No. 19-16308

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM PRICE TEDARDS, JR.; MONICA WNUK;
BARRY HESS; LAWRENCE LILIEN; AND ROSS TRUMBLE,

Plaintiffs-Appellants,

v.

DOUG DUCEY, GOVERNOR OF ARIZONA, IN HIS OFFICIAL CAPACITY, AND
MARTHA MCSALLY, SENATOR OF ARIZONA, IN HER OFFICIAL CAPACITY,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona
No. 18-cv-4241
Hon. Diane J. Humetewa

APPELLANTS' REPLY BRIEF

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To restate the case: by text, legislative purpose, and the prior history under Article I, Section 3, the Seventeenth Amendment bars a law like A.R.S.§16-222 from using a temporary, partisan appointee not as a bridge to, but a substitute for, directly elected representation. While Defendants claim to rely on the text, they argue that "empower" really means "mandate," "temporary" means only "not permanent," and would have this Court use a *proviso* to cancel out a principal clause.

For convenience, plaintiffs set out again the vacancy filling provision of the Seventeenth Amendment, which consists of a single sentence:

> 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.

The text as quoted here is plain enough: the *principal clause* says that the executive shall issue the writs of election to fill any vacancy. The *proviso* says that the legislature can "empower" the executive to decide whether to use a temporary appointee until the people can fill the vacancy by orderly election. *See also Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986)(discussing limitations on "Times, Places and Manner" clause).

Plaintiffs invoke four principles of interpretation in support of their comprehensive reading of the Seventeenth Amendment.

- *First*, the interpretation must be a "holistic endeavor" that gives due meaning to both the principal clause and the *proviso*. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd.* 5484 U.S. 365, 371 (1988)(statutory interpretation); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)("the meaning of statutory language, plain or not, depends on context.").

- *Second*, the text must be construed *in pari materia, i.e.*, consistent with interpretations of the same language in other laws in what is known as the "Related Statutes Canon." Antonin Scalia & Bryan Garner, Reading the Law: The Interpretation of Legal Texts, (2012), §39 at 252.

- *Third*, "Provisos or exceptions are strictly construed...[.]" *United States v. Atchison, T. & S. F. R. Co.*, 220 U.S. 37, 42 (1911).

- *Fourth*, laws should be interpreted in light of the "public understanding of a legal text in the period after its enactment or ratification...[.]" *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

And on that score, it is implausible to suggest that the public understanding of the temporary appointment clause in the Seventeenth Amendment—the animating purpose of which was to require direct election of United States Senators and to take away the appointive power of state legislatures—would allow a partisan political appointee to serve unchallenged for 27 months, or *even longer* on Defendants' interpretation of "temporary."

Such delay is not only anathema to the Seventeenth Amendment, but is just the sort of manipulation of federal representation that is barred to Arizona as an unlawful interposition of itself between the people of the United States and their National Government, and in contravention of our republican form of government. *Cook v. Gralike*, 531 U.S. 510, 527 (2001)(Kennedy, J. *concurring*); U.S. Const. Art. IV, Section 4; *In re Duncan*, 139 U.S. 449, 461 (1891) distinguishing feature" of republican government "is the right of the people to choose their own officers for governmental administration.").

I. Accepted principles of interpretation, when applied to the Seventeenth Amendment, favor a finding that Arizona law is unconstitutional when it substitutes a "temporary" partisan appointee for directly elected representation in the United States Senate for longer than necessary to hold an orderly election.

To recap Plaintiffs' interpretive efforts set forth in their opening brief: The primary clause of the Seventeenth Amendment is the "exact same" as the clause providing for the filling of House vacancies in Art. I, Sec. 2, cl. 4, which has been interpreted to require an election as soon as practicable, and the *proviso* can only complement but not over-ride that process. *ACLU v. Taft*, 385 F.3d 641 (6th Cir. 2004); *Jackson v. Ogilvie* 426 F.2d 1333 (7th Cir. 1970).

Defendants' brief is bereft of analysis of this primary clause, and while they characterize the statements of Senator Bristow as "extratextual," an eyeball comparison of the primary clause reveals it to in fact be the same as that used in

the corresponding House provision. And here, Plaintiffs invoke their second principal of interpretation that text should be construed consistently across analogous statutes. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation Of Legal Texts (2012), § 39 at 252. Therefore, Plaintiffs' citation to *ACLU v. Taft* and *Jackson v. Ogilivie* remains compelling if not conclusive authority as to the meaning of the principal or primary clause of Section 2 of the Seventeenth Amendment.

In referring to the principal clause, Defendants protest that it has no "time line." But that is true of Article I, Section 2 as well. And that is why Plaintiffs look to the leading precedent interpreting Art. I, Section 2, *i.e.*, *ACLU v. Taft* and *Jackson v. Ogilvie.* Significantly, Defendants do not challenge the reasoning of those cases, or argue that their interpretations of Article I, Section 2 (*i.e.*, the same language as in the Seventeenth Amendment) were wrong.

Against that precedential interpretation and to bolster their argument that the *proviso* wins them the case, Defendants engage in a structural analysis and point out that "The 'same language' appears in only the first part of the Amendment." Def. Br. at 16. Against that, Plaintiffs invoke their first and third principles of interpretation.

As the Seventh Circuit noted in the very passage cited by Defendants, the vacancy filling provision at issue in this suit is the *second* paragraph of the

Seventeenth Amendment. The first paragraph sets forth the animating purpose of the Amendment—securing direct election. *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010)("In interpreting this text, we have taken care not to lose sight of the fact that the provisions for filling vacancies immediately follow the amendment's central command that henceforth the two senators from each state must be chosen by popular election."). As such, this Court should engage in a "holistic" interpretation of the Amendment, in light of all its terms and its "central command" of making the people the electors of the Senate. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd.* 484 U.S. 365, 371 (1988). Where the point of the Seventeenth Amendment is direct elections, *and* the primary clause of the vacancy provision requires a vacancy be filled by election, any interpretation of the *proviso* that allows the prolonged representation of the People by a partisan appointee would produce an outcome that is incompatible with the rest of the Amendment and should be rejected.

This position is strengthened by the fact that the text to be interpreted is a *proviso*, as in Plaintiffs' fourth interpretive principle. From the Supreme Court down, courts are uniform in limiting the application of a *proviso*. *See, e.g.*, *United States v. Atchison, T. & S. F. R. Co.*, 220 U.S. 37, 42 (1911); *United States v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998). The provenance of that rule dates at least to Justice Story, as noted in an 1875 Supreme Court opinion:

> In *United States* v. *Dixon*, Mr. Justice Story stated, that it was "the general rule of law, which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof."

Leavenworth v. United States, 92 U.S. 733, 758 (1875)(dissent of three Justices).

Still, Defendants are correct in citing to *Burlington N. & Santa Fe Railway Co. v. White* for the proposition that the *proviso* must add *something* to the mix, *i.e.*, it should not be interpreted as mere surplussage. And Plaintiffs agree the *proviso* does add something.

As the *amici* Professors put it, the *proviso* adds a "bridge" (but not a "bar") to continued elected representation and avoids a lapse in representation. *Amicus* brief of Prof. Chemerinsky, *et al.*, at 11-16. And that is just what happens when the *proviso* is limited to "carve[] special exceptions" out of the general requirement that Senators be directly elected as set out in the primary clause—an appointee serves until an orderly election may be held. That is what is required for the exception in the *proviso* to be "within the words as well as the reason thereof" of the Seventeenth Amendment.

As argued in Plaintiffs' opening brief, the *proviso* can be best understood as continuing the practice under Art. I, Sec. 3, of allowing for temporary recess appointments. That is, the *proviso* is best interpreted as itself a "bridge" between the old language in Art. I, Sec. 3 (allowing for recess appointments), and the new language borrowed from Art. I, Sec. 2, cl. 4 (filling vacancy by election).

This is bolstered by Plaintiffs' fourth interpretive principle—that laws should be interpreted in light of the "public understanding" of the "legal text in the period after its enactment." *Heller*, 554 U.S. at 605. At the time of the passage of the Seventeenth Amendment, temporary appointees to the Senate were limited to a recess appointment. As such, they were of limited duration and likely no longer than one year, at the outer limits.

Continuing with that principle, Defendants' attempts to pinpoint the meaning of "temporary" by reference to contemporary dictionaries – but in isolation from the Amendment as a whole – also fail. In *Heller*, the Supreme Court highlighted the role that the public's understanding of the text has a key role to play in its interpretation. And on that score, it is implausible to suggest that the public understanding of the temporary appointment clause in the Seventeenth Amendment – the animating purpose of which was to require direct election of United States Senators – would allow a partisan political appointee to serve unchallenged for 27 months. *See also Arizona v. Inter Tribal Council of Ariz., Inc.*,

570 U.S. 1, 10-11 (2013)(interpreting "accept and use" to preclude the addition of other conditions upon the acceptance). Thus, Defendants operate under a misconception when they decry the contemporaneous interpretive statements as "infelicitous scrap[s] of legislative history." Def. Brief at 15. Those statements reflect the "public understanding" of the Seventeenth Amendment and act to bar conditions such as a 27-month delay on the filling of the "temporary" vacancy by election.

As to what "temporary" means, that depends on the context. For example, in the context of a *Terry* stop, a person may be detained on a "temporary" basis. *Florida v. Royer*, 460 U.S. 491, 498-99 (1983). No one would argue that "temporary" in this context means "less than permanent" as argued by Defendants' invocation of assorted dictionaries. *See United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637 (1983)(90 minute seizure of luggage found to be too long).[1] A "temporary" restraining order may last only fourteen days. Fed. R. Civ. P. 65. And in *Wisconsin v. Illinois*, 278 U.S. 367, 417-18 (1929), the Court discussed how a "temporary" and "conditional" permit allowing a greater draw of water from Lake

[1] As *Place* demonstrates, courts are more than competent to determine how long is "too long" in any number of legal settings. *See also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002)(discussing how long is "too long" to infer causation from timing alone in Title VII retaliation suits); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1044 (9th Cir. 2006) (discussing when advance notice of public gatherings are "too long" under the First Amendment).

Michigan was premised on addressing an exigent circumstance. That is, "temporary" means until the exigency can be dealt with. But even in the case of an exigency, the state may be required to show that the underlying right (in this case, to directly elect a United States Senator) could not be accommodated more quickly. *See United States v. Good*, 780 F.2d 773, 775 (9th Cir. 1986)(Where child is taken into custody on fear of abuse, "Exigent circumstances alone, however, are insufficient as the government must also show that a warrant could not have been obtained in time.").

Here, the "exigency" is a vacant Senate seat and corresponding loss of representation. The time in which the exigency can be resolved is not more than 190 days under Arizona law, and may in fact be less.

As to how long a delay is too long and cannot reasonably be considered "temporary," the Supreme Court noted in *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 224 (1964), that under the First Amendment, "A delay of even a day or two may be of crucial importance in some instances." *See also Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012)(holding same in context of political speech in advance of elections). And if the suppression of speech for "a day or two" *in advance of elections* is actionable as in *Bullock*, it would be odd to hold that *a protracted delay of the election itself* is not a redressable injury and without remedy.

What is clear is that any interpretation of the word "temporary" must account for the setting. What is equally clear from the history, language, and motivating purpose of the Seventeenth Amendment is that in the "setting" of vacancies in the United States Senate, "temporary" means until an orderly election may be held. And just as a ninety-minute *Terry* stop is too long, it is also "too long" to wait 27 months to fill a vacancy by election, as required in this instance by Arizona law. *See, Freeman v. Quicken Loans, Inc* 566 U.S. 624, 632 (2012)(noting that when an interpretation would undermine the purpose of a statute by disadvantaging the class for whom the statute was enacted, it "provides strong indication that something in [that] interpretation is amiss.").

The Defendants do not and cannot deny that the primary clause of Section 2 of the Seventeenth Amendment requires an election as soon as practicable, and this Court should follow accepted principles of interpretation and read the *proviso* in a manner that does not undermine that primary clause.

II. Principled interpretation likewise precludes the Defendants' interpretation of the word "empower" as allowing the legislature to require certain acts of the Executive.

To empower is to grant authority, including as a "transfer of power" as Defendants argue. But "empower" does not mean "require." Period. Nonetheless, Defendants make a valiant effort to reach that goal.

They begin by a sleight of hand in invoking the legislature's right to "direct" vacancy elections. But – as Plaintiffs raised without rebuttal in their opening brief – the Seventh Circuit interpreted the "as the legislature may direct" clause to modify only the election, and not the "temporary" appointment. *Judge I* at 550.

Defendants next try to question the leading Qualifications Clause precedent on the basis that an appointment, not an election, is at issue. But Plaintiffs' claim that Arizona law is inconsistent with the comparative duties and powers assigned to the legislature and executive by the Seventeenth Amendment do not turn on the Qualifications Clause.[2] And at any rate, the Seventeenth Amendment is to be read consistent with the Elections Clause.

As to the remaining arguments, Plaintiffs recognize and agree that the decision to "empower" the executive to make an appointment is discretionary. But that is the limit what the phase "*may* empower" adds to the analysis. Of course, the legislature could refuse to allow a temporary appointment.

And as for *Jones v. Madison Cty. Commissioners*, that case interprets the phrase "authorized and empowered"—a phrase absent from the Seventeenth Amendment.[3] And even were this Court to apply *Jones* to this case, the subject of

[2] That clause and the key precedent interpreting it is dispositive for the partisan requirement challenge, and in Plaintiffs' favor.

[3] *Jones* is further suspect as useful precedent. It arose out of a financial crisis and was a state supreme court dealing with a question as to restoring financial order to a county, including through the issuance of much-needed bonds. It also openly

the supposedly "mandatory" duty inferred from the phrase "may empower" is not the executive—*it is the legislature itself*, with the outcome being that the legislature *must* empower the executive to make a temporary appointment. There is no interpretive route from the language of the Seventeenth Amendment to save Arizona's law by which the legislature can *require* the Governor to make a (partisan) appointment.

III. Neither *Valenti* nor *Rodriguez* is controlling precedent in applying the Seventeenth Amendment to the claims in this case.

In their opening brief, Plaintiffs discussed the limited nature of the summary affirmance in *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y 1968) *aff'd* 393 U.S. 405 (1969).[4] The claim was in *Valenti* was for the Senate vacancy to be filled during the general election in November 1968. The majority of the three judge panel, over a strong dissent, adopted a broader rationale; but no district court decision is binding on this Court, and in reviewing that case, the Supreme Court upheld an outcome, not any opinion or any reasoning. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984).

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flouts standard rules of construction by failing to give any significance to the choice to in one place use the phrase "authorize and empower," but in another use "authorize, empower, and direct." *Jones v. Madison Cty. Commrs*, 50 S.E. 291 (N.C. 1905).

[4] The Court can note that *Valenti* was decided by a three judge panel pursuant to 28 U.S.C. § 2284, and as such the Plaintiffs had an appeal by right to the Supreme Court. 28 U.S.C. § 1253. *Valenti v. Rockefeller*, 292 F. Supp. 851, 854 (S.D.N.Y. 1968). As such, the Court could not issue a "*cert denied*." Plaintiffs maintain that in the instance of an appeal by right, a summary affirmance is akin to a *cert denied* and should be afforded the same precedential value.

As to *Rodriguez*, the Seventeenth Amendment has no application to a commonwealth like Puerto Rico. Puerto Ricans have no rights under the Seventeenth Amendment as Puerto Rico has no United States Senators, or for that matter, any Representatives or electors for President. *See, e.g.*, *Igartua-de la Rosa v. United States*, 417 F.3d 145, 147-48 (1st Cir. 2005). Therefore, *Rodriguez* can have nothing to say as to the meaning of the Seventeenth Amendment, and any comments as to *Valenti* and the Seventeenth Amendment must be considered *dictum*, and non-precedential. Black's Law Dictionary defines dictum as: "A judicial comment while delivering a judicial opinion, but one that is unnecessary to the decision in the case and not precedential." *Black's Law Dictionary* 1102 (8th ed. 2004); *see also NLRB v. Int'l Bhd. of Workers, Local 340*, 481 U.S. 573, 591 n. 15 (1987)(describing *dictum* as remarks that are "unnecessary to the disposition" of the case.). Discussion of a law that cannot by its very nature apply must by any measure be treated as dictum.

In short, and as argued in Plaintiffs' opening brief, neither *Valenti* nor *Rodriguez* stand as a bar to this Court interpreting the Seventeenth Amendment as Plaintiffs seek. This is true not just from a perspective of the limited precedential value of those cases, but also in light of the material development of new precedent in the areas of the Seventeenth Amendment (*Judge v. Quinn*) and also the

Elections and Qualifications Clauses (*Cook v. Gralike* and *U.S. Term Limits, Inc., v. Thornton*).

IV. Under *Burdick*, a two-year delay of an election is a severe or significant impact on the right to vote, and it is unclear how the offered justifications relate to any state interest or are even the true purpose.

As set forth above, A.R.S. 16-222 is in conflict with the Seventeenth Amendment itself, and this Court need not engage in a *Burdick* analysis. But Arizona law would also be unlawful under the sliding scale review in *Burdick v. Takushi*, 504 U.S. 428 (1995).

In analyzing the case under the *Burdick* standard, the Court must note that this case comes on a appeal not from summary judgment or trial, but from a motion to dismiss. This Court in *Soltysik* was keenly aware of the importance of that fact, and on that basis distinguished many of the same cases the Defendants raise in their brief, *e.g., Munro, Arizona Libertarian Party*, and *Dudum*. *Soltysik v. Padilla*, 910 F.3d 438, 449 (9th Cir. 2018).

The Defendants rely on those cases without ever really answering the challenge posed by *Soltysik*, in which this Court offered the most complete discussion of the State's obligation to provide real reasons, and to even "develop evidence" supporting the means-end fit analysis of *Burdick* to date:

> If the *Anderson/Burdick* framework is to remain a sliding-scale, "means-end fit analysis," that from time to time "require[s] an assessment of whether alternative

> methods would advance the proffered governmental interests," then a state must sometimes be required to offer evidence that its regulation of the political process is a reasonable means of achieving the state's desired ends.
>
> Permitting a state to justify *any* non-severe voting regulation with a merely "speculative concern of voter confusion," would convert *Anderson/Burdick*'s means-end fit framework into ordinary rational-basis review wherever the burden a challenged regulation imposes is less than severe. We have already rejected such an approach.

Soltysik v. Padilla, 910 F.3d 438, 448-49 (9th Cir. 2018)(internal citations omitted).

Defendants continue to rely on three state interests: voter turnout, the cost of an election, and voter confusion. But what is lacking (unsurprisingly as the case was decided on a motion to dismiss and there were no expert reports or discovery) is any analysis explaining the means-end fit of the electoral delay imposed by Arizona law towards securing these ends, or if there are any less restrictive means available. Instead, the Defendants rely on judicial opinions recognizing a state interest in some other set of facts in lieu of developing their own. But those opinions often had the benefit of a developed factual record, or a stipulated position, unlike this case. And most if not all arose from summary judgment. On the basis of proper interplay between *Burdick*, Fed. R. Civ. P. 8, and Fed. R. Civ.

P. 12 alone, reversal is warranted even if this Court does not decide the merits of the case.

Crawford v. Marion Cty. Election Board involved a photo-id requirement to vote, and was supported by the fact that Indiana established it had inflated voter rolls. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 192 (2008)("evidence credited by [lower court] estimated that as of 2004 Indiana's voter rolls were inflated by as much as 41.4%...and data collected by the Election Assistance Committee in 2004 indicated that 19 of 92 Indiana counties had registration totals exceeding 100% of the 2004 voting-age population."). *Washington State Republican Party v. Washington State Grange* was decided on summary judgment, and under a burden-shifting framework testing the state's interests. Likewise for *Lightfoot v. Eu*, which came on appeal from a grant of summary judgment and that applied strict scrutiny to a ballot access challenge in upholding a minimum support provision of California law. Furthermore, many of Defendants' cases involve challenges to a state's regulation of its own elections, where they have more leeway to act, such as requiring information that they may not require for federal elections even if that results in issuing a "federal only" ballot, as Arizona does.

In Plaintiffs' opening brief, they raised the lack of any legislative history tying the supposed interests at issue not to say that there must be "contemporary evidence of legislative purpose" (*see* Def. Br. at 23) but to highlight that there is no

factual record apart from the limited and unexplained historical voting data and electoral costs. There is no evidence explaining how the electoral delay fits into a means-end test in connection with voter confusion. There is no explanation showing what the expected turnout would be in any special Senate election, whether held in November of 2020 or at some earlier date. There is no explanation or opinion offered as to what a tolerable level of turnout is, or how to balance that against the interest of a prompt election vs. representation by partisan appointee. And as to costs, again there is no real record applying a means-end test, and the cases relied on by Defendants arose after discovery, after the opportunity for expert reports, and after summary judgment as in *Weber v. Shelley* (challenging use of touch screen voting).

Against these three purported state interests stands the interest of the Plaintiffs to vote, to elected representation, to associate, and even to representation by a Senator whose appointment is not the result of fundamentally flawed procedures. As the Supreme Court stated in striking down an Ohio law that favored the incumbent major political parties:

> the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. ... Similarly we have said with reference to

> the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).[5]

The rights identified in *Williams* hold with at least equal force to the decision to delay an election as to access of political parties to the ballot, and the abrogation of those rights is a harm, including in connection with the rights complained of in this case under the Seventeenth Amendment, Elections Clause, Qualifications Clause, and First Amendment. One can easily imagine that if a government delayed or even cancelled an election in order to favor a candidate or class of candidates that a court would have little problem finding a burden on a voter's First Amendment right to associate and elect their preferred candidate, and enjoin the delay.

V. Apart from the standing of Plaintiff Hess, all Plaintiffs have exceptionally broad standing to bring a challenge under the First Amendment to a facially invalid law even if it does not affect them directly.

In what is likely the leading case on this point, the Supreme Court reasoned: "[C]are must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice." *Elrod v. Burns*, 427 U.S. 347,

[5] *Williams* is of further note in that the Court had little trouble setting aside Ohio's arguments that the measure in question related to its interests including voter confusion.

362 (1976). As tautological as it sounds, Arizona's partisan requirement serves partisan, not governmental interests.

As should be clear to any lawyer, layman, or judge, the decision as to who represents you in government affects you as much, if not more, than the person who is "empowered" to appoint that representative (Senator).[6] And under precedent including *Elrod*, a partisan requirement to hold the office of the United States Senator could not be more unconstitutional, and to be frank, a court would be entitled on summary judgment to infer discriminatory intent generally from the fact that Arizona defends that aspect of its law.

On this point, and to highlight the non-partisan nature of this suit, Plaintiffs agree with sentiment of the district court opinion striking California's tax return release law in *Griffin v. Padilla*, No. 2:19-cv-01477-MCE-DB, 2019 U.S. Dist. LEXIS 170704, at *23-24 (E.D. Cal. Oct. 1, 2019) ("Finally, in this day and age of partisan politics, evaluating the constitutionality of the Act is one of the most non-partisan questions of which the Court can conceive."). The Qualifications Clause (whether for the House, Senate or President) makes clear that party affiliation (or release of tax returns) cannot be made a condition of holding or seeking office, whether elected or as a "temporary" appointment.

[6] Plaintiffs stand on their arguments as to the standing of Barry Hess, apart from the standing of all the Plaintiffs generally.

Nor does the justification for the partisan requirement make any real sense. Elections are about a decision between candidates, not a broader statement of policy. *Burdick v. Takushi*, 504 U.S. 428, 438 (1992); *see also Underwood v. Guam Election Comm'n*, 2006 Guam 17, ¶ 32 (interpreting *Burdick* for the proposition that "the election process is not meant to be a platform for expression of discontent or some other display. It is meant to choose between candidates."). Under *Burdick*, all that can be gleaned from the most recent election of Senator McCain is that the electors preferred *him* – a self-styled "maverick" – to his opponents. Senator McCain's repeated election cannot be used by Arizona (or its political class) to infer a preference for republican representation by Republicans as opposed to representation by Republican John McCain.

To further rebut the Defendants' *de rigueur* standing argument, Plaintiffs enjoy exceptionally broad standing to challenge a facially invalid law, even a law which may affect not them but others not before the Court. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).[7] As the Court stated in *Broadrick*:

> One such exception [to the prohibition on advisory opinions] is where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves.

[7] Plaintiffs must further note that Defendants made no effort to distinguish *Daniels v. Williams*, 474 U.S. 327 (1986), cited for the proposition that Plaintiffs have standing to challenge a "fundamentally flawed" procedure.

Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973).

Here, and as highlighted by citations to *Elrod* and the Qualifications Clause, Plaintiffs "stand to lose" by having their various rights impacted and absent the ability to bring this suit, would "have no effective avenue of preserving their rights themselves." "Their rights" being their rights under the various provisions of the Constitution and amendments thereto that preserve their fundamental political rights and rights to an elected representative as opposed to a political appointee subject to partisan qualifications. By analogy, this case presents a question of a "prior restraint" but on association rather than speech.

On all counts, the Plaintiffs have standing to challenge their representation in their National Government by a representative who has been appointed on a partisan basis and who holds office on an illegitimate basis.

Conclusion

The Seventeenth Amendment was enacted to require direct election of United States Senators. This Court should issue a ruling consistent with that purpose.

* * *

Respectfully submitted,

Date: October 18, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,262 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: October 18, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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