STATE OF MINNESOTA
IN SUPREME COURT

Jill Clark, an individual and candidate for Minnesota Supreme Court Chief Justice, Heather Robins, an individual and a registered voter, and Gregory Wersal, a candidate for Minnesota Supreme Court Chief Justice,

Petitioners,

v.

Mark Ritchie, in his official capacity as Secretary of State of the State of Minnesota, and Governor Timothy Pawlenty,

Respondents.

File No. A10-501

PETITION FOR WRIT OF MANDAMUS TO CORRECT THE OFFICIAL BALLOT & REQUIRE ACCEPTANCE OF FILINGS FOR THE SEAT OF CHIEF JUSTICE: AMENDED

SUMMARY OF PETITION

It has been many years since the seat of Chief Justice of the Supreme Court of the State of Minnesota was on the ballot. The Minnesota Constitution *requires* elections of judges. This year, the filing period for public office is May 18 through June 1, 2010. Chief Justice Magnuson announced his resignation in time for the seat to be run in 2010 (when election is due). There is no reason why Justice Magnuson's resignation could not be effective *before* the filing period, so that Minnesotans can file to run for the seat of Chief Justice. Exiting the seat on June 30, 2010, suggests that use of the appointment process would thwart an otherwise

possible election. Pursuant to Minnesota Supreme Court precedent in Zettler v. Ventura, 649 N.W.2d 846, 851 (Minn. 2002), this election must proceed.

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 to force the Secretary of State ("SOS") to accept filings for the Chief Justice seat this May, and to put the candidates for the seat on the ballot(s).

This Court has original jurisdiction of this Petition pursuant to Minn. Stat. §204B.44, and in that context has original jurisdiction to determine if the State is required to place the Chief Justice seat on the 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 Justices, but also statutory and constitutional challenges to the ballot. *Id.* And accepting the 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.

In 2008, Jill Clark filed to run for the Minnesota Supreme Court, Seat #4, and filed a Petition challenging: i) the systemic over-use of the interim appointment system to prevent elections of judges and justices in Minnesota; ii) her opponent's use of the word 'incumbent' on the ballot, and iii) challenging the constitutionality of the 'incumbent' statute.

Jill Clark intends to file for candidacy for the Chief Justice seat for the Supreme Court for the State of Minnesota. She has a First Amendment right to run for public office, under the US Constitution. If the Chief Justice Seat is not opened for filings, and not on the ballot, Jill Clark's constitutional right to run for office will be violated.

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).

Robins has been unable to vote for the seat of Chief Justice of the Supreme Court of the State of Minnesota, for many years.

3. Gregory Wersal.

Gregory Wersal is an individual who resides in the State of Minnesota. He is a licensed attorney in the State of Minnesota. He is a citizen of the State of Minnesota, and a citizen of the United States. Gregory Wersal intends to file for candidacy, for the Chief Justice seat, of the Supreme Court of the State of Minnesota. He has a First Amendment right to run for public office, under the US Constitution. If the Chief Justice Seat is not opened for filings, and not on the ballot, Gregory Wersal's constitutional right to run for office will be violated. Wersal publicly announced at a Republican Convention on March 6, 2010, that he was running for the seat of Chief Justice. Within days, Chief Justice Eric Magnuson announced publicly that he was stepping down from the seat, effective *June 30, 2010*. This, if allowed to occur, would prevent Wersal from running for the Chief Justice seat.

In 1998 he announced that he was going to run against Justice Gardebring. She then resigned, and the Governor appointed to fill the "vacancy," and Wersal was

unable to file to run for the seat. In 1998 he announced that he would run against Justice Tomljanovich, who then resigned, and the Governor appointed. Wersal was unable to file to run for that seat. In 2008, Wersal announced that he was running for the Chief Justice seat, the held the Russell Anderson. Chief Justice Anderson then announced his retirement, and the Governor appointed. Again, Wersal was unable to file to run for that seat.

Wersal was one of the lead Plaintiffs in the *White* case. He is currently suing the state of Minnesota, arguing that the certain provisions of the current Code of Judicial conduct violate judicial candidates free speech rights guaranteed by the First Amendment. That case is currently on appeal to the Eighth Circuit court of appeals; oral argument was held on December 15, 2009.

B. The Respondent.

1. Governor Timothy 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. 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. Petitioners submit that this is more than coincidence, and that the Governor has

engaged in a systemic overuse of the appointment process, to appoint his friends and colleagues, at the expense of the public's right to vote for Chief Justice.

Petitioners seek to prevent Governor Pawlenty from appointing anyone to the Chief Justice seat in 2010.

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 filed for by candidates. This Court has already determined that the SOS is the appropriate respondent on this and similar issues. See Clark v. Pawlenty, 755 N.W.2d 293 (Minn. 2008), Cert. denied, 129 S. Ct. 2009.

Petitioners contacted the SOS to ask whether the Chief Justice seat will be posted to accept filings, and were told that it would not. This, it seems, is due to a systemic deference to the Governor to appoint, *even when the filing period is approaching and the seat is up for election that year.*

III. TIMING OF THIS PETITION.

In Clark v. Pawlenty, the Supreme Court ruled that Clark and Robins had filed their petition too late. Here, Petitioners filed as soon as feasible after the announcement by Eric Magnuson that he was stepping down. They filed *before* the filing period, and before the ballots are printed. Petitioners reserved the right to amend this Petition, and to file affidavits in support.

To the extent necessary, Petitioners seek to expand or overrule the law.

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) **Chief Justice seat not to be posted or on ballot.** As noted above, the SOS intends *not* to post the Chief Justice seat for public filings, and not to place it on the ballot. The seat was up for re-election this year, and the filing period is rapidly approaching.

2) **Systemic overuse of the appointment process, in violation of the Minnesota Constitution, is wrongful.** Such a process allows a small group of people in the State to control the judiciary and its rulings. It allows governors to appoint their friends. The People of the State of Minnesota have a right to select their Chief Justice. The People of the State of Minnesota is the "group" that should control the judiciary. Systemic overuse of the appointment process violates the Minnesota Constitution, which demands that judicial officers be *elected.*

3) **Systemic misuse of appointment violates First Amendment.** Systemic misuse of appointment authority, violates Candidate Clark and Wersal'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) **Require the SOS to post the Chief Justice seat for filing in 2010.**

2) **Require the SOS to place the Chief justice seat on the ballot in 2010.**

If these things do not occur, Petitioners seek the right to request further relief, including the disqualification of the election.

V. DISCUSSION OF THE SPECIFIC CHALLENGES TO THE BALLOT

A. Minnesota Constitution Mandates Elections for Judges.

1. 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).

2. 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;
- No Court of Appeals judges have been elected- ever; and
- Few trial courts judges were elected.

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.

The Minnesota constitution is the law. The all-too-frequent appointments of Judges flies in the face of the Constitution, *regarding those very officers who have taken a sworn oath to uphold it.* Minnesotans do not have to put up with a system where the privileged few decide that they do not have to follow the law. Compliance with the law is vital for *all* Minnesotans. The judiciary should set an example of following the law, to encourages others to do so. Flagrant disrespect for the Constitution, and disregard for its *mandates* weakens the judiciary and leads by bad example.

3. 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. Notwithstanding the decision in Clark v. Pawlenty that Justice Gildea was not barred from running for Seat #4, Petitioners urge that this year, an election must be held to fill the vacancy created by Russell Anderson, and filled by appointment with Eric Magnuson.

Section 8 of the Minnesota constitution also mandates that,

> The successor shall be elected for a six year term at the next general election occurring more than one year after the appointment.

No successor to the vacancy created by Justice Blatz, or the vacancy created by Justice Anderson, has ever been elected, as mandated by the Minnesota Constitution.

Although the Governor has a limited power to appoint to fill a vacancy, the Constitution is clear that following the filling of the vacancy, the successor shall be elected at the next general election. This Petition alleges that the seat should have been run for election in 2008. The Governor appointed Eric Magnuson, but the Constitution is clear: the seat must be run for election this year. The obvious intent of the Constitution is to require an election at the next opportunity for general election. This year is just that opportunity.

4. Governor cannot use current 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.[1] This is a 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.[2] Instead, they have become a very common method of "judicial selection."

---

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

2 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.

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 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, or resignation in such a manner intended to disenfranchise voters and prevent judicial elections.

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." (But the incumbency designation is not the specific focus of this Petition.)

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.

5. 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.

> Where the office of judge is created by the constitution, and it fixes the term of office, the [governor] cannot, except insofar as there is constitutional authority for same, alter the term of judges in office, either by lengthening or shortening such term.

48A C.J.S. Judges (Term and Tenure of Office) § 43 (updated online June 2008) (citations omitted). Yet Governor Pawlenty has done just that. He has lengthened the term of office for the Chief Justice of this State, effectively giving himself the opportunity to serially appoint Chief Justices without the mandated public election.

Chief Justice Blatz was appointed in 1998, she ran for election in the year 2000, and she resigned around January 2006. (Exh. 5). It was at approximately that point that Governor Pawlenty appointed Associate Justice Russell A. Anderson to fill the seat of Chief Justice. Russell A. Anderson vacated Seat #4, and Gildea was appointed to fill the "vacancy" in that seat. *Id.*

According to the plain language of Section 8, the Chief Justice seat should have been posted for election "at the next general election occurring more than one year after the appointment." Since Chief Justice Blatz vacated in January 2006, and

Russell A. Anderson was appointed then,[3] the next election more than one year later would have been 2008. Just before the filing period came open, however, Governor Pawlenty appointed now-Chief-Justice Eric J. Magnuson. Section 8 does *not* provide that the governor may appoint to fill a vacancy, then appoint again to fill another vacancy within the same term, *thereby ensuring that there is no election.* (The very Section that allows the Governor to appoint, requires an election.) And since it does not specifically state it – the governor was never granted that power by the people.

This is just the scenario that the Dissent warned of in Winter v. Kiffmeyer, 650 N.W.2d 167 (Minn. 2002). Being less than careful in interpreting Section 8 would "open the door to a certain mischief in the appointment process," allowing the governor to appoint beyond the mandate of the Constitution. *Id.* at 176-77. The mischief has now occurred. Perhaps the Governor *wants* his appointees to have life terms. Perhaps the Governor *wants* to be able to appoint all justices – without any elections. But that is not the law.

6. What some "want" cannot transform the law.

Some hope to amend the Minnesota Constitution. A proposal to amend the Minnesota Constitution to provide initially for appointments, with retention elections only after appointment (and only appointment if the judge is not "retained") is afoot in this State. Some refer to it as the "Quie Proposal." That

---

[3] It is unnecessary to engage in the analysis found in the majority opinion in Winters v. Kiffmeyer, 650 N.W.2d 167 (Minn. 2002). The "next election" would be this year - 2010.

proposal may have merit. Or maybe a different appointment process will be chosen.[4] Since the *White* decisions, there has been good discussion in this State about the "best practice" for selecting judges. The stated goal of the Quie Commission is an independent and impartial judiciary. But laudable goals are not the law; the Quie proposal is not the law. And that proposal cannot be ingrafted onto Section 8, even if some wish it were the law.

7. *White* decisions should have inspired compliance.

It should be noted that the Governor made the appointments at issue here, *after* both the United States Supreme Court, and the Eighth Circuit Court of Appeals remarked in the *White* cases, that Minnesota was not following its own Constitution in selecting judges. The Governor is obligated to follow the Minnesota Constitution.

It is troubling that the Highest Court in the land spoke, and the Governor did not listen. Those who support an independent and impartial judiciary, those who are concerned that Courts will not be respected when they speak the law, should be concerned as well. It is at times like this that Courts are called upon to maintain the stronghold of democracy. It is when politics and pressures result in lawlessness, that the Courts need to part ways with everyone (their friends, their brethren, and a governor who might have appointed them), and follow the law.

---

[4] There is still risk that a small group (the performance review commission) could be pressured (what safeguard prevents contact with that group, and who will be monitoring that?), or that that process would involve judges feeling pressured to please that small group in order to be "retained."

8. The ordinary language focuses on election.

With the above in mind, the language of Section 8 allowing the governor to **fill the vacancy ... until a successor is elected** comes clear. The point of filling the vacancy is to *temporarily* fill the vacancy. The focus on the proper selection of judges for that Seat – is election. Nowhere in that Section does it state that the vacancy-filler can be the successor. And that language cannot be ingrafted onto the Constitution. Because to hold otherwise, ***would give the governor the power to select the judges***, ignoring the Constitutional mandate.

B. Minnesotans have a First Amendment right to run for office and to vote for the candidate of their choice.

Minnesota has acknowledged that candidates have a First Amendment right to run for office. American Federation of State, County andMunicipal Employees Council 65 v. Blue Earth County, 389 N.W.2d 244 (Minn. 1986).

The ballot has a special place in American society, due to the effect it has on voter impressions. Cook v. Gralike, 531 U.S. 510, 532, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001) (Rehnquist, C. J., concurring in judgment) ("[T]he ballot ... is the last thing the voter sees before he makes his choice").

> The ballot comes into play "at the most crucial stage in the electoral process-the instant before the vote is cast." *Anderson v. Martin,* 375 U.S. 399, 402, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964). It is the only document that all voters are guaranteed to see, and it is "the last thing the voter sees before he makes his choice," *Cook v. Gralike,* 531 U.S. 510, 532, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001) (Rehnquist, C. J., concurring in judgment). Thus, we have held that a State cannot elevate a particular issue to prominence by making it the only issue for which the ballot sets forth the candidates' positions. *Id.,* at 525-526, 121 S.Ct. 1029 (opinion of the Court).

Washington State Grange v. Washington State Republican Party, -- U.S. --, 128 S.Ct. 1184, 1200 (2008).

Petitioners assert that systematically allowing appointments of judges and justices, violates the First Amendment of the U.S. Constitution.

The right to run for public office is a federally protected constitutional right guaranteed under the First Amendment, made applicable to the states through the Fourteenth Amendment. Stiles v. Blunt, 912 F.2d 260, 265 (8th Cir. 1990), *cert. denied,* 111 S. Ct. 1307 (1991). Hargrove v. Board of Trustees, *supra,* 310 Md. at 426, 529 A.2d at 1382 ("[T]he constitutional right to be a candidate for elective office is a corollary of the constitutional protection of the elective franchise"). "If the State chooses to tap the energy and legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles." *White,* 122 S.Ct. at 2528 (internal quotation marks omitted and alteration incorporated).

The U.S. Supreme Court has identified "two different, although overlapping, kinds of rights" that the First Amendment grants: " '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 rank among our most precious freedoms." Anderson v. Celebrezze, 460 U.S. 780, 787, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

While the role of voter "is of the most fundamental significance under our constitutional structure," Burdick v. Takushi, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (internal quotation marks omitted), "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, corrective effect on voters. Anderson, 460 U.S. at 786, 103 s. Ct. 1564 (internal quotation marks omitted). Accordingly, the Supreme Court has "minimized the extent to which voting rights cases are distinguishable from ballot access cases." *Burdick,* 504 U.S. at 438, 112 S.Ct. 2059. In either context, "[o]ur primary concern is with the tendency of ballot access restrictions to limit the field of candidates from which voters might choose." *Anderson,* 460 U.S. at 786, 103 S.Ct. 1564 (internal quotation marks omitted).

In Bullock v. Carter, 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972), the Supreme Court discussed the interrelationship between candidate eligibility requirements and the fundamental rights of voters: "[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."

Bullock held that the right to run for office is not a fundamental right, but that in analyzing ballot regulations, "it is essential to examine in a realistic light the extent and nature of [the scheme's] impact on voters." *Bullock,* 405 U.S. 134, 143, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972). Courts must first ascertain "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth

Amendments that the plaintiff seeks to vindicate." *Id.* Court must make that assessment not "in isolation, but within the context of the state's overall scheme of election regulations." Lerman v. Bd. of Elections in the City of New York, 232 F.3d 135, 145 (2d Cir.2000).

If the reviewing courts' realistic assessment yields the conclusion that the electoral scheme lightly or even moderately burdens First Amendment rights, we apply a relaxed standard of review, according to which the restrictions generally are valid so long as they further an important state interest. *Lerman,* 232 F.3d at 145. On the other hand, if the court concludes that a law imposes severe burdens, we apply strict scrutiny, which requires that the law be necessary to serve a compelling state interest. *Id.; see also Bullock,* 405 U.S. at 147, 92 S.Ct. 849 ("But under the standard of review we consider applicable to this case, there must be a showing of necessity.").

Petitioners assert that the system discussed more fully above (governors have systematically appointed to fill vacancies, even when a *filing period is coming soon,* thereby *putting off* any election for that seat; followed by an election in which the vacancy-filler is allowed to have the word "incumbent" as an advertisement on the ballot), this process unduly burdens the right of candidates to be to file for office and be considered on the ballot, and the voters' rights to a broad spectrum of candidates. Such infringement by ballot regulation was held unconstitutional in Campbell v. Bysiewicz, 242 F.Supp.2d 164 (D.Conn. 2003), citing Lubin v. Panish,

415 U.S. 709, 716, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974) (finding regulation "heavily burdened" rights).

Campbell applied the three-fold test from Anderson, examining: (1) the character and magnitude of the right allegedly violated; (2) the interests claimed to be advanced by the intrusion on the right; (3) the extent to which the interests asserted make it necessary to burden the rights in the manner challenged. Petitioners assert that in the case at bar, these factors weigh in favor of strict scrutiny of the appointment process that has been systemically used.

(1) The character and magnitude of the right allegedly violated: keeping in mind the discussion above, Petitioners assert that the voter's right to a field of candidates, as well as the candidate's right to run for office (First Amendments rights as noted above) are severely impaired, and impaired in *nearly every single judicial race in this State.*

(2) The interests claimed to be advanced by the intrusion on the right. It seems clear that the interest being advanced, is the "traditional" hybrid, which is unconstitutional. The State cannot use an unconstitutional motive (or application) to justify its intrusion.

(3) The extent to which the interests asserted make it necessary to burden the rights in the manner challenged. Again, there is no need for the intrusion, except to perpetrate a systemic violation of the Minnesota Constitution, and create a de facto appointment process. This is not "necessary," and indeed, unlawful.

Ballots serve primarily to elect candidates and not, for First Amendment purposes, as forums for political expression. Washington State Grange v. Washington State Republican Party, -- U.S. --, 128 S.Ct. 1184 (2008).

The system of appointing to fill a vacancy heavily burdens rights. Campbell v. Bysiewicz, 242 F.Supp.2d 164 (D.Conn. 2003), citing Lubin v. Panish, 415 U.S. 709, 716, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974) (finding regulation "heavily burdened" rights). (Petitioner reserves argument that it also fails under a lower standard of review that might be argued by Respondents.)

A strict scrutiny analysis must be employed with regard to these First Amendment rights. (Clark v. Pawlenty should be overruled on this point.)

CONCLUSION

For all of the foregoing reasons, Petitioners seek an Order of this Court that:

- The Secretary of State, Mark Ritchie, is required to post the Chief Justice seat and accept filings for that seat from May 18, 2010 until June 1, 2010; and
- The Secretary of State, Mark Ritchie, is required to place the seat of Chief Justice on the ballot for primary election (if sufficient candidates file), and for the general election in 2010.

Petitioners seek to restraing the Governor of the State of Minnesota from appointing anyone to the Chief Justice seat, and reserve the right to file a motion for temporary restraining order prohibiting such appointment while this petition is pending.

Dated: March 29, 2010

ATTORNEYS FOR PETITIONERS
Jill Clark, Esq. (196988)
Jill Clark, P.A.
2005 Aquila Avenue North
Golden Valley, MN 55427
PH: (763) 417-9102