

No. 19-1427

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**In The  
Supreme Court of the United States**

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WILLIAM PRICE TEDARDS, JR., et al.,

*Petitioners,*

v.

DOUG DUCEY, Governor of Arizona, et al.,

*Respondents.*

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

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**REPLY BRIEF**

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THOMAS H. GEOGHEGAN  
*Counsel of Record*  
MICHAEL P. PERSOON  
DESPRES, SCHWARTZ AND  
GEOGHEGAN LTD.  
77 West Washington St.,  
Room 711  
Chicago, Illinois 60602  
Tel. (312) 372-2511  
tgeoghegan@dsgchicago.com  
mpersoon@dsgchicago.com

MICHAEL KIELSKY  
UDALL SHUMWAY  
1138 North Alma School Rd.,  
Suite 101  
Mesa, Arizona 85201  
Tel. (480) 461-5300  
MK@UdallShumway.com

*Attorneys for Petitioners*

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**REPLY BRIEF****Introduction**

The questions presented here concern the meaning of a major piece of Constitutional text, never interpreted by this Court, and seek to settle the proper legislative and executive roles in filling a Senate vacancy and determining how the people will be represented in the Congress. Far from recognizing the importance of these issues, the Respondent comes close to mocking the principle that enforcing the separation of legislative and executive power is a “solemn obligation” of this Court. *NLRB v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring). This Court should grant the petition because the allocation of legislative and executive roles in determining how long a “temporary” appointee may serve in place of a Senator elected by the people is “an important question of federal law that has not been, but should be, settled by this Court . . . ,” as set out in Rule 10(c) of the Rules of this Court. It is worth noting that importance at present when the U.S. Senate is so nearly evenly divided between the two major political parties. Should a vacancy arise in the coming session of Congress, there will be little opportunity for this Court to decide the important questions raised here in time to protect the right of the people to fill the vacancy and determine what Section 2 of the Seventeenth Amendment requires. Even if this were not the case, the questions presented here involve, as Justice Scalia said, an important obligation of the judicial branch. As set out in the precedents of this Court, it is the paramount

judicial obligation to interpret Constitutional text just as it is written and to ensure that one branch of government not usurp the power or authority of the other.

Respondents instead focus on whether there is a split of the Circuits within the meaning of Rule 10(a). Because different questions were raised in the case decided by the Ninth Circuit here and by the Seventh Circuit in *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010) (*Judge I*), the conflict is indirect but both genuine and substantial. The Ninth Circuit upheld the constitutionality of A.R.S. 16-222; and it did not order a special election. The Seventh Circuit struck down a similar Illinois law unconstitutional, and it ordered a special election. *Judge v. Quinn*, 624 F.3d 352, 355-56 (7th Cir. 2010) (*Judge III*). The Ninth Circuit upheld an election delay of 27 months and opined that anything short of six years might be valid. The Seventh Circuit found that loss of elected representation for even a few months was significant. *Judge I*, 612 F.3d at 556.

Nonetheless, this Court should grant this petition because the questions raised here can only be settled by this Court. Both the Ninth and Seventh Circuit clearly had difficulty interpreting this Court's fragmentary readings of the Seventeenth Amendment in two cases to date – a summary affirmance in *Valenti v. Rockefeller*, 292 F.Supp. 851 (W.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969) and a dictum in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 11 (1992). This Court should settle the questions presented here as to the allocation of executive and legislative roles in

determining how long a “temporary” appointment may be and how long the people may be denied elected representation in the Senate.

There are numerous responses that might be made to Respondents’ Brief in Opposition, but there is no need to repeat arguments already made in the Petition. Keeping in mind that a reply brief should be brief, the Petitioners wish to address just three points.

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## ARGUMENT

### **I. This Challenge To A.R.S. 16-222 Is Justiciable And Petitioners Have Standing To Challenge The Violation Of The Executive And Legislative Roles Even If The Governor Would Have Made The Same Decision.**

Respondents wish to assure the Court that as Governor, even if A.R.S. 16-222 had not eliminated his discretion, he would have set the same date, and the citizens therefore suffered no injury. They continue to argue that, unless there would be a different outcome, this challenge to A.R.S. 16-222 as a violation of the separation of powers is not justiciable. Respondents are wrong. This Court just rejected such an argument in *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183 (2020). In that case, the Court stated: “We have held that a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government’s course of conduct would have been different in a ‘counterfactual world’ in which the Government had acted with

constitutional authority. *Free Enterprise Fund*, 561 U.S. at 512, n. 12.” *Seila Law*, at 2196. This Court has also liberally granted standing to citizens who seek to enforce the proper allocation of power between the legislative and executive branches. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983).

**II. This Court Should Grant This Petition Because Of The Importance Of Determining The Proper Legislative And Executive Roles In Deciding When And How The People Can Fill A Senate Vacancy By Election.**

As set out in the Petition, this Court has frequently held that the constitutional structure, and the allocation of legislative and executive roles, protects the liberty of the people by dispersing power and avoiding the concentration of power in one branch. *See, e.g., Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down unconstitutional usurpation of executive power by Congress). On June 29, 2020, just after the filing of this Petition for Certiorari, this Court reaffirmed and further explained that principle in *Seila Law LLC v. Consumer Fin. Prot. Bureau*, *supra*. In that case, the Court struck down a statute that prohibited the President from removing the director of a consumer protection agency. The Court here reaffirmed the principle that legislative control of discretionary executive acts is incompatible with the structure of the Constitution. Even where the allocation of roles is not explicit in the text, the fundamental premise of the Constitution is the dispersal of power or avoiding the concentration of

power in a single individual or single branch. It is especially important to prevent usurpation of the executive role by the legislative branch. The Court said: “The Framers viewed the legislative power as a special threat to individual liberty. . . .” *Id.* at 2202. At the same time, the Court went on to say, the Framers sought to build up the authority of the executive. *Id.* at 2202. The reason, as explained in *Seila Law*, is that the executive is much more accountable to the people, and that “political accountability is enhanced by the solitary nature of the Executive Branch which provides ‘a single object for the jealousy and watchfulness of the people’ (quoting Federalist Number 70).” *Id.* at 2202.

That reasoning is directly applicable here – even more so where the Seventeenth Amendment gives the explicit authority to the executive to issue a writ and limits the authority of the legislature merely to “empower” the executive to make a “temporary” appointment. The Framers of the Seventeenth Amendment intended to carry over the same constitutional principle established by the original Framers, when they gave the primacy of the executive to set the date of election to fill vacancies in the U.S. House under Article I, section 4. The text of the Seventeenth Amendment entrusts the executive alone with the role of issuing the writ of election, and excludes the legislature from any role other than to “empower” the executive to make a “temporary” appointment for such limited period as the legislature may direct. There is a reason that the text of Section 2 was written as it was – and that is to assure that a “solitary” executive



accountable to the people is in charge of setting the date of the election and doing so with dispatch and without legislative interference on the particular occasion that the *vacancy arises*.

**III. The Proper Allocation Of Roles Between The Legislative And Executive Branches Is Crucial To Ensuring That The Loss Of Elected Representation Is Only Temporary And Not For A Period Of Two And A Half Years.**

Petitioners contend not just that A.R.S. 16-222 violates the allocation of executive and legislative roles set out in Section 2 but that a delay of two and a half years for an election is too long. The arguments are related.

The proper allocation of roles between the legislative and executive branches is crucial to the protection of the right to vote to fill a Senate vacancy by the executive at a time appropriate to the occasion and responsive to the wishes of the people. By making the executive responsible for setting the date *when* the vacancy arises, Section 2 helps ensure that a delay is no longer than necessary as the particular circumstances may require. No executive solely accountable for this decision to set the date is likely to incur the onus of postponing elected representation for over two years.

A delay that is not genuinely temporary as in this case is only likely or possible when that date is fixed by law and taken out of a single executive's control. A.R.S. 16-222 is designed to give the executive

the power to have a temporary appointment without accountability for a much longer period than the Framers of the Seventeenth Amendment could have expected when they drafted Section 2. Over the years, the consistent violation of Section 2 has led to a formal statutory tolerance of long and unreasonable delays when the proper allocation of executive and legislative roles was intended to prevent such a result. In this case, the perverse legislative sanction of an election delay of over two years would have been undone by the proper and strict application of Section 2 – a text that is faithful to the constitutional structure of the government and designed to restore elected representation in the Senate.

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## CONCLUSION

The meaning of Section 2 has not been, but should be, settled by this Court and the Petition for Certiorari should be granted.

Respectfully submitted,

THOMAS H. GEOGHEGAN

*Counsel of Record*

MICHAEL P. PERSON

DESPRES, SCHWARTZ AND GEOGHEGAN LTD.

77 West Washington St., Room 711

Chicago, Illinois 60602

Tel. (312) 372-2511

tgeoghegan@dsgchicago.com

mperson@dsgchicago.com

MICHAEL KIELSKY  
UDALL SHUMWAY  
1138 North Alma School Rd.,  
Suite 101  
Mesa, Arizona 85201  
Tel. (480) 461-5300  
MK@UdallShumway.com  
November 19, 2020  
*Counsel for Petitioners*