LATE
SB2239

Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

The Twenty-Eighth Legislature, State of Hawaii
The Senate
Committee on Judiciary and Labor

Testimony by
Hawaii Government Employees Association

February 10, 2016

S.B. 2239 – PROPOSING AN AMENDMENT TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII RELATING TO THE SELECTION AND RETENTION OF JUSTICES AND JUDGES

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly opposes the purpose and intent of S.B. 2239, which proposes a constitutional amendment to require justices and judges be elected to serve six-year terms and additionally be subject to the consent of the Senate for subsequent judicial terms.

In order to function properly, our judicial system must have judges who have the authority and autonomy to exercise their independent judgement, free from coercion and the many distractions that surround running for office. When politics – inclusive of campaigning, fundraising, and seeking organizational and personal endorsements – comingle with controversial, high stakes, precedent-setting decisions, abuse is prone to happen. It is shortsighted and unwise to create a situation where our judges are beholden to special interest groups and campaign financiers, or where the voting electorate with little knowledge of individual judges can be so easily swayed by public attacks. We respectfully insist that it is not in the state or public's best interests for a judge's decision making to be influenced by its donor base; a judge must have the independence to interpret law based solely on fact and merit.

Thank you for the opportunity to testify in strong opposition to S.B. 2239. We respectfully request the Committee defer this measure.

Respectfully submitted,

for Randy Perreira
Executive Director

HAWAII FILIPINO LAWYERS ASSOCIATION

Date: February 10, 2016

To: Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor

Re: Testimony on S.B. 2238 / SB2239 - Relating to Judicial Elections and Proposing an amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges.

HEARING: 2/10/16 9am Room 16

The Hawaii Filipino Lawyers Association (HFLA) appreciates the opportunity to submit this testimony in **OPPOSISITION** to both **SB2238** RELATING TO JUDICIAL ELECTIONS and **SB2239**, PROMOTING AN AMENDMENT TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII RELATING TO THE SELECTION AND RETENTION OF JUSTICES AND JUDGES.

Among the purposes of the HFLA is to promote participation in the legal community by Filipino lawyers; to represent and to advocate the interests of Filipino lawyers and their communities; to foster the exchange of ideas and information among and between HFLA members and other members of the legal profession, the Judiciary and the legal community; to encourage and promote the professional growth of the HFLA membership; and to facilitate client referrals and to broaden professional opportunities for Filipino lawyers and law students.

Given HFLA's mission, it is thus necessary for us to express our deep concern that **these measures will significantly erode the diversity of Hawaii's bench**. As explained in the May 2015 article attached to this testimony from the publication "Mother Jones", minority candidates are more likely to lose a judicial and/or judicial retention election to a white candidate.

We concur with the theories presented in this article for the proposition that the general electorate may exhibit subconscious or implicit bias based on a candidate's name or

physical appearance. For example, the article explains how in Ohio, candidates with Irish names were consistently winning elections over minority incumbents.

We are also concerned about the costs, manpower, and other resources that are needed to run an effective campaign; and whether minority judicial candidates can garner the kind of support that wins elections. Related to this is the troubling impact we expect as a result of the 2010 U.S. Supreme Court's decision in Citizens United, where the special interests of corporations and political action groups with deep pockets would subvert the purpose and policy of a merit-based judicial selection process.

As attorneys, officers of the court, and proponents of the balance and separation of powers in our democracy, we believe that our Justices and Judges should interpret and apply the law and should have the proven capacity to do so. While the leaders in our legislative and executive branches are selected by the general public, we support a more deliberative process for the selection of those in our judicial branch.

We therefore have much greater faith in the existing judicial selection process, which has been designed to carefully vet judicial candidates based upon: evaluations from members of the bar; confidential reports from practicing attorneys familiar with the candidates' fitness and aptitude for a judicial posts; as well as public sentiment and comment.

The existing process necessarily involves a robust inquiry into a candidate's professional conduct and ethics - matters that can be easily eclipsed by the physical appearance of a judicial candidate that may seem – on the surface - more attractive to a given voter, without considering the judicial candidate's commitment to understanding, interpreting, and upholding the law.

Thank you for this opportunity to testify on these measures in opposition.

Mother Jones

Judicial Elections Erode Diversity on the Bench

A new report shows that minority candidates have a harder time holding onto judicial seats than white justices.

—Pema Levy on Mon. October 26, 2015 5:00 AM PDT

Supreme Court Justice Sonia Sotomayor reflects judicial diversity of a sort that has vanished on some state courts. *Matt Slocum/AP*

In 2002, Texas Supreme Court Justice Xavier Rodriguez, a Republican, lost his seat on the bench to a white lawyer named Steven Wayne Smith. Smith, a fellow Republican who made a name for himself fighting affirmative action at the University of Texas, suggested that Rodriguez had been "underqualified" for his undergraduate education at Harvard. The *Houston Chronicle* reported that Smith decided to take on Rodriguez because "he thought a Hispanic wouldn't do well in the Republican primary."

Six years later, Wisconsin's first black state Supreme Court justice lost his reelection bid—the first member of the state's high court to lose a seat in 40 years—in the face of nasty, well-funded, and racially tinged ad campaign that harkened back to the infamous Willy Horton TV spot.

In Ohio, African American state Supreme Court justices seem cursed. Two of the three black justices ever to serve on the state's highest court lost their reelection bids the year after their appointment. In 2012, Justice Yvette McGee Brown, the first female African American on the court, lost reelection to a white woman with an Irish surname.* In fact, the three winners in state Supreme Court races that year all had Irish last names, prompting a local reporter to note that new court "will resemble politicians at a St. Patrick's Day parade."

These may not be isolated incidents. A new report from the left-leaning Center for American Progress released Monday finds that minority Supreme Court justices around the country are reelected at lower rates than white judges. (Full disclosure: *Mother Jones* is participating in a panel discussion about the report Monday afternoon.)

The report, "More Money, More Problems: Fleeting Victories for Diversity on the Bench," finds that since 2000, the overall reelection rate for incumbent Supreme Court justices in contested races is 88 percent. For white justices, that number is 90 percent. But black justices have been reelected 80 percent and Hispanic justices 67 percent of the time.

"In many states with elections, advocates for diversity have succeeded in pressing for diverse appointments, but these victories are often fleeting," the report states. "In many states where diverse judges were appointed, they were voted off the bench in the next election. According to new research for this report, appointed black and Latino justices running in their first election only had a 68 percent re-election rate."

The possible causes of this trend are numerous. Perhaps voters in states like Ohio who knew nothing about the candidates let their subconscious biases come out when they voted for the candidate with the Irish (and therefore likely white) last name. Billy Corriher, one of the authors of the report, points out that in Texas, while the Latino justice lost his seat, two African American justices—whose last names don't obviously convey the color of their skin—were reelected and ultimately left the bench voluntarily.

In other instances, minority justices lost their seats due to partisan politics. In Alabama, two African American state Supreme Court justices, both Democrats, lost their seats in 2000 amid a Republican surge that year. Today, all of Alabama's Supreme Court and appellate court justices, including both its civil and criminal appellate courts, are white. "That, to me, was really shocking because you've got this state that has a very substantial African American population and it was the site of all these civil right battles that we've been celebrating recently—the march from Selma to Montgomery, Bloody Sunday—and we have all these people that fought for voting rights and then today none of those communities are represented on the appellate courts in Alabama," says Corriher, who studies state courts at CAP. "That's really tragic to me."

The rising flood of money into judicial elections tends to hurt minority candidates, whereas public financing programs have fostered diversity. The CAP report points in particular to North Carolina, where a public financing system brought newfound diversity to the bench.

"In 2002, before the shift to public financing and nonpartisan elections, all three black appellate judges who sought reelection lost," a 2010 report by the group Democracy North Carolina found. "[B]ut the four African-American judges who have run since then in regular elections all used public financing and won. That's a pretty remarkable turnaround."

That system no longer exists. After taking over the state legislature and governorship in 2012, Republicans repealed it.

Correction: An earlier version of this article misstated the gender of Justice McGee Brown's opponent.

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190 Comments Mother Jones Login

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Niko Lotta • 3 months ago

Literally buying judges. We will never overturn citizens united at this rate. It is time to seriously consider retooling some of our framework.

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gilhcan → Niko Lotta • 3 months ago

It is long past time for a peaceful but very effective revolt against the politicians and their backers who are blatantly defying our Constitution, separation of religion and government, church and state. Vital to freedom of religion is the freedom to reject religion.

1 • Reply • Share ›

Cassandra of Troy • 3 months ago

Texas, Wisconsin and Ohio are Conservative "poopholes" and it is beyond me why anyone sane would not want to leave. (Edit: Throw in Alabama and South Carolina into the mix.)

6 • Reply • Share ›

footballexpt → Cassandra of Troy • 3 months ago

Alabama has never elected a black in a state wide election. Blacks who are very qualified have been appointed to the Supreme Court, but when they have to run, they lose, sometimes to candidates who have very little experience.

1 • Reply • Share ›

greatjoy → footballexpt • 3 months ago

This article holds up Sotomayor as "diversity" of skin color, but she had no previous experience. She is not qualified to be a judge at all, let alone a Supreme Court judge. Politicians need to stop appointing unqualified judges who have no training in following the Constitution.

Louise K. Y. Ing
1080 S Beretania St #504
Honolulu, HI 96814
February 10, 2016

VIA E-MAIL
The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Maile S. L. Shimabukuro, Vice-Chair
Senate Committee on Judiciary and Labor
415 S. Beretania St.
Honolulu, Hawai`i 96814

RE: SB 2238 and SB 2239 – Judicial Elections in Hawai`i
Hearing: Wednesday, February 10, 2016, at 9:00 AM
Conference Room 016
State Capitol

Dear Chair Keith-Agaran, Vice Chair Shimabukuro and Members of the Senate Judiciary and Labor Committee:

I respectfully submit comments on SB 2238 and SB 2239 as an interested citizen and from the perspective of a lawyer with over thirty years of litigation experience in Hawai`i and a former president of the Hawaii State Bar Association. Thank you for this opportunity to submit comments and for your careful and thoughtful consideration of this important and dangerous bill.

I strongly oppose legislation that would change the selection of judges from the existing judicial election process to a judicial election process. Judicial elections run counter to the separation of the executive, legislative and judicial branches on which our country and state's system of government is founded.

Judges should be impartial, free from political influence, and not distracted from their important jobs of applying the rule of law. Requiring judges to campaign, fundraise and appeal to the popular vote would distract them from their already heavy caseloads, influence their decisionmaking and as Justice Sandra Day O'Connor wrote, make them "likely to feel that they have at least some personal stake in the outcome of every publicized case." See Justice O'Connor's separate concurring opinion in *Republican Party of Minnesota v. White* (expressing disapproval of the state's judicial election process).

It is enough of a challenge to recruit experienced and highly qualified lawyers to apply to be judges, given the level of judicial compensation compared to compensation levels in private practice and state judges' heavy workload. Add to that economic challenge the need for judicial candidates to raise substantial campaign funds, and chances are that the pool of candidates will be further limited to those with independent wealth; those with the ability to attract funds from special interest groups; and/or those who need to

spend more time campaigning than attending to their judicial duties. "The increase in political funding has raised questions about how courts can maintain their independence when campaign donors and interest groups spend so much money seeking influence on the bench." Christina Cassidy, *Campaign Cash in State Judicial Elections Grows,* www.salon.com (12/28/15).

Our state already has a rigorous and balanced judicial selection process administered by the Judicial Selection Commission and has an established avenue for obtaining an array of information about judicial candidates in a confidential setting through the Hawaii State Bar Association's qualification process. Both the executive and legislative branches have the ability to participate in the selection process through the Governor's power to select Circuit Court judges and above from a slate of candidates vetted by the Judicial Selection Commission and the Senate confirmation process. There have been criticisms from time to time about certain aspects of that process, but the answer is to tweak a process that works, not "throw the baby out with the bathwater."

In short, judicial elections would be bad for the citizens of the State of Hawai`i and harmful to our judicial system and to the delivery of fair and impartial justice.

Respectfully Submitted,

Louise K. Y. Ing

February 8, 2016

Senate Committee on Judiciary and Labor
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813
Wednesday, February 10, 2016, 9:00 a.m.

RE: Opposition to SB2238, SB2239, and SB2420

Dear Chair Keith-Agaran, Vice Chair Shimabukuro, and Esteemed Committee Members:

My name is Brandon Marc Higa; I am the President of the Student Bar Association (SBA) and currently a first-year law student at Richardson. The SBA is Richardson's student government and serves as the official voice of the student body.

On behalf of the student body at the William S. Richardson School of Law, I write in support of the American Constitution Society for Law and Policy's (ACS) position **in opposition to SB2238, SB2239, and SB2420.** These proposals would result in an infusion of politics into judicial selection and retention processes.

SB2238 and SB2239 would undermine the judiciary's independence and harm the community. An ethical framework for judicial elections would be difficult for our state to police and increase the likelihood of judicial misconduct.[1] It is important to consider that elected judges are disciplined at higher rates and for more serious crimes than appointed judges,[2] and elected judges are substantially harsher on parties in criminal matters.[3] Campaign financing would also lead many in the community to question the judiciary's independence and leave judges subject to attacks from those with deep pockets and political agendas.[4]

SB2420 would undermine the ability of the Judicial Selection Committee ("JSC") to make well-informed judicial retention decisions. The JSC reviews confidential comments from the community, bar members, and other judges that would not be available to the Senate during its proposed review. Judges are able to respond to JSC retention proceedings because they are confidential; however, a judge would not be able to respond publicly before the Senate. Politics will also be further infused into retention decisions if consent power is consolidated in the Senate, for retention decisions are reached with input from members designated by the other legislative body, the executive branch, the judicial branch, and the state's bar.

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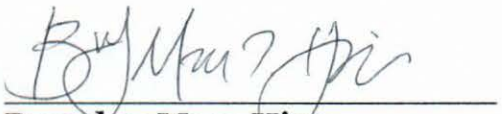
[1] *See Williams-Yulee v. The Florida Bar*, 135 S.Ct. 1656 (2015).
[2] Malia Reddick, *Judging the Quality of Judicial Selection Methods: Merit Selection, Elections, and Judicial Discipline, available at* http://www.judicialselection.us/uploads/documents/Judging_the_Quality_of_Judicial_Sel_8EF0DC3806ED8.pdf.
[3] Erik Opsal, *New Analysis: Judicial Re-Election Pressures Tied to Harsher Criminal Sentencing*, COMMON DREAMS (Dec. 2, 2015, 11:30 a.m.), http://www.commondreams.org/newswire/2015/12/02/new-analysis-judicial-re-election-pressures-tied-harsher-criminal-sentencing.
[4] *Koch Brothers Set Sights on Florida Supreme Court Justices*, FLORIDA CENTER FOR INVESTIGATIVE REPORTING (Oct. 1, 2012), http://fcir.org/2012/10/01/koch-brothers-set-sights-on-florida-supreme-court-justices/.

As President of the Student Bar Association and on behalf of the student body, I write in support of the American Constitution Society for Law and Policy's opposition to SB2238, SB2239, and SB2420 for the aforementioned reasons.

Signed: February 9, 2016



Brandon Marc Higa
President, Student Bar Association

From: Eyke BrathHurdman
To: JDLTestimony
Subject: SB 2238, SB 2239, SB 2420
Date: Tuesday, February 09, 2016 5:19:04 PM

Dear Chair Keith-Agaran, Viuce Chair Shimabukuro and members of the Senate Committee on Judiciary and Labor:

I am writing in opposition of the proposed bills listed above. I have read other submitted oppositions and agree with the many good arguments made in these oppositions.
My arguments are practical arguments-
1) Our court calendars are already over scheduled with our hearings being limited to 15 minutes if we are fortune, hearings must be set within certain statutory requirement, but if a hearing must be continued, then we must wait 3-4 weeks to reset.
2) Our Judges are working long hours as it is and to add campaigning to their schedule can only take away much needed time for them to focus on their cases and to also have necessary quality personal time for themselves. The human aspect of our Judges seems to be over looked time and time again. We cannot expect healthy Judges to make good decisions if we are pushing them to their physical, mental and emotional limit. Forcing them to now campaign mean they must now allocate time away from their work as a Judge and their personal life. Another negative aspect of an election process is the lack of privacy. Spouses, parents, children-all become "fair game" , I cannot see how this would encourage attorneys to seek Judicial positions.

Sincerely,

Ms.Eyke L. BrathHurdman, Esq.

Immediate Past President of MCBA

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February 9, 2016

Senate Committee on Judiciary and Labor
Wednesday, February 10, 2016, 9:00 a.m.

RE: Opposition to SB2238, SB2239, and SB2420

Dear Chair Keith-Agaran, Vice Chair Shimabukuro, and Esteemed Committee Members:

Thank you for your service to our community. I am a second-year student at the William S. Richardson School of Law (WSRSL), and I sit on the board of the our school's chapter of the American Constitution Society (ACS). I write on behalf of the board and members of the WSRSL chapter of ACS in opposition to SB2238, SB2239, and SB2420. We are concerned that the judicial election system proposed by Senate Bill 2238 and 2239 would endanger the fairness and impartiality of Hawaii judges.

SB2238 and SB2239 would undermine the judiciary's independence and harm the community. An ethical framework for judicial elections would be difficult for our state to police and increase the likelihood of judicial misconduct.[1] It is important to consider that elected judges are disciplined at higher rates and for more serious crimes than appointed judges,[2] and elected judges are substantially harsher on parties in criminal matters.[3]

Forcing judges to campaign and to raise money for their elections campaigns threatens to tilt the scales of justice as various interest groups may use the opportunity to shape the judiciary. According to Justice at Stake polls, 87% of Americans believe that campaign contributions affect courtroom decisions. Nearly 50% of judges believe that campaign contributions do influence judges' decisions. Recent studies provided by the American Constitution Society confirm a significant relationship between campaign donations and judicial decisions. It is vital that that the public has confidence in the judiciary. Courts need to stay fair and independent -- and private money involvement should be minimized. Instead of boosting public confidence in our court system, the involvement of campaign money through an election process will do just the opposite.

Judges are not politicians; they should be selected based on a merit, not based on campaign promises. Moreover, judges need to be able to protect the rule of law without fear of political retribution. The cornerstone of justice is an independent judiciary that is free from political restraints. It is the duty of courts to protect the rights of people, no matter what the politics of the day may demand.

I write in oppossition to SB2238, SB2239, and SB2420 for the aforementioned reasons.

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[1] *See Williams-Yulee v. The Florida Bar*, 135 S.Ct. 1656 (2015).
[2] Malia Reddick, *Judging the Quality of Judicial Selection Methods: Merit Selection, Elections, and Judicial Discipline*, *available at* http://www.judicialselection.us/uploads/documents/Judging_the_Quality_of_Judicial_Sel_8EF0DC3806ED8.pdf.
[3] Erik Opsal, *New Analysis: Judicial Re-Election Pressures Tied to Harsher Criminal Sentencing*, COMMON DREAMS (Dec. 2, 2015, 11:30 a.m.), http://www.commondreams.org/newswire/2015/12/02/new-analysis-judicial-re-election-pressures-tied-harsher-criminal-sentencing.

Sincerely,
Kaily Wakefield
William S. Richardson School of Law Student Chapter of
American Cconstitution Society
Public Relations Manager
JD Candidate, Class of 2017

LATE TESTIMONY

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: Submitted testimony for SB2239 on Feb 10, 2016 09:00AM
Date: Wednesday, February 10, 2016 9:59:03 PM

SB2239
Submitted on: 2/10/2016
Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
De MONT R. D. CONNER	Ho'omana Pono, LLC.	Support	Yes

Comments: We FULLY SUPPORT this bill to bring an end to the "appearance of impropriety" of appointing Judges. Mahalo.

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DOUGLAS S. MCNISH
Judge, Second Circuit Hawaii Family Court (Ret.)
_____
2101 Piiholo Rd., Makawao, HI. 96768

Testimony to the Senate Committee on Judiciary and Labor

Senator Gilbert S.C. Keith-Agaran, Chair

Senator Maile S.L. Shimabukuro, Vice Chair

Wednesday, February 10, 2016, 9:00 am

State Capitol, Conference Room 016

Senate Bill 2239 proposing and an amendment to the Constitution of the State of Hawaii to require that Judges be elected for six-year terms and be subject to Senate confirmation for subsequent terms.

I am very much opposed any system of judicial selection that includes election. I recognize the strong sentiment in our democratic system of government that our significant public officials should be subject to election by the people. That sentiment makes it difficult to accept that the judiciary, as part of our democratic system, is not and should not be an institution subject to popular vote. It is not the institution that should carry out the will of the majority. The role of judges is to understand the facts of a dispute as best they can be understood and then apply the law, as provided by our Legislature, Constitution, and prior court decisions to those facts. It should not be of concern whether this pleases or displeases the majority of voters.

The judge's role I have decided in not easy. Few cases are either black or white. Opposing sides bring up many points – there are many factors that influence the judge's decision. One of those factors should not be a concern about re-election or re-appointment. The goal should always be to remove political consideration from making an appearance in judicial decisions. By subjecting the judge to any election by popular vote, political consideration is being interjected. The candidate elected will be the one perceived by the majority most likely to rule on cases according

TELEPHONE (808) 572-9642 • FAX (808) 572-3746 • EMAIL: douglas.mcnish@gmail.com

to their pre-conceived preferences.

I am not suggesting that election would lead to rampant corruption in the judiciary. Most elected judges would try to remain impartial and to avoid being influenced by whether their decision might hurt them in a future re-appointment, but we are all human.

Another issue is that the pool of people who would make themselves available to serve would shrink. I would never have considered serving as a judge if I had been required to stand for election.

I also oppose requiring Senate approval for retention. It seems to me to be a milder form of needing your constituency to approve of your decisions. The Senate is not the voting public but it is a group that is, as it should be, influenced by public opinion.

As to the provision of reducing all terms to 6 years, I am neutral on that

Thank you for the opportunity to submit this testimony.

Douglas S. McNish

LATE

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: Submitted testimony for SB2239 on Mar 2, 2016 10:00AM
Date: Thursday, February 11, 2016 9:33:12 AM

SB2239
Submitted on: 2/11/2016
Testimony for JDL on Mar 2, 2016 10:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Rachel L. Kailianu	Individual	Comments Only	Yes

Comments: I support the section to require the be elected to serve a six year term and be brought back to the Senate for a review. I strongly oppose the Governor and/or the chief justices making any interim appointments. The system needs to be overhauled.

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From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: *Submitted testimony for SB2239 on Feb 10, 2016 09:00AM*
Date: Wednesday, February 10, 2016 12:16:05 AM

SB2239
Submitted on: 2/10/2016
Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Thomas Michener	Individual	Oppose	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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