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VIA ELECTRONIC AND REGULAR U.S. MAIL

The Honorable Robert B. Evnen
 Secretary of State
 State of Nebraska
 2300 State Capitol
 Lincoln, NE 68509
 E-Mail: Robert.Evnen@nebraska.gov

RE: Request to Enforce Nebraska Election Law Regarding Legally Insufficient Proposed Ballot Measure (Medical Marijuana)

Dear Secretary of State Evnen:

Our firm represents several Nebraska residents/registered voters who are concerned about the legal sufficiency of the medical cannabis related ballot measures filed with your office for inclusion on the November 2020 general election ballot. In connection with your statutorily mandated duty as Nebraska's chief election official to review the legal sufficiency of these measures, we wish to draw your attention to the legal defects of the Nebraska Medical Cannabis Constitutional Amendment Petition (the "Medical Cannabis Amendment"), as you conduct your review.¹ We request that you withhold this legally insufficient measure from the ballot.

Background: The Medical Cannabis Amendment

The Medical Cannabis Amendment is a voter-initiated measure that proposes to amend the Nebraska Constitution by adding a new Article XIX, Section 1. A new Article XIX, Section 1 would make it legal to use, possess, access, and safely produce cannabis, and cannabis products and materials, for serious medical conditions as recommend by a physician or nurse practitioner. The use, possession, and production of, and access to, cannabis for any reason has never been legally permissible in the State of Nebraska.

The Medical Cannabis Amendment was filed in your office at least four months prior to the general election, meaning the proposed amendment will be presented to Nebraska voters for approval or rejection at the November 2020 general election if all statutory and constitutional requirements have been met for submission of the proposed amendment to voters. It is our clients' position they have not.

¹ Available at: https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/2018/Medical_Cannabis.pdf.

The Medical Cannabis Amendment is Legally Insufficient and Invalid

The Medical Cannabis Amendment must be withheld from the ballot because it violates the Constitution's single subject rule, is confusing to voters as to what they are asked to decide, and creates serious doubt as to what would be legalized after the election. *See* Neb. Const. art. III, § 2. The first power reserved by the people is the power of initiative by petition, however, the Constitution provides, among other matters related to initiatives, that "[i]nitiative measures shall contain only one subject." Neb. Const. art. III, § 2. The Supreme Court of Nebraska has held that, "[a] purpose of this language is to avoid voter confusion and logrolling, which is the practice of combining dissimilar propositions into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately." *Christensen v. Gale*, 301 Neb. 19, 31, 917 N.W.2d 145, 156 (2018); *see also State ex rel. Loontjer v. Gale*, 288 Neb. 973, 997, 853 N.W.2d 494, 511 (2014) (holding that the single subject rule is "intended to avoid voter confusion when deciding whether to support a proposed change in the constitution").

In determining whether the single subject rule has been satisfied, Nebraska courts apply the natural and necessary connection test: "[w]here the limits of a proposed law, having natural and necessary connection with each other, and, together, are part of one general subject, the proposal is a single and not a dual proposition." *Christensen*, 301 Neb. at 32, 917 N.W.2d at 156 (internal quotation omitted). "The controlling consideration in determining the singleness of a proposed amendment is its singleness of purpose and the relationship of the details to the general subject." *Id.* "The general subject is defined by its primary purpose." *Id.*

The Supreme Court of Nebraska first applied the natural and necessary connection test to state-wide initiatives in *State ex rel. Loontjer*. *See State ex rel. Loontjer*, 288 Neb. at 100, 917 N.W.2d at 513. The natural and necessary connection test has three components:

a proposed municipal ballot measure is invalid if it would (1) compel voters to vote for or against distinct propositions in a single vote – when they might not do so if presented separately; (2) confuse voters on the issues they are asked to decide; or (3) create doubt as to what action they have authorized after the election.

Id. (quoting *City of North Platte v. Tilgner*, 282 Neb. 328, 349, 803 N.W.2d 469, 487 (2011)). Applying these principles to the Medical Cannabis Amendment, it is evident that it violates the single subject rule, is deeply confusing, and creates serious doubt as to what voters will have authorized post-election if the amendment is passed.

Single Subject Rule Violation

The Medical Cannabis Amendment is in violation of the single subject rule, and therefore invalid, because it contains more than one separate and distinct issue on which voters must decide: first, it proposes to provide individuals with the right to use, possess, access, purchase, and produce cannabis, cannabis products, and cannabis-related equipment for serious medical conditions; second, it allows private entities and their agents operating in Nebraska to grow, cultivate, process, possess, transport, sell, test, or transfer possession of cannabis, cannabis products, or cannabis-related equipment for sale or delivery to authorized individual users; and finally it contains separate provisions regarding the use of cannabis to treat a serious medical condition by two separate and unrelated populations.

The Attorney General approved the following explanatory statement and ballot title to be included on the ballot in the November 2020 general election:

A vote “FOR” will amend the Nebraska Constitution to: (1) provide individuals the right to use, possess, access, purchase, and produce cannabis, cannabis products, and cannabis-related equipment for serious medical conditions if recommended by a licensed physician or nurse practitioner, subject to certain exceptions and reasonable laws, rules, and regulations; and (2) allow private entities and their agents operating in Nebraska to grow, cultivate, process, possess, transport, sell, test, or transfer possession of the cannabis, cannabis-products, or cannabis-related equipment for sale or delivery to authorized individual users, subject to reasonable laws, rules, and regulations, including licensing.

A vote “AGAINST” will not cause the Nebraska constitution to be amended in such a manner.

Should the Nebraska Constitution be amended to: (1) Provide individuals the right to use, possess, access, purchase, and produce cannabis, cannabis products, and cannabis-related equipment for serious medical conditions, if recommended by a licensed physician or nurse practitioner, subject to certain exceptions and reasonable laws, rules, and regulations; and (2) Allow private entities and their agents operating in Nebraska to grow, cultivate, process, possess, transport, sell, test, or transfer possession of cannabis, cannabis products, or cannabis-related equipment for sale or delivery to authorized individual users, subject to reasonable laws, rules, and regulations, including licensing?

The first proposition in the ballot language is related to the use of cannabis solely for a serious medical condition and the second proposition has no relation to the use of cannabis to treat serious medical conditions and clearly violates the single subject rule of Article III, Section 2 of the Constitution. There is no natural and necessary connection between these two propositions and therefore the single subject test established in *State ex rel. Loontjer* has not been met. A voter may be willing to vote for the use of cannabis to treat a serious medical condition, however, that same voter may vote against allowing private entities to grow,

cultivate, produce, and sell cannabis, particularly since the second proposition set forth in the ballot language does not limit such activities to purpose of legalizing the use of cannabis to treat serious medical conditions.

The Supreme Court of Nebraska stated in *Christensen v. Gale* that:

The controlling consideration in determining the singleness of a subject for purposes of article III, § 2, of the Nebraska Constitution is its singleness of purpose and relationship of the details to the general subject ... Whether the elements of complex statutory amendments can be characterized as presenting different policy issues, the crux of the question is the extent of the differences and how the elements relate to the primary purpose.

Christensen v. Gale, 301 Neb. 19, 34-35, 917 N.W.2d 145, 157-58 (2018). The proposed explanatory language and ballot statement each contain two propositions that do not relate to the same primary purpose. The object statement contained in the Medical Cannabis Amendment reads follows: “[t]he object of this petition is to amend the Nebraska Constitution to provide the right to use, possess, access, and safely produce cannabis, and cannabis products and materials, for serious medical conditions as recommended by a physician or nurse practitioner.” Thus, the primary purpose of the ballot initiative is the use of cannabis to treat serious medical conditions and each of the elements of the proposed amendment must be related to this purpose.

Further, regardless of the language contained in the explanatory statement and ballot title, there is no natural and necessary connection between the right of an individual to use and possess, and produce cannabis to treat a serious medical condition and the right of a private entity to grow, cultivate, process, possess, transport, sell, test, or transfer possession of cannabis for sale or delivery. If an individual is permitted to produce their own cannabis, as is set forth in the proposed amendment, it is not necessary for private entities operating in Nebraska to be permitted to grow, cultivate, sell, transfer possession, etc. to achieve the purpose of the Medical Cannabis Amendment. Therefore, the Medical Cannabis Amendment contains multiple “subjects” for purposes of Article III, Section 2 of the Constitution. It is entirely plausible that a voter would prefer to vote for one of the measures set forth in the Medical Cannabis Amendment and against another. By requiring voters to vote for or against the whole package containing dissimilar propositions, the Medical Cannabis Amendment violates the single subject rule and is facially unconstitutional.

The Medical Cannabis Amendment is easily contrasted with many of the ballot initiatives presented to the people of Nebraska in which a natural and necessary connection has been found and the proposed ballot initiatives did not violate the single subject rule. In *Christensen v. Gale*, the Supreme Court of Nebraska held that funding the expansion of Medicaid was a natural and necessary connection to the expansion of Medicaid, stating that “[t]he general subject is Medicaid expansion, and maximizing federal funding for that expansion is a detail related to the singleness of purpose of expanding Medicaid.” *Christensen*, 301 Neb. at 34, 917 N.W.2d at 157. *Christensen* is illustrative of the natural and necessary connection that must exist for singleness of purpose. It follows logically that an expansion of Medicaid benefits must be funded, however, it is not a necessary or natural

consequence of legalizing cannabis for medical use that private entities should be permitted to sell cannabis for any use that is not medical.

The Medical Cannabis Amendment contains a second violation of the single subject rule in the text of the proposed amendment. The proposed amendment considers the use cannabis for a serious medical condition separately for individuals who are eighteen years of age or older and those who are younger than eighteen years of age. It is entirely plausible that a voter would vote in favor of permitting the use of cannabis to treat a serious medical condition by individuals who are eighteen years of age or older and not in favor of the use of cannabis to treat a serious medical condition by individuals who are younger than eighteen years of age. There is no natural and necessary connection between these two age groups regarding the use of cannabis to treat a medical condition. An individual who is eighteen years of age or older can use cannabis to treat a serious medical condition regardless of whether an individual younger than eighteen years of age is permitted to do the same. Revisiting the facts of *Christensen*, there was a natural and necessary connection between the expansion of Medicaid benefits and funding of the same. *Christensen*, 301 Neb. at 34, 917 N.W.2d at 157. As set forth in the Medical Cannabis Amendment there is a clear demarcation between the proposed age groups.

In considering the differences between the proposed age groups, it is important to consider the age of majority in Nebraska. A person is under nineteen years of age is a minor in the State of Nebraska. Neb. Rev. Stat. § 43-2101(1). Upon reaching the age of nineteen, a person in Nebraska acquires all rights and responsibilities granted or imposed by common law, however, there are specific exceptions to the age of majority that allow individuals who are eighteen years old to enter into binding contracts, enter into financing arrangements, acquire or convey title to real property, and consent to mental health services without the consent of a parent or legal guardian. Neb. Rev. Stat. § 43-2101(2). A parent or guardian of an individual who is eighteen may delegate to the minor, by a properly executed power of attorney, the parent or guardian's authority to consent to the minor's health care and medical treatment. Neb. Rev. Stat. § 30-2604.² The current laws of the State of Nebraska are illustrative of the age at which the citizens of this state wish to grant full rights and responsibilities to an individual and draw a clear line regarding the age at which individuals are historically granted full rights and responsibilities of an adult.

The Medical Cannabis Amendment asks voters to decide on multiple policy issues that are not related to the same general purpose with a single vote, in violation of the single subject rule. Voters will be asked to decide whether to allow individuals to use cannabis to treat serious medical conditions, whether to allow private entities to produce and sell cannabis without limiting the purpose; and whether to allow minors to use cannabis to treat serious medical conditions. These are all issues on which a voter may take a different position, and asking voters to decide all three in one fell swoop is a violation of the Constitution.

² It is important to note that 19 years of age (not 18) is now the legal age for the use of tobacco products in Nebraska. See, e.g., Neb.Rev.Stat. § 28-1418.

Voter Confusion and Doubt

The Medical Cannabis Amendment also violates the test set forth in *Stat ex rel. Loontjer* because it creates confusion and serious doubt regarding the exact nature of the actions that a vote cast in favor of the amendment would authorize. See 288 Neb. at 1000, 853 N.W.2d at 513.

The Medical Cannabis Amendment is silent on what medical conditions cannabis can be used to treat, and voters will be confused regarding what their vote may be authorizing. A voter may be willing to vote in favor of allowing the use to treat certain conditions, but not others. The lack of clarity that results from the use of the vague phrase “serious medical condition” creates confusion and prohibits voters from making a fully informed decision on whether to vote for or against the Medical Cannabis Amendment. This also results in a risk that rights conferred by the amendment will be applied in a wildly varied manner.

In lieu of defining “serious medical condition,” the Medical Cannabis Amendment offers no guidance regarding how a physician or nurse practitioner shall make a determination that a medical condition is serious, such that use of cannabis for treatment is permissible, as authorized by voters. This casts serious doubt on the actions that voters will have authorized, as it may result in a treating physician or nurse practitioner using cannabis to treat a medical condition that the voters may not have intended to authorize. By not clearly defining “serious medical condition,” the Medical Cannabis Amendment causes confusion and creates serious doubt as to what action the voters have authorized in violation of the test set forth in *State ex rel. Loontjer* and should be withheld from the ballot.

Additionally, voters are also likely to be confused about the rights that are granted to individuals who have historically been considered minors in the State of Nebraska if the Medical Cannabis Amendment passes. As discussed herein, the age of majority in the State of Nebraska is nineteen, and the laws of this state paint a clear and storied picture of the age at which individuals are granted the full rights and responsibilities of a citizen of this state. Voters may be unaware, or confused about the fact, that they are authorizing minors to use cannabis to treat a serious medical condition, in a stark departure from the existing laws of this state. It is not clear from the ballot language or the Medical Cannabis Amendment that allowing an eighteen year old to use cannabis for a medical purpose without the permission of a parent or guardian is a departure from the standard age at which an individual is permitted to make their own health care decisions. Currently, an eighteen year old is only permitted to make decisions regarding their health care and medical treatment with a properly executed power of attorney by their parent or guardian. Neb. Rev. Stat. § 30-2604. Therefore, a vote in favor of the Medical Cannabis Amendment may cause a confused and unsuspecting voter to unknowingly authorize an eighteen year old to take certain actions regarding their health care and medical treatment that the voter would not have otherwise authorized. Thus, the Medical Cannabis Amendment should be withheld from the ballot for causing confusion in violation of the test set forth in *State ex rel. Loontjer*.

The Medical Cannabis Amendment should be withheld from the ballot because it violates the single subject rule, causes confusion, and creates doubt about what will be authorized after the election; therefore, it is legally insufficient and facially unconstitutional. The proposed amendment violates at least one, if not all, of the requirements of test set forth in *State ex rel. Loontjer* to determine the legal sufficiency of a ballot initiative and the Medical Cannabis Amendment should be withheld from the ballot accordingly. *State ex rel. Loontjer*, 288 Neb. at 1000, 853 N.W.2d at 513 (holding that “a ballot measure is invalid if it would (1) compel voters to vote for or against distinct propositions in a single vote – when they might not do so if presented separately; (2) confuse voters on the issues they are asked to decide; or (3) create doubt as to what action they have authorized after the election”).

The Legal Sufficiency of a Ballot Initiative is Ripe for Review Pre-Election

When the legal sufficiency of a ballot initiative has been challenged prior to the election, the “Secretary of State must review a petition for a proposed initiative measure to determine whether the petition satisfies statutory prescriptions regarding the form of an initiative measure.” *Duggan v. Beermann*, 249 Neb. 411, 434, 544 N.W.2d 68, 82 (1996). The legal sufficiency of a ballot measure should be reviewed prior to its submission to voters, and the Secretary of State can, and should, reject the measure if it is facially invalid or unconstitutional. *Id.* “Substantive challenges to proposed initiatives are not justiciable before the measure is adopted by voters.” *City of Fremont v. Kotas*, 279 Neb. 720, 725, 781 N.W.2d 456, 461 (2010). However, “procedural challenges to the legal sufficiency of an initiative petition may be determined prior to an election.” *Id.* See also *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003); *State ex rel. Labedz v. Beermann*, 229 Neb. 657, 669, 428 N.W.2d 608, 616 (1988); *State ex rel. Winter v. Swanson*, 138 Neb. 597, 294 N.W. 200 (1940).

The Supreme Court of Nebraska has held that the question of whether a ballot initiative violates the single subject rule is a question of legal sufficiency, and not a substantive challenge. Therefore, the Secretary of State should evaluate the Medical Cannabis Amendment for compliance with the single subject requirement set forth in the Constitution prior to the election. In *Stewart v. Advanced Gaming Technologies, Inc.*, 272 Neb. 471, 483-85, 723 N.W.2d 65, 75-76 (2006), the Supreme Court of Nebraska Stated:

As we recently noted in *State ex rel. Lemon* ... this court held that the district court was correct in *Duggan* in declining to rule on the constitutionality of an initiative measure prior to the election ... We held in *Duggan* that the question did not become justiciable until the measure was adopted by the voters ... In contrast to the substantive constitutional challenge which was not ripe in *Duggan*, we have had occasion to consider challenges which bear of the regulation of the initiative process itself and we have found these latter challenges justiciable prior to an election ... [T]he issue of whether an initiative violated the single subject rule of article III, § 2, was a justiciable issue prior to the election ... whereas the single subject rule contained in article III, § 2 was a “procedural requirement” affecting the legal sufficiency of the measure which would justiciable prior to the election.

A determination as to the legal sufficiency of the Medical Cannabis Amendment and its compliance with the single subject rule is clearly appropriate prior to the election.

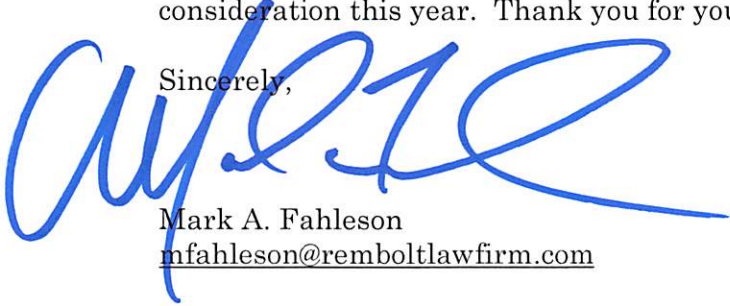
**The Secretary of State has a Duty to Withhold
Legally Insufficient Measures from the Ballot**

The Supreme Court has made clear, from cases in which the court has sustained mandamus actions, that the Nebraska Secretary of State has a clear duty to withhold legally insufficient and facially unconstitutional measures from the ballot. *See State ex rel. Wieland v. Beermann*, 246 Neb. 808, 816, 523 N.W.2d 518, 525 (1994). *See also State ex rel. Lemon v. Gale*, 272 Neb. 295, 297, 721 N.W.2d 347, 351 (2006) (affirming Secretary of State's refusal to place measures which violated Article III, Section 2 of the Constitution on the ballot). It is a well-established principle of law that a proposed amendment to the Constitution which contains more than one subject but requires voters to consider them as a single subject "is facially invalid because it does not meet the constitutional requirement." *Loontjer v. Robinson*, 266 Neb. 902, 922, 670 N.W.2d 301, 314 (2003) (Wright, J., concurring). Therefore, a clear duty exists to withhold the Medical Cannabis Amendment from the ballot.

Because of the sensitivity of the matter at hand, we respectfully request that your review of the legal sufficiency of the Medical Cannabis Amendment be completed as quickly as possible. Time is of the essence due to the general election deadlines that begin as early as mid-September. We anticipate that by exercising your duty to withhold the Medical Cannabis Amendment from the ballot, proponents of the Medical Cannabis Amendment will respond by commencing litigation. An early review and quick decision will allow the Supreme Court of Nebraska to review the matter and affirm your decision to withhold the measure from the ballot as required by the Constitution and clear precedent set by the Supreme Court. *See ex rel. Lemon v. Gale*, 272 Neb. 295, 297, 721 N.W.2d 347, 351 (2006). However, if you disagree with the analysis set forth herein, or prefer to defer to the judiciary, we respectfully request that you notify us of your decision by August 28, 2020, so that we may proceed under Neb. Rev. Stat. § 32-1412.

We appreciate your thorough review and consideration of the above in evaluating the legal sufficiency of the Medical Cannabis Amendment, and the other initiatives filed for consideration this year. Thank you for your attention to this matter.

Sincerely,



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