

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 William Price Tedards, Jr., et al.,

No. CV-18-04241-PHX-DJH

10 Plaintiffs,

ORDER

11 v.

12 Doug Ducey, et al.,

13 Defendants.
14

15 This matter is before the Court on the following Motions: Plaintiffs’ Motion for
16 Preliminary and Permanent Injunctions (Doc. 14); Plaintiffs’ Motion to Consolidate Trial
17 on the Merits with a Hearing on the Motion for Preliminary and Permanent Injunctions
18 (Doc. 16); and Defendants’ Motion to Dismiss the First Amended Complaint (Doc. 21).
19 The matters are fully briefed.¹ The Court held oral argument on the Motion to Dismiss and
20 the Motions for Preliminary and Permanent Injunction on April 12, 2019, and took this
21 matter under advisement. Plaintiffs subsequently filed a Motion for Status Conference.²

22 ¹ Although the case was filed on November 28, 2018, a number of events caused the parties’
23 briefing to be delayed, namely Plaintiffs withdrew their initial motions and filed an
24 amended complaint in late December 2018. The parties then submitted a proposed
25 discovery and hearing schedule and the Court set oral argument on the Motions for the
earliest available day considering all of the conflicts identified by the parties in their
proposed schedule. (Doc. 42).

26 ² Plaintiffs seek a status conference “to discuss the disposition of their renewed motion for
27 a preliminary injunction.” (Doc. 65 at 2). The Court notes that Plaintiffs filed their Motion
28 less than two months after the Court took this matter under advisement. Moreover,
Plaintiffs acknowledge that “this case raised important issues and deserves the careful
consideration of this Court.” (*Id.*). Although Plaintiffs’ Counsel, Mr. Persoon, sought to
expedite the Court’s ruling, the oral argument on the Motions was initially delayed due to
his personal and/or business schedule, apparently having a number of conflicts from

1 (Doc. 65). On June 20, 2019, Plaintiffs filed a Notice of Appeal. (Doc. 68). Plaintiffs do
2 not appeal an Order of this Court, but contend they are appealing an “effective denial of
3 Plaintiffs’ Motion” for Preliminary and Permanent Injunction. (*Id.*)³

4 Plaintiffs request the Court to declare unconstitutional an Arizona statute that
5 establishes the procedures for appointment to the United States Senate when a vacancy in
6 that office arises, arguing that the statute violates the Seventeenth Amendment to the
7 Constitution.

8 **I. Background**⁴

9 United States Senator John S. McCain III died on August 25, 2018, leaving vacant
10 an Arizona Senate seat he had held for over thirty years. Senator McCain was re-elected
11 to a six-year term on November 8, 2016, a term scheduled to end on January 3, 2023. The
12 next scheduled general election for that seat was to be held in November of 2022. On
13 September 4, 2018, Arizona Governor Doug Ducey appointed former Senator Jon Kyl to
14 the vacant seat. On September 5, 2018, Governor Ducey issued a writ of election pursuant
15 to A.R.S. § 16-222 (“Section 16-222” or “the Statute”) setting the dates of the special
16 elections to fill the remainder of the term: a primary election to be held on August 25, 2020,
17 and a general election to be held on November 3, 2020. The individual elected in the 2020
18 general election will serve out the term’s remaining two years. Senator Kyl resigned his
19 seat effective December 31, 2018, and Governor Ducey then appointed Representative
20 Martha McSally, who presently occupies the seat.⁵

21 February through early April 2019. (Doc. 42). Moreover, as the Court noted in the Order
22 setting the oral argument, “Defendants wish to expedite any hearing. Plaintiffs’ counsel is
23 apparently not available until April.” (Doc. 45). Finding no reason to hold a status
24 conference on this matter, the Motion will be denied.

25 ³ Plaintiffs attempted to side-step the jurisdiction of this Court by seeking an immediate
26 ruling from the Ninth Circuit. Because the Motion is still pending on this Court’s docket,
27 and there has been no Order of this Court appealed to the Ninth Circuit, the Court will issue
28 its ruling on the Motions.

⁴ At the hearing, the Court granted Defendants’ request to take judicial notice of a number
of publicly known facts that are not in dispute. (Doc. 51). Many of the facts in the
background section herein come from generally known facts and public records.

⁵ Defendant Senator Martha McSally appeared in this action and filed a Joinder to the
Defendants’ Motion to Dismiss. (Doc. 62).

1 Plaintiffs are a group of registered Arizona voters, comprising an Independent, two
2 Democrats, a Libertarian, and a Republican. (Doc. 13 at 3). Plaintiffs filed their original
3 Complaint (Doc. 1) along with a Motion for a Preliminary Injunction or in the Alternative
4 for a Permanent Injunction (Doc. 2) on November 28, 2018. Those pleadings sought “an
5 order directing the defendant Governor to issue a writ of election as required by the
6 Seventeenth Amendment to fill the current vacancy in Arizona’s representation in the
7 Senate.” (Doc. 1 at 2). On December 12, 2018, Plaintiffs filed a Motion to Amend their
8 Complaint, and also withdrew their initial Motion for Injunction. (Doc. 11). Plaintiffs then
9 filed a renewed Motion for Preliminary and Permanent Injunction and a First Amended
10 Complaint (“FAC”), alleging three claims: (1) 42 U.S.C. § 1983 (“Section 1983”) deprivation of the right to vote under the Seventeenth Amendment; (2) Section 1983
11 violation of the Elections Clause and Seventeenth Amendment; and (3) Section 1983
12 violations of the Elections Clause, Qualifications Clause and the First Amendment. (Doc.
13 13). The FAC acknowledged that Governor Ducey had issued a writ of election on
14 September 5, 2018, and that requested relief was removed from Plaintiffs’ complaint.
15 (Doc. 13). Defendants seek dismissal of Plaintiffs’ FAC, arguing that Plaintiffs have failed
16 to state a claim on Counts One and Two of their FAC, and that they do not have standing
17 to assert Count Three. (Doc. 21). For reasons that will become clear, the Court will first
18 analyze Defendants’ Motion to Dismiss.
19

20 **II. Motion to Dismiss Legal Standards**

21 Under Fed. R. Civ. P. 12(b)(6), a district court must dismiss a complaint if it fails to
22 state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
23 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on
24 its face.” *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially
25 plausible when the plaintiff pleads facts that “allows the court to draw the reasonable
26 inference that the defendant is liable for the misconduct alleged.” *See Ashcroft v. Iqbal*,
27 556 U.S. 662, 678 (2009) (citation omitted). There must be “more than a sheer possibility
28 that a defendant has acted unlawfully.” *Id.* In other words, while courts do not require

1 “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a
2 right to relief above the speculative level.” *See Twombly*, 550 U.S. at 555.

3 Establishing the plausibility of a complaint’s allegations is “context-specific” and
4 “requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*,
5 556 U.S. at 679. Although a plaintiff’s specific factual allegations may be consistent with
6 a plaintiff’s claim, a district court must assess whether there are other “more likely
7 explanations” for a defendant’s conduct such that a plaintiff’s claims cross the line “from
8 conceivable to plausible.” *Id.* at 680-81 (quoting *Twombly*, 550 U.S. at 570). This standard
9 represents a balance between Rule 8’s roots in relatively liberal notice pleading and the
10 need to prevent “a plaintiff with a largely groundless claim” from “tak[ing] up the time of
11 a number of other people, with the right to do so representing an *in terrorem* increment of
12 settlement value.” *Twombly*, 550 U.S. at 557–58 (quoting *Dura Pharmaceuticals, Inc. v.*
13 *Broudo*, 544 U.S. 336, 347 (2005)).

14 Before proceeding to the analysis on the Motion to Dismiss and Motion for
15 Preliminary and Permanent Injunction, the Court must consider other legal standards.

16 **III. Seventeenth Amendment⁶**

17 The U.S. Constitution grants powers to the states to fill vacancies in the U.S. Senate
18 that may occur as a result of death, resignation, or removal from office. The Seventeenth
19 Amendment to the Constitution governs the procedure for filling vacancies that arise in the
20 Senate. U.S. CONST. amend. XVII. The Amendment states, in relevant part:

21 When vacancies happen in the representation of any state in the Senate, the
22 executive authority of such state shall issue writs of election to fill such
23 vacancies: Provided, that the legislature of any state may empower the
24 executive thereof to make temporary appointments until the people fill the
vacancies by election as the legislature may direct.

25 U.S. CONST. amend. XVII.

26
27 ⁶ Some of the historical background on appointments to the United States Senate is taken
28 from publicly accessible information from the Senate Historical Office.
https://www.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm

1 Unlike the procedure for filling vacancies in the U.S. House of Representatives,
2 which can be filled only by special election, the Seventeenth Amendment gives the state
3 legislatures the authority to establish procedures for filling vacancies in the Senate. U.S.
4 CONST. amend. XVII. If a vacancy occurs for any reason, such as a senator's death,
5 resignation, or expulsion, the Seventeenth Amendment permits state legislatures to
6 empower the governor to appoint a replacement until a special election can take place. *Id.*
7 Since ratification of the Seventeenth Amendment in 1913, all fifty states have enacted
8 legislation on the matter.⁷ The majority of the states allow the governor to make a
9 temporary appointment pending a special election.⁸

10 Article I, Section 4, often referred to as the Elections Clause, grants the individual
11 states the power to determine the "Times, Places and Manner of holding Elections for
12 Senators and Representatives," subject to conflicting federal law. U.S. CONST. art. I, § 4;
13 *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008)
14 ("The States possess a broad power to prescribe the Times, Places, and Manner of holding
15 Elections for Senators and Representatives."). Based on the authority granted to it by the
16 Seventeenth Amendment, in conjunction with the Elections Clause, the Arizona
17 Legislature passed a statute outlining the procedures for filling vacancies in the U.S.

18
19 ⁷ During oral argument, Plaintiffs argued that the Court should not consider other states'
20 relevant legislation in assessing the constitutionality of the Statute, because "to the extent
21 that a lot of other states have something similar . . . that's not right at all." (Doc. 61 at 47).
22 Plaintiffs nonetheless urge the Court to compare the statutes passed in Alabama, New
23 Jersey, and Massachusetts because they "all held special elections within several months
24 of a Senate vacancy happening." (Doc. 15 at 6). Plaintiffs' arguments here are inconsistent
25 and self-serving.

26 ⁸ As of 2018, 36 states require a special election to be held at the next scheduled general
27 election, with some of those states having an exception that if the vacancy arose within a
28 certain number of days of the general election, the election is held at the subsequent
election. *Filling Vacancies in the Office of United States Senator*, (December 2007)
<http://www.ncsl.org/research/elections-and-campaigns/vacancies-in-the-united-states-senate.aspx>. All of these states allow their governor to make a temporary appointment to
serve until an election is held. The remaining 14 states require that a special election be
called within a certain number of days of the vacancy, without regard to the date of the
next regularly scheduled general election. Nine of those states allow the governor to make
a temporary appointment. *Id.* A number of states require the replacement to be of the same
political party as the previous incumbent. Only four states expressly prohibit the governor
from making a temporary appointment to the vacant Senate seat, resulting in a lapse of
representation until a special election can be held. *Id.*

1 Senate. Section 16-222(c) states:

2 For a vacancy in the office of United States senator, the governor shall
3 appoint a person to fill the vacancy. That appointee shall be of the same
4 political party as the person vacating the office and, except as provided in
5 subsection D of this section, shall serve until the person elected at the next
6 general election is qualified and assumes office.

6 Section 16-222(d) states that:

7 If a vacancy in the office of United States senator occurs more than one
8 hundred fifty days before the next regular primary election date, the person
9 who is appointed pursuant to subsection C of this section shall continue to
10 serve until the vacancy is filled at the next general election.

11 If a vacancy in the office of United States senator occurs one hundred fifty
12 days or less before the next regular primary election date, the person who is
13 appointed shall serve until the vacancy is filled at the second regular general
14 election held after the vacancy occurs, and the person elected shall fill the
15 remaining unexpired term of the vacated office.

14 A.R.S. § 16-222(d).

15 Senator McCain died on August 25, 2018, three days prior to the primary election
16 scheduled for August 28, 2018. Therefore, the initial vacancy occurred “one hundred fifty
17 days or less before the next regular primary election date.” Pursuant to Section 16-222,
18 Governor Ducey appointed former Senator Jon Kyl to fill the vacant seat and issued a writ
19 of election for the vacancy, to occur at the next general election on November 3, 2020.
20 Senator Kyl resigned the seat effective December 31, 2018, creating another vacancy.
21 Governor Ducey appointed Martha McSally to fill that vacancy, and pursuant to the Statute,
22 she “shall continue to serve until the vacancy is filled at the next general election.”⁹

23 ...

24 ...

25 _____
26 ⁹ This time, the vacancy arises out of the first portion of Section 16-222(d), because the
27 vacancy was more than “one hundred fifty days before the next regular primary election
28 date.” The parties did not argue the distinction between the Sen. McCain vacancy and the
Sen. Kyl vacancy. However, it appears that it is a distinction without a difference, as the
date of the vacancy election pursuant to Section 16-222 would have been in November
2020 regardless of the resignation of Sen. Kyl.

1 **IV. Analysis**

2 Plaintiffs' renewed Motion for Preliminary and Permanent Injunction¹⁰ asks this
3 Court to order the "Governor of Arizona to issue a writ of election that will call a special
4 election, at the earliest reasonably practicable date but not longer than one year," from the
5 date of Sen. McCain's death. (Doc. 14 at 2). Plaintiffs' FAC contains three counts
6 alleging: (1) Section 1983 deprivation of the right to vote under the Seventeenth
7 Amendment; (2) Section 1983 violation of the Elections Clause and Seventeenth
8 Amendment; and (3) Section 1983 violations of the Elections Clause, Qualifications Clause
9 and the First Amendment. (Doc. 13). Plaintiffs also seek the Court to "retain continuing
10 jurisdiction of this case for other relief that may be appropriate to ensure a special election
11 consistent with the rights of plaintiffs as declared above." (*Id.*). For their requested
12 injunctive relief, Plaintiffs request the Court to order the Governor to "issue a writ of
13 election that will call a special election, at the earliest reasonably practicable date but in
14 not longer than one year." (Doc. 14 at 2) (sic). Plaintiffs' memorandum of law in support
15 of their Motion for injunctive relief largely mirrors the relief sought in the FAC.

16 At the hearing, the Court asked Plaintiffs what specific relief they were seeking.
17 Counsel for Plaintiffs stated that they were asking for the Court to declare: (1) that the 27-
18 month appointment is unconstitutional as it exceeds a "temporary" appointment pursuant
19 to the Seventeenth Amendment and that, "by waiting more than one congressional term to
20 fill the vacancy by election," the Statute violates the Constitution; (2) that Section 16-222's
21 requirement that the executive "shall" appoint someone to a vacancy be declared
22 unconstitutional so that the executive would have the option to hold a special election
23 immediately; and (3) that the "same political party" requirement in Section 16-222 is
24 unconstitutional. (Doc. 61).

25 ...

26 ...

27 ¹⁰ Plaintiffs' first pleadings asked the Court to Order the Governor to "issue a writ of
28 election." (Doc. 1). However, these initial motions were withdrawn and amended,
presumably due to Plaintiffs' realization that Governor Ducey had already issued a writ of
election for November 3, 2020.

1 **A. Standard of Review**

2 As an initial matter, the Court must determine what standard of review to apply to
3 the Constitutional issues raised in this case. Plaintiffs argue that, in application, Section
4 16-222 imposes a severe restriction on their right to vote, and thus strict scrutiny applies to
5 the Defendants' justifications for "delaying" the special election. Defendants argue that
6 the Statute imposes reasonable and nondiscriminatory restrictions on the Plaintiffs' First
7 and Fourteenth Amendment rights to vote and thus they are not required to show the Statute
8 is narrowly tailored to advance a compelling state interest. (Doc. 21 at 4-5).

9 **1. Legal Standards**

10 Individuals have a protected right to vote under the First and Fourteenth
11 Amendments to the Constitution. Indeed, "voting is of the most fundamental significance
12 under our constitutional structure." *Illinois Bd. of Elections v. Socialist Workers Party*,
13 440 U.S. 173, 184 (1979). "These associational rights, however, are not absolute and are
14 necessarily subject to qualification if elections are to be run fairly and effectively." *Munro*
15 *v. Socialist Workers Party*, 479 U.S. 189, 193 (1986). As to the right to vote, the Supreme
16 Court has noted that the Constitution "does not confer the right of suffrage upon any one,"
17 *Minor v. Happersett*, 88 U.S. 162, 178 (1874), and that "the right to vote, *per se*, is not a
18 constitutionally protected right." *San Antonio Independent School Dist. v. Rodriguez*, 411
19 U.S. 1, 35, n.78 (1973). For instance, states retain "broad power to prescribe the Times,
20 Places and Manner of holding Elections for Senators and Representatives." *Tashjian v.*
21 *Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (internal citation omitted). However,
22 a state's broad "power is not absolute." *Wash. State Grange*, 552 U.S. at 451.

23 Therefore, there must be a balance between the right of the state to manage its
24 elections and the right of the individual to vote. *Id.* The standard of review for laws
25 regulating a person's First and Fourteenth Amendment rights to vote was analyzed by the
26 Supreme Court in *Burdick v. Takushi*, 504 U.S. 428 (1992). There, the Supreme Court
27 held that states "must play an active role in structuring elections," and that "[e]lection laws
28 will invariably impose some burden upon individual voters." *Id.* at 433. "Consequently,

1 not every voting regulation is subject to strict scrutiny.” *Pub. Integrity All., Inc. v. City of*
2 *Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016). Rather, “a more flexible standard applies.”
3 *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). “A court considering a
4 challenge to a state election law must weigh ‘the character and magnitude of the asserted
5 injury to the rights protected by the First and Fourteenth Amendments that the plaintiff
6 seeks to vindicate’ against ‘the precise interests put forward by the State as justifications
7 for the burden imposed by its rule,’ taking into consideration ‘the extent to which those
8 interests make it necessary to burden the plaintiff’s rights.’” *Id.* Courts “have repeatedly
9 upheld as ‘not severe’ restrictions that are generally applicable, evenhanded, politically
10 neutral, and protect the reliability and integrity of the election process.” *Id.* (quoting
11 *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011)). “[T]o subject every voting
12 regulation to strict scrutiny and to require that the regulation be narrowly tailored to
13 advance a compelling state interest, as petitioner suggests, would tie the hands of States
14 seeking to assure that elections are operated equitably and efficiently.” *Burdick*, 504 U.S.
15 at 433.

16 Therefore, while strict scrutiny is applied when a state imposes severe restrictions
17 on the right to vote, where “a state election law provision imposes only ‘reasonable,
18 nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters,
19 ‘the State’s important regulatory interests are generally sufficient to justify’ the
20 restrictions.” *Pub. Integrity* 836 F.3d at 1024 (quoting *Anderson*, 460 U.S. at 788).

21 2. Analysis

22 To determine what standard of review to apply, the Court must consider the claimed
23 voting restrictions imposed on Plaintiffs, balanced against Defendants’ proffered interests
24 in regulating its elections. Plaintiffs argue that Section 16-222, as applied here, severely
25 burdens their First and Fourteenth Amendment rights to vote by denying them an
26 opportunity to vote for over 27 months. Plaintiffs argue that any period of time longer
27 than one year is “obviously severe.” (Doc. 35 at 11). Further, they argue, without citing
28 to any authority, that “any delay longer than a year is *presumptively suspect* absent a

1 showing it is necessary to serve some compelling state interest,” and that they have a right
2 to “direct elected” representation in the Senate “except for *reasonable and brief interim*
3 *periods.*” (Doc. 13 at 2 and 6) (emphasis added). Defendants make a number of arguments
4 as to why Section 16-222’s restrictions are reasonable and necessary to protect Arizona’s
5 election process, including: maximizing voter turnout; the high cost of holding special
6 elections; avoidance of confusion and inconvenience to voters; and standardization of
7 election dates. (Doc. 21 at 11-14). These State interests will be analyzed in turn.

8 **a. Maximizing voter turnout**

9 One state interest advanced by Defendants is maximizing voter turnout. Plaintiffs’
10 Counsel recognized voter turnout as being “somewhat important” to the State. (Doc. 61 at
11 16). Defendants produced exhibits evidencing that the number of votes cast in special
12 elections is dramatically less than the number of votes cast in general elections. (Doc. 51-
13 1). For example, for a state-wide special election held on May 17, 2016, only 1,064,649
14 votes were cast out of 3,353,289 registered voters in the state, for a total of 31% turnout.
15 (*Id.*). In the State’s most recent special election on April 24, 2018, for a vacancy in the
16 House of Representatives, 184,201 votes out of a possible 455,660 were cast, for a turnout
17 rate of 40%. (*Id.* at 30). Conversely, 2,661,497 votes were cast out of 3,588,466 registered
18 voters in the November 2016 general election, for a total of 74% voter turnout. (*Id.* at 6).
19 The State has an interest in having high turnout for Senate elections. *Valenti v. Rockefeller*,
20 292 F. Supp. 851, 854 (W.D.N.Y. 1968), *aff’d* 393 U.S. 405 (1969). (finding a “substantial
21 state interest” in delaying an election until the scheduled general election, where “voter
22 interest and turnout are at a maximum”). Moreover, Section 16-222 does not restrict access
23 to the election process, nor does it discriminate against classes of voters. While Plaintiffs
24 argue the reasons cited by Defendants are not legitimate reasons, it is apparent that
25 Defendants seek to *increase* rather than suppress the right to vote, as evidenced by the
26 above data which shows drastically reduced voting rates at recent special elections as
27 opposed to general elections. The Court finds voter turnout to be an important State
28 interest.

1 include the potential for months of highly politicized advertising leading up to the special
2 elections, which would otherwise not occur at this time, and not allowing adequate time
3 for voters to make an informed voting decision. Here, a unified election date has the
4 potential to lower the barriers to ballot access, allowing more Arizona voters the chance to
5 exercise their right to vote. *See Anderson*, 460 U.S. at 796 (“There can be no question
6 about the legitimacy of the State’s interest in fostering informed and educated expressions
7 of the popular will in a general election.”). The Court finds the State’s interest in having
8 the special election date align with the next general election to be an important regulatory
9 interest.

10 Therefore, Section 16-222 serves important state interests, applies to all voters
11 equally, is evenhanded and politically neutral, and protects the integrity and reliability of
12 the election process as described above. The Statute does not deprive any Arizona citizen
13 of their right to vote. In fact, the citizens of Arizona will get to exercise their right to vote
14 two years earlier than they would have had the right to do otherwise. That is, an election
15 for this seat was held in 2016 and the next election was to occur in 2022, but will now
16 occur in 2020. Additionally, the Supreme Court has recognized the right to regulate
17 elections in this way. *See Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 12 (1982)
18 (“Moreover, the interim appointment system plainly serves the legitimate purpose of
19 ensuring that vacancies are filled promptly, without the necessity of the expense and
20 inconvenience of a special election. The Constitution does not preclude this practical and
21 widely accepted means of addressing an infrequent problem.”). Given that Section 16-222
22 “does not restrict access to the electoral process or discriminate among classes of voters or
23 political parties, the method chosen by the state legislature for filling vacancies is entitled
24 to substantial deference.” *See Lynch*, 682 F.2d at 96.

25 There is simply no delay of Plaintiffs’ right to vote. The Seventeenth Amendment
26 does not mandate that a special election take place within a certain time frame. Rather, it
27 allows the election to be held “as the legislature may direct.” U.S. CONST. amend. XVII.
28 Here, Section 16-222 imposes reasonable and nondiscriminatory restrictions on the

1 Plaintiffs’ First and Fourteenth Amendment rights to vote, and the regulatory interests of
2 the State are sufficient to justify the limited restrictions. *See Burdick*, 504 U.S. at 433.
3 Therefore, and for reasons more fully explained below, strict scrutiny will not be applied.¹¹

4 **B. 27-Month Delay**

5 Plaintiffs next argue that the portions of Section 16-222 that direct the governor to
6 appoint a person to fill a vacancy for more than a year, which in this case amounts to a
7 period of 27 months, are unconstitutional under the Seventeenth Amendment and result in
8 an infringement on their First and the Fourteenth Amendment rights to vote. Plaintiffs
9 argue that they “have a right to fill the vacancy by election of the people at a date no later
10 than a year from which the vacancy arose, absent a finding that a delay of more than a year
11 is necessary for a compelling state purpose.” (Doc. 13 at 9). Defendants argue Section 16-
12 222 is constitutional in all respects.

13 **1. Legal Standards**

14 As analyzed by other courts, the portion of the Seventeenth Amendment addressing
15 Senate vacancies has two sections, the “principal clause,” and the “proviso.” *See Judge v.*
16 *Quinn*, 612 F.3d 537, 546 (7th Cir. 2010). The principal clause states that, “When
17 vacancies happen in the representation of any State in the Senate, the executive authority
18 of such State shall issue writs of election to fill such vacancies.” U.S. CONST. amend.
19 XVII. As the court stated in *Judge*, “if the Seventeenth Amendment ended with the
20 principal clause, our task would be over.” *See Judge*, 612 F.3d at 547. Of course, it does
21 not. The proviso, which comes directly after the principal clause, permits the legislature
22 to establish a procedure for the executive to make temporary appointments to fill vacancies.
23 The proviso states “[t]hat the legislature of any State may empower the executive thereof
24 to make temporary appointments until the people fill the vacancies by election as the
25 legislature may direct.” U.S. Const. amend. XVII.

26 “[T]he Seventeenth Amendment permits a state, if it chooses, to forgo a special

27 ¹¹ Plaintiffs’ Counsel acknowledged that if the Court finds that the delay of the election
28 imposed by Section 16-222 is a permissible and reasonable means of restricting the right
to vote, “then there would be no meaningful infringement. There would be no violation of
a legal right.” (Doc. 61 at 20).

1 election in favor of a temporary appointment to the United States Senate[.]” *Rodriguez*,
2 457 U.S. at 11. Most challenges to this Amendment involve the meaning of the word
3 “temporary.” A 29-month vacancy appointment was upheld by the Supreme Court in
4 *Valenti*. The circumstances in *Valenti* are similar to the facts of this case. The vacancy in
5 that case arose as a result of the assassination of Senator Robert Kennedy in 1968. There,
6 the governor made a vacancy appointment pursuant to a New York statute which would
7 continue for 29 months. A three-judge panel of the district court held that the New York
8 appointment statute was constitutional. *Id.* The Supreme Court not only summarily
9 affirmed *Valenti*, but has also discussed its holding with approval in subsequent rulings.
10 *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *see also Rodriguez*, 457 U.S. at 10-11
11 (“In [its affirmance of the district court decision in] *Valenti v. Rockefeller*, the Court
12 sustained the authority of the Governor of New York to fill a vacancy in the United States
13 Senate by appointment pending the next regularly scheduled congressional election—in that
14 case, a period of over 29 months.”). *Valenti* thus “interpret[ed] the Seventeenth
15 Amendment, as have most of the state legislatures, to allow the states to conduct Senate
16 vacancy elections in accordance with their regular election procedures, so long as those
17 procedures further substantial state interests.” *Valenti*, 292 F.Supp. at 861.

18 Moreover, the Supreme Court has held that the state possesses “substantial state
19 interests” to set a special election to coincide with the next general election, including
20 “voter interest and turnout,” the “inconvenience and expense” associated with special
21 elections, and “allow[ing] time for the party nominees to be selected and for a campaign
22 to be conducted by the nominees.” *Id.* at 859-60; *see also See Lynch*, 682 F.2d at 97.
23 “[T]he interim appointment system plainly serves the legitimate purpose of ensuring that
24 vacancies are filled promptly, without the necessity of the expense and inconvenience of
25 a special election. The Constitution does not preclude this practical and widely accepted
26 means of addressing an infrequent problem.” *Rodriguez*, 457 U.S. at 12.

27 **2. Analysis**

28 Plaintiffs first argue that, because “the vacancy created by the death of Senator

1 McClain [sic] will not be filled by election of the people for a period of about twenty-
2 seven months,” the Arizona statute allows an appointment that, at some point, becomes
3 longer than “temporary.” (Doc. 13 at 4). They argue that by “delaying” the election for
4 27 months,¹² the “Governor has effectively denied the right to a special election required
5 by the Seventeenth Amendment.” (Doc. 13 at 2). Plaintiffs concede, however, that “a
6 temporary appointment is permissible” pursuant to the Seventeenth Amendment. (Doc.
7 15 at 2).

8 Nothing in the Seventeenth Amendment, or in relevant case law, supports
9 Plaintiffs’ arguments. Other courts, albeit few in number, have addressed this issue. “A
10 ‘natural reading’ of the vacancy provisions of the Seventeenth Amendment ‘grants to the
11 states some reasonable degree of discretion concerning both the timing of vacancy
12 elections and the procedures to be used in selecting candidates for such elections.’”
13 *Gietzen v. McMillon*, 857 F. Supp. 777, 782 (D. Kan. 1994) (quoting *Valenti*, 292 F. Supp.
14 at 856). “[T]he explicit provision in the vacancy paragraph of the Seventeenth
15 Amendment vesting discretion in the state legislatures not once, but twice, cannot have
16 been without significance.” *Trinsey v. Pennsylvania*, 941 F.2d 224, 234 (3d Cir. 1991).
17 Perhaps most significantly, the Supreme Court cited with approval the *Valenti* decision
18 upholding a governor’s appointment to a Senate seat where the appointment lasted 29
19 months. *See Rodriguez*, 457 U.S. at 10–11 (1982); *see also Judge*, 623 F. Supp. at 933,
20 940 (N.D. Ill. 2009), *aff’d*, 612 F.3d 537 (7th Cir. 2010) (noting that “nearly two years
21 will pass before the vacancy is filled by election . . . it is still well within the period that
22 *Valenti* allowed.”). Other cases cited by Plaintiffs regarding state special elections are not
23 persuasive to this Court.¹³

24 ¹² While Plaintiffs consistently refer to a “delay” of the election, there has been no delay.
25 The election is scheduled to be held on November 3, 2020, pursuant to Section 16-222, and
there is no evidence that the election has been or will be delayed from that date.

26 ¹³ Plaintiffs cite a number of cases in which special elections were held for House vacancies
27 mere months from the date the vacancy arose. These cases are inapposite for a number of
28 reasons. As an initial matter, a House term is only two years, so a House vacancy would
never last as long as the vacancy here. Most importantly, however, temporary
appointments are explicitly not allowed for House vacancies. “The House vacancy
provision begins and ends with the imposition of a mandatory duty to call an election for

1 Plaintiffs make a number of inconsistent arguments as to their interpretation of the
2 Seventeenth Amendment as it relates to the timing of a special election. Initially they
3 argued that the Seventeenth Amendment requires the Governor to hold an election “as soon
4 as is *reasonably practicable*.” (Doc. 15 at 10) (emphasis added in all following). At the
5 hearing, Plaintiffs’ Counsel stated that “refusal to hold a special election for *more than an*
6 *entire congressional term* is prohibited by the Constitution.” (Doc. 61 at 5). In their
7 briefing on their injunction request, Plaintiffs request an election be held “*not significantly*
8 *later than a year* from the time of the vacancy.” (Doc. 15 at 18). Later, Plaintiffs changed
9 their argument slightly, arguing at the hearing that the election must be held “*within one*
10 *year of the vacancy*.” (Doc. 61). Counsel for Plaintiffs further altered this argument by
11 agreeing that a “one-year rule” would not be a bright line rule and the date would be up for
12 negotiation.¹⁴ (*Id.*). When pressed by the Court as to what would be a complying time
13 period, Plaintiffs’ counsel stated that this Court should “tell Governor Ducey, ‘I’m not
14 going to tell you what date you have to have [the election] done by. I’m going to give you
15 a chance to come forward with a date. And if you drag your feet and mess around, I will
16 regrettably order you to do it.’” (Doc. 61 at 13).

17 Complying with the Seventeenth Amendment and the Elections Clause, the Arizona
18 legislature empowered the governor to issue a writ of election and make a temporary
19 appointment. *See* U.S. CONST. amend. XVII; *see also* Art. I, § 4. As to the duration of the
20 vacancy, neither party presented authority finding a state statute unconstitutional for
21 allowing appointments that were longer than “temporary.” Further, none of the cases cited
22 by the parties, other than cases related to House vacancies, come anywhere close to

23 _____
24 the vacancy.” *Judge*, 612 F.3d at 547; *see also* U.S. CONST. Art. I, § 2, cl. 4 (“When
25 vacancies happen in the Representation from any State, the Executive Authority thereof
shall issue Writs of Election to fill such Vacancies.”).

26 ¹⁴ At one point, Plaintiffs’ Counsel suggested that the Court ask Defendants to come up
27 with a reasonable proposed date for holding an election sooner than November 3, 2020,
and only order the Governor to issue a specific date for holding the election if the Plaintiffs
28 were not satisfied with the date proposed by Defendants. Plaintiffs also suggest that the
Court could declare the statute unconstitutional, order the parties to “come up with a plan”
for an election process, and “talk that out in advance” so that Plaintiffs could determine if
the plan was acceptable to them. (Doc. 61 at 45).

1 mandating the timeline proposed by Plaintiffs. Plaintiffs have not identified that they
2 possess a right to vote any time there is a vacancy in representation. Moreover, Plaintiffs
3 do not provide any authority for their argument that any delay over a year is “presumptively
4 suspect,” or for their argument that the interim appointment can only be “reasonable and
5 brief.” (Doc. 13 at 6). The “one year” rule proposed by Plaintiffs is arbitrary, as admitted
6 by Plaintiffs’ counsel when he stated that it would not be “a bright-line rule,” and is not
7 based in the law. (Doc. 61). The Seventeenth Amendment, in conjunction with the
8 Elections Clause, leaves the authority to the states to establish the vacancy procedures and
9 the State of Arizona has done so here.

10 Because Senator McCain died just days before the scheduled 2018 primary election,
11 over two years will pass before the voters have a chance to fill the seat by election. While
12 this period may not be a short period of time, nothing in the Seventeenth Amendment limits
13 the period of time an appointed senator can be in office. The 27-month period, on its own,
14 is not unreasonable considering case precedent, and does not amount to an unreasonable
15 restriction on Plaintiffs’ right to vote.¹⁵ Because there is no unreasonable restriction on
16 Plaintiffs’ right to vote, Plaintiffs cannot establish a violation of their Constitutional rights
17 and therefore, Count One will be dismissed.

18 **C. Interpretation of the Appointment Power**

19 Plaintiffs argue in Count II of the FAC that Section 16-222 violates the text of the
20 Seventeenth Amendment that the “legislature of any state *may empower* the executive
21 thereof to make temporary appointments” U.S. CONST. amend. XVII (emphasis
22 added). Plaintiffs argue that Section 16-222 *requires* the governor to appoint a person to
23 fill the vacancy, rather than *empowering* him to do so, and therefore that the Statute violates
24 the Seventeenth Amendment and their right to be represented by an *elected* senator.
25 Defendants argue that the text of the Amendment allows the legislatures to choose whether

26
27 ¹⁵ Plaintiffs argue that applicable case law does not address the question of whether the
28 Seventeenth Amendment’s phrase ‘as the legislature may direct’ gives the states “unlimited
power to delay or suspend a vacancy election.” (Doc. 35 at 9). Neither will the Court
address that question; Section 16-222 clearly does not suspend the vacancy election
forever, it is just not as soon as Plaintiffs want it to be.

1 to empower the governor to make a temporary appointment, or to require a special election
2 without allowing an interim appointment.

3 A similar argument was unsuccessfully made by the plaintiffs in *Judge*, and the
4 Seventh Circuit refused “to read a limitation into the Seventeenth Amendment that is not
5 there.” *Judge*, 612 F.3d at 550. The plaintiffs in *Judge* (represented by the same law firm
6 as is in this lawsuit) argued that Illinois’s appointment statute was “unconstitutional
7 because it usurps the governor’s duty to call a special election . . . and compels (rather than
8 ‘empowers’) the governor to make a temporary appointment in the interim.” *Judge v.*
9 *Quinn*, 623 F. Supp. 2d 933, 936 (N.D. Ill. 2009), *aff’d*, 612 F.3d 537 (7th Cir. 2010),
10 opinion amended on denial of reh’g, 387 F. App’x 629 (7th Cir. 2010). Furthermore,
11 Plaintiffs do not explain their argument, nor cite to any legal authority, that the Statute
12 “impermissibly dictates an electoral outcome,” or their contention that the Governor’s
13 appointment lacks “legitimacy” and prevents them from having “a direct relationship with
14 their representatives in Congress.” (Doc. 15 at 11-13). Plaintiffs have not established that
15 Section 16-222 infringes on their right to have direct representation in the Senate, or that it
16 dictates electoral outcomes or disfavors a class of candidates.¹⁶ *See U.S. Term Limits v.*
17 *Thornton*, 514 U.S. 779, 833-34 (1995).

18 Plaintiffs are asking this Court to interpret the Seventeenth Amendment as never
19 done before in its 100-year history, by holding that the text requires the states to give power
20 to the governor to choose whether to appoint someone to the vacancy, or to hold a special
21 election without making a vacancy appointment. The Seventeenth Amendment, and the
22 cases that have interpreted it, leaves the decision to the state legislatures. The Arizona
23 Legislature has spoken on the matter and has done so in a constitutionally permissible way.
24 Accordingly, Plaintiffs have not stated a claim in Count Two on which relief can be

25 _____
26 ¹⁶ Likewise, the cases on which Plaintiffs rely are not relevant to the issue at hand. *See*
27 *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995) (striking down Arkansas law
28 that imposed term limits on members of congress and holding that the states have the
“authority to issue procedural regulations, and not . . . to dictate electoral outcomes, or to
favor or disfavor a class of candidates”). Plaintiffs cannot establish that the Section 16-
222 does any of the above. Moreover, Section 16-222 does not regulate any person running
for *election* or alter any of the qualifications for standing for an *election*.

1 granted.

2 **D. “Same political party” Requirement**

3 In Count Three, Plaintiffs argue that Section 16-222’s “same political party”
4 requirement violates the Elections Clause, the Qualifications Clause, and the Seventeenth
5 Amendment. Defendants argue that Plaintiffs do not have standing to pursue this claim.

6 **1. Legal Standards**

7 Article III provides that federal courts may only exercise judicial power in the
8 context of “cases” and “controversies.” U.S. CONST. art. III, § 2, cl. 1; *Lujan v. Defs. of*
9 *Wildlife*, 504 U.S. 555, 559 (1992). For there to be a case or controversy, the plaintiff must
10 have standing to sue. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (“*Spokeo II*”).
11 Whether a plaintiff has standing presents a “threshold question in every federal case
12 [because it determines] the power of the court to entertain the suit.” *Warth v. Seldin*, 422
13 U.S. 490, 498 (1975). A suit brought by a plaintiff without Article III standing is not a
14 “case or controversy,” and an Article III federal court therefore lacks subject matter
15 jurisdiction over the suit. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101
16 (1998). In that event, the case must be dismissed pursuant to Rule 12(b)(1). *Id.*

17 To establish standing, a plaintiff seeking the jurisdiction of a federal court has the
18 burden of clearly demonstrating that she has: “(1) suffered an injury in fact, (2) that is fairly
19 traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed
20 by a favorable judicial decision.” *Spokeo II*, 136 S. Ct. at 1547 (quoting *Warth*, 422 U.S.,
21 at 518); accord *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)
22 (noting the party asserting jurisdiction bears the burden of establishing subject matter
23 jurisdiction). A plaintiffs’ alleged “personal stake in the outcome” of the case must be
24 distinct from a “generally available grievance about government.” *Lance v. Coffman*, 549
25 U.S. 437, 439 (2007) (*per curiam*). “That threshold requirement ‘ensures that we act as
26 judges, and do not engage in policymaking properly left to elected representatives.’” *Gill*
27 *v. Whitford*, 138 S. Ct. 1916, 1923 (2018), quoting *Hollingsworth v. Perry*, 570 U.S. 693,
28 700 (2013).

1 A plaintiff must prove standing “in the same way as any other matter on which the
2 plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required
3 at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561. Ordinarily, “[f]or
4 purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing
5 courts must accept as true all material allegations of the complaint and must construe the
6 complaint in favor of the complaining party.” *Maya v. Centex Corp.*, 658 F.3d 1060, 1068
7 (9th Cir. 2011) (quoting *Warth*, 422 U.S. at 501). Here, however, Plaintiffs are also moving
8 for a preliminary injunction, and as such, they must make “a clear showing of each element
9 of standing.” *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013); *see also Lopez*, 630
10 F.3d at 785 (“[A]t the preliminary injunction stage, a plaintiff must make a ‘clear showing’
11 of his injury in fact”) (internal citation omitted).

12 2. Analysis

13 Plaintiffs argue that a condition of Senator McSally’s service is that she “remain a
14 member of the Republican party,” adding an additional qualification for service in the
15 Senate. (Doc. 13 at 5). Moreover, Plaintiffs argue that, as a result of the partisan
16 requirement, the “Governor has deprived the plaintiffs their right under the First
17 Amendment to be free from official endorsement by the State of Arizona of the particular
18 viewpoint that they will hear and receive from unelected persons serving in the Senate.”
19 (*Id.* at 8-9).

20 Defendants argue that, pursuant to the Seventeenth Amendment and Section 16-
21 222, the authority to appoint a temporary replacement to the Senate belongs solely to the
22 governor. Thus, they argue that only Governor Ducey is restricted by Section 16-222; and,
23 therefore, that only he has standing to challenge Section 16-222 on that ground.
24 Nonetheless, Defendants argue that even if Plaintiffs could establish standing, the partisan
25 requirement protects the rights of the voters and is constitutional.

26 As Plaintiffs seek injunctive relief, the initial inquiry for the Court must be whether
27 Plaintiffs’ FAC makes a “clear showing” of each element of standing. *Spokeo II*, 136 S.
28 Ct. at 1547; *Lopez*, 630 F.3d at 785. Here, the FAC alleges harm that is speculative at best.

1 Plaintiffs' alleged harm apparently stems from the possibility that they would receive better
2 representation by a person of a different political party. Initially, the Court finds this is not
3 a "clear showing" of an injury in fact. Plaintiffs also cannot clearly establish a redressable
4 injury. The effect of what they seek, declaring this provision to be unconstitutional, would
5 be that Governor Ducey's appointment would not necessarily have to be a Republican.
6 Plaintiffs have not argued, nor could they establish, that, even if the same party requirement
7 was held unconstitutional, Governor Ducey would not just keep Sen. McSally in place.
8 Even if there was harm here, there is not redressability, as the Court cannot order the
9 Governor to appoint a replacement that is suitable to plaintiffs. While it is not exactly clear
10 to the Court who has been alleged to have suffered an injury here, Plaintiffs have not
11 established particularized harm fairly traceable to Defendants, nor have they established a
12 redressable injury. Plaintiff Hess argues that he would have liked to have been considered
13 for the open Senate seat, but as a registered Libertarian he was not able to be considered
14 and thus was harmed. Notably, he does not argue that his chances would be any different
15 had this provision not existed. Hess has not made a "clear showing" of an injury in fact.¹⁷
16 *See Lopez*, 630 F.3d at 785. Rather, it appears that Plaintiffs have a concern that could be
17 addressed through the political process. *See Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018),
18 quoting *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013) (The Court should "not engage
19 in policymaking properly left to elected representatives").

20 Plaintiffs did not establish an injury in fact and redressability for purposes of
21 standing and thus the Court will not reach the merits of Plaintiffs' argument in Count
22 Three.¹⁸ Plaintiffs lack particularized harm and a redressable injury, and therefore

23 ¹⁷ Even if there was harm here, there is not redressability, as the Court cannot Order the
24 Governor to appoint Hess to the vacant Senate seat, nor can the Court require the Governor
25 to consider Mr. Hess or any other individual. Moreover, Hess argues that he plans to run
26 for the Senate in the future and will be "prejudiced by the effective incumbent advantage"
27 of Sen. McSally. While he did not produce evidence of this "advantage," re-election rates
28 for appointed senators is approximately 52%, substantially lower than the incumbency
29 advantage that non-appointed senators enjoy.
https://www.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm.

¹⁸ Had Plaintiffs established standing, the Court notes that the Supreme Court has upheld
similar politically-oriented schemes to be constitutional. *See Rodriguez*, 457 U.S. at 12.
Nonetheless, the Court need not reach the issue here.

1 Plaintiffs lack Article III Standing and Count Three of the FAC will be dismissed.

2 **V. Injunctive Relief**

3 Because of the Court’s ruling herein, the Court will only briefly examine the factors
4 for injunctive relief.¹⁹ A preliminary injunction “is an extraordinary and drastic remedy,
5 one that should not be granted unless the movant, by a clear showing, carries the burden of
6 persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quoting 11A
7 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, 129–130 (2d ed.
8 1995)). An injunction may be granted when the movant shows that ““he is likely to succeed
9 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
10 that the balance of equities tips in his favor, and that an injunction is in the public interest.””
11 *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)
12 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). In this circuit,
13 a preliminary injunction may also be issued when a plaintiff shows that ““serious questions
14 going to the merits were raised and the balance of hardships tips sharply in [plaintiff’s]
15 favor.”” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011)
16 (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)). The movant has
17 the burden of proof on each element of the test. *Envtl. Council of Sacramento v. Slater*,
18 184 F. Supp. 2d 1016, 1027 (E.D. Cal. 2000).

19 Where relief seeks to order “a responsible party to take action,” it is properly
20 “treated as a mandatory injunction.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir.
21 2015). A mandatory injunction “goes well beyond simply maintaining the status quo
22 pendente lite [and] is particularly disfavored.” *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313,
23 1320 (9th Cir. 1994) (internal citations omitted). A “district court should deny such relief
24 unless the facts and law clearly favor the moving party.” *Id.* (quoting *Anderson v. United*
25 *States*, 612 F.2d 1112, 1114 (9th Cir. 1979)).

26 Section 16-222 imposes reasonable and nondiscriminatory restrictions on the
27 Plaintiffs’ First and Fourteenth Amendment rights to vote, and the regulatory interests of

28 ¹⁹ The Court notes that Plaintiffs devote less than one page of their 18-page brief in support
of their Motion for Preliminary and Permanent Injunction to the *Winter* analysis.

1 the State are sufficient to justify the limited restrictions, if any, caused to Plaintiffs. *See*
2 *Burdick*, 504 U.S. at 433 (1992). Plaintiffs have not shown that any of their Constitutional
3 rights have been violated by the effects of Section 16-222. Moreover, Plaintiffs do not
4 have standing to challenge the same party requirement of Section 16-222. Therefore,
5 Plaintiffs cannot show that they are likely to succeed on the merits of their claims.
6 Plaintiffs cannot establish a likelihood of irreparable harm absent the protection of a
7 preliminary injunction. Generally, courts of equity should not act when the moving party
8 “will not suffer irreparable injury if denied equitable relief.” *Younger v. Harris*, 401 U.S.
9 37, 43–44 (1971). Plaintiffs have the burden of establishing that there is a likelihood, which
10 is more than just a possibility, that they will suffer irreparable harm if a preliminary
11 injunction is not entered. *See Winter*, 555 U.S. at 21–23. Plaintiffs have not established
12 irreparable harm here.

13 Moreover, the Court finds the balance of equities and public interest weigh in favor
14 of Defendants. Plaintiffs have not been denied a right to vote, neither has their right to vote
15 in an election been delayed. The costs to the state, as outlined herein, are high and
16 negatively impact Plaintiffs and all Arizona taxpayers. Moreover, Plaintiffs recognize the
17 “expense of a special election” to the citizens of Arizona. (Doc. 15 at 18). As Plaintiffs
18 have not met their burden of proof on any of the *Winter* elements, Plaintiffs’ Motion for
19 injunctive relief will be denied.

20 **VI. Conclusion**

21 “In this case we are confronted with no fundamental imperfection in the functioning
22 of democracy. No political party or portion of the state’s citizens can claim it is
23 permanently disadvantaged . . . or that it lacks effective means of securing legislative
24 reform if the statute is regarded as unsatisfactory. We have, rather, only the unusual,
25 temporary, and unfortunate combination of a tragic event and a reasonable statutory
26 scheme.” *Valenti*, 292 F. Supp. at 867. The same is true here. Section 16-222 does not
27 violate Plaintiffs’ First or Fourteenth Amendment rights to vote in the direct election of
28 their senator, nor is Section 16-222 unconstitutional under the framework of the

1 Seventeenth Amendment. The Seventeenth Amendment, along with the Elections Clause,
2 allocates a duty to the states to establish the time, place, and procedures for special elections
3 in the event of a vacancy in the Senate. The Amendment does not impose a temporal limit
4 on the vacancy period, and certainly does not mandate an election be held “within one
5 year” of the vacancy. Moreover, the State’s interests in avoiding excessive costs, lessening
6 voter confusion, and increasing voter turnout are substantial interests that result in
7 reasonable and non-severe restrictions (if any) on Plaintiffs’ rights to vote. Therefore,
8 Section 16-222 is constitutional, and the Court will not substitute its own judgment for that
9 of the legislature. *See Valenti*, 292 F. Supp. at 867 (“[A]s the Seventeenth Amendment has
10 specifically given to the legislatures of the states power to regulate vacancy elections, it is
11 not for a federal court to substitute its own judgment for that of the elected representatives
12 of the people.”). Accordingly, Defendants’ Motion to Dismiss will be granted²⁰ and
13 Plaintiffs’ Motions denied as moot.

14 Accordingly,

15 **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss (Doc. 21) is
16 **granted**. Counts One and Two are dismissed for failure to state a claim upon which relief
17 can be granted. Count Three is dismissed because Plaintiffs lack standing to assert the
18 claim.

19 **IT IS FURTHER ORDERED** that Plaintiffs’ Motion for Preliminary and
20 Permanent Injunction (Doc. 14) is **denied**.

21 **IT IS FURTHER ORDERED** that Plaintiffs’ Motion to Consolidate a hearing on
22 the Motion for Preliminary and Permanent Injunction with Trial on the Merits (Doc. 16) is
23 **denied as moot**.

24 **IT IS FURTHER ORDERED** that Plaintiffs’ Motion for Status Conference (Doc.
25 65) is **denied as moot**.


26 ...

27 ²⁰ Because the parties agree that all facts have been pled, all evidence has been submitted,
28 and the matters before the Court are purely legal in nature, the Court finds that the pleadings
could not be cured with the allegation of additional facts. Thus, amendment would be
futile, and this action shall be terminated.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS FINALLY ORDERED that the Clerk of Court shall kindly enter judgment and terminate this action.

Dated this 27th day of June, 2019.



Honorable Diane J. Humetewa
United States District Judge