

AGENDA REQUEST FORM

FOR: City Council Meeting of January 20, 2015

FROM:
City Attorney Kit Williams

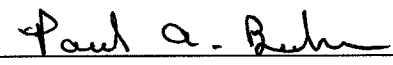
ORDINANCE OR RESOLUTION TITLE AND SUBJECT:

AN ORDINANCE TO ENACT ARTICLE III PROCEDURE TO EXERCISE INITIATIVE AND REFERENDUM RIGHTS OF CHAPTER 36: ELECTIONS INTO THE FAYETTEVILLE CODE TO CLARIFY THE PROPER PROCEDURE FOR THE CITIZENS' RIGHT OF THE INITIATIVE AND REFERENDUM


APPROVED FOR AGENDA:


City Attorney Kit Williams

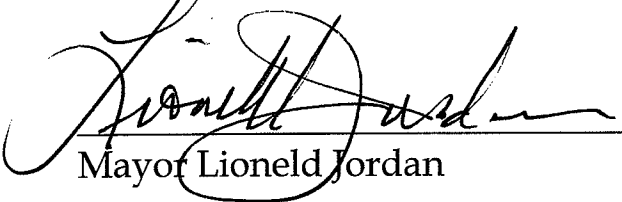
January 2, 2015
Date


Paul Becker, Finance Director

JANUARY 5, 2015
Date


Don Marr, Chief of Staff

1/5/2015
Date


Mayor Lioneld Jordan

1/6/15
Date



OFFICE OF THE
CITY ATTORNEY

DEPARTMENTAL CORRESPONDENCE



Kit Williams
City Attorney

Blake Pennington
Assistant City Attorney

Patti Mulford
Paralegal

TO: Mayor
City Council

FROM: Kit Williams, City Attorney

DATE: December 23, 2014

RE: **Avoiding future litigation over ballot language for initiated or referred local legislation**

Prior to the recent referendum concerning the Civil Rights Administration ordinance, Fayetteville had not been forced into any litigation over a referendum's or initiative's proposed ballot language. Referral of the Road Impact Fee and Smoking Ordinance complied with the tests set forth for state legislation referendums and initiatives {A.C.A. § 7-9-107 (c)} and the forms set forth for county ordinances {A.C.A. § 14-14-917 (d)}. However, neither of these statutes are controlling over the referendum or initiative of city ordinance because Amendment 7, now codified as **Article 5 § 1 of the Arkansas Constitution** places procedural power in the City Council.

"Municipalities may provide for the exercise of the initiative and referendum as to their local legislation."

This is only a general grant of procedural power to municipalities which must still follow other provisions of the **Arkansas Constitution** regarding how many signatures of local voters need to be obtained and the time period for the petition sponsors to gather such signatures. Other constitutional procedures including submission of the petitions of the City Clerk, the Clerk's examination and decision regarding the petition's

sufficiency and the granting of additional time to the sponsors must be followed and cannot be varied by local legislation.

In order to avoid future litigation, to bring our procedure in line with state and county referendums and initiatives, and to eliminate potentially misleading wording in referendums rejected by state law {A.C.A. § 7-9-107 (c)}, I have drafted a proposed new section to be enacted into **Chapter 36: Elections of the Fayetteville Code**. This proposal is attached to this memo.

This proposed ordinance is one of the rare times that I believe it is appropriate to have any legislation proposed by an elected official other than an Aldermen or the Mayor (through his staff). I believe I am empowered to present such ordinance because it concerns a legal issue for the **Fayetteville Code** and especially because it generated litigation in which Fayetteville was recently sued by opponents of a referendum in Circuit Court. That suit brought to my attention the need for local legislation as authorized by **Article 5 § 1** of the **Arkansas Constitution** to clarify proper procedure and wording of any initiative or referendum of local legislation.

As you see, I placed a difficult, but obtainable burden on myself and my successors as Fayetteville City Attorney to quickly examine, analyze and either certify or correct any proposed initiative or referendum petition within two business days. Such rapid analysis is always necessary for referendum petitions and could be necessary for initiative petitions.

Please review my proposed ordinance and let me know if you believe changes, additions or deletions would be advisable. I plan to submit this with the Tentative Agenda for the January 20th City Council meeting.

§ 7-9-104. Form of initiative petition -- Sufficiency of signatures.

(a) The petition for an ordinance, act, or amendment proposed by initiative shall be on substantially the following form:

Initiative Petition

(b) The information provided by the person on the petition may be used as evidence of the validity or invalidity of the signature. However, if a signature of a registered voter on the petition is sufficient to verify the voter's name, then it shall not be adjudged invalid for failure to sign the name or write the residence and city or town of residence exactly as it appears on voter registration records, for failure to print the name in the space provided, for failure to provide the correct date of birth, nor for failure to provide the correct date of signing the petition, all the information being an aid to verification rather than a mandatory requirement to perfect the validity of the signature.

(c) No additional sheets of voter signatures shall be attached to any petition unless the sheets contain the full language of the petition.

(d) (1) The signature section of the petition shall be formatted and shall contain the number of signature lines prescribed by the Secretary of State.

(2) Before the circulation of a statewide petition for signatures, the sponsor shall file a printed petition part with the Secretary of State in the exact form that will be used for obtaining signatures.

§ 7-9-105. Form of referendum petition -- Sufficiency of signatures.

(a) The petition and order of referendum for an ordinance or act shall be on substantially the following form:

Referendum Petition

(b) The information provided by the person on the petition may be used as evidence of the validity or invalidity of the signature. However, if a signature of a registered voter on the petition is sufficient to verify the voter's name, then it shall not be adjudged invalid for failure to sign the name or write the residence and city or town of residence exactly as it appears on voter registration records, for failure to print the name in the space provided, for failure to provide the correct date of birth, nor for failure to provide the correct date of signing the petition, all of that information being an aid to verification rather than a mandatory requirement to perfect the validity of the signature.

(c) No additional sheets of voter signatures shall be attached to any petition unless the sheets contain the full language of the petition.

(d) (1) The signature section of the petition shall be formatted and shall contain the number of signature lines as prescribed by the Secretary of State.

(2) Before the circulation of a statewide petition for signatures, the sponsor shall file a printed petition part with the Secretary of State in the exact form that will be used for obtaining signatures.

§ 7-9-107. Approval of ballot titles and popular names of petitions prior to circulation -- Publication.

(a) Before any initiative or referendum petition ordering a vote upon any amendment or act shall be circulated for obtaining signatures of petitioners, the sponsors shall submit the original draft to the Attorney General, with a proposed legislative or ballot title and popular name.

(b) Within ten (10) days, the Attorney General shall approve and certify or shall substitute and certify a more suitable and correct ballot title and popular name for each amendment or act. The ballot title so submitted or supplied by the Attorney General shall briefly and concisely state the purpose of the proposed measure.

(c) If, as a result of his or her review of the ballot title and popular name of a proposed initiated act or a proposed amendment to the Arkansas Constitution, the Attorney General determines that the ballot title, or the nature of the issue, is presented in such manner that the ballot title would be misleading or designed in such manner that a vote "FOR" the issue would be a vote against the matter or viewpoint that the voter believes himself or herself casting a vote for, or, conversely, that a vote "AGAINST" an issue would be a vote for a viewpoint that the voter is against, the Attorney General may reject the entire ballot title, popular name, and petition and state his or her reasons therefor and instruct the petitioners to redesign the proposed measure and the ballot title and popular name in a manner that would not be misleading.

(d) If the Attorney General refuses to act or if the sponsors feel aggrieved at the Attorney General's acts in such premises, the sponsors may, by petition, apply to the Supreme Court for proper relief.

§ 14-14-917. Initiative and referendum elections.

(d) **Ballot Specifications for Initiative and Referendum Measures.** Upon receipt of any initiative or referendum measure certified as sufficient by a county clerk, it shall be the duty of the members of the county board of election commissioners to take due cognizance and to certify the results of the vote cast thereon. So that

electors may vote upon the ordinance or measure, the board shall cause the ballot title to be placed on the ballot to be used in the election, stating plainly and separately the title of the ordinance or measure so initiated or referred to the electors with these words:

“FOR PROPOSED INITIATIVE (OR REFERRED) ORDINANCE (OR AMENDMENT)

NO. _____

AGAINST PROPOSED INITIATIVE (OR REFERRED) ORDINANCE (OR AMENDMENT)

NO. _____”

In arranging the ballot title on the ballot, the commissioners shall place it separate and apart from the ballot titles of the state acts, constitutional amendments, and the like. If the board of election commissioners fails or refuses to submit a proposed initiative or referendum ordinance when it is properly petitioned and certified as sufficient, the qualified electors of the county may vote for or against the ordinance or measure by writing or stamping on their ballots the proposed ballot title, followed by the word "FOR" or "AGAINST", and a majority of the votes so cast shall be sufficient to adopt or reject the proposed ordinance.

FAYETTEVILLE CODE OF ORDINANCES
TITLE III ADMINISTRATION

CHAPTER 36: ELECTIONS

**ARTICLE I
GENERAL PROVISIONS**

**36.01 Initiative Petitions; When To Be
Filed**

All municipal initiative petitions shall be filed pursuant to Amendment 7 of the Constitution of the State of Arkansas found in Article 5 §1 of the Arkansas Constitution. These initiative petitions shall be filed no later than 83 days before the general election date.

(Code 1965, §2-22.1; Ord. No. 2472, 10-3-78; Code 1991, §36.01; Ord. 5528, 9-18-12)

State law reference(s)--Form of initiative petition-sufficiency of signatures, A.C.A. §7-9-104.

36.02-36.14 Reserved

**ARTICLE II
REFERENDUMS**

36.15 When Petition To Be Filed

All referendum petitions under Amendment 7 to the Constitution of the State of Arkansas must be filed with the City Clerk within 31 days after the passage of the ordinance to which it relates.

(Code 1965, §2-19; Ord. No. 588, 12-21-25; Code 1991, §36.15)

State law reference(s)--Form of referendum petition-sufficiency of signatures, A.C.A. §7-9-105(a).

36.16 – 36.99 Reserved

ORDINANCE NO. _____

AN ORDINANCE TO ENACT ARTICLE III PROCEDURE TO EXERCISE INITIATIVE AND REFERENDUM RIGHTS OF CHAPTER 36: ELECTIONS INTO THE FAYETTEVILLE CODE TO CLARIFY THE PROPER PROCEDURE FOR THE CITIZENS' RIGHT OF THE INITIATIVE AND REFERENDUM

WHEREAS, Amendment 7 of the Arkansas Constitution (now codified as **Article 5 § 1**) states: "Municipalities may provide for the exercise of the initiative and referendum as to their local legislation;" and

WHEREAS, the State Legislature has been granted express authority to provide "for the exercise of the initiative and referendum as to counties," (**Amendment 7 of the Arkansas Constitution**) and has enacted A.C.A. § 14-14-917 **Initiative and referendum elections** to provide for the proper exercise of the initiative and referendum for county ordinances; and

WHEREAS, the lack of clarity for proper municipal referendum procedure led to litigation against Mayor Jordan, the City Council and City Clerk Sondra Smith after she certified the last referendum petition for a special election; and

WHEREAS, this litigation can be avoided in the future if the City enacts proper procedures modeled upon long established state law for state and county initiatives and referendums.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:

Section 1. That the City Council of the City of Fayetteville, Arkansas hereby enacts **Article III Procedure To Exercise Initiative and Referendum Rights** of Chapter 36: **Elections** into the Fayetteville Code to clarify the proper procedure for the citizens' right of the initiative and referendum for municipal legislation as follows:

“Article III Procedure To Exercise Initiative And Referendum Rights

§ 36.20 Initiative and Referendum Petitions

Pursuant to **Article 5 § 1 of the Arkansas Constitution**, the City establishes the following procedure for the exercise of the citizens’ right of the initiative and referendum of city legislation.

(a) *Petitions Must Be Submitted To City Attorney For Certification Or Correction.*

Before any initiative or referendum petition ordering a vote upon any municipal legislation shall be circulated to obtain signatures, the sponsor shall submit the original draft of the petition with the attached legislation to the City Attorney with any proposed legislative or ballot title.

(b) *Review And Certification Or Correction Within Two Business Days.*

(1) Within two business days, the City Attorney shall approve and certify or shall substitute and certify a more suitable and correct petition and/or ballot title.

(2) The City Attorney shall ensure the form of any initiative petition complies with A.C.A. § 7-9-104.

(3) The City Attorney shall ensure the form of any referendum petition complies with A.C.A. § 7-9-105.

(4) The City Attorney shall ensure that any ballot title conforms with A.C.A. § 14-14-917 (d) and A.C.A. § 7-9-107 (c) so as not to be misleading to voters.

(c) *Appeal To Circuit Court.*

If the City Attorney fails to act within two business days after receipt of the proposed initiative or referendum petition or if the sponsors feel aggrieved by the City Attorney’s actions or proposal, they may immediately file suit in the Washington County Circuit Court.

(d) *Extension Of Time For Petitioners May Be Granted By Circuit Court.*

If the Circuit Court grants the sponsors their requested relief related to the proper form of the petition or ballot title, the time when the referendum petitions must be filed shall be extended until 31 days after the Court’s decision is

announced as long as **Article 5 § 1 of the *Arkansas Constitution***'s provision of a maximum 90 days after the passage of the legislature is not violated."

PASSED and **APPROVED** this 20th day of January, 2015.

APPROVED:

ATTEST:

By: _____
LIONELD JORDAN, Mayor

By: _____
SONDRA E. SMITH, City Clerk/Treasurer



OFFICE OF THE
CITY ATTORNEY

DEPARTMENTAL CORRESPONDENCE



Kit Williams
City Attorney

Blake Pennington
Assistant City Attorney

Patti Mulford
Paralegal

TO: Mayor Jordan
City Council

FROM: Kit Williams, City Attorney

DATE: January 20, 2015

RE: Need for referendum procedural ordinance

There has been some question in the press about why I would submit for your consideration an ordinance to clarify that municipal ordinance referendums should follow the same forms and procedures as county ordinance referendums and state statute referendums. It is alleged I seek to give the City government unfair control over ballot language for referendums. However, I merely think that city ordinance referendum proponents should follow the same procedures as they would to challenge a county ordinance or State Act. Is it unfair to treat city ordinances the exact same way the State Legislature has required county ordinances and State Acts be treated in a referendum?

Rather than mistreating referendum petitioners, I listened to the attorneys who represented Repeal 119. On August 23, 2014, Repeal 119's attorney, Stephanie Nichols, emailed me with questions about the referendum petition: "Do either of you know if a ballot title or popular name is required for a municipal referendum? We have not been able to get a definitive answer on that from the statutes, some of which seem to apply to municipalities and some do not." (copy of email attached).

When the City Council met on October 7, 2014 to set the special election date, Repeal 119's attorney Travis Story and I did not agree on

everything, but we did agree the law about referendums and ballot titles was "very murky."

I said: "What we agree on is that election law, especially on Municipal Referendums is really vague. There are no cases I could find where the Supreme Court has ever made any interpretation on Municipal Referendums. They make all their decisions on state actions and issues which are much better described by the statute. Maybe we could bring a little light into these referendum elections for municipal ordinances. Something needs to be done. I would ask the legislature to take another look at this and provide us some guidance like they do with counties. Counties have a very clear system about what their petitions and ballots are supposed to look like."

Then Travis Story said: "I agree with Mr. Williams that the law on this part is very murky and at this point we have agreed to disagree on the law. What we are trying to do, is do something short of throwing this into litigation. Nobody wants that."

Unfortunately, we got litigation when a citizen sued the whole City Council, Mayor Jordan and City Clerk Sondra Smith challenging the validity of Sondra's certification of the referendum petition, how the signatures were obtained and how the ballot was worded. Repeal 119 properly intervened and after motions, briefs, discovery, and depositions, Judge Lindsey conducted a trial over a two day period. I successfully defended the City Clerk's certification of the referendum petition and defeated Repeal 119's petition to force Sondra to evaluate and certify another thousand signatures which were not needed for the petitioner's certification.

I also supported the City Council's Resolution which would have worded the ballot as any county ordinance referendum would have been worded. I noted in Paragraph 40 of our Answer "that the language approved by the Election Commission does not exactly match the ballot title that was included in the certified petition," because it used a portion of the ordinance title instead of just numbers. The Judge ruled the slightly amended title proposed by the Election Commission was satisfactory.

The City might have been sued even without the “murky” nature of the law surrounding municipal ordinance referendums. However, this is the first time the City of Fayetteville has been sued over a referendum petition on ballot wording issues since I became Fayetteville City Attorney in 2001. I told you during the October 7, 2014 City Council meeting that “(s)omething needs to be done,” and, pursuant to Amendment 7, it is the City Council rather than the Legislature that has been granted the authority to “provide for the exercise of the initiative and referendum as to their local legislation.” However, I thought I should wait until the Civil Rights Ordinance issue was resolved before presenting anything to you.

Shortly after the 52/48 referendum election repealed the Civil Rights Administration Ordinance, there was some discussion about trying to amend it and reconsider that amended ordinance. I did not believe consensus could ever be achieved that way. However, I remembered Alderman Tennant’s strong statements during the November 18, 2014 City Council Meeting about not turning his back on the civil rights issue if what he termed the very flawed Civil Rights Administration ordinance was repealed. Alderman Tennant said: “I do hope that if the ordinance does not pass or if it is repealed that we will not turn away from this and we will do something that works for everyone and I intend to help with that.”

I thought that if I removed the uncertainties of new definitions and used the two decade old definitions of the Arkansas Civil Rights Act; if churches and other religious organizations were exempted even more fully than they are in the Arkansas Civil Rights Act; and if a civil enforcement measure (possible revocation of a business license) was proposed, then I could help Alderman Tennant advance his intention to “write something that is really inclusive instead of divisive.”

However, since no alderman approached me to sponsor this ordinance, my effort to find consensus has failed. I believe that Arkansas Legislature will soon remove the power of any Arkansas City to pass an ordinance to further protect its citizens from discrimination. Thus, Fayetteville will never face this civil rights issue again.

With the Civil Rights Ordinance no longer a possibility, I decided that I should still address the “very murky” law surrounding municipal ordinance referendum language. Thus, I have presented this possible code section to clarify the procedure for persons seeking to exercise their initiative or referendum rights. This code section basically says “Just follow the procedures and forms required by the State Legislature for referendums concerning state acts and county ordinances.” Let’s treat all referendums the same way, a level playing field, no voter surprise, no electioneering manipulation by either the government or the petitioners.

Some may think that our government treats those seeking to repeal its ordinances unfairly or tries to obstruct their referendum rights. Let me read you an email from Stephanie Nichols dated August 22, 2014 sent to City Clerk Sondra Smith and me:

“Thank you for your review. You always go above and beyond in your promptness and are one of the most easy to work with attorneys I have ever dealt with. I sincerely appreciate it and have told several Fayetteville citizens about your fairness and ease to work with. Have a great weekend! Stephanie Nichols.”

The only reason I placed the responsibility to review and certify or correct a proposed referendum petition upon the City Attorney is to hopefully prevent a legally improper petition from being circulated and later being either rejected by the Court or having to be recirculated because of some mistake. As you see from Stephanie’s email, Sondra and I do not try to obstruct a referendum, but instead help the applicants properly exercise their constitutional right for a referendum. We always favor democracy.

The two business day review should be a help, a boon to someone who probably has never had to prepare a referendum petition before. I am only aware of three referendum petition efforts in my fourteen years of service as City Attorney. Two were successful and one led to the repeal of an ordinance. This infrequency means that most persons, even most lawyers will have little experience. Therefore, it is fair to place this burden of review and correction on the City Attorney.

Williams, Kit

From: Williams, Kit
Sent: Monday, August 25, 2014 9:15 AM
To: Law Office of Stephanie Nichols; Smith, Sondra
Cc: Pennington, Blake
Subject: RE: Ballot Title/Popular Name?

Stephanie,

I think you have reduced the printing size of the ordinance too much and could make this a point of attack for your opponents. If the ordinance was not easily readable by every signer, the requirement of attaching the ordinance would not be achieved. I think a two sided page can contain the ordinance that would be large enough for almost anyone to read and thus, less susceptible to legal attack. It would need to be attached to each petition.

I anticipate that title of the ballot issue would tract pretty closely to the title of the ordinance. I agree that the statutes I have looked at are not nearly as clear for municipal referendums as for state referendums. I am working on other briefs that soon will be due and cannot spend too much time now researching this point.

Kit Williams

Fayetteville City Attorney
479.575.8313

From: Law Office of Stephanie Nichols [mailto:stephanie.nichols777@gmail.com]
Sent: Saturday, August 23, 2014 4:17 PM
To: Williams, Kit; Smith, Sondra
Subject: Ballot Title/Popular Name?

Kit and Sondra,

Local attorney Travis Story is working on a petition, and I am assisting him. He has revised the petition from what I sent you last night. (Thank you for the information, Sondra). Do either of you know if a ballot title and popular name is required for a municipal referendum? We have not been able to get a definitive answer on that from the statutes, some of which seem to apply to municipalities and some which do not. However, the form in the statute, which Sondra sent last night, does indicate a placement for a ballot title/popular name. Is this required, or is this something that can be left off when it is not a statewide initiative?

If it is required, does this petition drafted by Travis seem to present any problem as far as the ballot title/popular name portion? Do either of you see any other problems as well? (There are a couple of typos, but we can easily take care of that. I am just concerned with the substantive part right now). Also, is it OK to have the ordinance on one sheet behind the signature page like we have it? I can read it, but I didn't know if the smallness of the type could possibly present a problem?

Thanks,

--

Stephanie Nichols
Attorney at Law
P.O. Box 1115
Jonesboro, AR 72403
(501) 288-2927

might be the way to resolve this. Not put ourselves up as judges, but instead just do what we have done in the past, which I believe is correct. Travis believes it is not correct and another way to go. Maybe he's correct, but I don't know.

What we agree on is that election law, especially on municipal referendums is really vague. There are no cases that I could find where the Supreme Court has ever made any interpretation on municipal referendums. They make all their decisions on state actions and issues which are much better described by the statute. Maybe we could bring a little light into these referendum elections for municipal ordinances. Something needs to be done. I would ask the legislature to take another look at this and provide us some guidance like they do with counties. Counties have a very clear system about what their petitions and ballots are supposed to look like. The people that should decide are one step above us, which is the county.

Travis Story: I've spoken with the local Election Commission and members of the Election Commission for the State of Arkansas. The two things to be aware of is in November there are two referendum matters that are going to be voted on, on the Washington County ballot. Both from similar circumstances. It's people of other cities doing a petition to repeal city ordinances. There will be two petitions to repeal that have been certified now to the Election Commission for Washington County for the November General Election ballot. Both of those are laid out in a simple to repeal ordinance number, for or against repeal of that ordinance number.

I agree with Mr. Williams that the law on this part is very murky and at this point we have agreed to disagree on the law. What we are trying to do, is do something short of throwing this into litigation. Nobody wants that. We believe the residents of Fayetteville want the December 9, 2014 date. October 10, 2014 is the last day for the Election Commission to put this on the ballot. They have to have that in order to under their guidelines to be able to accomplish everything that needs to be done. We ask that what's placed in the resolution tonight would be what is on the ballot. Unfortunately for us, it's either good or bad. If someone says this is inappropriate and there is a legal challenge, then we'll have to deal with that. We ask that we don't cause the confusion which would end up having to be decided by the Election Commission and turned over to the county to deal with. We ask the only thing to be put in the resolution tonight, having anything to do with ballot language, would be exactly what we have submitted on all the petitions, that same language or something that says the language of the petition shall be the ballot language. That way we could work through the normal process. We believe it would be appropriate and allow the process to move forward smoothly at the county level so that the election could be scheduled and the will of the people to hold this election at a special election on December 9, 2014.

Alderman Adams: I understand you are a paid attorney representing this group. Are you a resident of Fayetteville?

Travis Story: I am not a resident of Fayetteville. I am a business owner in Fayetteville. This is one of those things where I wish I was a resident of Fayetteville.

Mayor Jordan: We are going to open it up for public comment. We will stay with the amendments first.

Williams, Kit

From: Law Office of Stephanie Nichols <stephanie.nichols777@gmail.com>
Sent: Friday, August 22, 2014 5:19 PM
To: Williams, Kit
Subject: Re: Final Copy of Petition

Thank you for your review. You always go above and beyond in your promptness and are one of the most easy to work with attorneys I have ever dealt with. I sincerely appreciate it and have told several Fayetteville citizens about your fairness and ease to work with.

Have a great weekend!

Stephanie Nichols

On Fri, Aug 22, 2014 at 5:12 PM, Williams, Kit <kwilliams@fayetteville-ar.gov> wrote:

I see no problems.

Kit Williams

Fayetteville City Attorney

479.575.8313

From: Law Office of Stephanie Nichols [mailto:stephanie.nichols777@gmail.com]
Sent: Friday, August 22, 2014 4:57 PM
To: Williams, Kit; Smith, Sondra
Subject: Final Copy of Petition

Kit and Sondra,

Here is my final draft of a petition re Chapter 119. Do either of you see any problems with this?

Thanks,

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