

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that Petitioners lack standing to challenge a state law requiring the Governor of Arizona to appoint an interim United States Senator following the death of an incumbent senator—an appointment that Governor Ducey would have made anyway.

2. Whether the Ninth Circuit erred in holding that a senate vacancy appointment lasting until the next practicable general election complied with the Seventeenth Amendment.

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BRIEF IN OPPOSITION

This lawsuit is an attempt to alter the Seventeenth Amendment and invalidate state laws across the country. Petitioners would add a requirement that elections to fill vacancies in the United States Senate occur as soon as practicable and that the governor rather than the legislature direct that timing. The Constitution includes no such requirement and, in fact, expressly leaves the administration of vacancy elections to state legislatures. The Ninth Circuit carefully parsed the Amendment’s text and structure to conclude that Arizona’s vacancy provision complies with the constitutional requirement that vacancy appointments be “temporary.” That conclusion is consistent with this Court’s affirmance of a yet-longer appointment in *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968), *aff’d* 393 U.S. 405 (1969). The Ninth Circuit also rejected the notion that anyone other than the Governor of Arizona would have standing to challenge the statutory requirement that the governor make an appointment rather than leave the seat vacant until an election. These holdings are unremarkable, consistent with the law in other circuits, and unworthy of this Court’s review.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 951 F.3d 1041 (9th Cir. 2020). Pet. App. 1–76. The district court’s opinion granting the motion to dismiss appears at 398 F. Supp. 3d 529 (D. Ariz. 2019). Pet. App. 77–114.

JURISDICTION

This Court has jurisdiction over this appeal from a decision of the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Seventeenth Amendment to the United States Constitution provides in relevant part that:

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.

U.S. Const. amend. XVII.

Arizona Revised Statutes Section 16-222(D) governs the temporary appointment of senators from Arizona. It provides:

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.

Ariz. Rev. Stat. § 16-222(D).

STATEMENT

When Senator John McCain died on August 25, 2018, four and a half years remained in his six-year term.

Under Arizona law, the governor appoints an interim successor to fill a vacancy in one of the State's senate seats. Ariz. Rev. Stat. § 16-222. The duration of the appointed senator's service depends on when the vacancy occurs. If it occurs more than 150 days before the next primary election, then the appointee serves only until the upcoming general election, at which point voters select a permanent replacement. Ariz. Rev. Stat. § 16-222(D). If there are fewer than 150 days until the next regularly scheduled primary election, then the appointee serves until the second general election following appointment. *Ibid.*

Here, Governor Ducey first appointed former Senator Jon Kyl, who served for several months until the end of 2018. Governor Ducey then named Senator McSally to serve until the general election in November 2020. He also promptly issued the writ of election as required by the Seventeenth Amendment, identifying the date of the vacancy-filling election pursuant to state law.

The statutory schedule reflects two important goals of Arizona’s electoral system: (1) primary elections that allow the voters to select their candidates for the general election, and (2) the greatest possible voter participation in selecting a senator. In fact, Senator McCain’s death occurred just three days before the primary election in 2018. Electing his successor at the 2018 general election was therefore impossible if there was to be a primary election; even if Arizona skipped the primary, holding a vacancy election in 2018 would have been extraordinarily difficult if not impossible.

As in most States, voter participation in Arizona is higher in regularly scheduled congressional elections than in off-year or special elections. At the time the district court decided Respondents’ motion to dismiss, the most recent general elections saw 74% voter turnout in a presidential year and 65% in a non-presidential year, compared with 31% for the most recent statewide special election and 40% for the most recent special election for the House of Representatives. ER 11.¹ Additionally, as this Court noted in *Rodriguez v. Popular Democratic Party*, 547 U.S. 1, 12 (1982), special elections carry special “expense and inconvenience.” The most recent statewide special election in Arizona cost taxpayers \$6.5 million to administer. ER 12.

Against this legal and factual backdrop, Petitioners brought suit alleging that Arizona law violates the

¹ “ER” citations refer to the Ninth Circuit’s excerpts of records in the underlying appeal (No. 19-16308), which are available at Docket Entry 19.

Fourteenth and Seventeenth Amendments by (1) obliging the governor to make a temporary appointment, (2) requiring that the appointed senator belong to the same political party as the former senator, (3) burdening the right to vote, and (4) permitting the appointment to last until the next practicable general election. See Plaintiffs' First Amended Complaint, ER 48–57. Respondents moved to dismiss for failure to state a claim and, as to the provisions that affect only the governor, for lack of standing as well.

The district court granted the motion. Relevant to the current appeal, the court reasoned that only the governor could suffer any injury by being required to select an interim senator and to make that selection from a given political party. Pet. App. 66. In the current case, Governor Ducey appointed Senator McSally and would have selected her even without a statutory requirement that he pick a Republican. Pet. App. 59. As a result, any alleged injury to Petitioners is not traceable to Section 16-222 and not redressable through a judicial decision holding that provision unconstitutional.

Interpreting the Seventeenth Amendment, the district court reasoned that this Court's affirmance of a 29-month vacancy appointment in *Valenti*, combined with later approval of that holding in *Rodriguez*, meant that the 27-month appointment here must likewise comply with the Constitution. Pet. App. 99.

The Ninth Circuit affirmed. Like the district court, it easily disposed of the claims challenging the requirement that the governor make an interim

appointment and that he choose a senator of the same party. Pet. App. 59 (explaining lack of standing to bring either claim).

On the Seventeenth Amendment, the Ninth Circuit explained at length the many interpretative guideposts pointing to the conclusion that Arizona’s vacancy-filling provision is constitutional. Pet. App. 16–53. Judge Collins concurred, reasoning that the outcome in *Valenti* affirming a 29-month appointment disposed of the instant challenge to a shorter appointment. Pet. App. 63 (Collins, J., concurring).

This appeal followed.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Identify a Division in the Lower Courts, and None Exists.

Even mustering all the advocacy it can, the Petition never alleges a division in the circuit courts. It settles instead for “the Ninth and Seventh Circuits are confused and are in some disagreement.” Pet. 16. Even the bathwater assertion of “some disagreement” is an overstatement. There is no division in the lower courts and no need for this Court to review the decision below.

A. No Circuit Would Find Standing for Citizens to Challenge a Requirement that the Governor Do Something He Would Do Anyway.

The first Question Presented asks whether Section 16-222 violates the Seventeenth Amendment by

requiring rather than merely permitting the governor to appoint an interim senator. The Ninth Circuit (and the district court) dismissed this claim for lack of standing. No circuit in the nation would reach a different conclusion.

The circuits are not divided because this Court has consistently interpreted Article III’s “case or controversy” to require an “injury in fact” that is both “(a) concrete and particularized” and “(b) actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (quotations omitted). The Court has repeated that “Article III standing ‘is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests.’” *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) (quoting *Diamond v. Charles*, 476 U.S. 54, 61 (1986)).

This lawsuit typifies the kind of “concerned bystander” who seeks to vindicate someone else’s interest. The law imposes an obligation on the governor, who has made clear that he would have taken the same action in the absence of the contested provision. Pet. App. 59, 107–08. Most importantly for standing purposes, the contested statutes did not prevent Governor Ducey from selecting one of Petitioners to serve as senator. Pet. App. 108 (noting that Petitioner Hess did not allege that his chances of being appointed would have been any greater had he been a Republican). Their only interest in this case is a generalized preference that governors have greater discretion in appointing an interim senator. That is not sufficient to confer standing under this Court’s

precedent, and every court in the country would reach the same conclusion, just as both courts below did.

Petitioners' only response is that this Court has "a 'solemn responsibility' to hear a case of this kind." Pet. 9. To the contrary, the Court has a solemn responsibility to apply Article III.

To the extent the Petition attempts to add a claim based on the absence of a statutory command that the governor issue a writ of election, Pet. i, that claim is waived because it never appeared in the lower courts. ER 48–57. Even if this claim were not waived, Petitioners would again lack a cognizable injury, because the governor issued a writ in this case. After all, the Seventeenth Amendment requires him to do so. Nothing in the Amendment, however, requires States to adopt statutes that duplicate its requirements.

Straightforward application of this Court's precedent disposes of the first Question Presented. There is no reason to doubt that every circuit would reach the same conclusion. This Court's Article III precedent is sufficiently clear that further discussion would be a waste of judicial resources.

B. No Circuit Interprets "Temporary" Differently than the Ninth Circuit.

The heart of the Petition is a plea for this Court to infuse the word "temporary" with Petitioners' preferred meaning—a meaning that has changed over the course of this litigation. Pet. App. 100–01 (tracing the evolution of Petitioners' demand for an election within various timeframes). No circuit has embraced anything of the sort.

The Petition identifies just two circuit decisions interpreting the Seventeenth Amendment, both of which the Ninth Circuit also discussed and harmonized with its holding here.

1. The Seventh Circuit in *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010), addressed a governor’s obligation to issue the writ of election required by the Amendment’s primary clause. *Judge* interpreted the Seventeenth Amendment’s instruction that “the executive authority of such State shall issue writs of election to fill such vacancies.” U.S. Const. amend. XVII; 612 F.3d at 540. The Seventh Circuit concluded that a governor “has a duty to issue a writ of election,” *Judge*, 612 F.3d at 555, but it expressly declined to comment on when the election itself would need to occur, *id.* at 542, 548. In fact, the election laws in Illinois are similar to those in Arizona and resulted in a vacancy appointment of approximately two years. *Id.* at 543.

Questions of whether and when a governor must issue the writ of election are not present in this case. The Seventh Circuit’s holding in *Judge* is therefore irrelevant and cannot possibly create a division in authority requiring this Court’s resolution. The Petition’s assertion that *Judge* represents a “different result[]” than the Ninth Circuit announced below is simply inaccurate. Pet. 7. The two cases presented entirely different questions.

2. The Third Circuit also faced a different question under the Seventeenth Amendment than the one presented here. *Trinsey v. Pennsylvania*, 941 F.2d 224 (3d Cir. 1991). The issue in *Trinsey* was whether a

Pennsylvania law that did not allow for primary elections before a vacancy election violated the Seventeenth Amendment. *Id.* at 226. The Third Circuit concluded that a primary was not among the Amendment’s provisions. *Id.* at 234.

The Petition itself does not mention *Trinsey*, but Petitioners’ amici do. They assert that the Third Circuit “appeared” to grant “unfettered deference to state legislatures in determining how and when Senate vacancies would be filled.” Br. of Amici Curiae at 24. That characterization rests on the fact that the Third Circuit quoted the language of the Seventeenth Amendment itself, which states that vacancy elections occur “as the legislature may direct.” *Ibid.*; U.S. Const. amend. XVII. Quoting the Constitution can hardly be an error worthy of this Court’s review. Moreover, it is untrue that “[t]he Ninth Circuit disagreed.” Br. of Amici Curiae at 24. Although the Ninth Circuit noted an apparent difference of opinion regarding the outer limits of legislative discretion under the Seventeenth Amendment, Pet. App. 23, its overall conclusion was that “*Trinsey* is generally consistent with” the decision below, Pet. App. 51. The issue decided in *Trinsey*—like *Judge*—is different than the one presented in the current case. As such, it is impossible that the Third and Ninth Circuits have “disagreed” in a way that requires this Court’s resolution.

If anything, the Third Circuit’s approach supports what the Ninth Circuit did below. Just as *Trinsey* declined to augment the Seventeenth Amendment by requiring a primary, so the Ninth Circuit declined to add language prescribing a vacancy election as soon as

possible. Both courts respected the Amendment's language and rebuffed efforts to add provisions that do not appear in the text.

This Court should not grant certiorari simply because different circuits have answered different questions under the same constitutional provision.

II. Arizona's System for Vacancy Elections Comports with the Seventeenth Amendment.

Absent a split in the lower courts, the Petition is nothing more than a merits argument. Even if merits errors were sufficient to justify certiorari, the Ninth Circuit correctly read the Seventeenth Amendment and this Court's precedent to permit Arizona's procedures for filling vacancies in the United States Senate.

Petitioners' argument overreads governors' obligation to issue a writ of election "when vacancies happen." They attempt to insert into this straightforward duty the power to set an election's date, which instead belongs to the legislature's authority to "direct" vacancy elections. Their argument cites no authority, departs from the consensus in the Seventh and Ninth Circuits, and makes no textual sense.

1. As a preliminary matter, Petitioners' gripe with Section 16-222 has changed at every stage of this litigation and continues to evolve even now. They initially asserted that the Seventeenth Amendment contains a timing requirement for when the vacancy-filling election must occur. That timeframe changed in the course of the litigation below, ranging from "as soon as is reasonably practicable" to 190 days to two years.

See Pet. App. 100–01 (tracing Petitioners’ ever-shifting theory).

Both courts below addressed an interpretative question around the meaning of the word “temporary” in the Seventeenth Amendment. *E.g.*, Pet. App. 24 (“The key issue here is the word ‘temporary.’”). They did not address—because Petitioners did not argue—the unrelated point of whether the governor or legislature has responsibility for setting the date of an election. Both courts noted that Governor Ducey issued the writ and thus complied with the requirement from *Judge*. Pet. App. 12–13, 79.

Now, in an effort to catch this Court’s attention, Petitioners pivot to arguing that the flaw in Section 16-222 is that it does not permit the governor to set the date of a vacancy election—*whenever* he might choose to set it. Pet. 18–22. The core of this argument is not that an election must occur on a certain timeline but that a State’s executive rather than its legislature must decide when the election will occur. Pet. 18.

Under Petitioners’ current reasoning, Arizona could vote on the same date prescribed by Section 16-222, provided that Governor Ducey selected it. To the extent that the Court is willing to consider Petitioners’ new argument, it should also consider that Governor Ducey would, in fact, have selected November 3, 2020 in order to maximize voter participation and allow for primary elections while minimizing confusion and expense. Thus, even permitting Petitioners’ new argument leads to a familiar conclusion: the Court should deny certiorari for the same reason it should not

hear Petitioners' other claims, namely there is no injury traceable to the statute.

Petitioners' ever-shifting merits arguments, noted in both courts below, militate against granting the petition.

2. Petitioners' reading of the writ requirement in the Amendment's principal clause has no basis in text or precedent. They insist that the duty to issue a writ of election necessarily encompasses discretion to choose the date when that election will occur: "date setting is what writs of election *do*." Pet. 18. They never provide any authority for that proposition, and the Seventh and Ninth Circuits have reached the opposite conclusion. Pet. App. 21 (citing *Judge*, 612 F.3d at 552).

The Seventeenth Amendment charges governors with issuing writs of election "[w]hen vacancies happen in the representation of any State in the Senate." U.S. Const. amend. XVII. Both Respondents and the Ninth Circuit embrace that obligation. Governor Ducey issued the writ pursuant to the Seventeenth Amendment on September 5, 2018. The Ninth Circuit parsed each phrase in the Seventeenth Amendment and noted that the writ in question "allow[s] some discretion on the part of the State Governor or legislature to choose the date on which the election will be held." Pet. App. 21.

As the Seventh Circuit explained and the Ninth Circuit summarized in this case, the writ requirement does not imply that the governor unilaterally chooses the date of the election rather than calculating it according to state law. "At the time the Seventeenth

Amendment was drafted, ‘it was settled that the state executive’s power to issue a writ of election carried with it the power to establish the time for holding an election, *but only if the time had not already been fixed by law.*” Pet. App. 21 (quoting *Judge*, 612 F.3d at 552; emphasis added).

That conclusion should come as little surprise, given the text of the Amendment itself. It does not end with the statement that the governor shall issue the writ of election. It goes on to explain 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.” U.S. Const. amend. XVII. As the Seventh and Ninth Circuits have held, the final clause—“as the legislature may direct”—refers to the vacancy election. Pet. App. 23; *Judge*, 612 F.3d at 549. While the executive’s writ-issuing role might allow setting an election date in the absence of legislation on point, the legislature holds the more sweeping authority to “direct” the election. Thus, 40 state legislatures enacted laws setting the date for senate vacancy elections in the first three years following the Seventeenth Amendment’s ratification. Pet. App. 39 (citing *Valenti*, 292 F. Supp. at 857); see generally *Noel Canning v. NLRB*, 705 F.3d 490, 501 (D.C. Cir. 2013) (“The interpretation of the Clause in the years immediately following the Constitution’s ratification is the most instructive historical analysis in discerning the original meaning. Indeed, such early interpretation is a ‘critical tool of constitutional interpretation’” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008))).

Petitioner’s premise is that the Seventeenth Amendment’s instruction for governors to issue writs of election carries an unwritten requirement that governors also pick the date on which that election will occur. Pet. 6 (faulting Section 16-222 for “setting the election date” and thereby “taking over the function that the writ itself is to perform”), 22 (contending that the Seventeenth Amendment’s principal clause “places the obligation on the executive, not the legislature, to set the actual date”). Unfortunately, none of these assertions arrive with legal or historical authority. The Petition cites neither precedent nor contemporaneous usage to suggest that the writ requirement encompasses setting the date of an election. It declares in conclusory fashion that Arizona improperly “tak[es] the matter out of the executive’s control” without explaining how the obligation to issue a writ implies an unwritten power to declare when the election should occur. Pet. 9; *see also id.* at 18–19.

Petitioners do not rebut the Seventh and Ninth Circuits’ historical or textual analysis or identify contrary authority. And, as discussed in Part I *supra*, the circuits’ consensus only illustrates the absence of any division in the circuit courts.

Finally, Petitioners point out that there is no provision of Arizona law duplicating the governor’s writ-issuing obligation imposed by the Constitution. Pet. 5, 12, 18. But such duplication is not necessary. If Petitioners believe that the governor acted *ultra vires* as a matter of state law by following the U.S. Constitution, they can bring that claim in state court, where it will fail under the Supremacy Clause.

Ultimately, the writ requirement in the Seventeenth Amendment requires nothing more than what it says: the governor must issue a writ when a senate vacancy occurs. Here, Governor Ducey did just that, issuing a writ of election for the date prescribed by statute—a statute he signed into law just months before. The Petition assumes without argument that the writ requirement removes the prerogative to set a date from the legislature’s general power to “direct” a vacancy election. No court has accepted that view, and this Court should not entertain it in the first instance.

3. Petitioners’ reading of the word “temporary” in the Seventeenth Amendment makes no sense. They correctly identify the meaning of “temporary” as “not permanent,” but then proceed to conflate impermanence with an executive prerogative to set an election date. Pet. 27. That equivalence is nothing more than Petitioners’ *ipse dixit*.

Regardless of the outer bounds on how long a vacancy appointment may last, the allocation of responsibility for setting the end date is a different question. Petitioners initially argued for various limits on “temporary.” *E.g.*, ER 54 (“twenty-seven months is just too long”); *id.* at 56 (requesting an election “no later than a year [after] the vacancy arose”). Now, they reframe their case as focused on whether the executive or legislative branch has responsibility for determining the length of any vacancy appointment, which is wholly unconnected to the duration that the decision-maker might select. Petitioners attempt to meld an appointment’s duration with the authority to appoint by asserting that governors are more politically

accountable for making lengthy appointments. Pet. 26. That unsubstantiated assertion, like the argument for gubernatorial discretion to set an election date, appears nowhere in Petitioners' complaint.

On the merits of the claim that actually animated this litigation—*i.e.*, how long is too long—this Court has affirmed and later cited approvingly a vacancy appointment lasting longer than the one in this case. *Valenti*, 292 F. Supp. 851, *aff'd* 393 U.S. 405; *Rodriguez*, 457 U.S. at 10–12. Moreover, no court has questioned the constitutionality of deferring a senate vacancy election until the next general election. There is no reason for this Court to do so now.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

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