STATE OF MINNESOTA
IN SUPREME COURT

Jill Clark, an individual and candidate for Minnesota Supreme Court Associate Justice, Seat #4, and Heather Robins, an individual and a registered voter, Petitioners, v. Tim Pawlenty, in his official Capacity as Governor of the State of Minnesota, Mark Ritchie, in his official capacity as Secretary of State of the State of Minnesota, and Fran Windschitl, in his official capacity as Rice County Auditor, Respondents.	**File No. A08-1385** ***** AMENDED ***** **PETITION FOR WRIT OF MANDAMUS TO CORRECT THE OFFICIAL BALLOT & REQUEST FOR ORDER**

SUMMARY OF PETITION

The ballot for Seat #4 for the Minnesota Supreme court is challenged, and this Petition alleges that: 1) Lorie S. Gildea is not an eligible candidate for Associate Justice Seat #4 and her name should be removed from the official ballot; 2) even if Gildea is an eligible candidate, the word "incumbent" should not appear by her name as she does not meet the criteria of Minnesota Statute, it gives an unfair advantage, and it is unconstitutional; and 3) Systemic use of appointment plus "incumbent" designation to select judges in Minnesota violates the First Amendment.

The official ballot should be changed prior to any election, or if not changed, any election based on an incorrect ballot should be disqualified/invalidated.

I. TYPE OF PETITION & JURISDICTION

This Petition is authorized for filing pursuant under Minn. Stat. §204B.44(a) (b) and/or (d), although other law is relied upon and cited in this Petition. The Petition is filed seeking a correction to the official ballot, before any election is held for Associate Justice Seat #4. Relief (in the form of correcting the official ballot) is sought for both the primary election and the general election.

This Court has original jurisdiction of this Petition pursuant to Minn. Stat. §204B.44, and in that context has original jurisdiction to determine if candidate for Supreme Court is legally entitled to have her name placed on the official ballot. *Cf.,* State v. Scott, 105 Minn. 513, 117 N.W.2d 1044 (Minn. 1908); In re Scarrelle, 300 Minn. 500, 221 N.W.2d 562 (Minn. 1974).

This Court has already determined that it has original jurisdiction and authority to decide more than mere procedural and mechanical errors or omissions. Page v. Carlson, 448 N.W.2d 274 (Minn. 1992). This Court may consider not only the Secretary of State's ministerial action regarding the ballot for Minnesota Supreme Court Justice, but also statutory and constitutional challenges to the ballot. *Id.* And accepting constitutional challenge to the ballot does not violate separation of powers principles, even if it impacts the Governor's actions. *Id.* Further, Minnesota statutes that impact the official ballot must be interpreted consistent with the state

constitutional provisions. *Id.* It is axiomatic that state statutes must pass muster under the Constitution of the United States ("US Constitution"). Republican Party v. White, 416 F.3d 738, 753 (8th Cir. 2005) ("Eighth Circuit Opinion").

II. THE PARTIES.

A. The Petitioners.

1. Jill Clark.

Jill Clark is an individual who resides in the State of Minnesota. She is a licensed attorney in the State of Minnesota. Jill Clark is a citizen of the State of Minnesota, and a citizen of the United States.

In 2002, Jill Clark filed to run for district court judge in Hennepin County. Her candidacy garnered over 47% of the vote.

On July 15, 2008, Jill Clark filed an affidavit of candidacy to run for election to public office, specifically the Minnesota Supreme Court, Associate Justice Seat #4 (Exh. 1).[1]

Jill Clark is a candidate for public office, and has a First Amendment right to run for public office, under the US Constitution.

Jill Clark's candidacy will be damaged if the official ballot contains any errors, or if it is otherwise contrary to law.

Jill Clark challenges the ballot, alleging that the election and her bid for public office will be irrevocably damaged by allowing the text of the sample ballot to

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1 Exhibits are attached to the Affidavit of Jill Clark.

become the official ballot. She seeks an order to correct the ballot, as further discussed herein.

2. Heather Robins.

Heather Robins is a resident of the State of Minnesota. She is eligible to vote, she is registered to vote, and she regularly votes in public elections. A registered voter has a sufficient interest in the election to raise the issue presented in this case. State ex rel. Sauer v. District Court, 74 Minn. 177, 178, 77 N.W. 28, 29 (1898).

In the past, Heather Robins held the seat of Rice County Commissioner, a nonpartisan seat. Heather Robins was elected to that seat, and ran again for re-election more than once. Each time Robins ran for re-election to that seat, her name appeared on the official ballot without any indication that she was the "incumbent." Robins was required to campaign for re-election, without the benefit that "incumbent" would have given her on the ballot. It is Robins' view, and she specifically alleges herein, that the word "incumbent" gives any candidate, including a judicial candidate, a distinct advantage over an opponent. Robins bases her opinion on her experience in public office, running for re-election, and in talking with voters throughout her prior district, and throughout the State.

Robins is a savvy voter. She is knowledgeable about politics, and knowledgeable about government. She is a graduate of Carleton College, and she has gained life experience in the arena of politics and government, including but not limited to that described above. Robins believes she is an informed voter, and she

spends time and energy before voting to learn about candidates. She believes that when she goes to the polls, she is making an informed choice for the offices in question.

Notwithstanding this, Robins has had difficulty learning about judicial candidates. She wants to know about them, and has taken active steps to learn about them. She believes that her ability to learn about judicial candidates is enhanced by the fact that her sister is a lawyer, so she can question her, and be pointed to sources of information about judicial candidates.

Robins has learned over time, and it is her educated opinion and allegation, that the farther down the ballot, the less the average voter knows about the candidates' qualifications and other criteria that would enable an informed selection. Robins has learned, and she specifically alleges, that the less a voter knows about the candidates in an election (even more so in "bottom of the ballot" races), the more likely that an extra word will influence the voter. Stated another way, if a word distinguishes one candidate from another toward the bottom of the ballot, the greater chance that the word will influence the uninformed voter, and give an advantage to that candidate. This is particularly true of the word "incumbent."

Robins is also aware, and she specifically alleges, that there is a large "drop off" at the bottom of the ballot. For example, in the 2002 contested primary election for Minnesota Supreme Court, there was about a 50% "drop off" in Hennepin

County. In the 2004 general election for Supreme Court, there was also about a 50% drop off. (Exh. 8).

Robins is also aware, and she specifically alleges, that voters who know nothing about bottom-of-the-ballot races, including judicial races, are more likely not to vote in those races. This is at least some explanation for the "drop off." But Robins is aware that any word that gives additional information about the candidate (descriptive of the candidate's occupation or qualifications, for example), gives a distinct advantage to that candidate. The less voters know the more this matters.

Robins is an informed voter. She wants her vote to count. Robins objects to any practice whereby judicial candidates have "incumbent" next to their name, as this provides that candidate an advantage in the election. When Robins ran for re-election to a non-partisan seat in Minnesota, she educated voters about who she was (her occupation at that time was County Commissioner, and her qualifications included that she had held that office) by campaigning, meeting people, talking to them, and informing them. Robins believes, and she specifically alleges, that that is the way to inform voters about nonpartisan elections, including judicial elections.

Robins believes, and she specifically alleges, that printing "incumbent" next to a judicial candidate's name dilutes Robins' knowing and informed vote, by encouraging those voters who know nothing about the candidates, to just vote for the candidate who holds the office now. Robins alleges that the Minnesota statute that provides for the use of the word "incumbent" next to a judicial candidate's

name infringes her First Amendment right to vote for her candidate of choice, and dilutes her vote as proscribed by the First Amendment of the US Constitution.

B. The Respondents.

1. Governor Pawlenty.

Minnesota Governor Tim Pawlenty appointed Associate Justice Russell A. Anderson to the Chief Justice Seat in January 2006, which was vacated by former Chief Justice Kathleen Blatz' resignation.[2] About that time Pawlenty also appointed Lorie Gildea to Seat #4, which had been vacated by Associate Justice Russell A. Anderson. Even though the Minnesota Constitution required that an election for the Chief Justice Seat be run for election in 2008, Governor Pawlenty appointed Eric J. Magnuson to the Chief Justice Seat just before the election-filing period in mid 2008.[3]

2. Secretary of State Ritchie.

Minnesota Secretary of State Mark Ritchie is responsible for preparing the sample ballot, and the official ballot, and posting which seats are vacant, and can be

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[2] Petitioners see no need to draw a distinction between the date the Governor announced these appointments, and the date these individuals took Office. It is not known to Petitioner when former Chief Justice Blatz sent a letter of resignation to the Governor, and the Governor's Office has taken the position that such letters from public, elected judges, are non-public. (Exh. 6). For purposes of this Petition, it is sufficient that the "appointments" took place in January 2006.

[3] Petitioners in no way doubt or challenge the premier qualifications of Eric J. Magnuson to serve Chief Justice. Nor are they seeking to challenge that Seat. He is mentioned here as a challenge to process *only.* There are numerous qualified judicial officers throughout this State, and Petitioners are not suggesting, in any way, that their accepted of an appointment diminishes their qualifications.

posted for by candidates. The sample ballot is provided to the County Auditors and/or other municipalities. Petitioners were informed that Hennepin County Auditor does not produce a sample ballot. Petitioner Robins was able to obtain a sample ballot from her County Auditor.

3. The County Auditor.

Heather Robins is a resident of Rice County, Minnesota. Fran Windschitl is the Rice County Auditor. Rice County provided the Sample Ballot at Exh. 4.

III. TIMING OF THIS PETITION.

Jill Clark made the decision to run for the Minnesota Supreme Court on July 15, 2008. She filed for Seat #4 that day. Neither the Chief Justice Seat, nor any seat that would have been run had Russell Anderson's seat been run, was open for filing. Clark attended the seminar for judicial candidates on July 30, 2008. She was informed by Bert Black of the Secretary of State's Office that sample ballots would be available from the county auditors on August 12, 2008. Clark was able to obtain a sample ballot from the Rice County Auditor on August 11, 2008. This Petition was filed forthwith. Petitioners do not know how they could have filed sooner.

Further, Petitioners were hopeful that the ballot would not contain the "errors" that it does, that the constitutional and statutory issues would have been resolved in favor of the law before the ballot was prepared. Petitioners do not believe they should be faulted for that hope.

There have been some cases where timing was discussed, but all of those cases did decide the issue on the merits.

IV. CHALLENGED ERRORS AND PROBLEMS WITH THE OFFICIAL BALLOT.

Minnesota Statute §204B.44 provides relief for errors and omissions on the ballot. It provides in pertinent part:

A. The Remedial Statute and its Focus.

> **204B.44 ERRORS AND OMISSIONS; REMEDY.**
> Any individual may file a petition in the manner provided in this section for the correction of any of the following errors, omissions, or wrongful acts which have occurred or are about to occur:
>
> (a) **an error or omission in the placement or printing of the name or description of any candidate or any question on any official ballot**;
>
> (b) **any other error in preparing or printing any official ballot**;
>
> (c) failure of the chair or secretary of the proper committee of a major political party to execute or file a certificate of nomination;
>
> (d) **any wrongful act, omission, or error of any election judge, municipal clerk, county auditor, canvassing board or any of its members, the secretary of state, or any other individual charged with any duty concerning an election.**
> The petition shall describe the error, omission, or wrongful act and the correction sought by the petitioner.

(Emphasis added.) This Petition invokes the statutory subsections bolded in the above text. The errors and/or omissions, which include challenges to the interpretation of statutes and constitutional language, include:

1) **Gildea is not a qualified candidate.** Lorie Gildea is disqualified from holding Seat #4. Her name should be removed from the ballot, because the ordinary language of Minn. Const. Art. VI, §8 provides that a substitute or replacement be elected at the next election.

2) **"Incumbent" should not appear on the ballot.**

   a. **"Incumbent" is improper under Minnesota statute.** Even if Lorie Gildea's name can appear on the ballot for Seat #4, the word "incumbent" must be removed from the ballot, since she does not qualify for that word under the plain language of Minn. Stat. §204B.36, Subd. 5. Further, the use of the word "incumbent" provides an advantage to Gildea's candidacy, which is prohibited by Minn. Stat. §204B.35, Subd. 2.

   b. **"Incumbent" is improper under the Minnesota Constitution.** Even if the use of the word "incumbent" survives scrutiny under the state statutes, use of that word violates the Minnesota Constitution by diluting the rights of voters to select judges by election.

3) **Systemic misuse of appointment violates First Amendment.** Systemic misuse of appointment authority, combined with the vacancy-filler being allowed to run with the moniker "incumbent," so disadvantages other candidates as to violate Candidate Clark's First Amendment right to run

for office, and voter Robins' First Amendment right to vote for her candidate of choice.

V. RELIEF REQUESTED

Petitioners seek the following relief:

1) **Disqualification of Gildea.** That the ballot be corrected to remove the name of Lorie Gildea from seeking Seat #4, because she does not meet the criteria of Minn. Const. Art. VI, §8. Since Gildea did not file an affidavit of candidacy for any other judicial seat, her name should be removed from the ballot, entirely.
2) **Removal of the word "incumbent" from next to Gildea's name.** If Gildea's name remains on the ballot (after analysis of the issue raised by (A), above), the ballot should be corrected to remove the word "incumbent" from next to Gildea's name.
3) **Election should be disqualified.** If the relief requested above in (A) and/or (B) is not granted when analyzing the federal constitutional violations complained of, Petitioners reserve the right to argue any federal issues regarding mootness, or regarding the text on the ballot, and request to disqualify (invalidate) any election using the "uncorrected" ballot.

Petitioners reserve the right to seek review of any portion of the US Constitutional analysis in the Supreme Court of the United States.

V. DISCUSSION OF THE SPECIFIC CHALLENGES TO THE BALLOT

A. Lorie Gildea is disqualified from holding Seat #4.

1. Undisputed facts support this contention.

The following facts are relevant to whether Gildea should be on the ballot at all, for Seat #4:

i. In 2006, Lorie Gildea was appointed by Governor Pawlenty to fill the vacancy in the Minnesota Supreme Court, Seat #4, which had been left vacant by Russell A. Anderson when he moved from Seat #4 to the Chief Justice Seat.

ii. The appointment of Gildea to Seat #4 had to have been made by Governor Pawlenty pursuant to Minn. Const. Art. VI, §8.[4] That section of the Minnesota Constitution provides that the one appointed to fill the vacancy shall do so "until a **successor** is elected and qualified. The **successor** shall be elected for a six year term at the **next general election.**" (Emphasis added.)

iii. The American Heritage Dictionary of the English Language, Fourth Ed., defines "successor" as, "to come next in time or succession; follow **after another**; **replace** another in an office or a position: *she succeeded to the throne.* (Italics in original, bold added.) The same dictionary defines "replacement" as "1. The act or process of replacing or of being replaced;

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[4] Sec. 8. **VACANCY.** Whenever there is a vacancy in the office of judge the governor shall appoint in the manner provided by law a qualified person to fill the vacancy until a successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after the appointment.

substitution. 2. One that replaces, especially a person assigned to a vacant military position.

iv. During the 2008 filing period, Lorie Gildea filed an affidavit of candidacy for Supreme Court, Seat #4 (Exh. 2).

v. The sample ballot (Exh. 4) lists Gildea's name as among 4 candidates for Seat #4 (Exh. 3 – p. 1).

vi. During the 2008 filing period, Lorie Gildea did not file any other affidavit of candidacy, for any other judicial office. *See* Exh. 3, and note that filing for more than one Seat is prohibited by Minn. Stat. §204B.06, Subd. 6, "[t]he individual shall be a candidate only for the office identified in the affidavit [of candidacy]. Each justice of the supreme court ... is deemed to hold a separate nonpartisan office."

2. Minnesota Constitution Mandates Elections for Judges.

The Minnesota Constitution requires judicial selection by election.

The Minnesota Constitution mandates the election of judges and specifies that the term of office of all judges shall be six years. Minn. Const. art. VI, § 7. Election is the principal method of selecting judges:
Since the adoption of the Minnesota constitution in 1857, there has been a constitutional requirement that judges be elected by the people, except in those situations in which the constitution itself permits appointment by the governor.
State ex rel. LaJesse v. Meisinger, 258 Minn. 297, 299, 103 N.W.2d 864, 866 (1960). Constitutional provisions for filling a judicial office by gubernatorial appointment "should be construed as subordinate to the sections providing for, and to be applicable only where vacancies in the judicial office cannot be filled by, the election of judges in regular course." Enger v. Holm, 213 Minn. 154, 157, 6 N.W.2d 101, 102 (1942).

Page v. Carlson, 488 N.W.2d 274, 278-79 (Minn. 2002).

When examining constitutional language, it is the Supreme Court's task to give effect to the clear, explicit, unambiguous and ordinary meaning of language. *Page, supra*, at 279, citing State ex rel Putnam v. Holm, 172 Minn. 162, 166, 215 N.W.2d 200, 202 (Minn. 1927).

> [W]e are interested in reaching the viewpoint of the framers of our fundamental law. Their intent, gathered from both the letter and spirit of the language, is the law. Unambiguous words need no interpretation. * * * We are not empowered to say that these men meant something they did not say. * * * We are not at liberty to give the language of the constitution any meaning other than its natural and ordinary meaning unless such construction would lead to an unjust or otherwise unreasonable result manifestly not intended. The constitution is the mandate of the sovereign power, and we must accept its clear language as it reads. It is our duty to construe the law; we cannot ingraft upon the constitution things that might have been included.

Stated another way, the Minnesota Supreme Court has no authority to step into the legislative arena in an attempt to regulate vacancies and elections for vacancy-fillers. That is the domain of the legislature. *Eighth Circuit Opinion*, 416 F.3d at 753.

> In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

District of Columbia v. Heller, -- U.S. --, 128 S. Ct. 2783, 2788 (2008).

3. Governor has limited power to appoint.

Generally speaking, the People of the State of Minnesota have granted specific powers to government, such as the Governor. But if no power is explicitly granted, it is reserved to the People.

> Since the supreme authority or sovereignty resides in the people, they can in general withhold, grant, or withdraw governmental powers; powers not granted to the [government] are reserved [] to the people. The supreme authority, or sovereignty, resides ultimately in the people. They are the source of all governmental and political powers and may, at their pleasure, withhold such powers, distribute them among various departments for purposes of government, or may withdraw such powers as have been conferred. In other words, a constitution is a compact between a government and the people in which the people delegate powers to the government and in which the powers of government are prescribed. A declared legislative policy can never rise above a constitutional grant or ignore a constitutional limitation on its powers.

16 C.J.S. Constitutional Law §97 (Generally) (citations omitted)(updated online June 2008). Minn. Const. Art. 1, sec. 1, reads,

> **OBJECT OF GOVERNMENT.** Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good.

Section 2 of that Article reads, "No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof...." And that Article's Sec. 16 reads, "The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people." The Governor has only those right enumerated to him, and nothing more. The remainder of all rights reside in their original source: the people.

> Every restriction imposed by the constitution must be considered as something which was designed to guard the public welfare, and it would be a violation of duty to give it any less than the fair and legitimate force which its terms require.

Wells v. Kent, 382 Mich. 112, 117, 168 N.W.2d 222, 224 (Mich. 1969).

This is an important concept when it comes to judicial selection. Because if the Governor appoints (and appoints, and appoints), the result is that the right of the public to select by judicial selection is not only infringed – it is eviscerated.

- Only one Justice currently on the Minnesota Supreme Court was elected;
- Petitioners are not aware of any Court of Appeals judges who have been elected; and
- Few trial courts judges were elected.

In 2003 91% of Minnesota's judges were initially appointed. K. Redfield, Ed., *Democratic Renewal*, Univ. Ill. at Springfield, January 2008 (Exh. 7).

The governors have managed, over time, to make elections of judges quite rare. This has been much-discussed in Minnesota in recent years. If the Governor disputes that he appoints the overwhelming number of judicial seats that come open, then Petitioner invites him to provide this Court with the precise statistics for a sufficient period of time to judge this issue (10-15 years).

The powers of the Governor to appoint should be strictly construed, so as to give power to the overall concept of the Minnesota Constitution, and its specific provisions requiring judicial selection by election. If there is any question as to whether the Governor should appoint – the decision should fall on the side of

election. Absent a specific grant of the power to appoint the judge, the power resides in the people.

4. Section 8 limits Governor's ability to appoint.

The plain language of Minn. Const. Art. VI, §8 sets the constitutional mandate for "vacancy-filler" judges.

> Sec. 8. **VACANCY.** Whenever there is a vacancy in the office of judge the governor shall appoint in the manner provided by law a qualified person to fill the vacancy until a successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after the appointment.

This Section uses very specific terms, in a very specific way. Section 8 uses the term "appoint" to apply to the selection of the vacancy-filler. As noted by Justice Paul Anderson in his dissent in Winters v. Kiffmeyer, 650 N.W.2d 167, 174 (Minn. 2002), appointment means "[t]he act of designating a person, such as a **nonelected** public official, for a job or duty," *Black's Law Dictionary* 96 (7th ed.1999)." *The American Heritage Dictionary of the English Language* 89 (3d ed.1992). It seems clear that a nonelected public official is different from an elected one.

Section 8 specifically states that whenever there is a vacancy, the governor shall appoint someone who will **fill the vacancy** ... **until a successor is elected.** The focus in this Section is to "fill the vacancy." The Section makes clear that the proper office holder (the "successor") shall be **elected.** In general, Article VI provides for "election" of judges. All of the language in that Section must be read with that focus in mind.

5. Governor cannot use Section 8 to turn elections into appointments.

As was made clear recently in Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528 (2002) ("White"), the Minnesota Constitution did not provide for an appointment system. "Since Minnesota's admission to the Union in 1958, the State's Constitution has provided for the selection of all state judges by popular election. Minn. Const. Art. VI, §7." That selection process is still the mandate of the sovereign. The fact that Minnesota may dispense with elections by future constitutional amendment, does not give its Supreme Court the power to *de facto* dispense with elections. *Cf.*, *White*, 122 S. Ct. at 2541.

Neither does the Minnesota Constitution authorize the "hybrid" system that has grown up as a practice in this State. This "hybrid" is what former Chief Justice Yetka referred to as the "traditional election process." Peterson v. Stafford, 490 N.W.2d 418, 420 (Minn. 1992). It consists of

- judges "retiring" before the end of the term they committed to serve,
- the governor appointing to fill the created vacancy, then
- the non-elected-vacancy-filler, who has never been elected, being allowed to use "incumbent" on the ballot at the next election.

As is discussed below, bestowing on the appointee the incumbency designation, has had an overwhelming tendency to insure the election of the appointee.[5] This is systemic violation of the Constitution.

> If Minnesota sees fit to elect its judges, which it does, it must do so using a process that passes constitutional muster.

Eighth Circuit Opinion at 748 (emphasis added). Zettler v. Ventura, 649 N.W.2d 846, 851 (Minn. 2002) held that when the effective date of judge's retirement suggests that use of the appointment process would thwart an otherwise possible election, the election process must be used.

The word "vacancy" in Section 8 was likely intended to deal with unexpected events: deaths, disability, and involuntary removal from office. *See* Kelley v. Riley, 417 Mich. 119, 332 N.W.2d 353, 354 (Mich. 1983) (vacancy provision found in Michigan Constitution art. 6 created mechanism to deal with death or removal of judge). The point is, "vacancies" were supposed to be rare.[6] Instead, they have become a very common method of "judicial selection."

According to the Director of Operations of Governor Pawlenty's Office, in the ten years prior to 2005, the Governor's Office had **220** judicial appointment files relating to judges who had retired or resigned during their term. (Exh. 6). That averages to about 22 judicial appointments *per year*. Surely those are not due to

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5 See discussion of Michigan case, *Kelley, infra.*

6 It is the frequent, systemic early retirements that cause the break in service discussed in Zettler, 649 N.W.2d at 850. It is not constitutional to first *create* the break in service, and claim that the break in service allows the appointments.

deaths, serious disabilities or removal from office. Not only is election not the actual method of selecting judges in Minnesota – it is extremely rare. Petitioners contend that the frequent, systemic use of "vacancy-filling" to select judges violates the ordinary language of the Constitution.

Stated another way, systemic "early retirement" and resignation, occurring *within the 6-year term of office*, is not contemplated by the Minnesota Constitution. Petitioners are not aware of any support for the notion that "vacancy" means intentional early retirement, intended to disenfranchise voters and prevent judicial elections. (See articles at Clark Aff. Exh. 9).

As stated well by the 1927 Minnesota Supreme Court as cited in *Page,* the language of the Constitution must guide its interpretation. The Minnesota Supreme Court lacks the authority to ingraft upon the Constitution things that it might have included. Indeed, the Supreme Court is not authorized to ingraft the "hybrid" process that had become the "tradition" in Minnesota - onto Article VI. It must read the language as consistent with the indigenous mandate of the people: selection of judges through election.

This *de facto* appointment process nullifies the direct Constitutional mandate that judges be selected by election. It is the more egregious because vacancy-fillers have been allowed to benefit from the use of the word "incumbent." (See further discussion on this advantage, below.)

Section 8 does not give the Governor the *right* to select the next judge – a *right* reserved for the people. The Governor can only **fill the vacancy *until the next election*.** Yet under the current practice, the right to appoint the vacancy *has become* the right to select the next judge.

6. Governor cannot manipulate Constitution to appoint justices.

Stated another way, the Governor is not allowed to manipulate the language of Section 8 to prevent elections of Supreme Court Justices. No such powers were given to him in Section 8.

Note how a prior Governor used Section 9 of the Minnesota Constitution to prevent an election in 1992. At that time, Alan C. Page intended to file an affidavit of candidacy, but Justice Yetka's term of office was "extended" by the Governor – just past the election. This prevented the electorate from selecting their Chief Justice. The Minnesota Supreme Court recused, and a panel of retired justices were appointed to hear and decide the case. That Panel held that Section 9 could not be used in the way the Governor had used it; the seat had to be put up for election. Petitioners urge that the same result should hold here.

This Governor has likewise manipulated Section 8. By using the appointment power in Section 8, he has effectively enlarged the term of office for judges past 6 years. The tenure of judges in office may only be changed by Constitutional amendment.