> 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,[7] the next election more than one year later is this year – 2008. Just before the filing period came open, however, Governor Pawlenty appointed now-Chief-Justice Eric J. Magnuson. Note that even Justice at Stake, an advocacy group of which the American Bar Association (ABA) is a member organization, listed "Russell Anderson's seat" as up for election this year. And yet

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[7] 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 in the same year – 2008.

that Seat was not posted for election. 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.

7. 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 proposal may have merit. Or maybe a different appointment process will be chosen.[8] Since the *White* decisions, there has been good discussion in this State

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8 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

about the "best practice" for selecting judges. The goals of an independent and impartial judiciary are laudable. The Petitioners hope that Minnesota will eventually settle on the finest system it can possibly have in order to achieve an 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.

Those who "want" the "hybrid" may suggest that the reason for the election-one-year-after-election language in Section 8, is to provide the governor's appointee sufficient time to prove him/herself in the office. But that notion is not supported by any history of the constitutional convention or amendment, and not supported by precedent. Indeed, this is a relic of the *de facto* appointment process called out by the *White* cases. As the Dissent stated in *Winters*,

> The majority also supports its conclusion with reference to the presumed intent of Article VI, section 8 to allow judicial appointees to actually serve in office for one year before facing election. But that intent is not apparent in section 8, which states only that a successor to an appointee shall be elected "at the next general election occurring more than one year after the appointment."
>
> ...
>
> There is nothing in this language to indicate that the court in *Peterson* or the framers of our state constitution thought one full year of actual service in office was necessary for voters to reflect on the competence of the appointee.

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be monitoring that?), or that that process would involve judges feeling pressured to please that small group in order to be "retained."

Winters, 650 N.W.2d at 174. Indeed, the framers of the Constitution contemplated "'ultimate control' by the electorate." *Id.* The only way to prevent the mischief – is to implement its plain language. A "successor" is a substitute, a replace for the vacancy-filler. They cannot be one and the same. Magnanimous citizens, and retired judges, may well serve to fill vacancies, so that the work can be done. But vacancy-fillers cannot be allowed to run for that office.

8. *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.

9. 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 <u>elected</u>** comes clear. The point of filling the

vacancy is to 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.

Indeed, since the vacancy-filler was not elected, the vacancy-filler is not qualified to be the successor, under Minn. Const. Art. VI, §7. "They shall be elected by the voters...." Note the slight difference in use of the word **successors** in Section 7 and **successor** in Section 8. Section 8 adds the word "elected and" before "qualified." This focuses on the need to "elect" the office-holder. To allow the appointed office-holder to be the successor would nullify the intent of the framers: **selection by election.**

The ordinary language of Section 8 supports this interpretation. The word successor means "to come next in time or succession; follow **after another**; **replace** another in an office or a position: *she succeeded to the throne.* (The American Heritage Dictionary of the English Language, Fourth Ed.; italics in original, bold added.) The same dictionary defines "**replacement**" as "1. The act or process of replacing or of being replaced; **substitution**. 2. One that replaces, especially a person assigned to a vacant military position. Put simply, for purposes of Section 8, the successor is the replacement. Not the same person – but a substitution. Why?

Because the vacancy-filler was never elected; the election provides the first qualified office-holder.

Lorie Gildea was never elected to Seat #4. She was appointed as a vacancy-filler. For all of the foregoing reasons, Gildea is not qualified to be the successor. By plain language, she cannot "replace" herself, cannot be a "substitute" for herself. She is disqualified from seeking election for the seat for which she filled the vacancy. Any other result would subvert the intention of the original framers of the Minnesota Constitution.

This result is not fanciful. Indeed, in Kelley v. Riley, 417 Mich. 119, 332 N.W.2d 353 (Mich. 1983), the Michigan Supreme Court discussed that State's Constitution regarding judicial vacancies, and amendments to that provision. "Starting with Georgia in 1812, States began to provide for judicial election, a development rapidly accelerated by Jacksonian democracy. By the time of the Civil War, the great majority of States elected their judges." *White*, 122 S. Ct. at 2540. The Michigan Constitution provides for judicial elections, with language very similar to the Minnesota Constitution's Article VI, §7. Michigan's "judicial vacancy" provision is also contained in that Constitution's Article 6. And that Article 6 shared some language with the Minnesota Constitution. In particular, the language, "until the successor is elected and qualified" appeared in that Constitution.

In 1963 Michigan amended its Constitution to clarify that vacancy-fillers could be selected from retired judges, that they were to fill the vacancy, *only*, and they were ineligible to be re-seated.

> The change [wa]s made in order to maintain consistency in the idea that this state should have an elected judiciary. The present system of appointment by the governor to fill vacancies, bestowing on the appointee the incumbency designation, has had an overwhelming tendency to insure the election of the appointee. This has created in effect an appointive judiciary.

Kelley, 332 N.W.2d at 355. Michigan acknowledged in 1983, what this Petition now alleges: the "hybrid" system (that has become the "tradition" in Minnesota) undermines the overall mandate of the Constitution to select by election.

To ensure that the work was getting done, Michigan again amended its Constitution in 1968. And the remainder of that case deals with a specific factual situation: whether a Governor can appoint to fill a Supreme Court justice vacancy not only for a part of the term in which the vacancy occurs, but also for a part of the next succeeding term. That issue resulted in a tie vote on the 1983 Michigan Supreme Court, so the ouster was denied. But the issue is similar to that raised by Petitioner herein with regard to the Chief Justice Seat: by appointing first Russell A. Anderson to a "vacancy", and then before the election scheduled for 2008, again appointing to fill that "vacancy" created by Russell A. Anderson's resignation, the seat did not go up for election in 2008, and Governor Pawlenty effectively filled the seat not just for the remainder of former-Chief-Justice Blatz' term, but for part of the

next term, as well. The argument Petitioner makes herein was serious enough to obtain 3 votes of the Michigan Supreme Court in 1983.

Further, as noted in *Kelley*, "[t]he [] system of appointment by the governor to fill vacancies, bestowing on the appointee the incumbency designation, has had an overwhelming tendency to insure the election of the appointee. This has created in effect an appointive judiciary." That holding by the Michigan Supreme Court shows this is a serious issue, worthy of consideration. That holding is relevant to the "effective appointive judiciary" referenced in this Section of the Petition. But it is also good to keep in mind, in reviewing the remainder of this Petition.

B. "Incumbent" should not appear next to Gildea's name on Ballot.

If after analysis of the issues raised in subsection (A), above, Gildea's name remains on the ballot, the ballot should be corrected to remove the word "incumbent" from next to Gildea's name.

Peterson v. Stafford, 490 N.W.2d 418, 420 (Minn. 1992) did discuss some of these issues. But it appears that the plain language argument made by Peterson was not ruled upon. So that case does not preclude this argument.

1. The plain language of the statute precludes "incumbent."

Under the plain words of the Minnesota statute, Gildea should not have "incumbent" by her name. *Cf.*, Nikolits v. Nicosia, 682 So.2d 663 (Fla. Ct. App. 1996) (strict reading of Florida incumbent disallowed word incumbent on ballot).

Minn. Stat. § 204B.36, Subd. 5 provides as follows:

> **Designation of incumbent; judicial offices.** If a chief justice, associate justice, or judge is a candidate to **succeed again**, the word 'incumbent' shall be printed after that judge's name as a candidate.

(Emphasis added.) If Gildea is allowed to stay on the ballot at all, then this Court must have already determined that "successor" means the person who succeeds in the next election. And if successor means succeeding in an election, then "succeed again" must mean that the "successor" had already succeeded prior – meaning, ***has been previously elected.*** It is undisputed that this is Gildea's first election. She was never elected prior. She never "succeeded" prior. Therefore, even if she can "succeed" this time – she cannot meet the criteria required for having "incumbent" placed by her name on the ballot.

Again, it appears that Peterson made this plain language argument, but that Justice Yetka declined to examine that language in his Opinion.

2. "Incumbent" violates illegal advantage Statute.

An additional Minnesota statute prohibits the use of the word "incumbent" next to Gildea's name. Minn. Stat. § 204B.35, Subd. 2, Manner of preparation, provides as follows:

> Ballots shall be prepared in a manner that enables the voters to understand which questions are to be voted upon and the identity and number of candidates to be voted for in each office and to designate their choices easily and accurately. **The name of a candidate shall not appear on a ballot in any way that gives the candidate an advantage over an opponent, including words descriptive of the candidate's occupation, qualifications, principles, or opinions, except as otherwise provided by law.**

(Emphasis added.) Petitioner Robins alleges, and the Michigan Supreme Court has already held: the use of the word incumbent for an appointed vacancy-filler gives that individual an advantage. Indeed, 25 years ago, it was acknowledges as an overwhelming tendency to insure the election of the appointee. Kelley v. Riley, 417 Mich. 119, 171, 332 N.W.2d 353, 371 (Mich. 1983) (designation as "incumbent" for recently-appointed state supreme court justice had the tendency to insure the election of such a justice).

Other jurisdictions addressed the issue. Generally, less information is available to voters in judicial elections. Mallory v. Ohio, 38 F.Supp.2d 525, 535 (S.D. Ohio 1997).

> Uninformed or indifferent voting behavior is referred to as the "windfall vote" or, at times, more derisively as the "donkey vote" inasmuch as those who vote randomly will often "uncritically check off whoever [sic] is at the top of the ballot, especially if the candidate is also an incumbent." Clough v. Guzzi, 416 F.Supp. 1057, 1063 (D.Mass.1976).

New Alliance Party v. New York State Board of Elections, 861 F.Supp. 282, 289 (S.D.N.Y. 1994). Indeed, this notion became so well accepted that even listing an incumbent in the "first position" on the ballot was challenged – and declared illegal. Ulland v. Growe, 262 N.W.2d 412, 414 (Minn. 1978); Other studies following the Bain & Hecock model "have yielded almost unanimous results: all other factors being equal, the name appearing first in a list of candidates attracts a larger than random share of the vote." William James Scott, Jr., Note, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents,* 45 So.Cal.L.Rev. 365, 366

(1972) (listing other studies and conducting its own study of California elections); *see also,* Sangmeister v. Woodard, 565 F.2d at 463 n. 3 (listing studies); Gould v. Grubb, 14 Cal. 3d 661, 536 P.2d 1337, 112 Cal.Rptr. 377 (Cal. 1975) (listing incumbent first on all ballots violates equal protection clause).

That round of litigation led to the current Minnesota statute, which requires rotation of candidate names on the ballot. If even primary position on the ballot is unconstitutional, it is axiomatic that allowing a never-before-elected judicial candidate to use the word "incumbent" is even more troubling.

Incumbents in other nonpartisan races do not have "incumbent" by their names. The Minnesota Legislature created this especially for judges. Minn. Stat. § 204B.36, Subd. 5. Whether it was intentional or not, the Minnesota statute that authorizes identifying gubernatorial appointees as "incumbent" has the effect of transforming a mandate to elect, into a *de facto* appointment system.

The *Peterson* case should not foreclose Petitioners' current arguments. First, the *Peterson* opinion, which essentially holds that the law could give way to "tradition," has been called into question by *White*, and the *Eighth Circuit Opinion*.

Second, Justice Yetka's holding was not supported by the material cited in the Yetka Opinion. And even if it had been, it has been called into question by the federal decisions cited herein: Minnesota *cannot* fashion a hybrid system by ignoring its Constitution. Indeed, Justice Yetka's analysis shows that he is upholding a popular yet unconstitutional "appointment-retention-hybrid" system.

> It seems clear that Minnesota has adopted **its own middle-of-the-road approach** to judicial selection. The open election process has been retained, but with a **quasi-retention feature** which simply informs the voter who the incumbent candidate is and who the challenger is.

Peterson at 425 (emphasis added). Justice Yetka went on to mention a "committee report" (*Id.* at 422) and a proposed amendment (*Id.*), and the "appearance" that the legislature had considered it appropriate for the ballot to inform the voters which candidate was seeking **retention.**" (Id. at 423 (emphasis)). This language in the Yetka Opinion show that the *desire* for a different system overwhelmed the actual mandate of the Constitution. In the words of a federal court in California, that "is tantamount to saying that popular but unconstitutional solutions to serious problems should survive judicial scrutiny...." Bates v. Jones, 958 F.Supp. 1446, 1468 (N.D.Cal. 1997). The *Peterson* opinion is called into sharp question.

If Gildea continues on the ballot, the word "incumbent" should be removed, because it is well-accepted that its use provides a distinct advantage to that candidate, in violation of Minn. Stat. § 204B.35, Subd. 2.

C. Use of "Incumbent" is unconstitutional.

1. "Incumbent" violates Minnesota Constitution.

Petitioners challenge Minn. Stat. § 204B.35, Subd. 2 as unconstitutional on its face under the Minnesota Constitution, or as applied to this race (where a gubernatorial vacancy-appointee is on the ballot for the first time), because it infringes the voters' right to select judges by election.

As early as 1969, the Michigan Supreme Court held that a statute which permitted an incumbent municipal judge who was candidate for district judge to use the designation on the ballot that he holds judicial office was unconstitutional. Wells v. Kent, 382 Mich. 112, 168 N.W.2d 222 (Mich. 1969), cited in Socialist Workers Party v. Secretary of State, 412 Mich. 571, 597, 317 N.W.2d 1, 10 (Mich. 1982).

Although Michigan's then Constitution is not identical to Minnesota's, the analysis in that case would hold sway under our State Constitution:

- Any authority granted to legislature by constitutional provision relating to election of judges of new district courts is to be exercised within entire framework of judicial article of Constitution. 168 N.W.2d at 228.
- One of the primary goals of election procedures is to achieve equality of treatment for all candidates whose names appear on ballot. *Id.* at 227.

Under the specific Michigan "purity of elections" language, the Michigan Supreme Court held: Any grant of designation of candidate on ballot should be upheld only in event it is clearly within those constitutional exceptions which permit such designation or it aids in some way the purity of elections.

As discussed above, the Minnesota Legislature lacks the authority to re-write the Minnesota Constitution in order to write out elections. The "judicial incumbent" statute does just that, by almost insuring that the gubernatorial vacancy-appointee will win the next election. Petitioners challenge the Respondents to come forward

with elections in which the gubernatorial vacancy-appointee, who had the word "incumbent" by his or her name on the ballot, did not win the next election.

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). Arguments made in the subsection below may well support Petitioners' argument that Minn. Stat. § 204B.35, Subd. 2 violates the Minnesota Constitution.

2. Use of "incumbent" violates US Constitution.

Petitioners challenge Minn. Stat. § 204B.35, Subd. 2 under the US Constitution because it: i) infringes Jill Clark's right to run for public office; and ii) it infringes voter rights. The law for these concepts is discussed fully in Section C, below. It may be unnecessary to rule separately as to whether the designation as "incumbent" violates the First Amendment, since Petitioners are also challenging the systemic combination of excessive appointments, plus the designation of incumbent for first-time judicial candidates, in Section C.

C. Systemic use of Appointment plus "incumbent" violates First Amendment.

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 applying Minn. Stat. § 204B.35, Subd. 2 to judicial vacancy-appointees violates the First Amendment of the US Constitution. Petitioners realize that the "appointment" provision is constitutional and not statutory. However, it is the systemic use (indeed misuse) of that Section of the Minnesota Constitution, combined with the use of the term "incumbent" for vacancy-filled-appointees, that infringes the rights of judicial candidates and the voters. This combined effect is challenged in the race for Seat #4. But it is also challenged in its overall systemic impact on First Amendment rights of Minnesotans.

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 vacancy-fillers to seats left by vacating judges, those appointees have been allowed to have "incumbent" by their name, and they have overwhelmingly been "retained" at election), unduly burdens the right of candidates to be considered, and 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 + incumbent designation. (Petitioners realize that the "appointment" prong of their argument refers to a constitutional provision; however, this is necessary discussion, since it heavily impacts the way the statute is *applied* to this race).

(1) The character and magnitude of the right allegedly violated: keeping in mind the discussion above (that "incumbent" unfairly advantages one candidate, and creates "windfall" voting instead of informed voting), 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 which the governor's vacancy-appointee runs for office.*

(2) The interests claimed to be advanced by the intrusion on the right. It seems clear that the interest being advanced, is the "tradition" 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). Stated another way, Appointee Gildea does not have a First Amendment right to have incumbent on the ballot.

If the system of appointing to fill a vacancy, combined with the use of the word "incumbent" is strictly scrutinized, it fails. 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.)

Finally, Petitioners reserve the right to argue on Certiorari to the Supreme Court of the United States (if that is necessary), that the issues are not moot, and that the election should be disqualified/unvalidated, or for other relief.

CONCLUSION

For all of the foregoing reasons, Petitioners seek the relief requested above.

s/jillclark

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