No. 19-1427

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 a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS ERWIN CHEMERINSKY, HELEN HERSHKOFF, ALEXANDER KEYSSAR, SANFORD LEVINSON, AND ROBERT BRAUNEIS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae are distinguished professors with expertise in voting rights, constitutional law, or legal history. The *amici* share a deep interest in protecting the integrity of the electoral system and ensuring that the development of constitutional doctrine aligns with the essential liberties guaranteed to the people. This interest, acute here where the right to vote directly for representation in the U.S. Senate is at stake, motivates the filing of this *amicus* brief.[1]

Erwin Chemerinsky, the Dean and Jesse H. Choper Distinguished Professor of Law at the University of California, Berkeley School of Law, has authored leading casebooks and treatises on constitutional law, among other topics, and numerous publications, including *We the People: A Progressive Reading of the Constitution for the Twenty-First Century* (2018). Professor Chemerinsky has also held distinguished professorships at University of California, Irvine (where he was founding dean of the

[1] Pursuant to Supreme Court Rule 37.6, the undersigned hereby state that no counsel for a party wrote this brief in whole or in part, and no one other than *amici curiae* or their counsel contributed money to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of the intent to file this brief and all parties have consented to its filing.

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SUMMARY OF ARGUMENT

The Seventeenth Amendment took the power to elect U.S. Senators away from state legislatures and gave it to the people of each state. In the context of Senate vacancies, however, many state legislatures have passed laws directly contrary to both the text and purpose of the Amendment. Indeed, although the Amendment was designed to ensure that governors would order elections so that the people could fill any vacancies, and so that any interim appointment would be "temporary," many state legislatures have passed laws effectively usurping that power and ensuring that appointed senators would fill vacancies for far longer than necessary. In the instant case, as a result of just such a law, the people of Arizona have been deprived of the opportunity to vote for Senator John McCain's replacement since his death in August

[2] The titles and institutional affiliations of *amici curiae* are listed for identification purposes only.

2018. The Ninth Circuit, attempting to construe a 50-year-old summary affirmance by this Court, held that the state law at issue did not violate the Seventeenth Amendment. That decision, together with earlier decisions in the Third and Seventh Circuits that also struggled with the meaning of the Amendment's vacancy-filling provisions, presents an urgent need for this Court to provide guidance and restore structural protections provided by the Seventeenth Amendment.

Even if this Court is not in a position to rule on this case before the November 2020 general election when the people of Arizona will vote for Senator McCain's replacement at long last, the present case will not be moot. It presents issues that are capable of repetition, yet have evaded, and will continue to evade, review absent action from this Court. *See Spencer v. Kemna*, 523 U.S. 1, 2 (1998) (recognizing an exception to mootness when a controversy is "capable of repetition, yet evading review"). The evasion of review is acute here. As long as lower courts are reluctant to intervene due to a cryptic 50-year-old summary affirmance of this Court, state legislatures may feel entitled to avoid the Seventeenth Amendment's strictures for at least the time it takes a challenge to proceed from initial complaint to final disposition in this Court, a period that often exceeds four years. *Cf.* Administrative Office of the U.S. Courts, *U.S. Courts of Appeals*

Judicial Business Table B-4 (September 30, 2019), https://www.uscourts.gov/file/27484/download (last visited July 23, 2020) (for the year ending September 30, 2019, the median time from filing of a complaint to final disposition in the Ninth Circuit alone is 33.2 months).

The Seventeenth Amendment safeguards our democratic system of government by providing the people with the right to directly elect their U.S. Senators. When vacancies arise, "the executive authority of each State shall issue writs of election to fill such vacancies," provided that state legislatures may "empower" the state executive to "make *temporary* appointments" until the people fill the vacancies by election. U.S. CONST. amend. XVII (emphasis added). By vesting power to elect senators in the people by direct election, and mandating state executives to issue writs of election to fill any vacancies, the Seventeenth Amendment ensured, to the extent possible, that the power to elect senators would rest with the people, and not state legislatures.

Nevertheless, in the 107 years since the ratification of the Seventeenth Amendment, state legislatures have adopted disparate approaches to the vacancy provisions that have gradually eroded these protections and resisted review. Indeed, some state legislatures have passed statutes that consciously divest the power from their governors to set the timing of any election, or to ensure that "temporary"

appointments to fill vacancies last for the remainder of any given term, essentially creating a "permanent" appointment. Not only can these approaches conflict with the text of the Seventeenth Amendment, but also they deprive the people, for far longer than the enactors of the Seventeenth Amendment could have possibly anticipated, the right to elect their senators.

This case highlights the degree to which state legislatures currently feel empowered to control the way vacancies are filled. The people of Arizona elected Senator McCain to his sixth term in November 2016. Less than two years later, contemporaneous with the Senator's declining health and prior to his death, the Arizona state legislature amended the state's statute on filling Senate vacancies. The amendment added a provision that if a Senate seat became vacant "one hundred fifty days or less before the next regular primary election," the governor's appointed "temporary" senator would serve until the second regular general election. Ariz. Rev. Stat. ("A.R.S.") § 16-222(D). This amendment meant that no replacement election for Senator McCain would occur in November 2018, and that Governor Ducey's "temporary" replacement(s) for Senator McCain would serve without election for a period of 27 months. This deprived the people of the opportunity to choose their representation in the Senate for more than a whole congressional term.

While state legislatures have parsed power among the people, their governors, and themselves in different ways, and often at odds with the text and purpose of the Seventeenth Amendment, relatively few challenges have followed. Those courts presented with challenges to these state laws have struggled in the absence of guidance from this Court. Ten years ago, for example, the Seventh Circuit upheld an Illinois statute that became the subject of litigation following Governor Rod Blagojevich's controversial appointment to fill the vacated Senate seat of President-elect Barack Obama, but its reasoning was severely constrained by the posture of the case. *See Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010) ("*Judge I*"). The plaintiffs challenged a state law that required the Governor to appoint a senator to serve on a "temporary" basis until the next election of representatives in Congress. *Id.* at 542. However, the plaintiffs abandoned any argument that the Seventeenth Amendment required an election to fill the Senate vacancy on a date as soon as possible; instead, they merely argued that an election was required "to fill out the remainder of President Obama's term in the 111th Congress (rather than an election to choose the junior senator from Illinois for the 112th Congress)." *Id.* at 543. Accordingly, although the Seventh Circuit agreed with the plaintiffs that the Seventeenth Amendment required the Governor to issue a writ of election, *id.* at 554–55, because the plaintiffs "disavowed any argument

relating to the timing of the election" they sought, and did not demonstrate any harm stemming from the required timing of the election under state law, the court concluded that the plaintiffs could not demonstrate irreparable harm sufficient to grant preliminary injunctive relief, *id.* at 557.

In this case, the Ninth Circuit deferred to a state law that permitted (indeed, required) an unelected senator to hold office still longer than the period at issue in *Judge I*. The Arizona law at issue, like the Illinois law before, mandated when any vacancy-filling election would be held (depriving the governor of any choice in the matter); but unlike in the case of Illinois, the date selected by the Arizona state legislature was more than two years away—occuring at the second general election after the vacancy arose, rather than at the next general election as mandated by Illinois and many other states. Faced with this incongruity, the Ninth Circuit below recognized that "temporary" must mean something and stated that it "would have difficulty reading it to approach anything nearing that full six-year term" of a U.S. Senator. Pet. App. at 24–25. But the court concluded that "the text is ambiguous as to the outer bounds of [the state's] discretion," *id.* at 26, and ultimately refused to hold that the Arizona revised statute violated the Seventeenth Amendment.

The Ninth Circuit relied heavily on this Court's summary affirmance in *Valenti v. Rockefeller*, 292 F.

Supp. 851 (W.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969), and its decision *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), as setting what the Ninth Circuit apparently believed to be the outer bounds of what "temporary" might mean. However, neither the summary affirmance in *Valenti*, nor *Rodriguez*, grappled with the text, history, or purpose of the Seventeenth Amendment, and as such are a "slender reed" on which to base decisions of such importance as how and when the people may elect replacement senators. *See Anderson v. Celebrezze*, 460 U.S. 780, 786 n.5 (1983) (summary affirmances are "'a rather slender reed' on which to rest [a court's] decision") (citation omitted).

This case provides the Court with an opportunity to restore the primacy of the people's right to elect senators to fill vacant seats. Following the Seventh Circuit's decisions in *Judge*, this Court denied the Illinois Governor's subsequent petition for a writ of certiorari, *Quinn v. Judge*, 563 U.S. 1032 (2011). Even though it was supported by Attorneys General from 13 states, *Quinn v. Judge*, No. 10-821, 2010 WL 5628243 (U.S. Jan. 21, 2011), this Court presumably recognized the limited posture of the case, where the lower court had held that the Governor was required to issue a writ of election but where the plaintiffs had abandoned any argument that the scheduled election was untimely (and where it was in any event to be held at the next scheduled

election, within two years of the vacancy arising). This case is different. The Questions Presented are well-preserved and the result is more troubling. The Ninth Circuit's decision upholds a statute that does not require the governor to issue a writ to set an election (as the date was predetermined by the statute), and thereby deprived the people of Arizona of their elected representation for at least 27 months.

ARGUMENT

I. The Court Should Grant the Petition Because the Arizona Statute Governing U.S. Senate Vacancies, Like Many State Statutes, Is Inconsistent with the Seventeenth Amendment

As highlighted by the Questions Presented in the Petition, the Senate vacancy-filling provisions of certain state statutes undermine the animating, pro-democratic purpose of the Seventeenth Amendment. Below, we set forth a brief history of the Seventeenth Amendment's ratification. We then juxtapose that history with the state statutes that, avoiding review by this Court, have diluted the power of the people to elect promptly their senators when vacancies arise.

a. The History and Purpose of the Seventeenth Amendment

The original provisions of the Constitution left the power to select U.S. Senators to state legislatures. By delegating this power, the Framers of the Constitution sought to protect the interests of state governments by giving them a stake in who would represent them in the federal government. Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1405 (1996) ("*Indirect Effects of Direct Election*"). Indeed, as stated by Roger Sherman, a delegate to the Philadelphia Convention: "If the State [Governments] are to be continued, it is necessary in order to preserve the harmony between the National and State [Governments] that the elections to the former [should] be made by the latter." *Id.* at 1353 (quoting James Madison, *Notes on the Debates in the Federal Convention of 1787* at 74 (Ohio U. 1966)). In the case of Senate vacancies, the original provisions of the Constitution granted state executives the power to appoint senators to serve until the state legislatures could fill the vacancy. The provision on filling vacancies sought to "prevent inconvenient chasms in the Senate," which would negatively impact a state's influence due to the relatively small size of the Senate; the Framers thought "[t]he [State] Executive might be safely trusted [to make temporary

appointments] . . . for so short a time" as until the next meeting of the state legislature. *Id.*

However, in the years following the Constitution's ratification, a popular perception grew that state legislatures were subject to bribery and corruption by special interests—leading some of the citizenry to believe their interests were not being represented in the Senate. *See* Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 NW. U. L. REV. 1181, 1190 (2013) ("*The Meaning of the Seventeenth Amendment*"); *see also Indirect Effects of Direct Election* at 1353. Political gridlock within state legislatures often resulted in extended vacancies, which deprived states of full representation. *See The Meaning of the Seventeenth Amendment* at 1189; *see also Indirect Effects of Direct Election* at 1353. This thwarted the Constitution's underlying aim to provide equal representation for each state in the Senate.

Against this backdrop, state actors built a movement. As early as 1826, a congressional proposal was introduced calling for a constitutional amendment providing for direct election of U.S. Senators, and that was followed by six additional proposals between 1835 and 1855. George H. Haynes, *The Election of Senators* 101-02 (H. Holt & Co. 1906). As action on these proposals stalled, the impetus for change was driven by the states. By 1905, 31 state

legislatures had communicated their support for direct Senate elections to Congress. Richard Albert, *The Progressive Era of Constitutional Amendment*, Revista de Investigaçóes Constitucionais, Curitiba, vol. 2, no. 3, at 35, 47, Sept./Dec. 2015. And by the time Congress approved the Seventeenth Amendment in 1912, more than half of the states had adopted some form of direct participation by the populace in selecting U.S. Senators. Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 10 (2019). States accomplished this effort to empower the people as voters by amending state constitutions, passing laws, and "sidestepping legislative selection of senators" through the holding of advisory referenda in which the electorate could express their preferred Senate candidate for the legislature's consideration. Albert, *The Progressive Era of Constitutional Amendment*, *supra*, at 48.

As Professor Richard Albert observes, "[t]hese subnational approaches reflected the distinctive strategy of the progressive movement: to pursue change at the state level . . . to make it close to inevitable at the national level." *Id.* Other scholars agree that by the time serious action began in Congress—with the Sixty-First Congress—"it seemed that direct elections were a foregone conclusion." *The Meaning of the Seventeenth Amendment* at 1191; *see also Indirect Effects of Direct Election* at 1355 ("[T]he

Seventeenth Amendment was a formalizing final step in an evolutionary process.").

This pro-democratic drive was cemented in the Amendment's command that the U.S. Senators from a given state shall be "elected by the people thereof." As Senator William Borah, drafter of the Senate Report for the Seventeenth Amendment, elegantly noted:

> It is our duty to place this power in constant, direct, immediate touch with the people. Dismiss every agent that it is possible to be rid of and go direct to the principal. . . . It is only under such a system that men may grow to the full stature of citizenship in a republic.

46 Cong. Rec. 1107 (Jan. 19, 1911) (remarks of Sen. Borah).

It was not merely the initial paragraph of the Seventeenth Amendment that was animated by pro-democratic interests—but also the vacancy provisions at play in this case. As Petitioner's textual analysis explains, Pet. at 16, the vacancy provisions of the Seventeenth Amendment ensured that the pro-democratic interests served by mandating direct election of senators would not be unduly diluted in the case of unexpected vacancies. The provisions do so first by ensuring that "when vacancies happen," the executive authority of a state "shall issue writs of

election"—meaning that the executive authority must call for an election whereby the people will once again have the opportunity to elect their senator. U.S. CONST. amend. XVII. And second, by ensuring that any senator appointed to fill a vacancy pending such election will hold that office only on a "temporary" basis "until the people fill the vacancies." *Id.*

Those who enacted the Seventeenth Amendment had a particular understanding of "temporary," which was tied to the election cycle that then existed within states. Under the unamended Constitution, the state executive's power to make temporary appointments to the Senate was triggered by a vacancy occurring during the recess of a state legislature. U.S. CONST. art. I, § 3, cl. 2; *see also The Meaning of the Seventeenth Amendment* at 1210–11. The temporary appointment would then expire once the legislature met again to select a new senator or if the next legislative session ended without making any selection—meaning that appointments under the original Senate vacancy-filling provision could last, at most, as long as a legislative session. *Id.* at 1211. At the time of the Framers, state legislatures generally met annually. *Id.*; *see also id.* at 1211 n.119. As such, vacancies in the Senate at the time of the Framing could only rarely exceed one year, and the Framers trusted the state executive to make temporary appointments "for so short a time." James Madison, *Notes on the Debates in the Federal Convention*,

Aug. 9, 1787 (remarks of Mr. Randolph), http://avalon.law.yale.edu/18th_century/debates_809.asp.

By the time the Seventeenth Amendment was adopted, most state legislatures convened every *two* years. *The Meaning of the Seventeenth Amendment* at 1212 n.122. And Senator Bristow, who drafted the Seventeenth Amendment, commented that his provision allowing state executives to make temporary appointments (if so empowered by the state legislature) is "practically the same provision which now exists in the case of such a vacancy." 47 Cong. Rec. 1483 (1911) (remarks of Sen. Bristow). Senator Bristow's invocation of Article I, Section 3, is therefore somewhat ambiguous with regard to the understanding as to the permissible length of "temporary" appointments—his remarks could be read with the one-year expectation of the Framers or the two-year expectation arising from state practice leading up to the Amendment's adoption. But the word "temporary" indisputably intended to serve as a limitation.

There are no doubt special temporal concerns with organizing the type of statewide elections necessary to elect a replacement U.S. Senator, and that some degree of discretion was both intended and warranted. However, reading unfettered discretion into the text of the Seventeenth Amendment is at odds with its mandate to ensure that the people of

each state would have a timely say in the election of their senators.

b. Arizona's Vacancy-Filling Statute, Similar to That of Many Other States, Is at Odds with the Seventeenth Amendment

Notwithstanding this history, state legislatures, through their Senate vacancy-filling statutes, have deployed various interpretations of the vacancy provisions of the Seventeenth Amendment that are oftentimes at odds with the Seventeenth Amendment's text and have eroded its structural protections. This is not merely a problem in theory. These statutes routinely permit and can often pose a problem in practice. Senate vacancies are a regular occurrence, having happened more than 200 times since 1913. *See U.S. Senate: Appointed Senators (1913–Present)*, https://www.senate.gov/senators/AppointedSenators.htm (last visited July 14, 2020). Arizona, like many states, contravenes the Seventeenth Amendment by (1) divesting the state executive of any functional power to set a special election to fill Senate vacancies, placing the power in the hands of the state legislature and (2) setting dates for such elections beyond what could have been considered "temporary" at the time the Amendment was ratified.

At least 36 state legislatures have enacted statutes that place limits—often severe limits—on

the dates at which a governor can set an election to fill a Senate vacancy. *See* Congressional Research Service, Thomas H. Neale, *Filling U.S. Senate Vacancies: Contemporary Developments and Perspectives* (R44781: Apr. 12, 2018).[3] While some of these statutes require prompt elections, the majority of states permit "temporary" appointments to extend until the next general election. *Id.* Given the timing of general elections, these provisions risk enshrining fixed terms far beyond the temporary appointment the proponents of the Amendment imagined.

Even more dubiously, 18 states eschew the next general election and compel an appointee to serve until the *following* general election in many situations. *See* Congressional Research Service, Thomas H. Neale, *Filling U.S. Senate Vacancies: Perspectives and Contemporary Developments* (R40421: Jul. 16, 2013). In one of the most egregious examples, Ohio law provides that if the next regular state election is less than 180 days away a "temporary" senator must be appointed to serve until the following election. *See* ORC Ann. 3521.02. In

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[3] The Congressional Research Service article notes that 36 states "provide for gubernatorial appointments to fill Senate vacancies, with the appointed Senator serving the balance of the term or until the next statewide general election." *Id.* Since the article's publication in 2018, Alabama has adopted legislation eliminating special elections for Senate vacancies and joins this list.

another example, the Senate vacancy-filling statute in South Carolina provides that if a vacancy occurs within 100 days of a general election the appointee must serve until the January following the second general election. *See* S.C. Code Ann. § 7-19-20. Through this statutory disregard for the text of the Seventeenth Amendment, some states have effectively converted the Constitution's permissive call for a "temporary" appointment into an enduring one.

Most states in practice, if not by statute, ultimately honor the Seventeenth Amendment's "temporary" language by promptly replacing their temporary appointees with elected senators. Yet, as in Arizona here, that is not always the case. *See The Meaning of the Seventeenth Amendment* at 1219 (reviewing compliance in the practice of timing vacancy-replacement elections and the instances where states have taken more than one, and sometimes two years to manage to conduct an election).

II. The Petition Presents an Appropriate Vehicle to Address the Questions Presented

States have received virtually no guidance from this Court on the meaning of the Seventeenth Amendment, and this Petition presents an appropriate vehicle for the Court's exercise of its

traditional interpretive role in the context of a live dispute.

The scarcity of cases challenging temporary appointments may be owed in part to the historical tendency among the states to conduct elections in a timely manner, even when their statutes may run afoul of the structure of the Seventeenth Amendment. Indeed, from the enactment of the Seventeenth Amendment to a century later, the average duration from vacancy to election was 362 days for vacancies involving temporary appointments. *See The Meaning of the Seventeenth Amendment* at 1221 n.162. Over that same period, only four temporary appointments lasted longer than two years. *Id.* at 1221. This case is the fifth such outlier. But as these longer appointments go unchallenged and unremedied, and the structural commands of the Seventeenth Amendment are ignored, future practice for filling vacancies may depart still further from these norms.

As the Petitioners explain, the only times this Court has addressed the Seventeenth Amendment, it has done so in cursory fashion. *See Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982). This Court has never grappled with the text or history of the Seventeenth Amendment, let alone opined on the outer limits of temporariness or the division of power between state gubernatorial and legislative actors in this context.

In *Valenti v. Rockefeller*, this Court upheld an order from a divided district court panel that allowed the New York governor's temporary appointment of a senator to fill the vacancy created by the June 1968 assassination of Robert F. Kennedy for a period of 29 months. *Valenti*, 393 U.S. 405; *Valenti*, 292 F. Supp. at 853-54. While there was an election scheduled for November 1968, the then-in-effect New York statute provided that there was not ample time for Kennedy's replacement to be chosen in that election, and the Governor of New York ultimately scheduled it by writ for November 1970. *Id.* at 853. While the decision allowed the temporary appointment to serve until November 1970, the primary question presented to the district court panel by plaintiffs was whether the Seventeenth Amendment required an election to be held in November 1968 (within five months)—not whether it required the state's governor to set an election date "promptly" to fill the vacancy. *Id.* And in concluding that the New York statute was in any event permissible, the majority members of the district court panel relied far more on their understanding of practice and policy than on an analysis of the actual text or history of the Seventeenth Amendment. *See id.* at 875-89 (Frankel, J., dissenting).

Thus, even if this Court's summary affirmance in *Valenti* could be interpreted to endorse anything more than the result of the district court panel's

decision, it would be of minimal guidance to the outer bounds of what is permitted under the Seventeenth Amendment. *See Anderson v. Celebrezze*, 460 U.S. 780, 784-85 n.5 (1983) ("[T]he precedential effect of a summary affirmance extends no further than the precise issues presented and necessarily decided by those actions.") (internal quotation marks and citation omitted).

This Court's decision in *Rodriguez* is similarly limited. *Rodriguez* referenced *Valenti* in upholding a Puerto Rico statute providing for interim appointments to the Puerto Rico legislature. 457 U.S. at 10–12. The Court wrote that it had "sustained the authority of the Governor of New York to fill a vacancy in the United States Senate by appointment pending the next regularly scheduled congressional election—in that case, a period of over 29 months," *id.* at 10–11, but it failed to provide any context to that decision. The Court cited *Valenti* solely to observe that, since making temporary appointments to the U.S. Senate is constitutionally permissible, it would be incongruous to conclude that Puerto Rico was precluded from making similar provisions for its legislature. *Id.* at 11.

With a lack of guidance, the few lower courts to have addressed the vacancy-filling provisions of the Seventeenth Amendment have struggled. To begin, only the Third, Seventh, and Ninth Circuits have addressed the vacancy-filling provisions at any

length, and in each case, the courts have essentially built-from-scratch interpretations of the Seventeenth Amendment to guide their decisions. These lower courts have recognized that, notwithstanding *Valenti* and *Rodriguez*, they have been "without firm guidance from the Supreme Court." *Judge I*, 612 F.3d at 549. In *Trinsey v. Commonwealth of Pennsylvania*, 941 F.2d 224 (3d Cir. 1991), the Third Circuit undertook a legislative history and textual analysis of the Seventeenth Amendment to uphold a Pennsylvania law mandating that elections to fill Senate vacancies would proceed in certain circumstances without primary elections. The Seventh Circuit, faced with a different issue in *Judge I*, found it necessary to build a similar foundation to determine how the history and text of the Seventeenth Amendment shed light on the requirement that state executives issue a writ of election to fill a U.S. Senate vacancy. *See Judge I*, 612 F.3d at 546–55. And the Ninth Circuit below did the same to address the limits on how long a temporary appointment may last under the Seventeenth Amendment. *See* Pet. App. at 17–59. Indeed, even though the Ninth Circuit ultimately based its decision in part on the result of *Valenti* and *Rodriguez*, it felt obligated to "undertake a full analysis . . . taking inspiration from the method by which the Supreme Court analyzed the meaning of the then little-litigated Second Amendment in [an inapposite case]

District of Columbia v. Heller"—effectively sitting in the seat of this Court. Pet. App. at 19.

The reasoning of the Third, Seventh, and Ninth Circuits, and their results, reveal confusion and critical differences. For example, the Third Circuit appeared to conclude that the text of the Seventeenth Amendment granted unfettered deference to state legislatures in determining how and when Senate vacancies would be filled. *See Trinsey*, 941 F.2d at 234 (observing that the proviso within the Seventeenth Amendment "itself could be deemed dispositive of the issue before us," because "it also states that those interim appointments will continue until filled by an election 'as the legislature may direct.'") (citation omitted). The Ninth Circuit disagreed. The Ninth Circuit concluded that the grants of power to the state legislature were more limited in scope than the *Trinsey* Court concluded. Pet. App. at 25 ("Contrary to the Third Circuit in [*Trinsey*], we do not read the proviso's two express references to state legislative discretion—'the legislature of any State may empower' and 'as the legislature may direct'—as creating state legislative discretion over the whole of the Vacancy Clause") (citation omitted). But the Ninth Circuit hesitated to parse any precise limits, stating simply that: "Because Arizona's additional lapse does not exceed the additional lapse endorsed by *Valenti* and *Rodriguez*, we hold that the timing provision of A.R.S. § 16-222(D) as applied to the

McCain vacancy is a permissible exercise of the State's discretion under the Seventeenth Amendment." *Id.* at 59.

Against this appellate background, it is not surprising that state legislatures have felt empowered to wrest control away from governors when setting the terms of when and how any Senate vacancy will be addressed. Indeed, the facts that preceded the amendment of Arizona's vacancy-filling statute alone justify this Court's intervention. The statute is not simply a vestige of long-standing state practice; as explained at the outset, it is the product of political choice by the state legislature, consciously divesting the state's governor (and, in turn, the people) of the power granted to them by the Seventeenth Amendment to choose when and how to address Senate vacancies. Mere months after the sitting Senator announced his terminal illness in the Summer of 2017, the State of Arizona passed an amendment that would postpone any election to fill a Senate vacancy by over two years if a seat became vacant "one hundred fifty days or less before the next regular primary election." A.R.S. § 16-222(D). And upon Senator McCain's death, Respondent Ducey appointed Senator Jon Kyl, and subsequently Respondent Senator Martha McSally—notably, Arizona's first vacancy appointments to the U.S. Senate in the history of the Seventeenth Amendment—to serve a combined "temporary" term

of 27 months, even though an election could have surely been called in the interim.

Unlike other vacancy-filling disputes, this case presents an uncommonly strong context for the Court to exercise its jurisdiction. In *Judge I*, for example, the Seventh Circuit found that the governor must issue a writ of election, but the question of the appropriate duration of a temporary appointment was not properly before the court (as plaintiffs-appellants abandoned related arguments on appeal). 612 F.3d at 542–43. This Court unsurprisingly rejected the defendants-appellees subsequent petition for a writ of certiorari even though it was supported by thirteen state attorneys general. *Quinn v. Judge*, 563 U.S. 1032 (2011). And in *Trinsey*, the question presented was so limited (having to do with whether the Seventeenth Amendment mandated primary elections to fill a Senate vacancy) that the petition would have presented no opportunity to address either of the Questions Presented here.

Conversely, in the case below, Petitioners explicitly presented the Ninth Circuit with questions of how quickly an election must be held to fill a vacant Senate seat and who gets to decide. While it refused to answer either question with precision, depending instead on its interpretation of *Valenti* and *Rodriguez*, the issues are fully presented by its opinion and ripe for review. *Cf.* Pet. App. at 19; *id.* at 26 ("The text is ambiguous as to the outer bounds of

[the timing to fill a Senate vacancy]."); *id.* at 25 ("We would have difficulty reading ["temporary"] to approach anything nearing that six-year term"). The Petitioners have repeatedly asked courts to define the contours of temporariness for the first time post-*Valenti* and to make clear that it is state executives (who, like senators, are accountable to the people on a state-wide basis) that must choose when vacancy-filling elections will be held. This case thus presents a proper vehicle for resolving these important issues.

Prior courts have reserved judgment on the limits of temporariness, while simultaneously acknowledging that such limits exist. Fifty years after the summary affirmance in *Valenti*, this Court should provide guidance. A century rife with disparate state interpretations of the Seventeenth Amendment, and the resulting lost years of elected rather than selected representation, is enough. Without firm guidance on how Senate vacancies must be filled, there will be nothing to stop Arizona, or any other state, from subverting the pro-democratic purpose of the Seventeenth Amendment by lengthening the duration of temporary appointments and depriving the people of elected representatives.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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