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NEBRASKA SUPREME COURT
COURT OF APPEALS

IN THE SUPREME COURT OF THE
STATE OF NEBRASKA

STATE OF NEBRASKA ex rel. TERRY)
WAGNER,)

Case No. S – _____

Relator,)

**APPLICATION FOR LEAVE TO
COMMENCE AN ORIGINAL
ACTION AND STATEMENT OF
JURISDICTION**

v.)

THE HONORABLE ROBERT B. EVNEN)
Secretary of State of the State of)
Nebraska,)

Respondent.

COMES NOW Relator TERRY WAGNER, requesting leave of the Court to commence an original action, pursuant to Neb. Ct. R. App. P. § 2-115, as set forth in the Verified Petition for Writ of Mandamus attached hereto as “Attachment A” and incorporated herein. In support of this Application, Relator states as follows:

INTRODUCTION

On August 27, 2020, the Secretary of State of Nebraska issued a written decision permitting the proposed Nebraska Medical Cannabis Constitutional Amendment (the “Medical Cannabis Initiative”) to be placed on the November 2020 general election ballot. The Secretary of State was required by law to refuse to certify the Medical Cannabis Initiative for placement on the November 2020 ballot because it is legally insufficient. Relator seeks a writ of mandamus requiring Secretary of State Robert B. Evnen to deny certification of the Medical Cannabis Initiative and remove it from the November 2020 general election ballot.

STATEMENT OF ORIGINAL JURISDICTION

This Court has original jurisdiction over this matter pursuant to Neb. Const. art. V, § 2 and Neb. Rev. Stat. § 24-204, as this case involves an action for a writ of mandamus.

**REASONS WHY IT IS NECESSARY TO
COMMENCE THIS ACTION IN THE NEBRASKA SUPREME COURT**

1. Pursuant to Neb. Rev. Stat. § 32-801, the Respondent Secretary of State is required to certify the content of the ballot for the November 3, 2020 general election fifty (50) days prior. *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 990-91 (2014) (§ 32-801 requires the Secretary to ensure proposed ballot measures satisfy legal requirements for their presentation to voters). The Respondent's Official Election Calendar says this date falls on September 11, 2020. Consequently, only 14 days remain prior to the certification from the date of this filing.

2. On August 26, 2020, counsel for Relator submitted a written "Request to Enforce Nebraska Election Law Regarding Legally Insufficient Proposed Ballot Measure (Medical Marijuana)" to Respondent (attached hereto as Attachment B). On August 27, 2020, Respondent Secretary of State Evnen issued a written response denying the request. Relator filed this Application less than twenty-four (24) hours of receipt of the Secretary's written decision.

3. It would not be practical to adjudicate this matter in the Lancaster County District Court.

4. First, as noted by the Secretary, there is very little time for the Court to review the matter prior to the Secretary's deadline to certify the ballot in its entirety. Thus, practically, there is not time to litigate the dispute in district court and proceed with an appeal prior to the Secretary certifying the ballot for the general election.

5. Second, the Verified Petition requires interpretation of the Nebraska Constitution. Any appeal from the district court would be reviewed *de novo*. The Nebraska Supreme Court would ultimately be tasked with deciding the dispute even if it were initially filed with the district court.

4. Third, the verified Petition requires interpretation of this Court's own precedent concerning interpretation of the Nebraska Constitution and the rights of Nebraska voters. Thus, this Court is uniquely situated to decide the legal issues in the Verified Petition.

5. Fourth, the verified Petition presents only questions of law. Relator is willing to stipulate to any facts necessary for this Court to decide the issues presented in the Verified Petition, such as stipulating as to true and correct copies of the Medical Cannabis Initiative.

6. Fifth, the Relator's verified Petition invokes an issue of fundamental constitutional rights which should be determined by the highest court of the State.

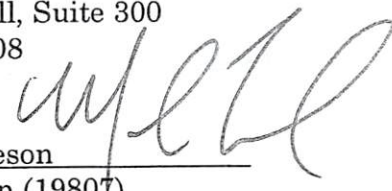
WHEREFORE, the Relator respectfully requests that the Court grant leave to commence an original action in mandamus as set forth herein, accept the Verified Petition for Writ of Mandamus accompanying this Application, docket this case as an original action on the Supreme Court docket, expedite proceedings in the case as necessary, and take any other action necessary or appropriate for the commencement of said original action.

Dated this 28th day of August, 2020.

TERRY WAGNER, Relator

By: REMBOLT LUDTKE LLP
1128 Lincoln Mall, Suite 300
Lincoln, NE 68508
(402) 475-5100

By: /s/ Mark A. Fahleson
Mark A. Fahleson (19807)
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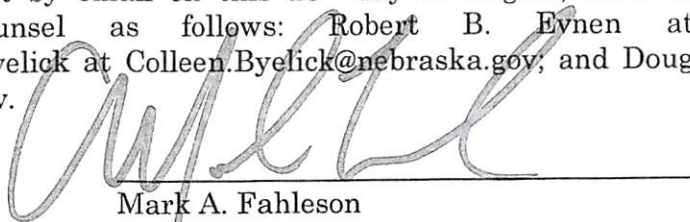


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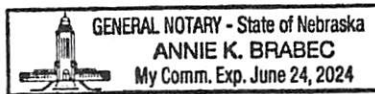
I, the undersigned Mark A. Fahleson, being first duly sworn on oath, state that on this 28th day of August, 2020, a copy of the foregoing Application for Leave to Commence an Original Action, together with the Verified Petition for Writ of Mandamus filed herewith, were served upon Respondent by certified mail as follows;

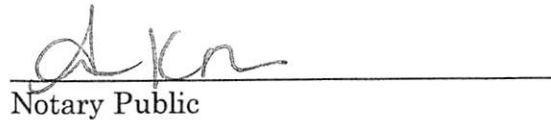
Robert B. Evnen, Secretary of State
c/o Douglas Peterson, Attorney General
2115 State Capitol
PO Box 98920
Lincoln, NE 68509

In addition, the same were sent by email on this 28th day of August, 2020 to Respondent and Respondent's counsel as follows: Robert B. Evnen at Robert.Evnen@nebraska.gov; Colleen Byelick at Colleen.Byelick@nebraska.gov; and Doug Peterson at Doug.Peterson@nebraska.gov.


Mark A. Fahleson

SUBSCRIBED AND SWORN TO before me by Mark A. Fahleson this 28th day of August, 2020.




Notary Public

IN THE SUPREME COURT OF THE
STATE OF NEBRASKA

STATE OF NEBRASKA ex rel. TERRY WAGNER, Relator,)	Case No. S – _____
)	
)	
)	
v.)	VERIFIED PETITION FOR WRIT
)	OF MANDAMUS
THE HONORABLE ROBERT B. EVNEN,)	
Secretary of State of the State of Nebraska)	
)	
Respondent.)	

COMES NOW Relator TERRY WAGNER, and for his causes of action and claims for relief against Respondent, the Honorable Robert B. Evnen, Secretary of State of the State of Nebraska (“Respondent”), alleges that the Relator is entitled to a writ of mandamus requiring the Respondent, in his capacity as Secretary of State for the State of Nebraska, to deny certification and withhold from the ballot, for the November 3, 2020 general election, an initiative measure or, in the alternative, issue an order declaring the constitutional measures invalid. In support of this petition, Relator hereby states and alleges as follows:

PARTIES

1. Relator Terry Wanger ("Relator") is a registered voter and resident of Lancaster County, Nebraska. Relator has worked in law enforcement for over forty (40) years and has concerns regarding the ballot initiative measure that is described herein and is the subject of this action.

2. Adam Morfeld, Anna Wishart, and Nebraskans for Sensible Marijuana Laws are the sponsors (collectively the “Sponsors”) of the ballot initiative measure that is described herein and the subject of this action.

3. Respondent is the duly elected, authorized and acting Secretary of State of the State of Nebraska. Respondent is charged with the duty of administering the election laws of the State and with supervising the conduct of general elections. Respondent has the authority and clear duty to withhold legally insufficient and facially unconstitutional measures from the ballot.

JURISDICTION AND VENUE

4. Relator is authorized to bring this action pursuant to Article V, Section 2 of the Constitution of the State of Nebraska, Neb. Rev. Stat. § 24-204, the Nebraska Declaratory Judgment Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164, and Neb. Rev. Stat. § 25-2156 et seq.

5. This Court has original jurisdiction of this matter by virtue of Article V, Section 2 of the Constitution of the State of Nebraska and Neb. Rev. Stat. § 24-204 because Relator seeks a writ of mandamus.

GENERAL ALLEGATIONS

6. On February 5, 2019, the Sponsors filed with Respondent the text of a proposed ballot initiative petition 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 (the "Medical Cannabis Initiative"). A true and correct copy of the Medical Cannabis Initiative is attached hereto as Exhibit A and incorporated herein by this reference.

7. The Medical Cannabis Initiative would, among other things, add a new Article XIX, Section 1 to the Nebraska Constitution, that contains nine (9) separate subsections and would permit, among other things, individuals to use, possess, access, purchase, and produce an adequate supply of cannabis, cannabis products, and cannabis-related equipment to alleviate a serious medical condition and allows private entities and their agents operating

in the State of Nebraska to grow, cultivate, process, transport, sell, test or transfer possession of cannabis, cannabis products, and cannabis-related equipment for sale or delivery.

8. Pursuant to Neb. Rev. Stat. § 32-801, the Secretary of State is required to certify the content of the ballot for the general election fifty (50) days prior to said election.

9. The date of 2020 general election is November 3, 2020.

10. The Attorney General prepared an explanatory statement for the Medical Cannabis Initiative, which states:

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.

11. The Attorney General prepared a ballot title for the Medical Cannabis Initiative, which states:

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?

12. On August 6, 2020, the Attorney General sent a letter to Respondent setting forth the ballot title and explanatory statement for the Medical Cannabis Initiative. A true and correct copy of this letter is attached hereto as Exhibit B.

13. The Secretary of State indicated in an August 27, 2020 letter and legal memorandum that he will certify the Medical Cannabis Initiative for the November 3, 2020 ballot unless otherwise ordered by a court of competent jurisdiction. A true and correct copy of the Respondent's letter is attached hereto as Exhibit C.

COUNT ONE
Violation of the Single Subject Clause
Under Article III, § 2 of the
Nebraska Constitution

14. Relator incorporates the allegations contained in paragraphs 1 through 13 as though set forth herein in full.

15. Initiatives are governed by Neb. Const., art. III, § 2.

16. Neb. Const., art. III, § 2 requires that “[i]nitiative measures shall contain only one subject.”

17. The Medical Cannabis Initiative contains several proposals that constitute direct and separate measures, including but not limited to (1) amending the constitution to legalize use of cannabis by individuals to alleviate a serious medical condition; (2) amending the constitution to permit private entities and their agents to produce, process and sell cannabis for any purpose; and (3) amending the constitution to provide civil and criminal immunity for individuals and private entities exercising their rights pursuant to (1) or (2) above.

18. The Secretary of State's decision is incorrect as a matter of law because the Medical Cannabis Initiative violates the applicable requirements of the Nebraska Constitution as to form, including, but not limited to, the requirement of the Neb. Const., art. III, § 2 that “[i]nitiative measures shall contain only one subject.”

19. These proposals lack a natural and necessary connection with each other, and thus constitute separate subjects that must be submitted so as to enable the electors to vote on each amendment separately.

20. The ballot language for the Medical Cannabis Initiative violates the single subject clause because it combines these and other provisions into one question, forcing voters to vote for or against all the amendments as a package.

COUNT TWO
Creation of Voter Confusion and Doubt

21. Relator incorporates paragraphs 1-20 above, as if fully set forth herein.

22. 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. *See State ex rel. Loontjer v. Gale*, 288 Neb. 973, 1000, 853 N.W.2d 494, 513 (2014).

23. The Medical Cannabis Initiative contains several proposals that are confusing and create serious doubt as to what voters will have decided after the election, including, but not limited to: (1) medical doctors or nurse practitioners would not be prescribing cannabis to patients with serious medical conditions because pharmacies are not authorized to dispense cannabis; (2) the Medical Cannabis Initiative fails to define what constitutes a serious medical condition; (3) the Medical Cannabis Initiative fails to identify which conditions might be “alleviated” by cannabis use; and (4) the Medical Cannabis Initiative provides civil and criminal immunity to private entities and their agents for the distribution of cannabis in unlimited quantities, even where the private entity or its agent has knowledge that the purchase is for reasons other than a serious medical condition.

24. Submission of the proposals to the voters as a package violates the single subject clause of Neb. Const. art. III, § 2 because it creates confusion and serious doubt as to what the voters will have authorized after the election.

ADVANCEMENT ON DOCKET

25. Consistent with Neb. Rev. Stat. § 32-1412(3), Relator respectfully requests that this suit be advanced on the docket and heard and decided by the Court as quickly as possible.

PRAYER FOR RELIEF

WHEREFORE, the Relator prays:

1. That the Court set this matter for hearing as soon as practicable, and that it be given priority over other cases due to the necessity for certification of the ballot for the November 3, 2020 general election.

2. That the Court issue a writ of mandamus requiring Respondent to deny certification and withhold from the ballot the proposed constitutional amendments contained in the Medical Cannabis Initiative, or alternatively, if resolution occurs after certification of the ballots occur, that the Court issue a writ of mandamus requiring the Respondent to abstain from certifying the election results on the proposed amendment.

3. That the Court enter judgment in favor of the Relator and issue a declaratory judgment pursuant to Neb. Rev. Stat. §§ 25-21,149 to 25-21,164, finding and determining that:

- a. The ballot language submitted to the Respondent for the Medical Cannabis Initiative is legally insufficient and invalid because it violates the single subject clause of Neb. Const. art. III, § 2.
- b. The ballot language submitted to the Respondent for the Medical Cannabis Initiative is legally insufficient and invalid because it is confusing to voters

and creates significant doubt about what the voters will have authorized after the election.

4. That the Court issue an order awarding attorney fees and costs to Relator pursuant to Neb. Rev. Stat. § 25-2165 and Neb. Rev. Stat. § 25-21,158.

5. For such other and further relief as is appropriate at law and equity.

Dated this 28th day of August, 2020.

TERRY WAGNER, Relator

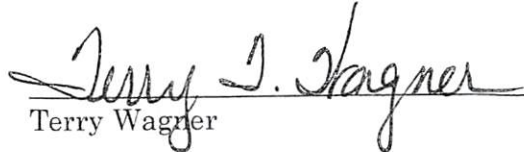
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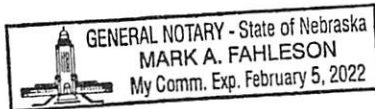
VERIFICATION

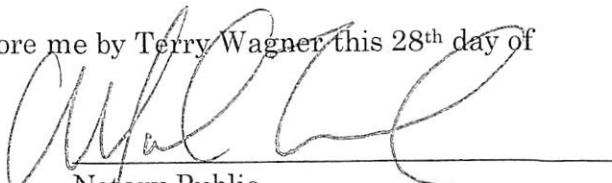
STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

Terry Wagner, being first duly sworn upon oath, deposes and states that he is the Relator herein, that he has read the foregoing Verified Petition for Writ of Mandamus and knows the contents thereof; and that the facts stated therein are true and correct.


Terry Wagner

SUBSCRIBED AND SWORN TO before me by Terry Wagner this 28th day of August, 2020.



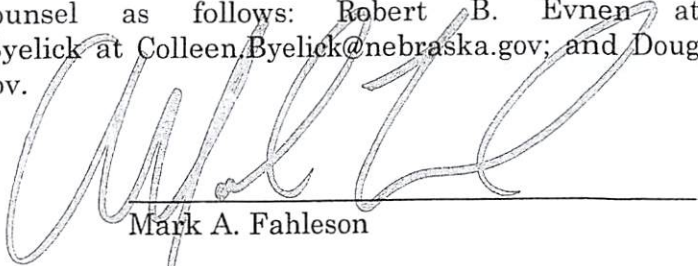

Notary Public

AFFIDAVIT OF SERVICE

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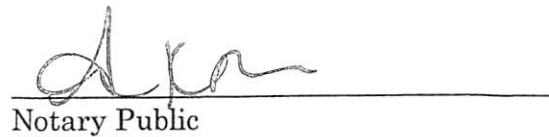
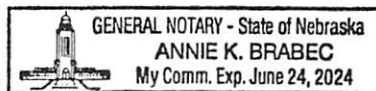
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Mark A. Fahleson

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Notary Public