No. _____

In The
Supreme Court of the United States

WILLIAM PRICE TEDARDS, JR., et al.,

Petitioners,

v.

DOUG DUCEY, Governor of Arizona, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Both the Ninth Circuit and Seventh Circuit have struggled to reconcile the text of Section 2 of the Seventeenth Amendment with this Court's order summarily affirming a 1968 district court case allowing a 29-month delay of an election to fill a U.S. Senate vacancy. *See Valenti v. Rockefeller*, 292 F. Supp. 851 (S.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969). While this Court broadly read that order in dicta in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), this Court has never interpreted the actual text of Section 2, which requires a particular procedure for setting an election date. Section 2 says that "when vacancies happen . . . the executive shall issue writs of election." The text gives no role for the legislature except to "empower," though not mandate, the executive to make a "temporary" appointment. In ARIZ. REV. STAT. § 16-222 ("A.R.S."), used to fill the vacancy created by the death of Senator John McCain, the legislature sets the date—precluding the executive from issuing a writ, and mandating rather than empowering the Governor to make a "temporary" appointee, which in this case lasts 27 months.

The two questions presented are:

1. In filling a Senate vacancy, does A.R.S. § 16-222 conflict with the text of the Seventeenth Amendment, which says that state executives "shall issue writs of election" and limits the state legislatures to "empowering"—not

QUESTIONS PRESENTED—Continued

requiring—an executive to make a "temporary appointment"?

2. Should the word "temporary" as used in the Seventeenth Amendment take its meaning from the primacy given in the text to direct elected representation, and not extend beyond the period that is normally taken under state law to conduct an election to the U.S. Senate?

PARTIES TO THE PROCEEDINGS

The following are the parties to the proceedings. In addition, Professors Erwin Chemerinksy, Helen Hershkoff, Alexander Keyssar, Lawrence Lessig, and Sanford Levinsions filed a brief as *Amici Curiae* in support of Petitioners in the proceedings below. Vox Populi Foundation and Arizona Advocacy Network Foundation filed a brief as *Amici Curiae* in support of neither side.

Petitioners:

William Price Tedards, Jr., Monica Wnuk, Barry Hess, Lawrence Lilien, and Ross Trumble.

Respondents:

Doug Ducey, Governor of Arizona, in his official capacity, and Martha McSally, Senator of Arizona, in her official capacity.

RULE 14.1(b)(iii) STATEMENT

The proceedings in the federal trial and appellate courts identified below are directly related to the above captioned case in this Court.

Tedards et al. v. Ducey, et al., Case No. CV-18-0421-PHX–DJH (D. Ariz.). The district court of Arizona entered judgment regarding Petitioners' claims on June 27, 2019.

Tedards et al. v. Ducey et al., Case No. 19-016308 (9th Cir.). The Ninth Circuit entered judgment in this matter on February 27, 2020.

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported *at Tedards v. Ducey*, 951 F.3d 1041 (9th Cir. 2020). Pet. App. 1. The opinion of the United States District Court for Arizona is reported at *Tedards v. Ducey*, 398 F. Supp. 3d 529 (D. Ariz. 2019). Pet. App. 77.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 27, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XVII

> The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.
>
> When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the

legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Arizona Revised Statutes § 16-222

A. When a vacancy occurs in the office of United States senator or representative in Congress by reason of death or resignation, or from any other cause and except as provided in subsection D of this section, the vacancy shall be filled at the next general election. At such an election the person elected shall fill the vacancy.

. . . .

C. For a vacancy in the office of United States senator, the governor shall appoint a person to fill the vacancy. That appointee shall be of the same political party as the person vacating the office and, except as provided in subsection D of this section, shall serve until the person elected at the next general election is qualified and assumes office. If the person vacating the office changed political party affiliation after taking office, the person who is appointed to fill the vacancy shall be of the same political party that the

vacating officeholder was when the vacating officeholder was elected or appointed to that office.

D. If a vacancy in the office of United States senator occurs more than one hundred fifty days before the next regular primary election date, the person who is appointed pursuant to subsection C of this section shall continue to serve until the vacancy is filled at the next general election. If a vacancy in the office of United States senator occurs one hundred fifty days or less before the next regular primary election date, the person who is appointed shall serve until the vacancy is filled at the second regular general election held after the vacancy occurs, and the person elected shall fill the remaining unexpired term of the vacated office.

STATEMENT OF THE CASE

This Court has yet to give an on-the-merits interpretation of the text of Section 2 of the Seventeenth Amendment which sets out a specific government-structuring provision to fill a Senate vacancy by election of the people. In this case, the Arizona law at issue, A.R.S. § 16-222, disregards the specific allocation of executive and legislative roles set out in Section 2. As far as the State of Arizona is concerned, the specific allocation of these roles in Section 2 might just as well not exist, and the executive and legislative branches are free to opt out of its particular checks and balances.

As this Court has held, however, it is a bedrock principle that the "constitutional structure of our government," including its checks and balances, is designed first and foremost not to look after the interests of the branches, but to "protect[] individual liberty." *Bond v. United States*, 564 U.S. 211, 223 (2011); *NLRB v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring). "Policing" the "enduring structure" of constitutional government when the political branches fail to do so is "one of the most vital functions of this Court." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment). *NLRB*, 573 U.S. at 571. When questions involving the Constitution's government structuring provisions are presented, it is the "solemn responsibility" of the Judicial Branch "to say what the law is." *Id.* at 571 (Scalia, J., concurring); *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012); *Marbury v. Madison*, 5 U.S. 137, 1 Cranch. 137, 177 (1803).

In light of this "solemn responsibility," it is important for this Court to interpret the government-structuring provision set out in Section 2. It too is also designed to protect the liberty of the people, in particular their right to direct elected representation in the Senate. Unlike A.R.S. § 16-222, which has the legislature lock in a date that may be over two years away, Section 2 requires that the executive set a date for an election *when* the vacancy happens. This Court has a solemn responsibility here to enforce the particular allocation of roles set out in Section 2 to decide how soon the people can fill the vacancy by election. Until

now, the Court has left the lower courts "without firm guidance" as to what Section 2 requires the executive and legislative branches to do. *See Judge, et al. v. Quinn*, 612 F.3d 537, 549 (7th Cir. 2010). Both the Ninth Circuit in the instant case and the Seventh Circuit in *Judge* struggled to reconcile the text of Section 2 with this Court's fragmentary readings of it. Neither the summary order in *Valenti* nor the dictum in *Rodriguez* addresses the procedure required under Section 2 to fill a Senate vacancy. Such guidance is critical when even the Ninth Circuit conceded Plaintiffs' interpretation of the language was possible. There is also uncertainty, if not actual disagreement, in both the Ninth Circuit's decision here, and the Seventh Circuit's decision in *Judge*, regarding how to make sense of the text of Section 2.

In filling a vacancy, Arizona, like other states, departs from the procedure set forth in Section 2. In disregard of Section 2's procedure, Arizona puts the legislature in charge of the entire process. In particular, under A.R.S. § 16-222, the state legislature does not "empower" the executive, but rather, mandates the executive to make a temporary appointment and sets the date of the election, and the term that the temporary appointee will serve. There is no "writ of election", and no role delegated to the executive for setting the election date, in direct conflict with the text of Section 2. To the contrary, the text is clear that "*when* vacancies happen" the executives "shall issue writs of election" (emphasis supplied). The state legislature has only one role, and no other; it may "empower," that

is, authorize or permit, the executive to make a "temporary" appointment. This does not authorize the legislature to mandate such an appointment, but only to "empower" or confer such discretion to the executive. To be sure, the legislature may limit or safeguard against an abuse of that discretion, if it chooses to confer it at all. But that is entirely different from mandating an appointment as well as setting the election date. There exists no textual warrant for using the proviso to let the legislature take charge of the process—either by mandating a temporary appointment—or by taking over the function that the writ itself is to perform.

In this case, Plaintiffs challenge A.R.S. § 16-222, which dispenses of the executive's issuance of a "writ of election" as required by Section 2 and mandates a temporary appointee to serve long after the people could fill the vacancy by an orderly election. Since John McCain died on August 25, 2018 just before a general election, A.R.S. § 16-222 requires in this case that this "temporary" appointee serve until the general election to follow in November 2020; this allows for the "temporary" appointee to serve 27 months, exceeding the length of an entire congressional term and demonstrating the state legislature's preference for an appointed Senator to serve far beyond the period that the vacancy could have been filled in an orderly election.

Here, the Ninth Circuit, with apparent difficulty and doubt, attempted to reconcile A.R.S. § 16-222 with the Seventeenth Amendment. In *Judge*, the Seventh Circuit held that a similar Illinois law *did* conflict with that procedure. In these two cases, with these different

results, the task of each court was all the more difficult because of this Court's very fragmented and partial readings of Section 2 in *Valenti* and *Rodriguez*, which as noted, have never addressed the proper allocation of roles.

The interpretation of Section 2 is hardly a minor constitutional question, but one that decides who gets into the Senate, and when. Since the ratification of the Seventeenth Amendment, 202 members of the United States Senate have served initially by way of a temporary appointment. U.S. Senate: Appointed Senators, https://www.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm (last visited May 29, 2020). These "temporary" Senators, who may ultimately serve for years, wield the advantage of incumbency when seeking to hold the seat in a subsequent general election; the longer they serve, the more the state has put its finger on the scale and given them an unfair opportunity for reelection over challengers. Twelve Senators now serving in the Senate originally took office by a temporary appointment. *Id*.

It is true that a number of other states follow Arizona's example in often requiring what are long mandated temporary appointments. However, other states have maintained the integrity of the text of Section 2, with no ill results, and with a more robust democratic process. The disregard of the text by Arizona and these other states and their preference for appointed over elected Senators corrupts the political process. Such was demonstrated in Illinois by the indictment of Governor Blagojevich in 2009 for seeking

a bribe in return for a temporary appointment to fill the Obama vacancy. *See Judge*, 612 F.3d at 541. It is disturbing in this case that defendant Ducey appointed defendant McSally to fill the McCain vacancy just a little over a month after she had been rejected by a majority of voters in an election to the Senate. Long term "temporary" appointments that conflict with Section 2 make possible (and may even encourage) the political cronyism that the Seventeenth Amendment was enacted to prevent.

The Ninth Circuit was mistaken in giving such weight to the practice of Arizona and similar states—or at least find it persuasive. What this state practice indicates is that state legislatures have a tendency to usurp the executive role set out in Section 2, and to exceed their own. To defer to the manner in which state legislatures "interpret" Section 2 is to let them usurp the judicial role as well.

By requiring the executive to issue writs "when vacancies happen," Section 2 calls for a dynamic, not static, process. It is a government structure provision that was designed to make the executive personally accountable to all people of the state in determining how soon a vacancy will be filled. That was the choice of the drafters—entitled to enforcement whether one agrees with it or not. That choice gives the people at least an implicit role in the decision as well, if only by making known their views to the executive when the vacancy occurs. As the single highest statewide elected official, the Governor is likely to better represent or take account of the wishes of the people on these occasions

and act in response to them. The text leaves open the possibility of a special election at the time the vacancy happens, rather than taking the matter out of the executive's control. In this case, the defendants Ducey and McSally have argued—and the District Court actually agreed—that the people of Arizona are either too confused or uninformed to make such a decision except at a general election pursuant to state law. *Tedards v. Ducey*, 398 F. Supp. 3d 529, 539-40 (D. Ariz. 2019). No court should ever accept such a condescending view of the people as an excuse to depart from the text of the Constitution.

It is a "solemn responsibility" to hear a case of this kind: to decide whether a state legislature can take over the executive's role in Section 2 and put off an election in this case for over two years. Likewise, it is also a judicial responsibility to determine how "temporary" a "temporary appointee" may be, so as to give some meaning to this important Constitutional text. Even the Ninth Circuit expressed concern for the prospect that Arizona could have a temporary appointee for five years or more. *See Tedards v. Ducey*, 951 F.3d 1041, 1051 (9th Cir. 2020). As the Ninth Circuit recognized, the word "temporary" has to mean something. There is also a special urgency in the two questions presented by this election-related case. Especially at this point in the country's history, in the middle of an unprecedented epidemic, this Court should make clear when, how, or in what circumstances state politicians may choose to "temporarily" postpone elections for an additional two years or more.

Petitioners now give a brief account of the proceedings below, which can be stated as follows: On August 25, 2018, Senator John McCain died after a long illness, creating a vacancy in the State of Arizona's representation in the U.S. Senate. Arizona state law, specifically A.R.S. § 16-222, does not empower, but rather mandates, that the executive fill the vacancy by temporary appointment until the next general election, unless the vacancy arises within seven months prior. In the latter case, the election will take place at the subsequent general election—two years later. No provision is made for a special election to fill the vacancy at any date other than the date that a general election is also held. Before certain legislative amendments to A.R.S. § 16-222 were made on May 16, 2018, when it seemed that Senator McCain might be about to die, the vacancy would be filled in November 2018; and to ensure that did not happen, there was an emergency measure to require that the vacancy must happen at least 150 days before the party primary elections in August 2018, or else be put off until the general election two years hence.

Though Section 2 of the Seventeenth Amendment requires the executive to issue "writs of election" to fill the vacancies, A.R.S. § 16-222 has no provision for the executive to issue a writ, or to set a date, but provides in relevant part as follows:

> B. When a vacancy occurs in the office of United States senator or representative in Congress by reason of death or resignation, or from any other cause and except as provided

in subsection D of this section, the vacancy shall be filled at the next general election. At such an election the person elected shall fill the vacancy.

. . . .

C. For a vacancy in the office of United States senator, the governor shall appoint a person to fill the vacancy. That appointee shall be of the same political party as the person vacating the office and, except as provided in subsection D of this section, shall serve until the person elected at the next general election is qualified and assumes office. If the person vacating the office changed political party affiliation after taking office, the person who is appointed to fill the vacancy shall be of the same political party that the vacating officeholder was when the vacating officeholder was elected or appointed to that office.

D. If a vacancy in the office of United States senator occurs more than one hundred fifty days before the next regular primary election date, the person who is appointed pursuant to subsection C of this section shall continue to serve until the vacancy is filled at the next general election. If a vacancy in the office of United States senator occurs one hundred fifty days or less before the next regular primary election date, the person who is appointed shall serve until the vacancy is filled at the second regular general election held after the vacancy occurs, and the person elected

> shall fill the remaining unexpired term of the vacated office.

Though not authorized by A.R.S. § 16-222, Governor Ducey did issue a writ of election on September 4, 2018. This unauthorized "writ of election" cites the date required by the above state law and did not have even a formal purpose except apparently to deal with a perceived flaw in § 16-222, especially in light of the decisions in *Judge*. On September 5, 2018, as required by A.R.S. § 16-222, Governor Ducey made a "temporary" political appointment—Senator Jon Kyl—to fill the McCain vacancy. On December 18, 2018, after Senator Kyl resigned, Governor Ducey appointed Martha McSally to serve as temporary appointee, following her loss in the Senate election held in November 2018.

Petitioners filed this suit on November 28, 2018, in a four-count complaint against defendant Governor and defendant temporary appointee Senator. Petitioners contended that A.R.S. § 16-222 was in violation of the Seventeenth Amendment, the Equal Protection Clause, and the Elections Clause. Petitioners subsequently filed a first amended complaint on December 21, 2018 to acknowledge the issuance of the writ by Governor Ducey, but continued to challenge A.R.S. § 16-222 because the legislature mandated: (1) the use of a temporary appointment, (2) the term of office, (3) the date of the election, and (4) usurped the role given to the executive in Section 2. Petitioners also challenged the provision in paragraph D of A.R.S. § 16-222 requiring the executive to appoint a person of the same political party as the Senator whose death or

resignation had created the vacancy. Petitioners filed a renewed motion for preliminary injunction, which Respondents opposed. In turn, Respondents filed a motion to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. On June 27, 2019, the District Court ruled in favor of Respondents. Petitioners then filed a timely appeal to the U.S. Court of Appeals for the Ninth Circuit.

On appeal to the Ninth Circuit, the Petitioners argued the following points:

First, the federal courts should give full meaning to the principal clause of Section 2, which requires the executive to issue writs of election, which should have the same effect as Article I, Section 2, also requiring the executive to issue writs of election and containing no provision for a legislative role in setting the date.

Second, under the proviso to Section 2, the legislature may only "empower," but not mandate, the Governor to make a temporary appointment; A.R.S. § 16-222 is also unconstitutional for mandating that this temporary appointee serve for a fixed term long past the period of when the seat should have been filled by proper election—even under Arizona's own laws.

Third, Petitioners argued that A.R.S. § 16-222, in postponing an election for 27 months, is a severe and unjustified restriction on the right to vote which should be invalid under this Court's framework in *Burdick v. Takushi*, 504 U.S. 428 (1992).

Finally, Petitioners argued that they had standing under the First Amendment to challenge the requirement in A.R.S. § 16-222 that the appointee be of the same political party, even if the defendant Governor in this case would have appointed a Republican to fill the vacancy without such a provision.

On appeal, five distinguished scholars filed an *amicus* brief in support of reversal. Professors Erwin Chemerinsky, Helen Hershkoff, Alexander Keyssar, Lawrence Lessig, and Sanford Levinson reviewed the history and purpose of the Seventeenth Amendment. In that brief the *amici curiae* argued that a "temporary appointment" lasting 27 months before holding an election is inconsistent with the pro-democratic history and purpose of the people's right to vote directly for representation in the U.S. Senate.

In this petition for certiorari, Petitioners do not seek review of the third argument set out above under *Burdick v. Takushi*, *supra*, that A.R.S. § 16-222 independently violates the Equal Protection Clause. Nor do Petitioners seek review of their argument for standing under the First Amendment to challenge the party affiliations requirement. In filing, Petitioners seek review of, and raise only, the argument that A.R.S. § 16-222 is in violation of the Seventeenth Amendment. A.R.S. § 16-222 violates the procedure required for filling the vacancy, including the allocation of executive and legislative roles. In addition, the law extends the term for a "temporary" appointment, in this case for 27 months, well beyond the reasonable meaning of that term as used in the context of the Seventeenth

Amendment, which gives such primacy to the people's right to direct elected representation in the Senate. Neither of the arguments raised have ever been addressed by this Court, for even in *Valenti* the issue was only the date of the election, not the length of time a "temporary" appointee may serve in lieu of an elected Senator. It is time this Court renders an interpretation of this constitutional text which determines how the people are represented in the Senate.

REASONS FOR GRANTING THE PETITION

First, as set out above, when questions involving the Constitution's government structuring provisions are presented, it is the solemn responsibility of this Court to say what "the law is." *NLRB v. Noel Canning, supra*, 573 U.S. at 571 (2014) (Scalia, J., concurring in the judgment); *see also Zivotofsky v. Clinton, supra*, 566 U.S. at 196 (quoting *Marbury v. Madison*, 5 U.S. 137, 1 Cranch. 137, 177 (1803)). As this Court has repeatedly emphasized, a government structuring provision like Section 2 is designed to protect the liberty of the people. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *NLRB v. Canning, supra*, at 571 (Scalia, J., concurring); *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). For that purpose, to protect such liberty, including the right to vote, the voters in this case have standing to enforce it. *See*, *e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 433-36 (1998) (injured parties have standing to challenge Presidential line item veto).

This Court has never addressed Section 2 as a government structuring provision. This Court's partial readings of Section 2 by a summary order in *Valenti* and dictum in *Rodriguez* have treated, indirectly, how long an election may be postponed, but not the specific process for setting a date. State laws like A.R.S. § 16-222 are in plain conflict with Section 2, and suit the convenience of the executive and legislative branches, without regard to the liberty of the people. There is no liberty interest greater than the right of a free people to have representatives of their own choosing, and not thrust upon them by appointment. It is true that Section 2 does not require an election to occur by a particular date. But Section 2 does require a procedure, or a government structuring, that, if followed, is likely to lead to a reasonably prompt election—by making the executive accountable to set a date when the vacancies happen rather than taking the executive out of the process. The allocation of roles ensures a procedure that is more democratic and more responsive to the wishes of the people at the time. The petition should be granted to fulfill this solemn responsibility of the Court to decide the roles of the political branches when it implicates, as in this case, the liberty of the people in so fundamental a way.

Second, this petition should also be granted because the Ninth and Seventh Circuits are confused and are in some disagreement as to how literally to read the text of Section 2. It is also crucial to give guidance to the lower courts as to whether the term "temporary," as used in the text, has any law-like meaning at all.

It is fair to read both the Ninth Circuit's decision here and the Seventh Circuit's decision in *Judge* as calling on this Court for guidance and to go beyond the fragmentary readings this Court has given Section 2 to date.

A. This Court has a "solemn responsibility" to enforce the plain meaning of a government structuring provision like Section 2, designed to protect the liberty of the people, including their right to elected representation in the Senate.

That "solemn responsibility" to enforce Section 2 is especially great because the Court has never rendered any on-the-merits interpretation of the procedure used to fill a Senate vacancy as set out in Section 2, and it is that particular allocation of executive and legislative roles that exists to protect the right of the people to an election. This petition should be granted because contrary to the Ninth Circuit's decision that it is bound by precedent, this Court has yet to address the allocation of legislative and executive roles in Section 2. Only the Judicial Branch has the authority to interpret the text of such a government structuring provision, and no regard is due to a conflicting practice in Arizona and certain other states.

Section 2 of the Seventeenth Amendment is but a single sentence, whose plain meaning should be determined by the ordinary rules of grammar and the

dictionary meaning of the words. Section 2 states as follows:

> "When vacancies happen in the representation of any State in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies; Provided, That the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

A.R.S. 16-222 does not follow this text. It has no provision for the executive to issue writs of election, and does not allow the executive to set the date. It does not "empower" but mandates the executive to use a temporary appointee. And in the case of the McCain vacancy, which arose on August 25, 2018, it mandates that the temporary appointee serve until November 2020, a period of 27 months of *appointed* representation imposed on the people without their consent. Whatever else may be said about A.R.S. 16-222, it is in direct conflict with the allocation of legislative and executive roles set out in the text of Section 2.

To begin, there is no writ of election under A.R.S. 16-222, or need for one. In fact, there is no executive role here at all. Under the principal or operative clause of Section 2, only the executive can issue writs of election, and date setting is what writs of election *do*; it is their sole purpose. Under Section 2, the legislature has *no role* for issuing that writ—and no authority to add, subtract, or dispense with what a writ does, namely, to set a date. Had the legislature such authority, it would

be set out in Section 2—it is not. Section 2 allocates a specific role—for the executive, and only the executive—which is an exception to the general authority of the legislature in setting the time, place, and manner of an election under Article I, Section 4 (Elections Clause). Section 2 does not even reference the Elections Clause. Yet A.R.S. § 16-222 does not recognize the existence of writs of election at all. It is true, as Respondents may protest, that the Governor in this case did issue a writ, but this was an extra-legal act, not authorized by A.R.S. § 16-222, and probably intended as a defense to a legal challenge for failure to comply with Section 2. This does not change the fact that A.R.S. § 16-222 has the legislature doing what Section 2 says that the executive should be doing by issuing writs of election setting the date. The principal, or operative clause, is modeled—has the same language—as the language in Article I, Section 2 for filling vacancies in the U.S. House: the executive must issue the writ, with no role for the legislature to commandeer or override. This is because the Framers of the 1787 Constitution distrusted giving any such authority to a legislative body. *See Arizona v. Arizona Inter Tribal Council, Inc.*, 570 U.S. 1, 8-9 (2013). What the principal clause of Section 2 *says* is that the executive "shall issue writs of election" "when the vacancies happen." And like Article I, Section 2, it vests that authority in the executive because the executive can act more efficiently to set an election date that has some relation to "when vacancies happen." The purpose of the literal reading of the principal clause is to ensure the executive makes a decision at that time,

and not to have it set by the legislature decades before. Thus, there is an express purpose for this allocation of legislative and executive roles, aside from the fact that it is the plain language of Section 2.

Nor does the proviso give the legislature any authority to dispense with, or modify, the executive's duty and exclusive authority to issue the date setting writ as set out in the principal clause. The proviso does not modify the principal clause at all, but refers to an additional discretionary power that may be given to the executive. In doing so, the proviso does not expand, but limits, the legislative role. The proviso states:

> "Provided, that the legislature of the state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

The phrase "as the legislature may direct" only refers back to the main clause of the proviso, the clause which allows the legislature to confer this discretionary power on the executive. It acts to allow the legislature to confine the "discretion" it confers on the executive—to check and balance this grant of authority. The executive can make or extend the appointment "until the people can fill the vacancy by election as the legislature may direct."

The first flaw of A.R.S. § 16-222 is that it does not "empower" but mandates the executive to make a temporary appointment. It does not follow the text. Nor does it follow the plain dictionary meaning of the word

"empower." *See* Black's Law Dictionary 363 (Abridged 6th ed. 1991) (defining "empower" as a "grant of authority rather than a command of its exercise"). *See* Vikram David Amar, *Are Statutes Constraining Gubernatorial Power to Make Temporary Appointments to the United States Senate Constitutional Under the Seventeenth Amendment?* 35 Hastings Const. L.Q. 727. The word "empower," or indeed the proviso itself, is there to increase the executive's role, not the legislature's. But A.R.S. § 16-222 turns the dictionary definition upside down and reads "empower" as a grant of authority to the legislature to run the show, and even to gut the principal, or operative clause.

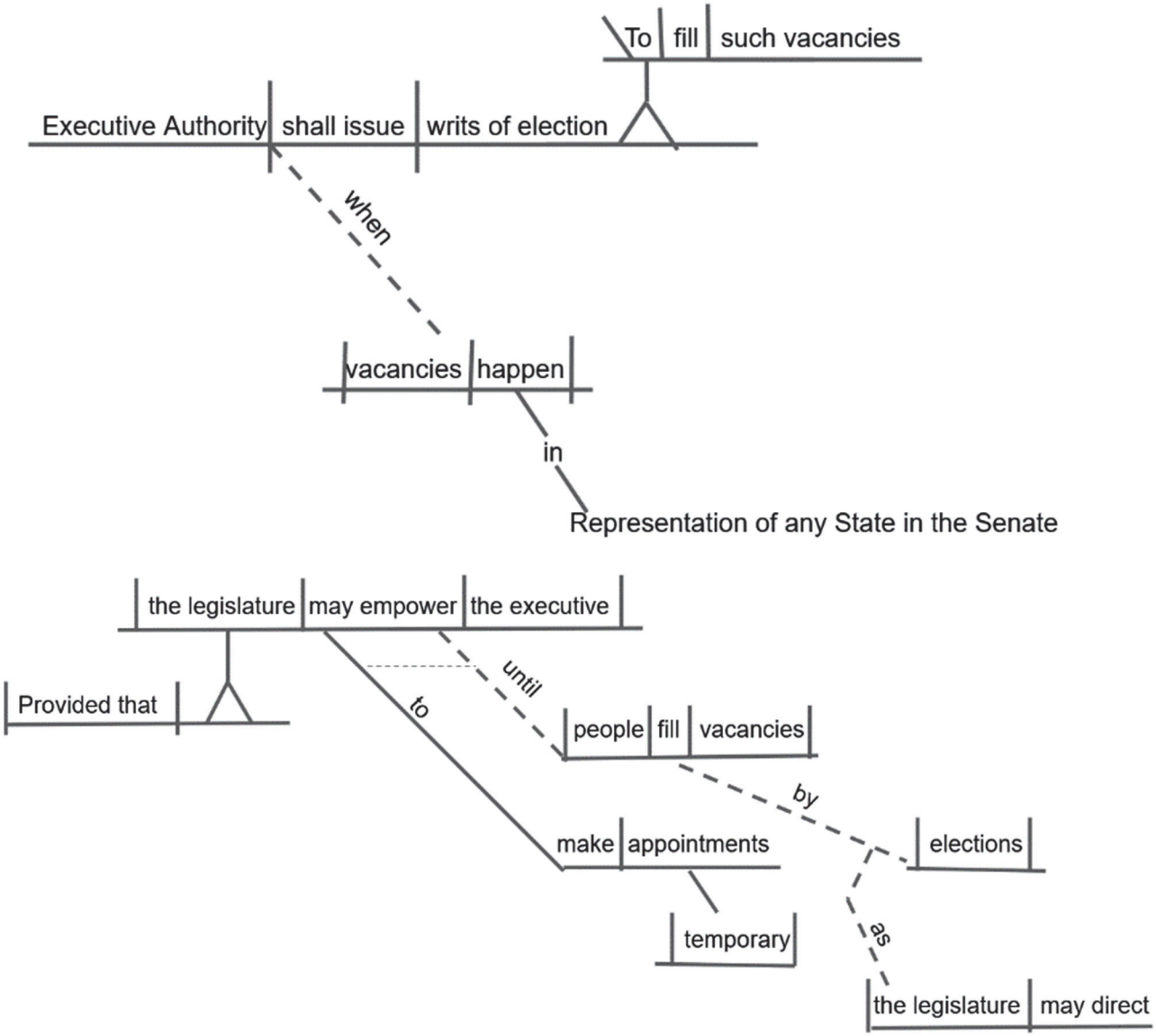
The second flaw is the misunderstanding of the subordinate clause at the very end of the proviso—"as the legislature may direct." Serving as a check and balance on the discretionary power to appoint, the phrase "as the legislature may direct" sets an outer limit on that power—to ensure that in making a temporary appointment, the executive can go only so far, not any further. It is also important to stress where this phrase appears, at the end of the proviso, rather than the end of the principal or operative clause: it is the last subjunctive and dependent clause modifying only one antecedent, the discretionary act of "empowering" the executive: it has no relation, grammatically, with the executive's independent obligation to issue the writ setting the date of the election. Indeed, in a grammatical sense, "as the legislature may direct" has nothing to do at all with the date setting function in the principal clause.

The flaw in treating this phrase to modify the principal clause is one of grammar. The phrase "as the legislature may direct" cannot sensibly or grammatically be read to put the legislature in charge of everything, from "soup to nuts," as A.R.S. § 16-222 does, or upend the allocation of roles prescribed by Section 2. It is a grammatical flaw because the phrase "as the legislature may direct" does not have the principal clause as an antecedent. Its antecedent is the "empowering" of the executive. Locating the antecedent *grammatically* allows both the principal clause and the proviso to be given effect.

It is a basic canon of construction that constitutional language must be read grammatically and by its plain meaning; there is no grammatical limit on the principal or operative clause. *See District of Columbia v. Heller*, 554 U.S. 570, 577-78 (2008) (finding no grammatical limit of prefatory clause on the operative clause). Just as this Court in *Heller* required the Second Amendment to be read consistently with its grammatical structure and proper relation between its various clauses, the Seventeenth Amendment should be read in a similar way as well. The language here should be read, as in *Heller*, to protect the integrity of the principal or operative clause, which places the obligation on the executive, not the legislature, to set the actual date. Likewise, consistent with *Heller*, the word "empowering" should have its ordinary or definitional meaning. At the very least, Section 2 should be read holistically, so as to give meaning to the principal clause, and the proviso should be interpreted to give

meaning to both. *See, e.g.*, *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988). A final canon is that an interpretation of the text should not result in an absurdity or contradiction. If the phrase "as the legislature may direct", which comes at the tail end of the proviso, were meant to nullify the role of the executive in the principal clause, Section 2 would read in effect as follows: "The executive shall set the date of the election, and the legislature shall set the date of the election." There is no warrant for making such a dog's mess out of Section 2.

Even if all such canons are to be ignored, Section 2 at least should be read grammatically. "[A]s the legislature may direct" is a dependent subjunctive clause which modifies the immediate antecedent, "until the people fill the vacancy by election," which modifies *its* immediate antecedent, "the legislature may empower the executive to make temporary appointments." By its placement, this last phrase does not leapfrog over to modify, or in fact cancel, the duty of the executive to set the date. Nor is it a veiled reference to the Elections Clause; its meaning is internal to the proviso. The following diagram of Section 2 bears out that point:


To
fill
such vacancies
Executive Authority
shall issue
writs of election
when
vacancies
happen
in
Representation of any State in the Senate
the legislature
may empower
the executive
Provided that
until
to
people
fill
vacancies
by
make
appointments
elections
temporary
as
the legislature
may direct

The vacancy filling procedure used by Arizona turns this diagram inside out and upside down, improbably flipping the last subordinate clause to replace the operative one on top.

Nor does it fit the Original Intent; the legislative history of the Seventeenth Amendment shows a profound distrust of the corrupt state legislatures of the day. It does not fit the stated intent of Senator Bristow, who drafted Section 2, to model it on Article I, Section 2, the vacancy filling provision for the House, which has no role for the legislature at all. This Court, however, does not need to reach back to Original Intent to enforce Section 2 as written. The specific procedure set out in the text of Section 2 of the Seventeenth Amendment is the surest way to enforce the rights of the people in Section 1 as well: to have a procedure that makes the executive accountable, and pay a possible political price, if the executive unreasonably delays the date of election.

B. This Court should give guidance to the lower courts as to the meaning of the word "temporary" as used in Section 2, when "temporary" has a limited meaning that can be drawn from the text of the Seventeenth Amendment.

As noted above, the word "temporary" must mean *something*. Even the Ninth Circuit doubted that there could be a "temporary" appointment of a Senator lasting five years. *Tedards v. Ducey*, 951 F.3d at 1051.

One guarantee that a "temporary appointment" will actually be "temporary" is to follow the text of Section 2, and make the executive accountable to set the date of election, thus having to defend postponing an election for 27 months. Yet the word "temporary" also has a meaning, which comes directly from the text. It arises not just from Section 2 but also Section 1, which gives such primacy to the value of elected representation.

The logic of the text—which gives such primacy to elected representation—is that neither the executive nor legislature can prefer a "temporary" appointee beyond the period that the people could have filled the vacancy by an orderly election. That period can presumptively be determined by the law for normally conducting an election for Senate in that State. This meaning of "temporary"—not in the abstract, but in its particular context here—is consistent with the underlying principles of the Constitution. As this Court has stated, there is no greater constitutional value than the right of the people to elected representation. *See Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964). It is also consistent with another principle: the separation of powers, and the limit on a temporary Senator's accountability to the executive branch of state government. To be sure, there may be special problems in holding a state-wide election, but those are presumptively accounted for in the timetable for Senatorial elections generally under that state's particular law. In Arizona, under A.R.S. §§ 16-311(A) and 16-201, the period for conducting a Senatorial election ordinarily

is 190 days. Using this standard gives a law-like meaning or outer limit to the word "temporary," and recognizes that there may be variations in larger or smaller states.

Another definition of "temporary" or "temporary appointment" also comes from the text, and the plain dictionary meaning of the word "temporary." The fundamental dictionary meaning is: "not permanent." *See*, *e.g.*, Random House Dictionary of the English Language, Second Edition, Unabridged. A "temporary appointment" in Section 2 may have an outer limit as an exercise of discretion—but the reality here is that Defendant McSally is serving a fixed term by law, to a date certain. She does not have a "temporary" or provisional one dependent on the discretion of the executive, but a permanent appointment fixed by act of the legislature. There was never a permanent appointment in this sense under the old Article I, Section 3. No "temporary appointee" under Article I, Section 3 ever had a claim to a fixed term, as Defendant McSally currently does. The drafters of the original Article I, Section 3 had a profound distrust of executive power, and expected that the "temporary" appointment would be impermanent, transient, lasting no longer than the time it took the legislature to fill the vacancy. James Madison, *Notes on the Debate in the Federal Convention*, August 9, 1787 (remarks of Mr. Randolph).

In a particular circumstance, there may be good cause for the executive to allow a temporary appointment for a period longer than it takes under state law

to elect a Senator ordinarily. But there is never good cause for a law like A.R.S. § 16-222 that ignores the text of Section 2 and mandates a permanent "temporary appointment" of more than two years: a fixed term, which by law blocks the executive from holding an election sooner. A definition of "temporary" arising from the text, and its primacy for elected representation, is not just "law-like" but crucial to the rule of law—for there is no greater danger to the rule of law than to postpone an election by the people, by ignoring the procedures set out in the text. There is in Section 2—in its allocation of roles and the dictionary sense of the word "temporary"—law for this Court to apply.

CONCLUSION

Since *Marbury v. Madison*, this Court has recognized its "solemn responsibility" as the Judicial Branch to enforce the government-structuring provisions of the Constitution. It is especially important to do so here, for Section 2 was intended to protect the liberty of the people to have Senators of their own choosing.

For that and all the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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