICTIONAL STATEMENT

The Petitioners rely on Article VI, § 5.1 of the Arizona Constitution to invoke this Court's original jurisdiction over "mandamus, injunction, and other extraordinary writs to State officers." The Petitioners allege there is sufficient public concern implicated by their claims for this Court to exercise its discretion. (Petition at 3.) However, they never address a more fundamental question: is there a state officer defendant subject to an extraordinary writ, thus giving rise to jurisdiction? There is not. Article VI, § 5.1 expressly applies only to "state officers." The State of Arizona and the Commission are not State officers; therefore, this Court does not have original jurisdiction under Article VI, § 5.1 to issue a writ against either entity. This case is a declaratory judgment action

masquerading as a special action. It should be refiled in Superior Court under the appropriate designation.[2] Accepting jurisdiction here allows Petitioners to file an original action in this Court to obtain declaratory relief against the State. Despite the alleged importance of the issue, Petitioners must seek relief in the appropriate forum.

The Petitioners also lack standing to assert organizational claims properly belonging to the Commission as a whole, which this Court has emphasized as particularly important in the special action context. *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 486, 143 P.3d 1023, 1027 (2006).

The Petitioners are a minority of the members of the Commission and, as such, cannot assert its organizational claims. The Commission has fifteen members, four of whom are the Petitioners herein. The Petitioners claim that they have standing because they have an interest in the outcome, but that is not the applicable test. *Bennett v. Napolitano*, 206 Ariz. 520, 527, 81 P.3d 311, 318 (2003), is instructive. In *Bennett*, four state legislators, including the President of

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[2] This Court should also decline jurisdiction because this facial challenge does not allow the State to properly develop an appropriate record demonstrating that H.B. 2600 was a procedural mechanism implementing the constitutional provisions. Petitioners ask this Court to make a constitutional determination divorced from the context: the thirty-eight year record of the Commission. The Commission's practices over the years are an essential component to this Court's consideration of how H.B. 2600 fits into the constitutional structure. Denying jurisdiction would allow the parties to develop an appropriate record in the superior court for this challenge to H.B. 2600.

the Senate and the Speaker of the House, brought a special action challenging the Governor's veto of specific items in an appropriations bill. This Court held that the legislators lacked standing as individuals because they failed to show any particularized injury. *Id.* Certainly, the President of the Senate and the Speaker of the House had an interest in the outcome in *Bennett*. Nonetheless, this Court held they lacked standing because they were not authorized to speak for their organization as a whole. *Bennett,* 206 Ariz. at 527, 81 P.3d at 318. The Petitioners likewise lack authority to speak on behalf of the Commission.

STATEMENT OF THE ISSUES

1. Whether H.B. 2600 hinders or restricts the merit selection system or constitutes permissible parallel legislation.
2. Whether H.B. 2600 violates Arizona Constitution, Article IV, Part 1, § 1(14).

STATEMENT OF FACTS

A. Merit Selection Passes in 1974

This case involves the merit selection system approved in 1974 by Arizona voters who sought to ensure an independent and qualified judiciary. As presented on the ballot, the merit selection initiative was "based on the fundamental idea that any judicial system is better if judges are selected solely on the bases of competency and capability." (*See* Petitioners' App. 1.)

The merit selection system is codified in the Arizona Constitution at Article VI, §§ 36, 37.[3] Section 36 creates the Commission on Appellate Court Appointments, which currently consists of fifteen members and the Chief Justice of the Arizona Supreme Court. Section 37 delineates certain responsibilities of the Commission. The Commission screens and nominates "no[] less than three" qualified candidates for each appellate court vacancy, which are then sent to the Governor, who must fill the judicial vacancy with one of those candidates. *Id*.

B. Explosive Growth in Pool of Prospective Judicial Candidates

Arizona had less than 4,000 licensed and active lawyers in 1974.[4] After almost four decades, that number had grown to 17,000 in 2012[5]-an increase of more than 425 percent.

Notwithstanding the dramatic increase in potential judicial candidates, the Commission continued to send the same number of candidates to the Governor in 2012 as it did in 1974-three. (*See* Arizona News Service 2012 Political Almanac at 62, attached as App. 1.)

[3] There have been further amendments to these sections as well. In 1992, Proposition 109 required the Commission to vote in public. *See* Arizona Secretary of State, Publicity Pamphlet for Proposition 109 (Petitioners' App. 3).
[4] Per telephone conversations with the State Bar of Arizona.
[5] *See* State Bar of Arizona Annual Report 2012, attached as App. 2.

C. House Bill 2600

To account for the fact that in the 39 years since the merit selection system became law, the Commission routinely submits only three names to the Governor, Representative Justin Pierce, an attorney, introduced H.B. 2600. *Hearing on H.B. 2600 Before the H. Comm. on Public Safety, Military, and Regulatory Affairs,* 51st Leg., 1st Reg. Sess. at 00:24:25 (Feb. 20, 2013)[6] (statement of Rep. Justin Pierce, Chairman). Representative Pierce explained that the fixed artificial adherence to three candidates has ended the judicial aspirations of many well-qualified candidates who were not selected for the Governor to consider. 2/20/13 Hrg. at 00:25:39–00:26:24 (statement of Rep. Pierce).

The most recent Arizona Supreme Court vacancy and appointment is illustrative of the inherent deficiencies associated with a rigid and artificial adherence to the number three. Several current Court of Appeals Judges- from both political parties and with years of judicial experience- applied for the position, but their continued public service aspirations were terminated for no reason except the rigid artificial adherence to a 39-year- old procedural benchmark. 3/11/13 Hrg. at 00:42:42-00:43:17 (statement of Rep. Pierce). Chief Justice Berch urged the

[6] The hearing has not been transcribed, but the video is available at *azleg.granicus.com/MediaPlayer.php?view_id=13&cip_id=1182* (last visited July 25, 2013). This hearing will hereafter be referenced as "2/20/13 Hrg."

Commission to send more than three names to the Governor, but to no avail. 3/11/13 Hrg.at 00:43:17-00:43:23 (statement of Rep. Pierce).

Indeed, for the last three Supreme Court vacancies combined, only six names were sent to the Governor. 2/20/13 Hrg. at 01:06:53 –01:07:06 (statement of Rep. Pierce); 3/11/13 Hrg. at 00:41:22–00:41:36 (statement of Rep. Pierce); (*See* App. 1).

The chart below compares the Constitution's merit system requirements and H.B. 2600. The shadowed area shows how H.B. 2600 parallels and does not conflict with the Constitution.

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Appellate Court Merit Selection System

Current, *See* Ariz. Const. art. VI	Pursuant to H.B. 2600
• Commission on Appellate Court Appointments consisting of 15 members (five attorneys and ten non-attorneys) and the Chief Justice	• Commission on Appellate Court Appointments consisting of 15 members (five attorneys and ten non-attorneys) and the Chief Justice
• Commission members serve four-year terms	• Commission members serve four-year terms
• Commission screens and nominates candidates to fill appellate court vacancies	• Commission screens and nominates candidates to fill appellate court vacancies
• Voting shall be in public hearing	• Voting shall be in public hearing, and the votes of individual Commission members shall be recorded
• Commission sends "not less than three" names to the Governor for each appellate court vacancy	• Commission sends "at least five" names to the Governor for each vacancy, but can send three or four if the Commission votes to do so
• No more than two of the nominees may be members of the same political party, unless four or more are nominated, in which case no more than sixty percent of the nominees may be members of the same political party	• If three or four are nominated, no more than two may be members of the same political party, if five or more are nominated, no more than sixty percent may be members of the same political party
• Governor chooses from the list of nominees provided by the Commission	• Governor chooses from the list of nominees provided by the Commission
• Appellate judges serve six-year terms	• Appellate judges serve six-year terms

Representative Pierce testified that with so many more lawyers now in Arizona than in 1974, increasing the presumed number of nominees will result in a

greater number of applicants and ultimately, in a greater number of qualified candidates sent to the Governor. 3/11/13 Hrg. at 00:41:38–00:42:17(statement of Rep. Pierce).

ARGUMENTS

I. HOUSE BILL 2600 IS PERMISSIBLE PARALLEL LEGISLATION

A. The Legislature Has Plenary Power to Enact Laws that Do Not Interfere with the Constitution

Petitioners have a heavy burden to establish that H.B. 2600 is unconstitutional. *Hall v. A.N.R. Freight Systems, Inc.*, 149 Ariz. 130, 133, 717 P.2d 434, 437 (1986). H.B. 2600 is presumed to be constitutional and the Petitioners must show beyond a reasonable doubt that it conflicts with the Arizona Constitution. *Id.*

Since Petitioners have failed to overcome the presumption of constitutionality, this Court should enter an Order denying their claims and declaring that H.B. 2600 is constitutional.

B. H.B. 2600 does not conflict with Merit Selection

H.B. 2600 does not directly conflict with Article VI, § 37 (hereafter "Section 37" or "§ 37") of the Arizona Constitution. It does not require the Commission to provide fewer than three nominees to the Governor, nor does it prohibit the Commission from nominating three or more candidates (as required by § 37). It is possible for the Commission to easily comply with both the requirements of H.B.

2600 (which permits three or four nominees with a two-thirds majority vote, and five or more nominees otherwise) and the requirements of § 37 (which requires three or more nominees).

Nor does H.B. 2600 indirectly conflict with Article VI, § 37. The question of indirect conflict turns on whether "the application of [H.B. 2600] interferes with, frustrates, or diminishes the constitution as opposed to reasonably supplementing the constitution." *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, ¶ 59, 290 P.3d 1126, 1242 (App. 2012); *See also Direct Sellers Ass'n v. McBrayer*, 109 Ariz. 3, 5, 503 P.2d 951, 953 (1972) ("If such legislation does not unreasonably hinder or restrict the constitutional provision and if the legislation reasonably supplements the constitutional purpose, then the legislation may stand."); *Turley v. Bolin*, 27 Ariz. App. 345, 348, 554 P.2d 1288, 1291 (App. 1976) ("The question thus becomes whether the statutory provision here involved implements or supplements the above-quoted constitutional provision and does not unreasonably hinder or restrict the [rights granted therein].").

The Petitioners heavy reliance on *Turley* is misplaced. In *Turley*, the Court analyzed the conflict between a statutory provision requiring the filing of an initiative petition "not less than five months" before an election and a constitutional provision requiring filing "not less than four months" before an election. The Court found that "the constitutional provision must be construed as

reserving a minimum filing right in the people, not subject to future derogation by the legislature." *Turley*, 27 Ariz. App. at 350, 554 P.2d at 1293. The legislation at issue in *Turley* had the effect of absolutely barring initiative petitions filed between four and five months prior to an election, even though these petitions were permitted by the Constitution. By contrast, H.B. 2600 permits the Commission to forward to the Governor precisely the same number of nominees provided in the Constitution—three or more.

McBrayer is far more instructive. In *McBrayer*, the Court upheld legislation that added a procedural requirement that referendum petition circulators had to be qualified electors. 109 Ariz. at 3, 503 P.2d at 951. If the petition circulator was not a qualified elector, the presumption that signatures were valid was lost. *Id*. at 5, 503 P.2d at 953. Although the legislation in *McBrayer* altered the procedural landscape surrounding the gathering of signatures for a referendum petition, it did not change the substance of the underlying right.

Here, the Legislature has concluded that the intent of § 37 is best served by encouraging a greater number of qualified nominees. The number of nominees that can be sent is not changed from the "no less than three" provided in § 37. The only difference is procedural: the Commission must comply with an additional requirement of a two-thirds majority vote to nominate either three or four applicants (instead of five or more). This Court should defer to the Legislature's

finding of fact that merit selection will be advanced by creating a situation in which a greater number of nominees is likely, but is not required. Accordingly, this Court should uphold H.B. 2600 as merely implementing the provisions of Article VI, § 37 by providing a procedural mechanism for the Commission.

The Petitioners argue that the Commission's discretion to only send the constitutional minimum number of names cannot be affected by statute. (Petition at 5, 9.) This Court's precedents, however, do not turn simply on whether discretion is limited. Most laws have some impact on official discretion. To take just a few examples, the Open Meeting Law limits the discretion of public bodies to conduct official business in private: the Conflict of Interest Laws limit the ability of public officers and employees to make official decisions if they have a personal interest in the subject matter: and, many statutes control the receipt, custody, and expenditure of public monies. The relevant question is not whether official discretion is being limited, but whether it is being limited in a way that conflicts with the Constitution, which H.B. 2600 does not do.

Moreover, the qualification upon the Commission's discretion provided by H.B. 2600 is a very modest one. If there are at least five qualified applicants, they should be sent to the Governor. In the event that two-thirds of the Commission feels that a candidate is not qualified for consideration, fewer than five candidates can be sent. The presumption that at least five nominees be forwarded for

consideration is consistent with the Constitution's mandate that the Commission make its decisions in an "impartial and objective manner." Ariz. Const. art. VI, § 36(D).

C. Petitioners' Claim that H.B. 2600 Would Permit Submitting Fewer than Three Names to the Governor Should Be Rejected.

Before declaring a statute unconstitutional, courts "must consider whether a limiting construction could be placed on the statute to cure the constitutional infirmity." *State v. Steiger*, 162 Ariz. 138, 145, 781 P.2d 616, 624 (App. 1989) (citations omitted). "There is a strong presumption in favor of a statute's constitutionality, and we should give a challenged statute a constitutional construction whenever possible." *Id.* (citations omitted).

Article VI, § 37 requires the Commission to submit "no less than three" names to the Governor. H.B. 2600 sets the normal baseline at five names, but permits the Commission to submit fewer names by two-thirds majority vote. Nothing in the text of H.B. 2600 explicitly authorizes the Commission to submit fewer than three names. It is proper for this Court to give H.B. 2600 a constitutional construction by finding that the statute allows only for the striking of the fourth and fifth names by two-thirds vote of the Commission, thus maintaining a "floor" of three names consistent with Article VI, § 37. To do otherwise would be to impose an unconstitutional reading on H.B. 2600 when such a reading is not

required or even suggested by the plain text of the statute, contrary to the Court's duty under *Steiger*.

II. H.B. 2600 DOES NOT VIOLATE ARTICLE IV, PART 1, § 1(14) OF THE ARIZONA CONSTITUTION.

Nothing in the Voter Protection Act bars future legislation based on an unsuccessful ballot proposition. Even if it did, H.B. 2600 would still be constitutional because it does not conflict with any provision of the Arizona Constitution and it is completely dissimilar to Proposition 115.

The Petitioners argue that Article IV, Part 1, § 1(14) of the Arizona Constitution (hereafter "Section 1(14)" or "§ 1(14)") prohibits the Legislature from "superseding" a referendum measure rejected by a majority of votes cast. Proposition 115 is not subject to § 1(14) because it was a proposed constitutional amendment under Article XXI, not an initiative or referendum. Furthermore, Section 1(14) applies only to measures approved by the voters, but Proposition 115 was rejected. Because H.B. 2600 is *not* Proposition 115 and § 1(14) does not apply to these facts, the Petitioners' claims fail.

A. H.B. 2600 is Not Similar to Proposition 115 and Petitioners' Attempt to Conflate the Two is Meritless

There is no relationship between H.B. 2600 and Proposition 115, which asked the voters to approve numerous *substantive* changes to Arizona's judicial merit system. Proposition 115 would have changed the minimum number of

candidates from three to eight, extended the length of judicial terms, changed the number of Commissioners the Governor appoints, extended the terms of Commissioners, raised the mandatory retirement age of judges, extended the terms of judges, and created a process for joint legislative committees to hear testimony about judges facing retention votes. (*See* Petitioners' App. 5 at 23.) H.B. 2600, by contrast, only requires the Commission to try to submit to the Governor at least five candidates (while still leaving the option of presenting only three or four). (*See* Petitioners' App. 4.) In short, H.B. 2600 bears almost no resemblance to the failed Proposition 115. Therefore, any attempt to use the Voter Protection Act (in relation to Proposition 115) to challenge H.B. 2600 has no merit.

B. Section 1(14) of the Arizona Constitution Does Not Apply to Proposition 115, a Constitutional Amendment Proposed by the Legislature.

On its face, Article IV, Part 1, § 1(14) protects two types of ballot propositions: initiative measures and referendum measures. "Initiatives" are measures proposed by ten percent of qualified electors or constitutional amendments proposed by fifteen percent of qualified electors. Ariz. Const. art. IV, pt. 1, § 2. A "referendum" is a measure enacted by the legislature and submitted to the voters. Ariz. Const. art. IV, pt. 1, § 3.

Referendum and initiative are not the only way that propositions can appear on the ballot in Arizona. Article XXI of the Arizona Constitution sets forth the

procedure for the Legislature to propose an amendment to the Constitution. Following a majority vote of both houses, the Secretary of State is required to submit a proposed constitutional amendment to the voters at the next general election. Ariz. Const. art. XXI, § 1. This was the procedure followed by Senate Concurrent Resolution 1001 in 2011. (*See* Petitioners' App. 6.) As a proposed constitutional amendment, S.C.R. 1001 (and thus Proposition 115, which it placed on the ballot) was neither an initiative proposed by the voters nor a referendum of enacted legislation to the voters. Since § 1(14) applies only to initiatives and referenda, it cannot apply to Proposition 115, which was neither.

C. Even if § 1(14) Applied to Proposition 115, It Does Not Apply to Measures Rejected by the Voters

Even though Petitioners mischaracterize Proposition 115 as a referendum falling within the scope of § 1(14), that provision still would not stand as an obstacle to H.B. 2600.

1. The language of § 1(14) does not support Petitioners' proposed reading.

Petitioners argue that § 1(14) prohibits the Legislature from superseding any referendum measure, regardless of whether that measure was approved or rejected by the voters. To reach this conclusion, Petitioners rely first upon the common meaning of "decide," and second upon the distinction between an "initiative measure approved by a majority of votes cast thereon" and a "referendum measure

decided by a majority of the votes cast thereon" in § 1(14). (*See* Petition at 12, 13.)

Petitioners correctly cite *Brewer v. Burns*, 222 Ariz. 234, 213 P.3d 671 (2009), for the appropriate analysis of constitutional provisions, but elide the critical language. "We give effect to the purpose indicated, by a fair interpretation of the language used, ***and unless the context suggests otherwise*** words are to be given their natural, obvious and ordinary meaning." *Brewer,* 222 Ariz. at 239, 213 P.3d at 676 (citation and quotation marks omitted) (emphasis added). Petitioners ignore the crucial context provided by Article IV, Part 1, § 1 of the Arizona Constitution, which contains language distinguishing between initiatives "approved" and referenda "decided" in five separate provisions. Petitioners emphasize this language only in § 1(14), but the other provisions are just as instructive. The Governor cannot veto an approved initiative measure or decided referendum measure. Ariz. Const. art. IV, pt. 1, § 1(6)(a). The Legislature cannot repeal an approved initiative measure or decided referendum measure. *Id*. § 1(6)(b). The Legislature cannot amend an approved initiative measure or decided referendum measure, except by three-quarters majority. *Id*. § 1(6)(c). The Legislature cannot divert funds created by an approved initiative measure or decided referendum measure, except by three-quarters majority. *Id*. § 1(6)(d).

These provisions uniformly prohibit actions aimed at legislation that has past. The Governor cannot "veto" a law that has not been passed. The Legislature cannot "repeal" a law that has not been passed. Laws that do not exist are not subject to "amendment." Since laws that do not exist have no legal effect, they cannot create any funds to be "diverted."

This principle applies equally to Section 1(14). In ordinary use, "supersede" means to "take the place of (a person or thing previously in authority or use)."[7] It is logically impossible to supersede a referendum measure that was not passed, and was therefore never "in authority or use." The context makes clear that giving "decided" the supposedly ordinary usage urged by the Petitioners in any provision of Article IV, Part 1, § 1 fails to serve any purpose-much less the drafters' purpose-because those clauses become nonsensical. To the contrary, the language involving referendum measures "decided" in Article IV, Part 1, § 1 can only reasonably be read to refer to those referendum measures approved by the voters.

2. The History of the Voter Protection Act Contradicts Petitioners' reading.

Petitioners refer to the intentions of the "drafters" of Article IV (Petition at 13), but they do not discuss the drafting of the actual provisions at issue. *See Laos v. Arnold*, 141 Ariz. 46, 48, 685 P.2d 111, 113 (1984) (publicity pamphlet and

[7] Supersede, Oxford Dictionaries, http://oxforddictionaries.com/us/definition/english/supersede (last visited July 22, 2013).

arguments advanced in support of constitutional amendment can be used to ascertain meaning and purpose of amendment). Section 1(14) was adopted in 1998 as part of Proposition 105, commonly known as the Voter Protection Act. (*See generally* Prop 105, attached as App. 3.) Prior to the passage of Proposition 105, Article IV, Part 1, §1 prohibited only the veto, repeal, and amendment of initiative and referendum measures passed by a majority of qualified electors. *See State v. Lopez*, 163 Ariz. 108, 116, 786 P.2d 959, 967 (1990); *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952). The Legislative Council's analysis attached to Proposition 105 clearly shows that its purpose was to change this majority-of-electors dynamic:

> Proposition 105 would make all of the following changes apply to any ballot measure that is ***approved*** by a majority of the people who voted on that ballot measure:
>
> 1. Prohibits the Governor from vetoing the ***approved measure***.
> 2. Prohibits the State Legislature from ever repealing the ***approved measure*** or from amending an ***approved measure*** except as provided below.
> 3. Requires a three-fourths vote of the State Legislature to amend or supersede the ***approved measure*** and requires that the legislation "furthers the purposes" of the ***approved measure***.
> 4. Requires a three-fourths vote of the State Legislature to appropriate or transfer funds that were designated to a specific purpose by the ***approved measure*** and requires that the appropriation or transfer of funds "furthers the purposes" of the ***approved measure***.
> 5. Provides that the State Legislature is not limited in its right to refer any measure to the ballot.

(Prop 105 at 5, attached as App. 3) (emphasis added).

The Legislative Council's analysis also makes clear that the language added to the Arizona Constitution by Proposition 105 applies only to ballot measures (*i.e.*, initiatives and referenda) approved by the voters. *Id.* The words "approved measure" appear in the description of four of the five provisions described. *Id.* Clearly the drafters of Proposition 105 did not intend for its provisions to apply to referendum measures rejected by the voters.

Even the official title of Proposition 105 eviscerates the Petitioners' argument. Proposition 105's official title is:

> PROPOSING AMENDMENTS TO THE CONSTITUTION OF ARIZONA . . . *AMENDING ARTICLE IV, PART 1, SECTION 1, SUBSECTION 14, CONSTITUTION OF ARIZONA, RELATING TO RESERVATION OF LEGISLATIVE POWER TO ADOPT MEASURES THAT SUPERSEDE MEASURES* ***ADOPTED*** *BY INITIATIVE OR REFERENDUM . . . .*

(Prop. 105 at 9, attached as App. 3.) (emphasis added).

The official title clearly shows that the provisions of § 1(14) only apply to "measures adopted by initiative or referendum." Measures that are not approved by a majority of votes cast are not adopted. *See* Ariz. Const. art. IV, pt. 1, § 13 (upon completion of canvassing of votes, "the governor shall forthwith issue a proclamation . . . declaring such measures or amendments as are approved by a majority of those voting thereon to be law").

Finally, the ballot language describing Proposition 105's effect, if enacted, illustrates the error in the Petitioners' reading:

> A "yes" vote shall have the effect of placing certain limits on veto, amendment, repeal or transfer of funds approved by initiative or referendum, including prohibiting the Governor from vetoing initiative or referendum measures, prohibiting legislative repeal and requiring a 3/4ths vote of the State Legislature to amend, to supersede a measure, or to transfer funds designated by an approved measure and only if the legislation furthers the purpose of the original measure.

(Proposition 105 at 5, attached as App. 3.). It is clear from this language that Proposition 105 was explained to the voters as having an effect only with respect to approved measures, not measures rejected by the voters.

The Legislative Council's analysis, official title, and "yes" vote ballot language of Proposition 105 all clearly apply only to measures approved by the voters by a majority of ballots cast. Therefore, Petitioners' reading is incorrect and rejected measures such as Proposition 115 do not trigger any of the provisions of § 1(14).

CONCLUSION

Respondent requests that this Court enter an Order (1) denying the special action because the Petitioners lack standing and awarding attorney fees to the State, or (2) declaring that H.B. 2600 is constitutional and awarding attorney fees to the State.

Respectfully submitted this 31st day of July, 2013.

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