No. 19-16308

IN THE

United States Court of Appeals for the Ninth Circuit

WILLIAM PRICE TEDARDS, Jr., *ET AL.*,
Plaintiffs-Appellants,

v.

DOUG DUCEY, GOVERNOR OF ARIZONA, IN HIS OFFICIAL CAPACITY AND MARTHA MCSALLY, SENATOR OF ARIZONA, IN HER OFFICIAL CAPACITY
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF *AMICI CURIAE* PROFESSORS ERWIN CHEMERINSKY, HELEN HERSHKOFF, ALEXANDER KEYSSAR, LAWRENCE LESSIG, AND SANFORD LEVINSON IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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STATEMENT OF COMPLIANCE WITH RULE 29(a)

All parties have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a). No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than counsel for *amici curiae* contributed money to fund the preparation of this brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae, listed below, submit this brief as historians and legal scholars with a deep interest in voting rights, the electoral process, and constitutional law, and the development of constitutional doctrine that aligns with the history and purpose of ensuring that essential liberties guaranteed to the people are protected and enforced. This interest, particularly 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 to provide context to the Court in interpreting, clarifying, and applying the Seventeenth Amendment to the Constitution.

Erwin Chemerinsky, the Dean and Jesse H. Choper Distinguished Professor of Law, 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 law school), Duke University, and University of Southern California Law School.

Helen Hershkoff is the Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties and co-directs the Arthur Garfield Hays

[1] The *amici curiae* are distinguished professors; their titles and institutional affiliations are listed for identification purposes only.

Civil Liberties Program at New York University School of Law. She teaches and writes in the fields of federal jurisdiction, civil procedure, and constitutional law.

Alexander Keyssar, the Matthew W. Stirling Jr. Professor of History and Social Policy at the Harvard Kennedy School, is a scholar of voting rights and electoral institutions in the United States. He is the author of numerous articles and several books, including *The Right to Vote: The Contested History of Democracy in the United States*, and a forthcoming book entitled *Why Do We Still Have the Electoral College?*

Lawrence Lessig, the Roy L. Furman Professor of Law and Leadership at Harvard Law School, is a constitutional law and institutional ethics scholar, the former director of the Edmond J. Safra Center for Ethics at Harvard University, and the author of numerous publications, including *Fidelity & Constraint: How the Supreme Court Has Read the American Constitution* (2019), and *America, Compromised* (2018). Professor Lessig, a former law clerk to Justice Antonin Scalia on the United States Supreme Court and the Honorable Richard Posner on the U.S. Court of Appeals, Seventh Circuit, has also taught constitutional law at the University of Chicago Law School and Stanford Law School.

Sanford Levinson, the W. St. John Garwood and W. St. Garwood, Jr. Centennial Chair in Law at the University of Texas Law School and Professor of Government at the University of Texas, is a scholar of constitutional law and

government. He has written several books and authored numerous publications on the Constitution, including *Fault Lines in the Constitution: The Framers, Their Fights, and the Flaws that Affect Us Today* (co-authored 2017; revised 2019), and *An Argument Open to All: Reading The Federalist in the 21st Century* (2015), and has co-edited a leading casebook—*Processes of Constitutional Decisionmaking* (6th ed. 2015).

SUMMARY OF ARGUMENT

The Seventeenth Amendment to the Constitution provides the people with the right to directly elect their U.S. Senators—a power previously reserved for state legislatures.[2] Far from a parchment guarantee, the Amendment prescribes procedures to ensure the people fill Senate vacancies. These procedures can only be understood against the backdrop of the Amendment and its intended purpose.

The Seventeenth Amendment limits "the executive authority of each State" to only "make *temporary* appointments" to fill Senate vacancies.[3] The definition of "temporary" is critical to this case—and yet the issue of temporariness has arisen in the courts so infrequently that there is little analysis as to the term's meaning. Indeed, no court—including the Supreme Court—has directly ruled on the contours of temporariness as raised by this appeal.[4] But, to have any meaning

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[2] U.S. CONST. amend. XVII; U.S. CONST. art. I, § 3.

[3] U.S. CONST. amend. XVII (emphasis added).

[4] The Supreme Court summarily affirmed the result in *Valenti v. Rockefeller*, 292 F. Supp. 851, 855-56 (W.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969) (*per curiam*) (affirming the district court's determination that the Seventeenth Amendment did not require an election to be held in five months, at the next general election). The Supreme Court's summary affirmance did not examine the Seventeenth Amendment's text, history, or purpose. Courts are appropriately reluctant to give precedential weight to summary affirmances. *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); *see also Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 477 (1979) (the Supreme Court can "give full consideration" to this question despite the "previous summary action.").

at all, as the Seventh Circuit has observed, "temporary" does not—and cannot—mean "indefinitely."[5]

What are the limits of "temporariness"? It is widely accepted among Constitutional scholars, judges, and Supreme Court Justices of all stripes that the history and purpose of constitutional and statutory provisions inform their meaning.[6] Moreover, "an interpretation . . . that tends to implement the legislator's will helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose."[7] Here, too, the Seventeenth Amendment's history and purpose provide guidance on the scope of "temporary" executive appointments. By adopting a definition of "temporary" that follows from the Seventeenth Amendment's original meaning, the Amendment's democratic purpose may be fulfilled.

As explained below, the framers of the Seventeenth Amendment ("the Framers") could not have envisioned a delay of more than two years between a

[5] *See Judge v. Quinn*, 612 F.3d 537, 547 (7th Cir. 2010) (*Judge I*) (holding that there was a "mandatory obligation" for a state executive to issue a writ of election to ensure that a Senate vacancy is filled by election).

[6] *See, e.g., D.C. v. Heller*, 554 U.S. 570, 594 (2008) (interpreting the Second Amendment and citing Blackstone as "the preeminent authority on English law for the founding generation"); *id.* at 665 (Stevens, J., dissenting) (noting that Blackstone "[c]ounsel[s] that the fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time the law was made, by *signs* the most natural and probable") (internal quotation marks omitted).

[7] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution*. Lecture, Tanner Lectures on Human Values, Cambridge, MA at 59, Nov. 17-19, 2004.

Senate vacancy and an election for the senator's replacement as "temporary." Instead, the historical evidence shows that the Framers anticipated an election for the senator's replacement to occur a year—or two at the latest—from the vacancy.

THE HISTORY AND PURPOSE OF THE SEVENTEENTH AMENDMENT PROVIDE A FOUNDATION FOR ITS INTERPRETATION

We begin with a history of the Seventeenth Amendment, including its ratification and purpose. We first discuss the pro-democratic movement that gave rise to the Seventeenth Amendment—as reflected by consistent accounts within scholarship of the Amendment's animating force and evident purpose. We then examine the context within which it was adopted and the state practice subsequent to its ratification. This historical backdrop will better equip the Court to resolve unsettled issues of interpretation regarding the permissible amount of time before a Senate vacancy must be filled by election.

A. Historical Underpinnings of the Seventeenth Amendment: From the Framers to the Progressive Era

Prior to the Seventeenth Amendment, the Constitution originally left the power to select U.S. Senators and appoint temporary replacements to state legislatures and state executives, respectively, stating in relevant part:

> The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof*, for six Years; and each Senator shall have one Vote.
> . . . .
> [A]nd if Vacancies happen by Resignation, or otherwise during the Recess of the Legislature of any State, *the Executive thereof may make temporary*

> *Appointments* until the next Meeting of the Legislature, which shall then fill such Vacancies.[8]

The reasons for delegating this power to the States were twofold. *First*, 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.[9] 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."[10]

Mr. Sherman's statement, as well as the original Constitution, reflected a broader goal of creating equal representation of the states within the Senate—exemplified by the clause providing each state with two senators.[11] To that end, 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 Chamber.[12] As such, the Framers thought "[t]he [State] Executive might be safely trusted [to make temporary appointments] . . . for so short a time"

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[8] U.S. CONST. art. I, § 3, cl. 1 (emphasis added).
[9] 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*").
[10] *Id.* at 1353 (quoting James Madison, *Notes on the Debates in the Federal Convention of 1787* at 74 (Ohio U. 1966)).
[11] *See* THE FEDERALIST NO. 62 (James Madison) (Clinton Rossiter, ed. 1961).
[12] 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.

as until the next meeting of the state legislature.[13] As we discuss later, at the time of the framing of the Constitution (the "Framing"), state legislatures met once per year.[14]

Second, some of the Framers saw state legislatures as "filters of popular passion [that would] elect a better class of people to the Senate than would be produced by direct election."[15] This view was espoused by James Madison, who noted that selection of senators by state legislatures had the advantage of "favor[ing] a select appointment."[16]

However, in the years following the Constitution's ratification, an increasing perception that state legislatures were subject to bribery and corruption by special interests and party bosses in the selection of senators eroded this Madisonian concept—leading some of the citizenry to believe their interests were not being represented in the Senate.[17] In addition, political gridlock within state legislatures often resulted in extended vacancies, which directly deprived states of full

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[13] *Id.*
[14] *See infra* Section B.2.
[15] *Indirect Effects of Direct Election* at 1353.
[16] THE FEDERALIST NO. 62 (James Madison) (Clinton Rossiter ed. 1961).
[17] *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.

representation.[18] This thwarted the main purpose underlying the original Constitutional command, as discussed above.

It was against this backdrop that a movement was built—aimed at ensuring direct representation *of* the people via direct election of senators *by* the people. As early as 1826, a congressional proposal calling for a constitutional amendment providing for direct election of U.S. Senators was introduced—followed by six additional proposals between 1835 and 1855.[19] Action on these proposals largely was at a standstill until the late 19th century and early 20th century—when the Seventeenth Amendment, as it is currently known, was introduced.[20] Notable among the later proposals was one submitted by the House in 1892, which "mirrored in nearly all respects the final version of the Seventeenth Amendment."[21]

The force that moved the stagnating congressional proposals to tangible results came from the states and state legislatures that originally held the power to select senators. For example, as early as 1874, California and Iowa petitioned

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[18] *See The Meaning of the Seventeenth Amendment* at 1189; *see also Indirect Effects of Direct Election* at 1353.
[19] George H. Haynes, *The Election of Senators* at 101-02 (H. Holt & Co. 1906).
[20] *See The Meaning of the Seventeenth Amendment* at 1191 (noting that, out of 187 proposals to ratify the Seventeenth Amendment, none made it out of committee until 1888).
[21] *Id.* at 1195. The only difference was the presence of a comma before the phrase "as the legislature may direct." However, "no member of Congress"—including the author of the House Committee Report, Representative Tucker—"gave [the comma] a second thought." *Id.*

Congress for an Amendment authorizing direct election of senators.[22] During the latter part of the 19th century, the right to direct Senate elections was also a rallying call by leaders of the Progressive movement, which at its core was based on empowerment through greater democratization. The movement also garnered significant public support from individuals, citizens' associations, and state and national parties, creating an impetus for further state action.[23]

By 1905, 31 state legislatures had communicated their support for direct Senate elections to Congress.[24] 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.[25] States accomplished this through amending state constitutions,[26] passing laws, and "sidestepping legislative selection of senators" by holding advisory referenda

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[22] Richard Albert, *The Progressive Era of Constitutional Amendment,* 2 REVISTA DE INVESTIGACOES CONSTITUCIONAIS 35, 47 (2015) ("*The Progressive Era of Constitutional Amendment*").

[23] *See* Zachary M. Ista, *No Vacancy: Why Congress Can Regulate Senate Vacancy-Filling Elections Without Amending (or Offending) the Constitution*, 61 AM. U. L. REV. 327, 338 (2011) (citing C. H. Hoebeke, *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment* at 151-54 (1995)).

[24] *The Progressive Era of Constitutional Amendment* at 47.

[25] *Id.*

[26] This effort was spearheaded by Oregon, which passed a state constitutional amendment requiring the state legislature to elect the senator with the greatest popular electoral support. Nebraska and Nevada adopted the so-called Oregon Plan soon after by 1909. *Indirect Effects of Direct Election* at 1354.

wherein the electorate would express their preferred Senate candidate for the legislature's consideration.[27]

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."[28] 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."[29] Ultimately, the Seventeenth Amendment was passed by the House and Senate on May 13, 1912, and ratified by the states shortly after on April 8, 1913, based on this pro-democratic movement.[30]

B. Pre-enactment History and Contemporaneous Practice Inform the Meaning of "Temporary" Under the Seventeenth Amendment

As a plain reading dictates, and the Seventh Circuit has noted, the word "temporary" in the Seventeenth Amendment necessarily cannot mean

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[27] *The Progressive Era of Constitutional Amendment* at 48.
[28] *Id*.
[29] *The Meaning of the Seventeenth Amendment* at 1192; *see also Indirect Effects of Direct Election* at 1355 ("In reality, then, the Seventeenth Amendment was a formalizing final step in an evolutionary process.")
[30] *See The Progressive Era of Constitutional Amendment* at 44. Connecticut was the 36th state to ratify the Seventeenth Amendment on April 8, 1913, officially giving the Amendment the required ratification by three-fourths of the states. U.S. Congressional Research Service, *Filling U.S. Senate Vacancies: Perspectives and Contemporary Developments* at 8 (R40421: July 16, 2013), by Thomas Neale, https://fas.org/sgp/crs/misc/R40421.pdf (last accessed Aug. 13, 2019) ("*Filling U.S. Senate Vacancies*").

"indefinitely."[31] But, to give the term more meaning, it is necessary to look more broadly. The above pre-enactment history of the Seventeenth Amendment shows that "temporariness" must be interpreted consistent with the pro-democratic purpose that led to the Amendment's enactment. Next, we look to (i) the Amendment's constitutional history to determine "the scope [it was] understood to have when the people adopted [it]"[32] and (ii) subsequent traditions—*i.e.*, "post-ratification history" or practice[33]—as evidence of how the public understood the Amendment's concept of temporariness.

The Supreme Court in *D.C. v. Heller* emphasized that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them."[34] The Court further noted that "an examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation."[35]

Indeed, while there is disagreement about the relative weight of each, courts and scholars have long looked to history and subsequent traditions to determine

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[31] *See Judge I*, 612 F.3d 537, 547.
[32] *Heller*, 554 U.S. at 605 (noting that the persuasive force of legislative history comes from the fact that "the legislators who heard or read those statements presumably voted with that understanding").
[33] *Heller v. D.C.*, 670 F.3d 1244, 1272 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).
[34] *Heller*, 554 U.S. at 634-35.
[35] *Id.* at 605.

constitutional meaning.[36] The Seventh Circuit, for example, used constitutional history when giving its in-depth interpretation of the Seventeenth Amendment, though not having occasion to discuss the meaning of "temporary"—as the *amici curiae* provide here with this brief.[37] Further, looking to subsequent traditions finds express support from at least one Framer of the Constitution. In 1830, James Madison remarked some 40 years after the Constitution's ratification that "the early, deliberate and continued practice under the Constitution" is relevant to discerning the meaning of constitutional provisions.[38]

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[36] *See, e.g.*, R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 123 (1994); Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161, 169-70, 182 (1996) (noting Justice Breyer's openness to using legislative history as compared to Justice Scalia's tendency toward its exclusion).

[37] *Judge I*, 612 F.3d at 548 ("[W]e do not have before us any properly presented question about how long a temporary appointment may last under the Seventeenth Amendment, nor the closely related question [of] how much time may elapse between the start of a vacancy and an election to fill it.").

[38] R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. at 141 (quoting from a letter by James Madison). Courts have since resolved constitutional issues using the view espoused by Madison in a variety of contexts. *See, e.g., Okanogan, Methow, San Poelis, Nespelem, Colville, &Lake Indian Tribes v. United States*, 279 U.S. 655, 684 (1929) ("Long settled and established practice . . . is a consideration of great weight in a proper interpretation of constitutional provisions" regarding the interplay between the executive and legislative branches.); *Chaplinksy v. New Hampshire*, 315 U.S. 568, 572 (1942) (looking to post-enactment history to determine which speech practices have been consistently excluded from the First Amendment).

1. The Constitutional History Shows that Temporary Appointments Were Intended as a Short Bridge, Not a Bar, to Direct Elections

The Seventeenth Amendment reads, in relevant part:

> 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.[39]

While the Amendment was being debated, there was broad support the for direct election of senators.[40] This widespread support was cemented in the Amendment's command that the senators of a state shall be "elected by the people thereof." As Senator William Borah, drafter of the Senate Report for the Seventeenth Amendment, elegantly stated:

> 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

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[39] The Seventh Circuit held that the phrase "as the legislature may direct" tracks, and "was not intended to change the Elections Clause of the original Constitution," which gives state legislatures the power to "prescribe the procedural mechanisms for holding congressional elections." *Judge I*, 612 F.3d at 553 (internal quotation marks and citation omitted); U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places, and Manner of holding elections . . . shall be prescribed in each State by the Legislature thereof . . . ."). While state legislatures may regulate the time, place, and manner of elections, the timing of such elections must still be made within constitutional bounds.

[40] *The Meaning of the Seventeenth Amendment* at 1192.

> 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.[41]

However, "[w]hat is perhaps most remarkable about deliberations over the 17th Amendment in both chambers is how little was said of the vacancies clause"—or the second paragraph of the Seventeenth Amendment.[42] As such, the "little [that] was said" provides one of the few sources for interpreting the intended period between a Senate vacancy and the people's opportunity to elect the senator's replacement. The pre-enactment history combined with the provision's use of the word "temporary" ("*temporary* appointments"), show that temporary appointments are best understood as a *bridge*, and not a *bar*, to elected representation in the Senate—limited only by a reasonable period of time to establish an election through which the people may fill a vacancy.

While explaining his proposed Amendment, Senator Bristow remarked that in requiring state executives to issue writs of election to fill Senate vacancies he was using "exactly the language used in providing for the filling of vacancies which occur in the House of Representatives."[43] Elaborating on this point, Senator Bristow added that "I use exactly the same language in directing the governor to call *special elections* for the election of senators to fill vacancies that is used in the

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[41] 46 Cong. Rec. 1107 (Jan. 19, 1911) (remarks of Sen. Borah).
[42] *Filling U.S. Senate Vacancies* at 8.
[43] 47 Cong. Rec. 1482 (1911) (remarks of Sen. Bristow); U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.").

Constitution in directing him to issue writs of elections to fill vacancies in the House of Representatives."[44]

For the following reasons, we read Senator Bristow's invocation of the House vacancy provision to emphasize the pervading democratic purpose of the Seventeenth Amendment and a policy interest in minimizing lapses in elected representation *as a whole*—notwithstanding the fact that a Senate term is for six years as compared to two years for the House of Representatives.[45]

First, Senator Bristow's reference to the House of Representatives necessarily invokes its inherently democratic nature, and thus reinforces the pro-democratic impetus behind the Amendment to reflect a similar nature in the Senate. As articulated in the Federalist Papers:

> As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people. *Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured*.[46]

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[44] 47 Cong. Rec. 1483 (1911) (remarks of Sen. Bristow) (emphasis added).

[45] Senator Bristow's remarks could conceivably be read to show that ratifying legislators would allow *any* timing for a Senate vacancy-filling election, as long as a writ of election is issued for such election. However, we find no evidence in the history to support the notion that more than a full congressional term without elected representation depends on the chamber of Congress. *See also* Plaintiffs-Appellants' Opening Br. At 8 (Aug. 28, 2019) ("[The drafters of the Seventeenth Amendment] expected a Senate vacancy to be filled in the same way as a vacancy in the U.S. House . . . .").

[46] THE FEDERALIST NO. 52 (Clinton Rossiter ed. 1961) (Alexander Hamilton or James Madison) (emphasis added).

An extended lapse of elected representation, then, would undermine the "frequent elections" contemplated by the Framers as a means to ensuring the essential liberty the Constitution sought to protect. Indeed, Senator Bristow's commentary evinces that a prime purpose of the vacancies clause was to ensure continued elected representation in the Senate with little interruption, by requiring that writs of election be issued each time a vacancy arises to ensure that such "frequent elections" occur.

We note that essential liberty cannot be ensured solely by issuing a writ of election. That state executives are mandated to issue a writ of election under the Seventeenth Amendment is not a novel finding—indeed, it formed the central issue of the *Judge v. Quinn* trilogy resolved by the Seventh Circuit regarding the appointment of the Honorable Roland Burris to serve the balance of President-elect Obama's Senate term.[47] However, because a writ of election only guarantees that an election will occur, we emphasize that the *holding* of a Senate vacancy-filling election serves its pro-democratic purpose only inasmuch as its *timing* aligns with that purpose.

Second, to that end, Senator Bristow also understood that "*special* elections" would be held to replace Senate vacancies in the same way they were presumably

[47] *See Judge I*, 612 F.3d 537 (7th Cir. 2010).

required for vacancies in the House (and notwithstanding the absence of the words "special election" from Article I, Section 2 or the Seventeenth Amendment to the Constitution). Without addressing whether special elections to fill a Senate vacancy must occur on a separate date from the biennial general election, we observe that Senator Bristow and the ratifiers of the Seventeenth Amendment envisioned a particular urgency in filling such vacancies. Thus, any understanding that senators may be appointed by the state executive and remain in power indefinitely throughout a Senate term without a popular election is fundamentally inconsistent with the expedited timeline implied by invoking special elections.

Finally, in light of the above, we conclude that the explicit reference to the House provision suggests a further detail about the timing of elections following a Senate vacancy: that more than a full congressional term—*i.e.*, two years—should not pass between a vacancy in *either* chamber and the election filling such vacancy.

Amici curiae recognize that there may be additional logistical concerns inherent in organizing a *statewide* election and that such concerns may require a longer period between a Senate vacancy and the election to fill the vacancy, as compared to *district*-wide elections for the House of Representatives. However, even after allowing states some degree of flexibility in setting an election date, no logistical concern appears great enough to override the democratic purpose of the

Seventeenth Amendment for years—as is currently permitted by the Arizona statute. Indeed, with regard to House vacancies, courts and states, including Arizona, recognize that such elections can and should occur within a *far shorter* period, often within several *months*[48]—with at least one court finding that special elections for House vacancies must occur "as soon as possible."[49]

Thus, the idea that the Seventeenth Amendment would allow not one, but *two*, general elections to occur before an elected replacement fills a vacancy runs contrary to the Amendment's democratic purpose as well as the principles and practices undergirding the House vacancy provision upon which it is based. A century of state practice in holding Senate vacancy-filling elections supports our interpretation.

2. Post-Ratification State Practice Informs the Meaning of "Temporariness"

In a 2013 article, authors Zachary Clopton and Steven Art[50] surveyed the

[48] *See, e.g.*, Ariz. Rev. Stat. Ann. § 16-222(B) (requiring a special election for House vacancies, if a general election does not occur within six months). *See also Jackson v. Ogilvie*, 426 F.2d 1333, 1335 (7th Cir. 1970) (finding that an Illinois Governor was required to call a special election for a four-month House vacancy); *ACLU v. Taft*, 385 F.3d 641, 649 (6th Cir. 2004) (finding that an Ohio Governor was required to call a special election for a six-month House vacancy).

[49] *Rossito-Canty v. Cuomo*, 86 F. Supp. 3d 175, 198 (E.D.N.Y. 2015).

[50] Messrs. Clopton and Art, authors of *Meaning of the Seventeenth Amendment*, *supra*, both served as law clerks to the Honorable Judge Diane P. Wood, who served on the Seventh Circuit panel that decided the *Judge v. Quinn* trilogy and

100 years of state practice following the Seventeenth Amendment's ratification, examining the amount of time between a Senate vacancy and when the subsequent election for the senator's replacement was held.[51] They found that out of 170 vacancies where elections were held, the average time without elected representation was only *11 months*.[52] Only slightly more than one-third of Senate vacancies were filled by election in a period exceeding one year.[53]

Perhaps most striking, Clopton and Art found that out of the same 170 vacancies, only *four* occurred with a lapse in elected representation exceeding two years.[54] As Clopton and Art pointedly observe: "one need not consult dictionaries or historical sources to establish that temporary appointments are not permanent."[55] A century of consistent state practice demonstrating when Senate vacancy-filling elections were held strongly evidences the public understanding of the Seventeenth Amendment since its enactment.[56] An election occurring 27 months after a Senate

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authored the opinions for *Judge I* and *Judge III* (*Judge II* was issued *per curiam*). *See Meaning of the Seventeenth Amendment* at 1181.

[51] *See The Meaning of the Seventeenth Amendment* at 1220-23 (analyzing the historical timing between a Senate vacancy and the election for a replacement, not the duration that a state statute authorized). Historical conformity with the practices described may explain the lack of challenges to other potentially objectionable statutes.

[52] *Id*. at 1220-21.

[53] *Id*. at 1221.

[54] *Id*.

[55] *The Meaning of the Seventeenth Amendment* at 1210.

[56] *Cf. NLRB v. Noel Canning*, 573 U.S. 513, 533 (2014) ("[T]hree-quarters of a century of settled practice is long enough to entitle a practice to great weight in a

vacancy, as is contemplated in this case, or potentially longer, is incongruous with when states have typically held elections to fill such vacancies. Clopton and Art's findings and the pre-enactment history of the Seventeenth Amendment further indicate that temporary appointments ought not to last longer than the time states have typically taken to hold a Senate vacancy-filling election.

3. The Seventeenth Amendment Contemplates "Temporary" Appointments, as Were Permitted in the Unamended Constitution, and Comports with Vacancies that Would Last, at Most, One to Two Years

The post-enactment state practice of holding elections reflects what Senator Bristow envisioned for how the Seventeenth Amendment would operate—as memorialized in his remarks to the Senate—and conforms with Senator Bristow's understanding of how Senate vacancies were filled based on traditions prior to the enactment of the Seventeenth Amendment.

Senator Bristow 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."[57] Adding that, under the original constitutional provision "[t]he governor of the State may appoint a Senator until the legislature elects."[58] Viewing Senator Bristow's

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proper interpretation of the constitutional provision.") (internal quotation marks and citation omitted).

[57] 47 Cong. Rec. 1483 (1911) (remarks of Sen. Bristow).

[58] *Id.*

statements with an eye toward the context and post-ratification history of the original Senate vacancy-filling provision, we find further evidence that neither legislators nor the public contemplated temporary appointments of the duration considered here, much less the potentially longer appointments the district court's decision would permit.[59]

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.[60] 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.[61] At the time of the Framers, state legislatures were understood to meet annually—evidenced, in part, by many state constitutions requiring annual meetings of the legislature.[62] As such, vacancies in the Senate at the time of the Framing could only rarely exceed one year. State legislatures controlled the duration of their recess, and as a result, the only delay between a Senate vacancy

[59] *See Tedards v. Ducey*, No. 2:18-cv-04241-DJH, 2019 WL 2646627, at *10 (D. Ariz. June 27, 2019) ("While this period ["over two years"] may not be a short period of time, nothing in the Seventeenth Amendment limits the period of time an appointed senator can be in office.").
[60] U.S. CONST. art. I, § 3, cl. 2; *see also Meaning of the Seventeenth Amendment* at 1210-11.
[61] *Meaning of the Seventeenth Amendment* at 1211.
[62] *Id*. *See also id*. n.119.

and the state legislature's ability to appoint a replacement was when the legislature decided to call itself into session.[63] It would make sense, then, that the Framers would trust the state executive to make temporary appointments "for so short a time."[64]

However, it is also worth noting that at the time the Seventeenth Amendment was adopted, most state legislatures convened every *two* years. By 1906, only six state legislatures met annually.[65] Senator Bristow's invocation of Article I, Section 3, is therefore somewhat ambiguous with regard to the 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 prior to the Amendment's adoption. Notwithstanding, we conclude that an appointment extending 27 months after a vacancy cannot be justified by the demonstrated intent of the drafters nor by any historical traditions regarding the frequency with which state legislatures met. The drafters' intent and pre-enactment traditions instead comport with the timeframes that states have historically held Senate vacancy-filling elections after the Seventeenth Amendment.

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[63] *See id.* at 1211 ("[A]ppointments before the Seventeenth Amendment could not have lasted longer than the time needed for a state legislature to convene and complete a legislative session.").

[64] 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.

[65] *Meaning of the Seventeenth Amendment* at 1212 n.122.

It would be paradoxical for an Amendment rooted in a history of democratization and the empowerment of the electorate to allow temporary appointees to serve for *longer* periods of time than under the provision the Amendment sought to change—thereby allowing for *longer* periods without elected representation. Whereas the original Senate vacancy-filling provision sought to "prevent inconvenient chasms in the Senate,"[66] an interpretation of its replacement allowing for 27 months (or potentially much longer) without elected representation presents an equally "inconvenient chasm[ ]" in the people's right to choose their senators. Allowing state legislatures to create a greater delay for the people's right to select a replacement in the U.S. Senate than the legislatures previously allowed is inconsistent with the pro-democratic history and purpose of the Seventeenth Amendment.

At the time of the Framers, temporary appointments were meant to bridge the gap between a Senate vacancy and "so short a time" as the next meeting of the state legislature, where it had a constitutional duty to select a replacement. Today, such appointments should similarly bridge the gap between a Senate vacancy and a reasonably short time until the people can exercise their right to elect their desired replacement. The interpretation advanced by Defendants-Appellees in the district court undermines elected representation by depriving the people of their

[66] 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.

constitutional right and belies the history, purpose, and traditions of the Seventeenth Amendment.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court vacate the district court's decision and remand with instructions for further proceedings.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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