STATE OF NEBRASKA

ROBERT B. EVNEN
SECRETARY OF STATE

P.O. Box 94608
State Capitol, Suite 2300
Lincoln, NE 68509-4608
Phone: 402-471-2554
Fax: 402-471-3237
www.sos.ne.gov

August 27, 2020

VIA EMAIL

Mark Fahleson
Rembolt Ludtke
Email: mfahleson@remboltlawfirm.com

Jason Grams
Lamson Dugan & Murray LLP
Email: jgrams@ldmlaw.com

Hon. Max Kelch
Sherrets, Bruno & Vogt, LLC
Email: mkelch@sherrets.com

Re: Legal Sufficiency of the Nebraska Medical Cannabis Constitutional Amendment

Dear Counsel:

The Nebraska Medical Cannabis Constitutional Amendment (the "Amendment") has been submitted to this office for placement on the November 2020, general election ballot. The Amendment proposes a new section 1 to a new Article XIX of the Nebraska Constitution.

By letter dated and received by me on August 26, 2020, attorney Mark Fahleson indicated that he represented several Nebraska residents/registered voters (hereinafter, "Objectors") who are concerned about the legal sufficiency of the Amendment and requested that the Amendment be withheld from the ballot due to its claimed legal insufficiency.

In response to my request, on August 26, 2020, I received a letter from Jason Grams of Lamson Dugan & Murray, LLP, and from Hon. Max Kelch of Sherrets, Bruno & Vogt, LLC, on behalf of the sponsors of the Amendment.[1] I also have reviewed email correspondence received today from Mr. Fahleson and Mr. Grams concerning the Amendment.

Neb. Rev. Stat. § 32-1409(3) directs the Secretary of State to total the valid petition signatures and determine whether constitutional and statutory requirements have been met for initiative petitions. The Secretary of State, pursuant to Neb. Rev. Stat. §§ 32-201 and 32-202, has the duty to decide disputed points of election law and to supervise the conduct of primary and general elections in this state. The Nebraska Supreme Court has held that the Secretary of State has the duty to determine the legal sufficiency of ballot measures such as these, and to

[1] The sponsors of the Amendment are Adam Morfeld, Anna Wishart and Nebraskans for Sensible Marijuana Laws. (Hereinafter, these parties will be referred to as the "Sponsors.")

withhold such measures from the ballot if they are legally insufficient. *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); *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 986-993, 853 N.W.2d 494, 505-508 (2014).

Having now reviewed and considered the submissions of the Objectors and the Sponsors, and based upon my independent review, this letter sets forth my determination of the legal sufficiency of the Initiatives.

Preliminary Statement

This is the eleventh hour. The objection to the Amendment was received by this office on Wednesday, August 26, 2020, only 16 calendar days before the date on which I am required to certify the ballot in its entirety. An issue of the magnitude of this matter will surely result in court review no matter what I decide here.

It is therefore incumbent on me to decide this matter very quickly, so that the parties can move on to the courts and so that the courts will have as much opportunity as possible to review the matter. For that reason, I am issuing my determination on the day following the date on which I received the objection.

I have done my best here to follow the law and issue a decision within that highly challenging time frame. In the near future, I intend to review the processes that result in such a compressed and unsuitable time frame for consideration of issues of this magnitude.

Standing

Counsel for the Sponsors assert that I lack jurisdiction to evaluate the objections set forth in Mr. Fahleson's letter because his letter fails "to identify the residents or voters it purports to represent…"

I find no standing requirement set forth in Neb. Rev. Stat. § 32-1409(3), the statute under which I conduct my review. The case cited by Sponsors' counsel, *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010), concerns invoking the jurisdiction of a court. The Secretary of State is a not a court, nor does the Secretary act in a quasi-judicial capacity in this statutorily mandated exercise.

Moreover, I have no reason to believe that Mr. Fahleson would violate his oath as a member of the bar by misstating to me that he represents Nebraska residents and registered voters if he did not.

Single Subject Rule

"Initiative measures shall contain only one subject." Neb. Const. art. III, § 2. The Nebraska Supreme Court has reviewed the single subject rule in a number of initiative and

referendum cases. In *State ex rel. Loontjer v. Gale,* 288 Neb. 973, 853 N.W.2d 494 (2014), the Court concluded that the natural and necessary connection test that had been applied to municipal ballot measures also applies to voter initiatives under article III, § 2. The test provides that a proposed 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. at 1000, 853 N.W.2d at 513.

The court expanded upon this standard in *Christensen v. Gale*, 301 Neb. 19, 917 N.W.2d 145 (2018):

> Where the limits of a proposed law, having natural and necessary connection with each other, and, together, are a part of one general subject, the proposal is a single and not a dual proposition. 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. The general subject is defined by its primary purpose.

Id. at 32, 917 N.W.2d at 156 (internal quotation omitted) (2018).

Primary Purpose

A determination of legal sufficiency must begin with a statement of the primary purpose of the initiative. Here, the primary purpose of the Amendment is to legalize the use of cannabis in this state for persons with serious medical conditions.

Single Subject Review

Whether the Amendment complies with the single subject rule is a close question, as discussed below.

Ultimately, I conclude that the Amendment is sufficiently similar to the Medicaid proposal discussed in *Christensen v. Gale,* 301 Neb. 19, 917 N.W.2d 145 (2018), and the immigration ordinance discussed in *City of Fremont v. Kotas,* 279 Neb. 720, 781 N.W.2d 456 (2010), to warrant placing the Amendment on the ballot.

City of Fremont v. Kotas involved an extensive city immigration ordinance proposed by initiative petition in the City of Fremont. The district court in that case found that the measure had one general subject–the regulation of undocumented aliens in Fremont. Additionally, the district court found that every provision within the measure was part of its general subject, even though the ordinance had several components, dealing with occupancy, licensing, electronic verification, government uses, resources, and penalty provisions. The Supreme Court held that the measure was not confusing or deceiving to the voters. *Id.* at 727-728, 781 N.W.2d at 463.

The initiative petition at issue in *Christensen v. Gale* was the expansion of Medicaid coverage. The petition proposed the addition of "Section 2" to the Medical Assistance Act with five subsections. The subsections would (1) expand Medicaid to adults ages 19 through 64 who met a certain income threshold, (2) direct the Department of Health and Human Services (DHHS) to submit a state plan amendment seeking approval of federal centers for services, (3) direct DHHS to take all actions necessary to maximize federal financial participation in funding medical assistance, (4) require no greater burden or restriction be imposed on persons eligible for medical assistance under section 2 than any other population eligible for medical assistance, and (5) require that section 2 would apply notwithstanding any other provision of law or federal waiver. *Christensen v. Gale*, 301 Neb. at 23, 917 N.W.2d at 151 (2018).

After reviewing the proposed petition, the Supreme Court, citing *City of Fremont v. Kotas*, held that the proposal for the expansion of Medicaid and its funding had a natural and necessary connection with each other and thus, a singleness of purpose. The court distinguished the case from *State ex rel. Loontjer v. Gale,* 288 Neb. 973, 853 N.W.2d 494 (2014), by rejecting the argument that the provision related to federal funding was only included to enhance the odds that voters would approve Medicaid expansion. The Court indicated that the general subject was Medicaid expansion and maximizing federal funding for that expansion was a detail related to the primary purpose of expanding Medicaid. *Christensen v. Gale*, 301 Neb. at 33-34, 917 N.W.2d at 157 (2018).

Here, the Amendment contains nine subsections related to the legalization of medical cannabis in the state. The subsections would (1) authorize an individual who is eighteen years of age or older to use, possess, access, purchase and produce cannabis to alleviate a serious medical condition if recommended by a licensed physician or nurse practitioner, (2) authorize an individual under the age of eighteen to use and possess cannabis to alleviate a serious medical condition if recommended by a licensed physician or nurse practitioner with the permission of a parent or legal guardian, (3) provide private entities may produce cannabis for individuals authorized to use cannabis under the first two sections, (4) decriminalize use of medical cannabis, (5) limit the enactment of laws related to medical cannabis to those that are reasonable and promote the health and safety of individuals authorized to use medical cannabis, (6) set forth certain limitations on the expansion of medical cannabis, i.e. not allowing the smoking of medical cannabis in public, (7) provide employers are not required to allow employees to work while impaired by cannabis, (8) provide insurers are not required to provide insurance coverage for medical cannabis, and (9) define "cannabis."

Mr. Fahleson argues that the first proposition in the ballot language is related to the use of cannabis solely for a serious medical condition, but that the second proposition has no relation to the use of cannabis to treat serious medical conditions, and thus that the Amendment violates the single subject rule. He indicates 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. Additionally, he argues that the ballot language does not limit such activities to the purpose of the use of cannabis to treat serious medical conditions.

The production and sale of medical cannabis has a natural and necessary connection to legalization of medical cannabis for individual use, which is the primary purpose of the Amendment. As with other legal medications, third parties are given the right to manufacture, sell and distribute the medications. It is inherent in the legalization of medical cannabis that someone or some category of persons must be granted the right or authority to produce, sell and distribute the medical cannabis.[2] It is possible that some voters may not like all of the details provided for in the Amendment related to legalizing cannabis in this state. Those voters will be able to express that dislike at the polls, however, the possibility of other policy choices does not in and of itself create a dual purpose. *Id.* at 35, 917 N.W.2d at 158.

Mr. Fahleson asserts that subsection (3) of the Amendment which provides the right for private parties to produce cannabis does not limit the production and sale of cannabis to the use which is permitted in the Amendment.

Subsection (3) provides that the production of cannabis is for sale or delivery to an individual authorized to use cannabis for serious medical conditions under subsections (1) or (2) of the Amendment. There is no penalty to the distributor, however, if the authorized user uses the cannabis unlawfully. Under the provisions of the subsection (3), even if a distributor knows or reasonably should know that the amount of cannabis purchased from the distributor is grossly excessive in quantity or frequency from the standpoint of purely personal use, the distributor is absolutely protected from liability if the purchaser is an authorized user.

Subsection (5)(a), however, provides that the rights protected in the Amendment are subject to reasonable laws, rules and regulations that....prevent unlawful diversion of cannabis. Subsection (5)(b) provides that the Amendment shall not prevent the expeditious license and reasonable regulations of entities and agents acting under subsection (3) of the Amendment. Citing the foregoing provisions of subsections (5)(a) and (b), counsel for the Sponsors has written that "the scenario you describe is not plausible..."

Because subsection (5) appears to provide a constitutional basis to address this otherwise large loophole, I will not withhold the Amendment from the ballot on this basis.

I note, however, that this difficulty in subsection (3) of the Amendment is substantial. If Mr. Fahleson's reading of subsection (3) is correct, then the Amendment would not be limited to a single subject and would be legally insufficient for that reason. There is no natural and necessary connection between the use of medical cannabis by persons who are diagnosed with a serious medical condition and the production and sale of cannabis for other purposes.

Mr. Fahleson argues that the Amendment contains a second violation of the single subject rule, by providing for the use of 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

[2] As noted by counsel for the Sponsors, "...it is impossible to use a plant product to treat a serious medical condition without first having a plant."

of age. The Sponsors of the proposed amendment separated the authorization between individuals eighteen years and older from those younger than eighteen in order to add the additional requirement of parental consent to the authorized user under the age of eighteen. The requirement for parental consent for those under the age of eighteen for the use of medical cannabis has a natural and necessary connection with the legalization of medical cannabis in this state. The additional requirement, parental consent for a person under the age of eighteen, is not a separate proposition. It is a detail related to the primary purpose of authorizing medical cannabis.

Voter Confusion and Doubt

Initiatives which "confuse voters on the issues they are asked to decide; or...create doubt as to what action they have authorized after the election" must be withheld from the ballot. *State ex rel. Loontjer v. Gale,* 288 Neb. at 1000, 853 N.W.2d at 513 (2014).

Mr. Fahleson argues that the Amendment creates confusion and serious doubt regarding the exact nature of the actions that a vote cast in favor of the amendment would authorize. He has two concerns: (1) the lack of definition for "serious medical condition" in the Amendment and (2) confusion regarding the rights that would be granted to individuals who have historically been considered minors in the State of Nebraska.

There is a substantial argument that the Amendment is both confusing and creates doubt about what would be authorized. Under this initiative, medical doctors or nurse practitioners would not be prescribing medication to treat a medical diagnosis for which the medication has been authorized by the U.S. Food and Drug Administration or anyone else. Instead, medical doctors or nurse practitioners would "recommend" the use of cannabis to "alleviate a serious medical condition." No pharmacy could dispense cannabis on this basis, hence the provisions of subsections 3, 4 and 5 of the Amendment.

While the definition of "cannabis" in section 9 of the Amendment is comprehensive and detailed, the Sponsors have failed to provide any definition, criteria, or guidance, as to what constitutes a "serious medical condition" or which such conditions might be "alleviated" by the use of cannabis. These terms – "serious medical condition" and "alleviate" – are legal terms, not medical terms.[3]

The sale and use of cannabis is limited by leaving to the judgment of a licensed physician or nurse practitioner the decision as to whether an individual has a "serious medical condition" warranting a recommendation of the use of medical cannabis. The absence of any definition, criteria, or guidance, makes this a close case, however, placing the determination in the hands of medical professionals is sufficiently clear such that I decline to withhold the Amendment from the ballot on the basis of this objection.

[3] *Cf.* Family Medical Leave Act (FMLA), which at least offers some guidance as to what constitutes a "serious health condition." 29 U.S.C. §2611(11); 29 CFR § 825.113.

With respect to Mr. Fahleson's assertion of confusion regarding the rights of minors, our statutes contain many carve-outs for eighteen year olds to the general rule that persons under the age of nineteen are minors. For example, persons eighteen years of age may enter into binding legal contracts, leases, and may obtain a mortgage and sign promissory notes. Neb. Rev. Stat. § 43-2101(2)(a). In the health care context, Neb. Rev. Stat. § 43-2101(2)(b) provides that a person eighteen years of age may consent to mental health services without the consent of his or her parents. The fact that the Nebraska Constitution would give the right to eighteen years olds to use medical cannabis is not confusing. Further illustrating this point, Art. VI, § 1 of the Nebraska Constitution provides that eighteen year olds are "electors" in this state. The fact that eighteen year olds have a constitutional right to vote even though the age of majority in the state is nineteen has not caused confusion.

Federal Drug Laws

The Revisor of Statutes indicated in her comments to the Sponsors that the text of the proposed Amendment conflicts with federal drug laws.[4] The people of Nebraska may amend their Constitution in any way they see fit, provided the amendments do not violate the federal Constitution or conflict with federal statutes or treaties. *State ex rel. Stenberg v. Moore*, 251 Neb. 598, 558 N.W.2d 794 (1997). I express no opinion on this subject because it is not clear that this issue is within the purview of a legal sufficiency review by the Secretary of State and because it does not appear to be ripe for decision.

Conclusion

The constitutional right to bring forward initiative petitions for a vote of the people is fundamental to our state governance and is to be zealously protected. *Christensen v. Gale*, 301 Neb. 19, 27, 917 N.W.2d 145, 153 (2018).

Based upon my review, and for the reasons set forth above, I conclude that the Amendment is legally sufficient and I shall not withhold it from the ballot unless otherwise ordered by a court of competent jurisdiction.

Sincerely,

Robert B. Evnen
Nebraska Secretary of State

[4] In a letter dated February 13, 2019, Ms. Pepperl, Revisor of Statutes wrote, "Finally, it is worth noting that the text of the proposed measure conflicts with federal drug laws which cannot be directly affected by action on the part of the State of Nebraska.