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Judiciary Committee
February 26, 2014

[LB811 LB1027 LB1035 LB1049 LB1110]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, February 26, 2014, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB1049, LB811, LB1027, LB1035, and LB1110. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Mark Christensen; Colby Coash; Al Davis; Amanda McGill; and Les Seiler. Senators absent: None.

SENATOR ASHFORD: We're a little late, my fault. Let's get going. Let me introduce my colleagues: To my far left, out in the left there, Senator Les Seiler from Hastings, Nebraska--he's really not that far left; Senator Mark Christensen from Imperial, Nebraska; and of course, Amanda McGill from Lincoln. Oliver VanDervoort is committee clerk; and Jenn Piatt is the...our lawyer, which is always good to have. We have five bills today and the first bill is by Senator Wightman, LB1049, a very technical real estate bill, I'm sure, because Senator Wightman is here. So welcome back.

SENATOR WIGHTMAN: Thank you, Chairman Ashford. I try to come down... [LB1049]

SENATOR ASHFORD: Yeah. [LB1049]

SENATOR WIGHTMAN: ...every so often. [LB1049]

SENATOR ASHFORD: No, it's important you come down here. [LB1049]

SENATOR WIGHTMAN: That's right. Well, we've got an important committee. [LB1049]

SENATOR ASHFORD: You bring us back to the reality. [LB1049]

SENATOR WIGHTMAN: But I did better this time. I let my legal aide pass out. Last time I tried to give that to Seiler over here, but... (Laugh) [LB1049]

SENATOR ASHFORD: Yeah. He's the only...he asks technical questions too, Senator Wightman, so anyway... [LB1049]

SENATOR WIGHTMAN: Okay. [LB1049]

SENATOR ASHFORD: All right. LB1049. [LB1049]

SENATOR WIGHTMAN: (Exhibit 1) Thank you. Good afternoon, Chairman Ashford and members of the Judiciary Committee. For the record my name is John Wightman, spelled J-o-h-n W-i-g-h-t-m-a-n. LB1049, and I'm going to tell you a little bit about what the bill would be but we're really looking at the proposed amendment to it, LB1049

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increases the time from 10 to 20 years when a landowner can sue to remove a person or improvement from his or her land. Adverse possession is quite literally a doctrine that...of land under certain circumstances where possession can be acquired by the person who was not the record owner. A person can acquire legal ownership of real property that he or she treats as their own if done for a long enough period of time, even if the property is not really his own or legally his own. So I want to tell you a little bit before I get into this that if it had been a bill that would have taken...changed the entire statute of limitations, I would never have brought it. But at the time it was clear that we were going to have an amendment and I'll discuss that later. As first-year law students, everyone learns in property class, might be a second year--I'm so far out of law school that I'm not sure which year it was--the person occupying the land must be: one, hostile, meaning without permission, though the definition can vary by state; actual, meaning physical occupancy or possession; open and notorious, meaning the possession is obvious to onlookers; and exclusive and continuing for a certain period of time. And as I indicated earlier, that's 20 years under Nebraska law. The time period that the person must have occupied the land varies by state to state. Nebraska is 1 of 14 states that requires ten years. Fourteen other states require 20 years. The required time period is set in various states' laws and runs from the range of 30 years to as little as 3 years--I'm going to have to get my book closer--if a person has paid the taxes on the property and holds some legal document that shows he or she owns the property. As introduced, LB1049 moves Nebraska into the 20-year time period for several types of legal actions, but I'll introduce an amendment that narrows its scope, as I said. Nebraska has no requirement that the person pay taxes on the property or have some type of legal document that indicates that the person may own the property. LB1049 does not change Nebraska law on these points. In order to narrow the scope of this bill to fit the facts that lead to its introduction I would offer to the committee AM2062. AM2062 narrows the application of the 20-year time period required to establish by adverse possession to vacant, subdivided real property or lots. The bill was not intended to extend the time period required to foreclose a mortgage or a deed of trust that is foreclosed as a mortgage. The separate classification for real property is a reasonable classification for the following reasons. As you will learn from the testifiers that follow, real estate development experiences extended periods when the lots can be vacant. The speed of the development of new housing subdivisions is very dependent on interest rates and the state of the national economy and the state of the state economy. The sale of all of the lots in a subdivision which can contain many, many lots, can take a decade or more. We need to allow entrepreneurs who take the considerable risk to develop and build homes more time, communities without persons taking--I better make sure I'm on the right page here--to build communities without persons taking property without paying taxes and ignoring lot lines marked by a system of boundary stakes. The developer may well end up with a lot that is too small to meet city codes for a home and not be a buildable lot. These risk-taking entrepreneurs make a considerable investment to install the infrastructure and pass the orderly development of a residential subdivision. Platted and subdivided real property or lots in Nebraska are surveyed and

physically marked by a system of stakes pounded into the ground. The boundary can conclusively be determined by finding these stakes. Further, if a stake is removed, it can be replaced by finding another stake in the system and measurements taken. In the cases of subdivided, platted lots, the legal justification for adverse possession has come and gone. The doctrine of adverse possession has its basis in centuries-old English law. It is based upon the concept that the user or occupier of land benefits society and prevents lawsuits by blocking them after a certain period of time has passed. Today, instead of reducing the number of lawsuits over the boundaries of property, the doctrine of adverse possession now encourages litigation in cases where the winner is a person who could, with very little effort, determine the boundaries of the lot. The survey and system of stakes for lot lines are more reliable to determine boundaries of the lot where a person or neighbor mows the grass. You will hear from the next testifier about how this can happen in Nebraska. The purchaser of a lot should not be put in the position where they must pursue costly litigation to determine if they really own the property described in their deed and marked by a system of stakes pounded into the ground. The court decisions in Nebraska tend to adhere to the centuries-old rules of adverse possession without considering the larger benefit to the public derived from platted, subdivided real estate development. Cities and counties have been given a necessary role to plan and regulate growth and development of the land under their jurisdiction. Public subdivision control protects the public interest in land by ensuring that subdivision of real estate is surveyed, marked by a system of survey stakes and given legal descriptions. Land use planning makes sure that lots are of an appropriate size and shape that also provides for adequate access, utility service, drainage, and other factors necessary for proper development. Defined lot sizes and lines makes all of the lots usable and buildable. The uncertainty of creating random-size and character developments created by adverse possession clearly is inconsistent with the planning objectives served by planning ordinances. The developer must provide a detailed survey and the infrastructure necessary for the approval to be obtained. The investment and benefit to the public should be protected, not undermined by the century-old doctrine of adverse possession. And I again point out that this is a very limited situation that we're asking be changed. The classification of vacant, platted, and subdivided real property is a rational classification where a 20-year time period would be appropriate and acquire title to the lot. It will bring more certainty to the title of land where certainty is justified by a survey, measurements, and a system of stakes. Recognizing vacant, subdivided, and platted lots as a separate class benefits the owner under deed by reducing litigation and benefits the public as through effective land-use planning. So I would ask the committee to advance LB1049 with AM2062 as a committee, and if that amendment were not included, I wouldn't be in favor of the act either. So I wanted to be sure that it should be limited by the amendment that's proposed. Thank you. [LB1049]

SENATOR ASHFORD: Thanks, John. I don't see any questions except for Senator Davis has a question. [LB1049]

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SENATOR DAVIS: Thank you, Senator Wightman, for coming and presenting this. This is always an interesting topic for me. But this is only going to be for platted ground, so not for... [LB1049]

SENATOR WIGHTMAN: Subdivisions. [LB1049]

SENATOR DAVIS: ...not for agricultural ground. [LB1049]

SENATOR WIGHTMAN: Right, not for agriculture at all. [LB1049]

SENATOR DAVIS: So why would we exclude agriculture from a 20-year (inaudible)? [LB1049]

SENATOR WIGHTMAN: Why would we exclude it? It's been the law for, I don't know, well over a hundred years, I think. I don't know if it's been a hundred years since the ten-year classification was made. And we are among the shorter time frame that anybody has. But people have dealt under that law for years and years, as I suppose they have here as well. But it seems to me this is a different situation just from the fact that somebody is developing lots, we have tough economic times and the lots don't get developed and there are a few left undeveloped. Well, they can come in and with one...there will be some argument as to whether this will apply I think, but utility lines and such things as that, that...and particularly if they were underground, and again there will be questions as to whether that is enough to take them out from under, but even putting some concrete in or something like that can be a situation where the lot size is reduced so it isn't a buildable lot anymore. And it may be one lot out of ten, but it's still a pretty major deal to the person that is subdividing. [LB1049]

SENATOR DAVIS: Well, I understand that. I just... [LB1049]

SENATOR WIGHTMAN: Yeah. [LB1049]

SENATOR DAVIS: ...wonder why we aren't going to be consistent across the board and have a 20-year time frame for agricultural land too. [LB1049]

SENATOR WIGHTMAN: I think it's been the law for way too long for me to even carry a bill such as that, so. [LB1049]

SENATOR DAVIS: Thank you. [LB1049]

SENATOR ASHFORD: Thanks, John. [LB1049]

SENATOR SEILER: Yeah, I have a question. [LB1049]

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SENATOR ASHFORD: Yeah, Senator Seiler. [LB1049]

SENATOR WIGHTMAN: Yeah. [LB1049]

SENATOR SEILER: John, if you'll check line 20 on your amendment, it reads "for the recovery of vacant, platted, and subdivided real property." Is "vacant" an adjective of "platted and subdivided," or is it a separate...? It doesn't seem to fit as separate. That's why I was wondering if it was modifying because it's got a comma after it and it would appear that it's a separate designated piece of property. [LB1049]

SENATOR WIGHTMAN: It could be a separate, it would be. It sounds as if, the way we have it drafted, that it would be a separate requirement. [LB1049]

SENATOR SEILER: Right. Is that what you intended or did the "vacant" apply to "platted and subdivided"? Because the platted, really, or "vacant"... [LB1049]

SENATOR WIGHTMAN: I really... [LB1049]

SENATOR SEILER: ...really doesn't come within the term of "platted" and subdivision. I understand what you're doing there. [LB1049]

SENATOR WIGHTMAN: Uh-huh. [LB1049]

SENATOR SEILER: But the "vacant," I have some question about whether that's a modifier or if it's a separate identification. Take a look at that. [LB1049]

SENATOR WIGHTMAN: In my opinion, it probably would be a modification and would be a separate reasoning. [LB1049]

SENATOR SEILER: You got three things? What's a vacant piece of property? Is that agriculture? Is that a street, alley? [LB1049]

SENATOR WIGHTMAN: We're talking about subdivided lots. [LB1049]

SENATOR CHRISTENSEN : No, it's got to be all three things: vacant, platted, and subdivided. [LB1049]

SENATOR SEILER: No, then it's not a separate... [LB1049]

SENATOR WIGHTMAN: What? [LB1049]

SENATOR SEILER: If you're talking about platted and subdivided, then vacant is a modifier of those two, not a separate. [LB1049]

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SENATOR WIGHTMAN: It's not. I think it's not a separate, but I'll... [LB1049]

SENATOR SEILER: Well, just take a look at it. [LB1049]

SENATOR WIGHTMAN: ...let some testifier who are very much involved in this sort of thing answer that question, but... [LB1049]

SENATOR SEILER: That will be fine. [LB1049]

SENATOR WIGHTMAN: Thank you. [LB1049]

SENATOR ASHFORD: Thank you, John. I don't see any. Okay, the next...the first person in support of the bill. Senator Davis from Hyannis has joined us over here, and Senator Lathrop from Omaha and Ralston is also here. Yes, sir. [LB1049]

JEFFREY NIX: Yes, good afternoon. I am Jeffrey Nix, spelled J-e-f-f-r-e-y, last name N-i-x. I represent the Home Building Professionals of Greater Omaha, as well as the Eastern Nebraska Development Council. I'm in litigation right now where you have homebuilders who will have an inventory of property in platted subdivisions. Some will not be developed for a period of time, maybe for economic reasons. And the issue in the case that I'm involved in and cases that I've been involved in is where you have an adjacent homeowner who's claiming, by virtue of what we call essentially lot or side yard creep, where there's no discernible boundary but the landowner has maybe thrown a few extra seeds of grass over the intended property line, unintentionally, and over a period of ten years, is now claiming, when we come in and purchase a property and want to develop it and make productive use, they're now claiming that that constitutes adverse possession. From the standpoint of the builders, there's nothing visual that tells us that there's been adverse possession. It's not a straight line. It might be a combination of a few blades of grass, some rocks, some dirt. It does not put us on any kind of reasonable notice. And from the standpoint of the builders, who want to make productive use of the property, we are relying on the surveyor certificates. And just as the senator said earlier, we are making this as to platted subdivisions only, so the LB1049 is drafted narrowly on this particular issue. This is a situation that occurs over and over and over again where if, for example, when the property has no stakes, nothing to tell us what the boundary is over a period of time, those stakes also, if they even had been put in, get knocked over from wind, from mowing and those sort of situations, and from the standpoint of homebuilders it creates no reasonable expectation of economic certainty that we can begin to build. By the way, the litigation usually initiates when we decide to actually build the property. Then the home...then the property owner next door says, stop, stop, we have adverse possession, when we had no reasonable notice of it. So we believe that this bill provides additional time and makes a more fair playing field for us to make productive use of property. I see my time

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is about up, so I'll certainly be happy to entertain any questions. [LB1049]

SENATOR ASHFORD: Sure, Senator Lathrop. [LB1049]

SENATOR LATHROP: I do. You say you don't have notice, but their adverse possession has to be open and notorious. We spent too much time on this in property class for me to ever forget it. [LB1049]

JEFFREY NIX: Yeah. [LB1049]

SENATOR LATHROP: And it sounds like the builders want to buy the lots, have them out in the neighborhoods, not mow them, not pay attention to them for beyond ten years, and then when they're prepared to build they scrape off the weeds. And all they have to do is go out there and mow it during the summer months and they are...the other guy is not going to get adverse possession. The only way they're going to get adverse possession is if they start tending to that lot or some portion of that lot like it's their own. And you ought to know that if it's going on when you're out there mowing it if you're taking care of the lot in the subdivision. [LB1049]

JEFFREY NIX: Here's one of the problems. The homebuilders will purchase a property maybe in the ninth year of that ten-year period, with nothing visible that tells us that there's a discernible boundary between the two properties. The allegation, for example, in one case I'm dealing with right now, the property owner says, well, I have underground sprinklers you should have known about that periodically would be turned on. We come and do... [LB1049]

SENATOR LATHROP: That wouldn't be open and notorious though. I mean they can say it but you and I both know that when the court gets a hold of that they're going to go, underground sprinklers that pop up from 5:00 to 5:15 every morning isn't open and notorious. [LB1049]

JEFFREY NIX: I understand. And those sprinklers, of course, are only used periodically because we have cold weather. But the fact still remains that from the homebuilder's standpoint this lot creep, as I call it, where you have some grass that gets thrown over, overseeded, combination of dirt, rocks, and so forth creates no, from our standpoint, no reasonable notice that there's adverse possession. We don't...we're not aware of that until we start building a house and perhaps we built...or purchased the property about a year before that ten-year period. Then the homeowner comes out and says, no, no, no, that little area is mine. Then it creates all kinds of problems for us with setback issues and other...and easement issues as well and changes the whole easement plan. The surveyor certificate has clearly divided property lines and there's a whole scheme for this whole community that this now is trying to overturn. [LB1049]

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SENATOR LATHROP: How often is this happening? [LB1049]

JEFFREY NIX: I'm in litigation on this right now on an appeal where we had a situation where the property owner is overseeding, claims that he sometimes will mow it, will sometimes turn on underground sprinklers. Over the period of several years that we owned the property, towards the last several of the ten-year period, we did inspections. We looked at it. We saw nothing that indicated to us adverse possession. [LB1049]

SENATOR LATHROP: So my question was how often is this happening, and you told me about the one case you have. Are there others, Mr. Nix,... [LB1049]

JEFFREY NIX: It's... [LB1049]

SENATOR LATHROP: ...or is this just we're trying to rewrite the law on adverse possession for one case? [LB1049]

JEFFREY NIX: The only case right now that I'm on is...I beg your pardon, is the one case that I'm involved in right now. But I'm talking to homebuilders who are saying, I'm seeing this now. If this is the situation, we're going to have problems, because this lot creep, if you will, that's the phrase that's being used, happens all the time. And again, LB1049 is all about platted subdivisions. We're limiting it to that. [LB1049]

SENATOR LATHROP: Okay. [LB1049]

SENATOR ASHFORD: Senator Chambers, then Senator Davis. [LB1049]

SENATOR CHAMBERS: You stated that there's no visible indication to this developer that this person is claiming that this property is a part of his or hers. Why won't the builder put some clear evidence that it belongs to the builder? What you have on a certificate doesn't mean anything to a person who's out here in the real world and I'd venture to say that these builders would have to look at the certificate to find out just what is what. So that's not persuasive to me. Why don't the builders be more careful and if for a ten-year period they have not built anything there, why wouldn't...what would give notice to a landowner? And you said this is a creep, gradually over ten years. You may not be aware of what's going on, but you know that you've been tending this and taking care of it. [LB1049]

JEFFREY NIX: One of the issues is that, as I say, sometimes in the case of the homebuilders, they will have purchased the property later on in that ten-year period. From the standpoint of a visual inspection of the property, you look at it and you go, that doesn't look like maintenance, that looks like grass with rocks, with dirt, with mud. How does that create any kind of... [LB1049]

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SENATOR CHAMBERS: Well, that's what you say after the issue is joined. Why don't you, as a builder, take care of what is yours and not look for the state to change the law to make up for your carelessness? You're just being careless and slipshod. And if you had a cause of action and did not act in an expeditious way, laches will be invoked, and laches can be invoked by a court before the statute of limitations has run. Your cause of action continues based on the statute of limitation. But the court has said under the circumstance of this case, laches, the person who is not bringing the action had a basis. If you were exercising due diligence to bring an action, you chose not to, so laches is going to cut you off even before the statute of limitation runs. Were you aware of that? [LB1049]

JEFFREY NIX: I am. I am, Mr. Senator. The problem again is that under adverse possession you're supposed to have reasonable notice, and I guess what I'm trying to respectfully say is, for the standpoint of homebuilders, we look at the divisions as indicated in the surveyor's certificate, we see nothing that indicates to us that there is this claim of ownership that's clear, and yet the courts now are interpreting it in a different way and it's causing confusion in the economic side of things. [LB1049]

SENATOR CHAMBERS: My final question, perhaps: This bill, if it were enacted into law, would have some impact on your pending litigation, would it? [LB1049]

JEFFREY NIX: No. No. This, the case that I'm involved in is already in appeal right now. [LB1049]

SENATOR CHAMBERS: Okay. Now Senator Lathrop was trying to pin you down--he didn't use that terminology--on how often this happens, and anecdotally you said that there are builders who say "all the time." That's not specific enough. What does "all the time" mean? [LB1049]

JEFFREY NIX: It means that given now that this...there was another case, a Wanha case that was a number of years ago, I could give you the cite later if the Senator wants that, what I'm being told is we've looked at this property situation and if that is supposed to, quote unquote, constitute adverse possession, then that could be... [LB1049]

SENATOR CHAMBERS: But that's not the question. I'm not trying to be rude. [LB1049]

JEFFREY NIX: Okay. Okay. [LB1049]

SENATOR CHAMBERS: Senator Lathrop asked how many times this had happened. You said all the time. I asked you, what does "all the time" mean? You said, well, there's a second case. So there are two cases... [LB1049]

JEFFREY NIX: Okay. [LB1049]

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SENATOR CHAMBERS: ...that you're familiar with where it has happened. Is that correct? [LB1049]

JEFFREY NIX: What are you referring to as "all the time"? If you're referring to lot creep, that's what I meant. [LB1049]

SENATOR CHAMBERS: No, you used that term. [LB1049]

JEFFREY NIX: That's what...and I was referring to lot creep as occurring all the time where you have now, as we view this in light of this recent litigation, if what the adjacent property owner is saying constitutes adverse possession based on this undefined area, which we are calling lot creep... [LB1049]

SENATOR CHAMBERS: I understand that. [LB1049]

JEFFREY NIX: ...then that lot creep is happening often. [LB1049]

SENATOR CHAMBERS: You're a lawyer. [LB1049]

JEFFREY NIX: Yes. [LB1049]

SENATOR CHAMBERS: And you represent these people. [LB1049]

JEFFREY NIX: Right. [LB1049]

SENATOR CHAMBERS: A lawyer is to give zealous representation to a client. A lawyer is also a counselor. A counselor gives advice, gives direction, gives instruction. You as a competent lawyer, now when I say you, I don't mean you sitting there, a competent lawyer would advise his or her client that it looks like we cannot rely on the outcome of litigation when there is a fuzziness here so I would advise you to do something to maintain your lot so it's clear you're giving notice that this belongs to you. So is that so difficult? [LB1049]

JEFFREY NIX: No. I understand what you're saying, but there are practical problems. For example, in some communities you can't put up temporary fences. In addition, because of zoning laws, you might say, well, it's not economically good for you to build a house right now. [LB1049]

SENATOR CHAMBERS: Can you mow the lawn regularly? [LB1049]

JEFFREY NIX: There is no lawn, Mr. Senator. [LB1049]

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SENATOR CHAMBERS: So what is there? Are there weeds? [LB1049]

JEFFREY NIX: That's what I'm trying to say. It's a ill-defined area of rubble, of mud, of grass as in the case I just was describing, that the plaintiff is saying, the adjacent property owner in that case is saying that constitutes adverse possession. And we respectfully disagree. We think that is not putting homebuilders on reasonable notice, which is part of the requirement of adverse possession, going back to the old law that has been established. [LB1049]

SENATOR CHAMBERS: I thought you were going to say going back to what this old senator said. [LB1049]

JEFFREY NIX: No, no. (Laughter) No, no. [LB1049]

SENATOR CHAMBERS: I was going to say you're pointing to the wrong one. You're talking to the oldest. But here, you realize that this bill is trying to rewrite the law of adverse possession as it has existed in Nebraska. And you can say it relates only to platted land or however you described it. [LB1049]

JEFFREY NIX: That's right. [LB1049]

SENATOR CHAMBERS: But you are rewriting the law of adverse possession. [LB1049]

JEFFREY NIX: We are making an exception to vacant, platted, subdivided real property. [LB1049]

SENATOR CHAMBERS: But wait a minute. I'm trying to ask the question so you understand it. [LB1049]

JEFFREY NIX: Okay. [LB1049]

SENATOR CHAMBERS: Is there in existence in Nebraska now a law dealing with the issue of adverse possession? [LB1049]

JEFFREY NIX: Are you talking about the statute of limitations or the elements thereof or both? [LB1049]

SENATOR CHAMBERS: What does the term "adverse possession" mean to you? I'll take it from your point of view. [LB1049]

JEFFREY NIX: Well,... [LB1049]

SENATOR CHAMBERS: What does the adverse possession mean to you? [LB1049]

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JEFFREY NIX: ...it talks about...I'm sorry. It talks about open, notorious, continuous possession under an adverse claim of right. [LB1049]

SENATOR CHAMBERS: For how long? [LB1049]

JEFFREY NIX: Well, under Nebraska, under the general law it's you have to do that for a period of ten years. [LB1049]

SENATOR CHAMBERS: And when you say... [LB1049]

JEFFREY NIX: That's the statute of limitation part. [LB1049]

SENATOR CHAMBERS: And when you say general law, you're talking about what's in the statute. [LB1049]

JEFFREY NIX: That is correct. Yes, sir. [LB1049]

SENATOR CHAMBERS: And how long has that been the law, if you know? [LB1049]

JEFFREY NIX: I don't know. I did one CD, the database. A long time, that's for sure. [LB1049]

SENATOR CHAMBERS: A long time, and that's specific enough for this. And you're asking us to rewrite that law with this bill. Is that correct? [LB1049]

JEFFREY NIX: To cut that narrow exception with regards to vacant, platted, subdivided... [LB1049]

SENATOR CHAMBERS: Let me ask it a different way. [LB1049]

JEFFREY NIX: ...property, absolutely. [LB1049]

SENATOR CHAMBERS: Okay. Now was that so difficult? You made it very difficult. If we don't pass this law... [LB1049]

JEFFREY NIX: I'm not trying to be difficult. [LB1049]

SENATOR CHAMBERS: (Laugh) You're too slow on the uptake. Okay. Okay. Okay. If we don't pass this law, what are homebuilders...what are these builders going to do? Are they going to take greater precaution or do what it takes to protect themselves in an interest that they may have? Or might they not buy land that they're not intending...stop buying land that it will be far off in the future before they make use of it? There are

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things they could do, aren't there? [LB1049]

JEFFREY NIX: They're in the business of buying property and paying state...and paying property taxes on that,... [LB1049]

SENATOR CHAMBERS: That's not my question. [LB1049]

JEFFREY NIX: ...which is what they've been doing, and they just...they... [LB1049]

SENATOR CHAMBERS: They're speculators, in other words. [LB1049]

JEFFREY NIX: ...they just want to know...they just want to know that there are reasonable expectations on that purchase. [LB1049]

SENATOR CHAMBERS: But we're talking about land speculators, aren't we, because we're not talking about people who purchase this land with a plan in mind and they're going to develop it when it comes into their possession. They're speculating on that land when they make the purchase, aren't they? [LB1049]

JEFFREY NIX: I would describe it as we are making a decision to purchase land based on a platted subdivision with clear boundary lines. That's what we expect to buy and I think... [LB1049]

SENATOR CHAMBERS: With the intention... [LB1049]

JEFFREY NIX: ...I think that's reasonable. [LB1049]

SENATOR CHAMBERS: ...with the intention of not using that land at the time you purchase it for that but sometime in the undefined future. That could be added to what you said, couldn't it, if ten years will elapse between the time you purchase it and the time you decide to build on it? It's clear you don't have a plan for building on that land when you buy it. Otherwise, you wouldn't let it sit there idle for ten years without doing anything to it that would let somebody know that this is your land. But anyway, I won't extend it. Thank you. [LB1049]

JEFFREY NIX: Thank you. [LB1049]

SENATOR ASHFORD: Senator Davis. [LB1049]

SENATOR DAVIS: You talk about this particular case that you have on appeal. Can you give us some of the information that goes along with that? [LB1049]

JEFFREY NIX: The property that we purchased was about six, seven years into that

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ten-year period. It was part of property that made up an inventory of property that we had purchased in Omaha. Unfortunately, as everyone knows, in 2008 we had a big economic downturn, so it was not an advisable time to develop, and particularly in that particular area. When the time did come that it was economically feasible to build a house, and keep in mind our people did periodically inspect the property, we saw nothing that put us on reasonable notice of an adverse possession. So by the time that we built the property, ten years had just passed from the adjacent property owner. He sees our home starting to get built and it's at that time that he alerts us for the first time, I have an adverse possession claim. We go out there and look and we're trying to figure out where is the line, where is the adverse possession. I suppose I could have, maybe I wish I had sent you or shown you a picture today of what it looked like. To me, there's nothing straight-lined about it. There's nothing that put us on reasonable notice of a adverse possession claim. Because when we started to build the house, that area looked pretty much like it had for the three or four years that we had owned it. And so it was in that context that the plaintiff then filed an adverse possession claim. [LB1049]

SENATOR DAVIS: So then there was no open notorious and continuous possession. [LB1049]

JEFFREY NIX: In our opinion. [LB1049]

SENATOR DAVIS: In your opinion. And where has the judge come down on your case? [LB1049]

JEFFREY NIX: The district court found adverse possession. [LB1049]

SENATOR DAVIS: On the basis of what? [LB1049]

JEFFREY NIX: On the basis of the fact that the plaintiff claimed that he periodically mowed it, that he overseeded in that area and used it in that way. But we had facts that we presented that aren't reflected in that district court Opinion, so now it's going to go on a de novo review before the appellate court. [LB1049]

SENATOR DAVIS: So when you bought the property, you didn't go out and determine where the markers were. Is that a common practice, that you don't resurvey, you just buy a parcel of property? [LB1049]

JEFFREY NIX: It's a common practice, but I can tell you that again with regards to the area in question, if we had put a stake there, from our standpoint there was nothing that put us on notice of an adverse claim in terms of the look and the presentation of that area. [LB1049]

SENATOR DAVIS: But when you bought the property though, you didn't go out and say,

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okay, here is the property as it was described, this appears to be the corner of the property. You just took it at face value from the buyer that this was the property. [LB1049]

JEFFREY NIX: We took it from face value based on the surveyor's certificate and the fact that there appeared to be nothing to indicate any straight edge line or an adverse possession by the adjacent landowner. [LB1049]

SENATOR DAVIS: And is that a common practice that you would do it that way, would take it on the basis of a survey's certificate? [LB1049]

JEFFREY NIX: It happens a lot, is what I can say, yes. [LB1049]

SENATOR LATHROP: Here's the practical side of it. You have a subdivision and you...somebody goes in there, a surveyor goes in and stakes it out according to the plat. They drop metal posts in the corners that are below the ground level, so no one can see them. You build a house on lot number one and lot number two is sitting right next to it. And lot number two gets overgrown with weeds and the guy that lives on lot number one says, jeez, those weeds are close to the house, I'm going to start mowing a little bit of lot number two because the builder isn't doing anything with it. And he mows and pretty soon he throws a little seed out there and it catches a little bit of water from the sprinkler system, and now grass is growing in lot number two about five feet in, which is really lot number one's attempt to keep the weeds away from his garage and his house and his investment. You guys come along. You buy the lot and the insurance on the title, title insurance, says, well, it's free and clear but we can't tell you whether somebody has been adversely possessing it or not. And so nobody goes out and does another survey to see if somebody has been mowing into lot number two. They just look at it and go, let's go build and, because they think they know what the dimensions are, they got a house that fits, they start to build it. And next thing you know, a corner of it is sitting on the part the guy in lot number one has been mowing for ten years. That's your problem, but you can't tell when you drive by it where the property line is because the stakes are under the ground. [LB1049]

JEFFREY NIX: I wish it was that straightforward because, as I said,... [LB1049]

SENATOR LATHROP: Isn't that the classic case that you're talking about though? [LB1049]

JEFFREY NIX: Not necessarily. When I talked... [LB1049]

SENATOR LATHROP: You think somebody is mowing the entire lot... [LB1049]

JEFFREY NIX: No, no, no. [LB1049]

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SENATOR LATHROP: ...and putting grass seed down? [LB1049]

JEFFREY NIX: No, what I'm suggesting is, is that the disputed area is a jagged jumble of rock, dirt, grass, stubble. [LB1049]

SENATOR LATHROP: Well, lot number one isn't getting it by adverse possession by leaving a pile of...leaving lot number two looking like a pile of debris. He's mowing it. He's putting seed...and it's starting to look a lot like his property on lot number one because now it has grass and now it's starting to look like a lawn instead of rubble. [LB1049]

JEFFREY NIX: In some cases perhaps it looks like that. All I can tell you is the case that I'm dealing with and what the homebuilders are telling me, that you go out and you look and it is not clearly distinguishable. And also I should say this. During different times of the year, when the season changes and the grass goes dormant and the sprinklers are not being used, we also have a concern about the alleged continuous nature of that as well under the elements of adverse possession. [LB1049]

SENATOR LATHROP: Okay. I get your problem. I get your problem. [LB1049]

SENATOR SEILER: Brad? [LB1049]

SENATOR ASHFORD: I'm sorry, Senator Seiler, I was following... [LB1049]

SENATOR SEILER: I want to go back to the word "vacant" again. It happens between two houses that are actually sitting there too. If you plant daylilies and they creep over on to your neighbor. So why do we want to just limit it to vacant? It solves your problem but it doesn't solve the guy that has daylilies growing into his neighbor's yard for ten years. [LB1049]

JEFFREY NIX: Well, maybe we can relook at that, but it seemed to me that... [LB1049]

SENATOR SEILER: Okay. And I'm willing to let John do that,... [LB1049]

JEFFREY NIX: Yeah. Right. [LB1049]

SENATOR SEILER: ...to look at that "vacant." The other question I had is if you had platted ground, there's stakes out there. There's buried pipes designating the corners of a lot. And if you sent a surveyor or you yourself went out and find the stakes and looked down them, you'd know whether somebody was over on your property. [LB1049]

JEFFREY NIX: A lot of those stakes get mowed over, run over, and are gone,

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particularly if you're talking about ten years. [LB1049]

SENATOR SEILER: And I think that's why the title company says, hey, you're buying this subject to doing a survey on your own. And I assume this is a lot of money when you're investing in this that maybe a surveyor was the proper way to do that. [LB1049]

JEFFREY NIX: And if we were to put stakes up, as I say, I believe in most cases, over time, because keep in mind we're talking about this ten-year period,... [LB1049]

SENATOR SEILER: Yeah. I know. [LB1049]

JEFFREY NIX: ...those stakes get removed, they get put away. [LB1049]

SENATOR SEILER: But a surveyor could reshoot them and put them back where they were. [LB1049]

JEFFREY NIX: And the best way maybe in some cases would be... [LB1049]

SENATOR SEILER: You just didn't want to pay that money. [LB1049]

JEFFREY NIX: I beg your pardon? [LB1049]

SENATOR SEILER: You just didn't want to pay the surveyor money. [LB1049]

JEFFREY NIX: No, that's not it. It's we thought adverse possession was open, notorious, continuous, something that you could see and say, aha, that's adverse possession. We don't see that in this case and in the... [LB1049]

SENATOR SEILER: Well,... [LB1049]

JEFFREY NIX: ...in the issues that we're talking about. That's the problem, is... [LB1049]

SENATOR SEILER: ...you didn't see it but a judge did. (Laugh) And now you're hoping seven other judges look the other way, or the Court of Appeals. No, I'm fine with what... [LB1049]

JEFFREY NIX: We're looking for what we believe is a reasonable time frame and reasonableness in the application of this law in this particular type of situation. [LB1049]

SENATOR SEILER: Okay. [LB1049]

SENATOR ASHFORD: Yes, Senator Chambers. [LB1049]

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SENATOR CHAMBERS: The court has now given you direction, and until the appeal is handled, we don't know whether what that lower court said is going to be accepted. But let's assume, for the sake of the discussion, while we're formulating policy, that the appellate court agrees with the lower court and says these activities indeed and in fact under the law constitute adverse possession if it occurred over a period of ten years. Are you then going to come back and try to get another Legislature to overturn that decision, or are you going to advise your clients that they need to take these legal ramifications into consideration and deal with their property differently when they are not going to build on it for maybe a period of ten years? [LB1049]

JEFFREY NIX: If the court rules in a way that we respectfully disagree with, we're still in the same situation. [LB1049]

SENATOR CHAMBERS: So you wouldn't tell your clients to do anything differently, just hope that if an issue arises you'd get a judge who would rule differently on the facts. That's what you would tell them, roll the dice, in other words, because you're speculators anyway? [LB1049]

JEFFREY NIX: Looking at a situation where we can have what we believe is a better, more realistic, more reasonable interpretation of what adverse possession is, Mr. Senator. [LB1049]

SENATOR CHAMBERS: But what you believe doesn't mean anything. You told the court what you believe and the court said that's well and good but that's not the way it is. So you're going to hold stubbornly to your belief and you will never have anybody from your country be an explorer and discover land on the other side of the horizon because you're convinced that the earth is flat and if you go beyond this land you'll fall over...this water, you'll fall off the edge. So in your country, you won't have any explorers who will ever discover anything because you believe the earth is flat. But there are other people who don't believe it's flat and they explore and disappear over the horizon and you say, see, I told you. But then they come back with ships laden with all kind of things that are considered treasures. What then? All these people would say, you misled us. That's what I see your position to be. The court has given guidance even at the lower court level. You, as a lawyer, should not want litigation. You should want your client to behave in a way to guard against litigation, unless your aim as a lawyer is to thrive on litigation, allow those circumstances to arise that will engender litigation and you get paid for it. I hate to say it, but that's what I'm seeing from your sitting there and indicating you will not tell your clients to do anything differently from what they did that got them into this bind in the first place. I'm not even going to charge you for this advice. (Laughter) [LB1049]

SENATOR LATHROP: You really can't. [LB1049]

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SENATOR MCGILL: Yeah, not on the clock. [LB1049]

SENATOR LATHROP: You really can't charge him for the advice. [LB1049]

SENATOR CHAMBERS: Well, based on the way they do business, I could and he'd probably pay me. That's all I have though, because I think my point is made and I won't go on. [LB1049]

SENATOR ASHFORD: Thanks, Jeffrey. Thank you. [LB1049]

JEFFREY NIX: Thank you. [LB1049]

SENATOR ASHFORD: Next supporter. Do we have any other supporters? Fred, are you going to talk about this? Okay. Any opponents? Oh, okay. That might be a good position to take right now, but I wouldn't know. I'm just suggesting. [LB1049]

WARD F. HOPPE: My name is Ward F. Hoppe. I'm an attorney in Lincoln, Nebraska, and I'm also not only a real estate developer, a builder and have a lot of different roles. I'm here on behalf the Nebraska Realtors Association, who opposes this bill. We don't believe that this change is warranted. The exception causes some confusion and isn't justified by all the circumstances. I've heard the testimony on the other side and I'm afraid what I heard was a confusion between the elements of adverse possession and the time limit for adverse possession, and all this bill deals with is the time limit for adverse possession on vacant and subdivided lots. I'm not totally sure what "vacant" and..."vacant" and "platted, and subdivided" lots, how "platted, and subdivided" lots goes together, which is part of my concern. But the...you know, if there was a policy change, why wouldn't it apply to all lots, number one? I want you to take a quick minute to think about the elements of adverse possession. I recognize that there was an issue in one case in Omaha. I've been in the law practice a long time in Lincoln, Nebraska, and that's not Omaha. So, you know, there certainly are some distinctions. I've not run into this issue once. I've heard of this issue once, and it's the case that precipitated this change. I'm sure, since there's a case cited in the case that precipitated this change, it must have happened at least once before. But it is not, in my experience, readily occurring. It doesn't happen a lot. This change specifically was not vetted by the real estate probate and trust section of the bar at their legislative meeting in the summer. It wasn't vetted at the real estate practice guidelines committee of the bar at their fall meetings, and I know it hasn't been discussed. I'm saying I don't see it as a problem and I don't think it needs a fix. The real issue is, and I think you hit on it, Senator Lathrop, you got to pay attention to your own property. And for Senator Seiler, one of the things you can do is order a survey on the property, and once...that survey will remove the five general exceptions to that title policy based on that survey. A survey should show what is open and notorious on a piece of ground, because that's the point

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of having the survey. And open and notorious, as you may know, is one of the elements of adverse possession. I think we're dealing particularly...I'm not going to say that the case is not disturbing to a builder in Omaha. It would be. But obviously there's a mixed fact pattern, and I don't think we should knee-jerk reaction to the fact pattern. My time is up. [LB1049]

SENATOR ASHFORD: Any questions of Mr. Hoppe? [LB1049]

SENATOR LATHROP: I just want to play devil's advocate with you for a second, because I've lived in a couple of platted subdivisions,... [LB1049]

WARD F. HOPPE: Uh-huh. [LB1049]

SENATOR LATHROP: ...and in my neighborhood now there's still an empty lot. And you can, according to the law...I did have an adverse possession case when I first started practicing law and so I am familiar with that. [LB1049]

WARD F. HOPPE: A lot creeper. [LB1049]

SENATOR LATHROP: Well, here's what happens, though, or what can happen. If you have a neighborhood, it's platted, the lots that...people move into the neighborhood because the houses that are going to be on there... [LB1049]

WARD F. HOPPE: Uh-huh. [LB1049]

SENATOR LATHROP: ...are going to have a certain number of square feet and they're going to have a certain appearance. [LB1049]

WARD F. HOPPE: Certain size. [LB1049]

SENATOR LATHROP: And you're very familiar with that. [LB1049]

WARD F. HOPPE: Uh-huh. [LB1049]

SENATOR LATHROP: But the guy who is next-door neighbor to an empty lot in a platted neighborhood starts mowing three mower widths in from his lot and he does it because the weeds are getting too close to his house... [LB1049]

WARD F. HOPPE: Because it gives him...right. [LB1049]

SENATOR LATHROP: ...and the guy isn't taking care of it. [LB1049]

WARD F. HOPPE: Uh-huh. [LB1049]

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SENATOR LATHROP: It's just sitting there with weeds on it, and he...but that's enough under the law to be adverse. That's open and hostile and no one is running him off. He's doing it during the daylight. He's mowing ten feet into the neighbor lot. And if he does that for ten years, that's enough, isn't it? [LB1049]

WARD F. HOPPE: Potentially. [LB1049]

SENATOR LATHROP: And if I own that lot, if I'm...if it's one of my inventory lots, and I now have 50 lots in my inventory that I hope to one day build on and this is one of my lots, and I drive by it every day because I'm building a house up the street. And I go by it and I can't tell where the pins are to know whether this guy is ten feet in or right on the lot line. And that really is the problem, isn't it? [LB1049]

WARD F. HOPPE: I think that's the concern in this specific case, that the creep... [LB1049]

SENATOR LATHROP: I don't even know anything about that particular case. I'm just listening to the concern and recognizing, because here's the other thing that happens. If, in theory, neighbors on either side go in five feet, now the lot can't be used in a way consistent with the overall scheme for the neighborhood, can it? You can't build a house big enough to meet the specs of the...or the requirements of the subdivision. [LB1049]

WARD F. HOPPE: Well, it obviously depends on the size of the lot and if you're talking about a 60-foot-wide lot, that would...taking 5 feet on each side would create a problem. You'd only have a 50-foot lot at that point if... [LB1049]

SENATOR LATHROP: And you might not be able to build a house big enough to even qualify for the...meet the whatever, what do they call those specs? [LB1049]

WARD F. HOPPE: Covenants or something, but. [LB1049]

SENATOR LATHROP: Convenants, yeah. You wouldn't be able to meet the covenants at that point. [LB1049]

WARD F. HOPPE: You know, there are a lot of depends, depends, but if you take it out the furthest direction... [LB1049]

SENATOR LATHROP: Well, tell me why. Tell me why the realtors would...why that would give them heartburn. If we said if it is in a neighborhood that's platted, it's going to have covenants, everybody is moving there so that the houses all have the same characteristics, not necessarily identical but the same characteristics, why does that give the realtors heartburn? [LB1049]

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WARD F. HOPPE: If the...well, originally, the opposition came when the thing affected a lot that...before the amendment that's been brought forward, the bill carried...cut a wide swath. [LB1049]

SENATOR LATHROP: Okay. [LB1049]

WARD F. HOPPE: It's been cut down quite a bit with the amendment. I will say that. [LB1049]

SENATOR LATHROP: Okay. [LB1049]

WARD F. HOPPE: But why the heartburn is it's a change that really isn't warranted in the law. That's the biggest issue. We didn't...haven't gone back to reverse it. [LB1049]

SENATOR LATHROP: You guys sell real estate all the time in those neighborhoods. Don't you have a cooperative relationship with the builders? [LB1049]

WARD F. HOPPE: I'm sure the realtors have several cooperative relationships with the builders. [LB1049]

SENATOR LATHROP: Okay. [LB1049]

WARD F. HOPPE: I mean it's a question of paying attention to your own lots. [LB1049]

SENATOR LATHROP: It is. It is. I'll grant you that. But it's not like out in Senator Davis' part of the world where there's a fence separating every neighbor. [LB1049]

WARD F. HOPPE: That's true. [LB1049]

SENATOR LATHROP: And these, a lot of these neighborhoods, the covenants say you can't even build a fence from one lot to the next. [LB1049]

WARD F. HOPPE: Okay. [LB1049]

SENATOR LATHROP: And so should we require... [LB1049]

WARD F. HOPPE: I will tell you, if you change the law the realtors will follow it. [LB1049]

SENATOR LATHROP: Okay. [LB1049]

WARD F. HOPPE: I mean that's not a question. [LB1049]

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SENATOR LATHROP: Okay. Thank you. I appreciate your candor. [LB1049]

WARD F. HOPPE: Uh-huh. [LB1049]

SENATOR ASHFORD: Senator Davis. [LB1049]

SENATOR DAVIS: You heard Mr. Nix say that this happened all the time. [LB1049]

WARD F. HOPPE: I did. [LB1049]

SENATOR DAVIS: But you say you haven't seen very many of these cases. How many have you seen? [LB1049]

WARD F. HOPPE: Of lot creep cases? Zero. The only one I've seen is Mr. Nix's case and someone provided it to me before, in this last month. I've seen a number of adverse possession cases, most of them rural. [LB1049]

SENATOR DAVIS: Most of them...? [LB1049]

WARD F. HOPPE: Rural. [LB1049]

SENATOR DAVIS: Rural. And that would be one of my concerns with extending this is we've got a lot of vacant lots in a lot of small towns... [LB1049]

WARD F. HOPPE: Right. [LB1049]

SENATOR DAVIS: ...and, in some respects, they may sit there for another ten years. Just a thought. [LB1049]

SENATOR ASHFORD: Thanks, Fred. All right, any other opponents? Neutral? Senator Wightman, do you want to clear this up for us, please? [LB1049]

SENATOR WIGHTMAN: I'll take about one minute or two. Thank you. As we've said, we've tried to limit the change in the law a great deal and we're certainly not asking and I would never be here asking you to change the law with regard to adverse possession all over, because we've dealt too many years in that. I don't know how many, but I wouldn't be surprised if it's a hundred years, but it may not be. I certainly didn't research that before coming here. I think Senator Lathrop has made the suggestion that really is the major item of concern, is that that lot may very well not be a usable lot under restrictive covenants, maybe even under some provisions of city government but certainly under restrictive covenants that make it impossible to use the entire lot because if somebody claimed adverse possession on 10 to 20 feet or 5 or 10 feet, it

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may not be big enough anymore to meet those restrictive covenants. And so, as I say, we're asking for a very limited change and so I would ask that you take some action on the bill and hopefully report it out of committee. Thank you. Senator. [LB1049]

SENATOR ASHFORD: Yes, Senator Chambers. [LB1049]

SENATOR CHAMBERS: Senator Wightman, everything you mentioned and that Senator Lathrop discussed in the nature of a problem, all of them are under the control of these developers. If they say a lot has to be so big and so big in order to comply with a restrictive covenant, let them change their covenants. Let them put some considerations in the covenant that might anticipate problems developing. But because the developers don't have good lawyers, because they don't have foresight and they get entangled in the law that is on the books and that they have notice of, the law shouldn't change; they should change. There was a preacher named Billy Sunday. He used to give what are called revivals and he was giving one in Chicago. And he was preaching and they said, Billy, you have to change what you're saying. And Billy Sunday said, why is that? He said, you're rubbing the cat the wrong way. He said, let the cat turn around. So it's easier for these lawyers and these developers to get their business in order than it is to change the law to make up for the deficiencies in how they conduct their business. That's just my opinion. I just thought I'd throw it out there. [LB1049]

SENATOR WIGHTMAN: Thank you. I'm not going to try to answer all that. (Laughter) And I haven't read Billy Sunday lately, so. [LB1049]

SENATOR ASHFORD: All right. Thank you, Senator Wightman. That concludes the hearing. We'll now go to Senator Schilz, LB811. Okay. [LB1049]

SENATOR SCHILZ: Good afternoon, Chairman Ashford and members of the Judiciary Committee. My name is Ken Schilz, spelled K-e-n S-c-h-i-l-z, and I represent the 47th Legislative District. The Attorney General and I have partnered to bring you LB811, legislation that amends the Uniform Controlled Substances Act to combat the latest versions of synthetic cannabinoids. And I would like to thank Speaker Adams for taking this up as a Speaker priority on this legislation. As currently written, Nebraska law bans all but the most recent variations of synthetic cannabinoids. Manufacturers are finding ways to circumvent the law by changing the chemical makeups to create legal substances. This process seems to have made the end product even more dangerous than the original substance it is intended to mimic. The effects can be devastating. Nebraska children are obtaining the new versions of these synthetic cannabinoids and literally dying because of the chemicals used to produce them. This bill will help prevent manufacturers from circumventing the ban on a yearly basis by making these slight chemical alterations. There's many experts behind me and I don't want to keep you waiting to hear from them, so I will take this time to defer to those folks and more specific questions to Corey O'Brien with the Attorney General's Office and Christine

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Gabig, forensic scientist, the CSI division with the Douglas County Sheriff's Department. I understand that Christine recently underwent knee surgery, so I really do appreciate her still making it here today to provide her expertise and also maybe, if somebody wants, some pronunciations of the words. (Laughter) Thank you. And I'll be happy to try and answer any questions you may have. [LB811]

SENATOR ASHFORD: Yes, Senator Lathrop. [LB811]

SENATOR LATHROP: Just briefly. [LB811]

SENATOR SCHILZ: Uh-huh. [LB811]

SENATOR LATHROP: Ken, did I read in CSG kind of an update that some state figured out how to legislate this in a broader way so that we don't have to do it every year? [LB811]

SENATOR SCHILZ: That...we've heard some about that. I know the others behind me are going to bring some questions about that, and that's part of the reason why we're here today is to try to... [LB811]

SENATOR LATHROP: Can we explore that as an amendment before we...so we don't do this every year, because we really accomplish nothing. We just move them on to a different series of drugs that potentially become more dangerous each year. [LB811]

SENATOR SCHILZ: Even more dangerous, and I agree with you completely. And there's others, we've talked about that and that's why we're here today is to get to that kind of solution. [LB811]

SENATOR LATHROP: Okay. [LB811]

SENATOR ASHFORD: Senator Chambers. [LB811]

SENATOR CHAMBERS: And, Senator Schilz, you may not be able to answer this question but it will alert those who are coming after you. I don't know what in the world this language means when they say, "This class includes, but is not limited to." Well, if they're giving a listing of those things that it includes, then they cannot just have another...some words that says "but not limited to," then they just throw something into it, because only the Legislature can create a crime. And if you're doing anything that's prohibited here, then it's a crime. So I want them to explain to me the significance of these words, "not limited to." [LB811]

SENATOR SCHILZ: And I... [LB811]

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SENATOR CHAMBERS: And you are just the sounding board so I could alert them. Thank you. [LB811]

SENATOR SCHILZ: I understand and I agree with you. I see where you're coming from. [LB811]

SENATOR CHAMBERS: Okay. [LB811]

SENATOR ASHFORD: Yes, Senator Coash. [LB811]

SENATOR COASH: Thank you, Senator Ashford. Senator Schilz, I just have a technical question, on page 12. [LB811]

SENATOR SCHILZ: I think we've been here before but let's see, page 12. [LB811]

SENATOR COASH: Line 16. [LB811]

SENATOR SCHILZ: Uh-huh. [LB811]

SENATOR COASH: What's the name of that drug? (Laughter) [LB811]

SENATOR SCHILZ: You know... [LB811]

SENATOR COASH: I just want to hear you give it a shot. (Laughter) [LB811]

SENATOR SCHILZ: ...you know, this is in...this is in, hold on, first, this is in the old legislation. [LB811]

SENATOR ASHFORD: Well, let him start with line 11. He can move up. [LB811]

SENATOR SCHILZ: Yeah. (Laughter) You want...shall we read it together, right? Line 16, is that what you're asking? [LB811]

SENATOR COASH: Yeah, page 12, line 16. [LB811]

SENATOR SCHILZ: Ethylmethylthiambutene,... [LB811]

SENATOR COASH: Very good, thank you. [LB811]

SENATOR SCHILZ: ...far as I know. [LB811]

SENATOR COASH: No further questions. [LB811]

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SENATOR SEILER: Close enough. [LB811]

SENATOR ASHFORD: That's pretty darn good. Thanks, Ken. Thank you, Senator Schilz. Corey. [LB811]

COREY O'BRIEN: (Exhibit 2) Good afternoon, Senators. My name is Corey O'Brien, it's O-'B-r-i-e-n, and I'm with the Nebraska Attorney General's Office and I'm here to testify on behalf of LB811, in support of it, also as a member of the Nebraska County Attorneys Association. As many in this committee know, I've appeared before this committee I think three out of the last five years specifically addressing the K2 or synthetic cannabinoid issue. When we first got this issue brought to us, it was indicated to us this was a synthetic form of marijuana and it was no more harmful than naturally occurring marijuana. We've since learned over that time period that that's not the case. We also have learned during that time period that tweaks in the formula were still going to be possible, even though this committee and this Unicameral has gone above and beyond I think every other state and the federal government in terms of what we've done with synthetic cannabinoids. And a lot of the credit for that goes to Christine Gabig and Celeste Laird and a lot of dedicated professionals who have put a lot of time and effort into this. To answer or get a little bit ahead, one of the things that, you know, this committee has told us over and over again is can't we come up with the be-all, end-all solution. On the two previous occasions I testified here, I was hoping to walk out of this room and have an epiphany and have that magical answer come to us. What we did is we heeded those words. We put together a roundtable of the best of the best. I think there were 20 or 30 of us in the room trying to come up with that magical language that would be the catchall so that we wouldn't have to be here year after year. We've attempted to do that and we realize that, you know, there may be some tweaks that we need to make to that catchall language that's contained in there. I know the criminal defense attorneys have a couple little tweaks that they have some problems with. Certainly we're willing to work with them. I've actually drafted some additional language. But we wanted to hear from the thoughts and concerns of others behind us as well as the members of the committee as to what other tweaks we need to make to the bill. I'd ask you to take a hard look at the bill. I'd be certainly willing to answer any questions you have about the bill. One thing I did want to point out is that we have escalated the penalty for simple possession of this to a Class IV felony. It currently sits as an infraction. The reason why the committee that we put together thought this was important is because we thought we were sending the wrong message that this is in fact the equivalent of marijuana. It is not. Kids are dying from it and becoming seriously ill so, therefore, we think that the penalty needs to reflect the seriousness and dangerousness of the drug involved. Thank you. Any questions? [LB811]

SENATOR ASHFORD: I don't. Senator Chambers has a question. [LB811]

SENATOR CHAMBERS: I would ask that question of you. What is the significance of

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the words when in several of these amendments it will say the class which includes "but is not limited to"? What is the value of that language "but not limited to"? [LB811]

COREY O'BRIEN: And I understand that's legal language but also when we put the roundtable together it was the suggestion of the chemists, Christine who will follow me and then...and Celeste Laird, that we include some exemplar language as to, you know, what types of compounds are included in the classification. So those classifications already existed and they suggested that we put in some examples of the actual compounds that we were seeing that are part of that classification to provide examples of what is covered and not be all-encompassing. [LB811]

SENATOR CHAMBERS: But she's not a lawyer; you are. [LB811]

COREY O'BRIEN: Yes, sir. [LB811]

SENATOR CHAMBERS: Nothing is criminal in Nebraska unless a statute specifically makes it so. No agency can create a crime, the Legislature cannot authorize anybody else to create a crime. There are no common law crimes in Nebraska. Every crime is statutory. When you say it includes, and you list them, then you are giving notice to any and everybody precisely what item, if you have it in your possession or do whatever with it, you have notice. But if you say "not limited to," then you're saying but there are other items not here and if you have those items not listed you're still guilty of a crime. I don't think those words ought to be in it. But you can think it over and see what you think later. I just want to let you know that I see these words as...I don't know if they go so far as to nullify the validity of the law but I don't think they have any legal significance. [LB811]

COREY O'BRIEN: Can I address that just briefly, Senator? The classifications, as you see in the green copy, those classifications already exist. They've existed in the law since we passed it, I think 2009. And so, frankly, one of the things that we've always been concerned about was did this put people on adequate notice of what kind of substances or compounds we're talking about. So we thought it might be instructive in terms of what types of compounds we were talking of to add that language in there. Frankly, those compounds that we listed in there as examples are the ones that are already covered under the classifications. But this we thought would provide greater clarity as to what compounds, the general nature and type, that we're talking about that were banned by those classes. So that was part of the goal is to... [LB811]

SENATOR CHAMBERS: Well, let's say... [LB811]

COREY O'BRIEN: ...provide greater specificity than existed under the law as it first was written. [LB811]

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SENATOR CHAMBERS: This is not instructing pharmacists on how to make compounds or telling them what categories various compounds fall into. This language is for the purpose of prosecuting people. So let's say you're prosecuting me and you're going to prosecute me for something that might fit within this class but it's not specified. You cannot prosecute me for something not specified. [LB811]

COREY O'BRIEN: I would... [LB811]

SENATOR CHAMBERS: And if you thought you could, then I've just instructed you on something that the Attorney General didn't. [LB811]

COREY O'BRIEN: I would disagree with that, because the guys that are making this, they know what they're making and that's the people that we're really after. They're doing this to circumvent those classifications. [LB811]

SENATOR CHAMBERS: I don't care what they're doing. You're asking us to create a crime... [LB811]

COREY O'BRIEN: Yes. [LB811]

SENATOR CHAMBERS: ...and you're saying that I should go along with what the Attorney General's Office says, when I know better. I don't know if you can find me any other criminal conduct which says "includes, but is not limited to," and you don't put anything after this "is not limited to." Let's say the speed limit is 85 miles an hour. You might say 85 miles an hour or more, but you're not specifying an item. You're talking about conduct and you're giving the range. But you're giving a minimum level which constitutes the crime itself. If you go above 85 miles an hour, you have committed this crime, 85 miles an hour. You can go up to 85 miles an hour, and we know they give you a little leeway. I'm trying to give an example. Are you telling me that your understanding is that by using this language, "but not limited to," would authorize you, as a prosecutor, to read in the paper where another substance, one of these substances, is being modified and it comes up with something other than what is listed here, that then you, without a change in the law to designate that modification and make it criminal, you could just go ahead and charge me with a crime, even though at the time the law was enacted, that was not a crime? [LB811]

COREY O'BRIEN: Respectfully, yes, because, quite frankly, the language there is instructive of the type of things that are already covered under existing law and so they are put on sufficient notice by the classification that's listed above. And basically all that we're doing there, and there are numerous examples actually, Senator, of other criminal statutes where we provide examples of the kind of items that are prohibited or the type of conduct that is prohibited as an instructive example of the kind of things that are prohibited. So we think that it's more specific to cover the general, which does actually

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contain the prohibition that they should be fully aware of. [LB811]

SENATOR CHAMBERS: I have no idea what you just said. But here's what I will say,... [LB811]

COREY O'BRIEN: Okay. [LB811]

SENATOR CHAMBERS: ...and then I'll leave it alone. I'll let it stand where it is. [LB811]

SENATOR ASHFORD: Thanks. Thanks, Corey. Christine, are you going to be next? Welcome back, I guess. [LB811]

CHRISTINE GABIG: Thank you. [LB811]

SENATOR ASHFORD: Had a little bit better movement when you were here last time. [LB811]

CHRISTINE GABIG: I'm sorry? [LB811]

SENATOR ASHFORD: Little better movement when you were here last time. [LB811]

CHRISTINE GABIG: Yeah, I know. Yeah. All right. I made it. Good afternoon, Senators. I'm Christine Gabig, G-a-b-i-g, and I work for the Douglas County Sheriff's Office as a forensic chemist. Several of you I saw last year, the year before, and others I've seen over the past... [LB811]

SENATOR LATHROP: Every year. [LB811]

CHRISTINE GABIG: ...yeah, several years. Obviously, I'm here to testify in support of LB811. I would like the opportunity, Senator Chambers, to clarify what you're speaking about. I think I understand what you are asking. I think I can provide some insight into that. But what we've basically done with the legislation this time is there are a few things that make it different. We did the same thing that you've seen us do before where we updated the classes to include the current synthetic cannabinoids that we're seeing now. A big thing that we did was to change the penalties to make it more in line with the type of drug that this is. Now we have years and years of data to show us how terribly destructive this drug...these drugs are. And the imitation controlled substance section, there were some changes made to that that may allow us to have multiple ways to catch some of these substances. For instance, let's say Scooby Snax come across my lab bench and identified as containing some ridiculous combination of letters and numbers, some compound, and it's not in these new classes. Well, what? Now we just come back again next year, and next year, and next year? We have some other options now in here because we have some changes to the definition of imitation controlled

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substances. And if you look at Class (M) in the bill, which is on one of these pages, Class (M) adds a new section that allows us to determine if the compound is either approved by the Federal Food and Drug Administration or if it is a cannabinoid receptor agonist. And so that gives us some other ways to maybe go about addressing these compounds, the new ones that might come out if our legislation comes out of date. So those are some of the new things that we've added to this bill. So other than that, I guess if anyone has any questions, I would address Senator Chambers' question. [LB811]

SENATOR ASHFORD: Do you want to address his question about the point about...he raised about the catchall phrase that could bring in other substances though? Could you address that? [LB811]

CHRISTINE GABIG: I could. Senator Chambers, I want to make sure I understand correctly what you're asking. I think you were talking...you were talking about the "limited to" where we list a couple examples and say "not limited to but including" PBF. [LB811]

SENATOR CHAMBERS: Includes but not limited to. [LB811]

CHRISTINE GABIG: Uh-huh, includes but not limited to. You know, all that is, it's not...it doesn't change anything. It is just there, honestly, to kind of make it easier for the attorneys that are prosecuting the cases. They...what happens is I'll identify what this is, it's PBF-22, and then I have to look at those classes, right, those (A) through (M). Let's see, let's find the classes real quick. What page is that on? [LB811]

SENATOR CHAMBERS: Let me ask it this way. If that language were removed, what difference would it make? [LB811]

CHRISTINE GABIG: None. It serves...it really does just serve to provide the attorneys, instead of them having to draw out an... [LB811]

SENATOR CHAMBERS: Which attorney? [LB811]

CHRISTINE GABIG: I'm sorry, sir? [LB811]

SENATOR CHAMBERS: Which attorneys? The defense attorneys or the prosecutors? [LB811]

CHRISTINE GABIG: Either. Any attorneys that are using the bill. [LB811]

SENATOR CHAMBERS: Say it again. [LB811]

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CHRISTINE GABIG: Any attorneys that are using the bill. So it would benefit either of them. But it would not affect the... [LB811]

SENATOR CHAMBERS: Well, I'm not an attorney... [LB811]

CHRISTINE GABIG: ...it would not affect what's covered. If it was removed, it would not affect what's covered. [LB811]

SENATOR CHAMBERS: I'm not an attorney. I'm a lawmaker while I sit here and I believe we should have clarity in the law... [LB811]

CHRISTINE GABIG: Uh-huh. [LB811]

SENATOR CHAMBERS: ...and not be giving instruction to lawyers. They should learn that in law school or they should have seminars and come to an understanding. But the Judiciary Committee, as long as I'm a member of it, will not enact laws designed to inform incompetent lawyers how to avoid the consequences of their incompetency other than by studying to remove it. I'm very serious about this. Trash legislation has come out of this committee before. And I'm not saying that you have done anything wrong. If I were a prosecutor and I had a cupcake committee, I'd put everything in a bill that I could to give me every advantage possible. And it's up to the committee members to discharge our duty. So the only reason I fought the Attorney General's Office, because they know how I'm going to be on this, and I'm not giving them any quarter. That's why I wanted to ask the question to a prosecutor and not...are you a prosecutor too? [LB811]

CHRISTINE GABIG: No, sir. [LB811]

SENATOR CHAMBERS: Okay. So that's why I wouldn't have even asked you. He bucked the question to you, I think. But that's between you and him, because you all are in cahoots with each other but I'm not in cahoots with anybody. That's all that I have though. And if Senator Ashford hadn't drawn me into it, I wouldn't even be doing this with you right now. [LB811]

CHRISTINE GABIG: Fair enough. [LB811]

SENATOR ASHFORD: Senator Coash and then Senator Seiler. [LB811]

SENATOR COASH: Thank you, Christine. Now so is your job, if law enforcement goes in and finds one of these synthetic products, they'll send it to you for testing? Is that... [LB811]

CHRISTINE GABIG: That's correct, Senator. [LB811]

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SENATOR COASH: ...that's what you do? How much has that occurred over the past couple of years? I mean... [LB811]

CHRISTINE GABIG: How many of these types of substances are we seeing? [LB811]

SENATOR COASH: Well, I guess my question is how often have you been asked to test the product? Is it a frequent... [LB811]

CHRISTINE GABIG: Daily. [LB811]

SENATOR COASH: Daily? [LB811]

CHRISTINE GABIG: That's what I spend my time doing, 100 percent of the time. [LB811]

SENATOR COASH: Okay. Daily on these types of products? [LB811]

CHRISTINE GABIG: I see designer drugs, these synthetic cannabinoids, weekly. [LB811]

SENATOR COASH: And do you get them mainly from...you're with Douglas County, correct? [LB811]

CHRISTINE GABIG: We are. Yeah, I'm with Douglas County. [LB811]

SENATOR COASH: So you're just getting the samples that are picked up by Douglas County law enforcement or you're getting samples from across the state? [LB811]

CHRISTINE GABIG: Not from across the state but from across the northeast. We have 12 agencies that submit to us so we get Washington County Sheriff's Office, Sarpy County Sheriff's Office, Bellevue Police Department, etcetera, so. [LB811]

SENATOR COASH: Okay. So if a local sheriff in...what county did you say? [LB811]

CHRISTINE GABIG: Sarpy County. [LB811]

SENATOR COASH: ...Sarpy County picks up a kid who's got this, then they'll take the Scooby Snax and send it to you to see if it violates the current law. Is that... [LB811]

CHRISTINE GABIG: Yes, sir. [LB811]

SENATOR COASH: ...is that correct? So back to my initial question, how frequently are you being requested to test these products? [LB811]

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CHRISTINE GABIG: I see these types of products weekly. [LB811]

SENATOR COASH: Weekly? [LB811]

CHRISTINE GABIG: Uh-huh. [LB811]

SENATOR COASH: Okay. And do you know what happens then after? After you've done your analysis, you'll write back to the sheriff's office and say, yep, this is a product that misses the law, right? [LB811]

CHRISTINE GABIG: Okay. [LB811]

SENATOR COASH: Is that...that's correct? That's what you do? [LB811]

CHRISTINE GABIG: I would generate a report to identify what it is. [LB811]

SENATOR COASH: Right. [LB811]

CHRISTINE GABIG: And then typically, yeah, I mean it goes to the attorney's office. [LB811]

SENATOR COASH: Okay. So what I'm trying to get at is the products that are currently on the shelves that you're testing, are they...are these manufacturers skating on the law right now? Are you seeing more products that are in compliance with the law, i.e., they have a...they have tweaked their formula? Are you seeing more products that you're testing that are in violation of the current law? [LB811]

CHRISTINE GABIG: Most of the products we've been seeing over the past several months are not covered by the current law and that's what... [LB811]

SENATOR COASH: So they're legal. [LB811]

CHRISTINE GABIG: ...adding these two classes...well, adding the one class and then modifying the other class would help us catch up with the things that were in, you know, the Scooby Snax that we all heard of and the other drugs like that. [LB811]

SENATOR COASH: So are you testifying that the majority of the things that you're testing you have to send back and say, to the law enforcement who sent it to you, sorry, the thing you had me test does not violate the law as it stands now? [LB811]

CHRISTINE GABIG: That's correct. [LB811]

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SENATOR COASH: Okay. [LB811]

CHRISTINE GABIG: That's correct. [LB811]

SENATOR COASH: Thank you. [LB811]

CHRISTINE GABIG: Yep. [LB811]

SENATOR ASHFORD: Senator Seiler. [LB811]

SENATOR SEILER: Ma'am, I just have a couple questions along the same line as Senator Chambers did. Let's take it through it. You're given a product and you test it and it misses by one...the chemist didn't quite make the product that's listed here. Would...then they could bring the charges under imitation controlled substance? Was that any...in your conversation, used in your conversation of putting that limited to but not included? [LB811]

CHRISTINE GABIG: I am very glad that you asked that. No, and I think that's where the confusion lies. This, if you look at...can we give these, can we look at an example of it so I can try to make sure that it's clear? Would that be okay? [LB811]

SENATOR SEILER: Okay. [LB811]

CHRISTINE GABIG: If we look at line 10 on page 23, the class there is tetramethylcyclopropanoylindoles. [LB811]

SENATOR SEILER: I believe you. [LB811]

CHRISTINE GABIG: Would you like to say that three times fast? (Laughter) Okay, so that class is clearly defined as a specific chemical structure. I won't bore you with the details or the words. That said, it's defined. It is that chemical structure. That's what's illegal. Anything that you have that fits that chemical structure is illegal. All that that next sentence does is just says, by the way, here's some examples of that type of chemical structure. We could have gone on and on and on and on and put hundreds of them there, so it doesn't have anything to do with the imitation controlled substance. It really is just a clarification for people who aren't chemists that are using this bill because it is a different way of scheduling these things. And so if you are an attorney, I don't blame you if you can't figure out where the substitution on the "nitrogen atom of the indole ring" is. That's not what their training is in. So that's the only reason that's there. And however, if this...this is all updated and we have our classes and something else still comes across that we don't have in this class, correct, that was kind of the point of the changes to the imitation controlled substance section would be that, well, it's not illegal according to these classes, but it might be able to be prosecuted or at least taken out of their...

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[LB811]

SENATOR SEILER: Well, imitation controlled substance goes back to the '70s. I tried the first case under that. [LB811]

CHRISTINE GABIG: Okay. [LB811]

SENATOR SEILER: Guy was making alfalfa and selling it as marijuana. [LB811]

CHRISTINE GABIG: Oh boy. [LB811]

SENATOR SEILER: And they nailed him under the imitation. [LB811]

CHRISTINE GABIG: (Laugh) Really? That is interesting. [LB811]

SENATOR SEILER: And what's really funny is the guy said he...the guy, he was present when the kids were smoking it at the university, said, man, they were getting high off of the alfalfa. [LB811]

CHRISTINE GABIG: Oh, the placebo effect. [LB811]

SENATOR SEILER: He said he thought he made a moneymaker for sure,... [LB811]

CHRISTINE GABIG: Right, until you came along, yeah. [LB811]

SENATOR SEILER: ...because his dad had plenty of alfalfa. (Laughter) [LB811]

CHRISTINE GABIG: Oh, to go back to those days. [LB811]

SENATOR COASH: Christine, I've got another question for you just...because I'm following here. You said that those extra examples were given there for the attorneys' benefit, which I guess I can understand. And maybe some attorneys following you can clarify this. But they're probably not relying on this bill, right? They're relying on you to say, yep, I've tested it and it violates the law. And then they move forward, based on your answer. Right? [LB811]

CHRISTINE GABIG: The same thing could be accomplished that way, absolutely. [LB811]

SENATOR COASH: I mean and, in a practical sense, when an attorney, that's what they're looking for. They're looking for your report that says we caught somebody with this substance, we want to know if you think it violates the law based on your training, you tell me yes or no and then I'll charge accordingly. [LB811]

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CHRISTINE GABIG: Sure. Typically, your report just identifies. Like my job as a chemist is not to know all the laws and care about what's against the law or not. I'm objectively telling you that this is what it is, and they could determine if it's against the law. However, in practice, that is the way it commonly happens. [LB811]

SENATOR COASH: But don't they ask you? [LB811]

CHRISTINE GABIG: They'll call you up and say, is this scheduled under, you know, these legislations? And it's absolutely appropriate for me to say, yes, it is and here's where you find it. [LB811]

SENATOR COASH: Okay. All right. Thank you. [LB811]

SENATOR ASHFORD: Thanks. Thanks, Christine. Next supporter. Now you've enlarged your lab quite a bit since the first time you came. [LB811]

CHRISTINE GABIG: We have. Have you been out recently? [LB811]

SENATOR ASHFORD: Well, I mean you have many more counties and other law enforcement. [LB811]

CHRISTINE GABIG: Uh-huh. Yeah, it's really... [LB811]

SENATOR ASHFORD: And when you started when you first came, I think it was just Douglas County, wasn't it? [LB811]

CHRISTINE GABIG: Oh, it was. I mean it wasn't even that long ago. [LB811]

SENATOR ASHFORD: Yeah. [LB811]

CHRISTINE GABIG: Maybe about ten years ago we just were doing Douglas County stuff and then was about 2008 when we brought on Sarpy County, and then everyone kind of followed after that, so. [LB811]

SENATOR ASHFORD: Thanks. [LB811]

CHRISTINE GABIG: Yeah, thank you, sir. Nice to see you. [LB811]

SENATOR ASHFORD: Yeah. All right, next supporter. Oh just go ahead and sit down. [LB811]

STEVE TUCKER: I'm new to this. I'm sorry. Bring you aware of who I am. I'm Steve

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Tucker. I'm the father to the son, my son is the boy that was in Waverly that lost his life. This is my son. This is what we're fighting is right here. October 13 I lost my son to K2, Scooby Snax, okay? To answer your question, Senator Lathrop, there have been states that have totally banned this substance. Colorado has banned it. Nevada has banned it. I'm working with Senator Schilz and others, but I'm also coming at a different angle. I also have a request, and I'm sorry I don't have the bill with you. I got a call on Monday that this was going to occur and my wife is currently fighting cancer and we were at the doctors. So today I threw this together real short. There is a list out here and of some that are on this bill and some that are not, and I would like these to be added to it. One particular one, and I'm just going to read the label to it, is an AH-7921. It is over in the European Union right now. As of 20th, the article broke, 15 deaths within one month. This is a new substance. It's there. It has a tradition to start in Europe and move to the United States. If we can get this right now, these producers in China are at the front of the steps and we're walking up to the steps, trying to play catch on them, knock, knock, we're here to stop this. If we can get these chemicals in, now we're stopping it. We're standing at the top of the stairs and they're trying to come through our door, and we've shut the door in their face. It's a list, not very long, page and a half. And I have to apologize. My kids got a hold of my paper on the printer and cleaned me out, so I'm recycling, so. But I have a copy of the list. I do believe I've got enough for everybody here, too, if they would care to take upon and look at this list of some of these. I'm scared. If you guys have not heard, this weekend, the 20th, this past, I should say, a couple weeks, we had an incident in Albuquerque, New Mexico, where a 19-year-old young man got a hold of synthetic marijuana, had been dating a young gal. She had a four-month-old baby. The baby was sexually abused by this man and beaten, was put on life support. And on the 20th they pulled life support and lost the baby. This could be your grandchildren, could be your children. Something has to be done. Something has to be done now. I wrote a little statement here. [LB811]

SENATOR ASHFORD: Let's do this because we're right...we're at the time. [LB811]

STEVE TUCKER: Okay, sir. [LB811]

SENATOR ASHFORD: So...but there may be some questions that someone would ask. [LB811]

SENATOR LATHROP: No, but maybe just to make this point. We appreciate, and believe me, we are terribly sorry for your loss, and we appreciate what this stuff is and what it does and how bad it is. And every year we've tried to pass what we understand to be the latest variation of it, and we will continue to do that, I suspect. The difficulty perhaps is trying to find a way to get ahead of it so that when this stuff lands on our shore we're already...we already have something on the books. We will be happy to work with Senator Schilz, who's a thoughtful guy, and see if we can come up with a way to do it. I know I've read somewhere where other states have found a way to just put a

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blanket across this, and if we can do that, we will. If we can't, the best we can do is what we have been doing. But I want you to know, we appreciate your concern and the fact that you come down here, as painful as it...as painful for you as that is. [LB811]

STEVE TUCKER: Thank you. [LB811]

SENATOR ASHFORD: Senator Chambers. [LB811]

SENATOR CHAMBERS: I don't like to address comments to somebody who has suffered a loss, but when we're in a setting like this there are issues that are raised. You mentioned something is happening overseas. Well, as you know, alcohol is legal in this country. [LB811]

STEVE TUCKER: Yes, it is. [LB811]

SENATOR CHAMBERS: Parents can give their children alcohol in the home and it doesn't violate the law. Alcohol can be served at church. In England they have this practice of finding unique ways to drink alcohol. Some guy had them pour it in the toilet stool and his friends held him by the feet and he drank it out of the toilet stool. I think five kids have died from it. It's now made its way to America. There have been some serious repercussions but nobody talks about banning alcohol, because alcohol, it is a drug, it can be lethal. It has been lethal on college campuses, in homes, every place you can find where people drink it. But since the right people have been allowed to be purveyors of it and sell it, alcohol is allowed. I don't believe you can find any drug that has been responsible for more deaths, more broken homes, more illnesses that have been diagnosed and treated than those caused by alcohol. So it might sound like I'm callous from the questions that I ask, but I think this is a very hypocritical society, not you. The victims,... [LB811]

STEVE TUCKER: I agree. I totally agree. [LB811]

SENATOR CHAMBERS: ...they need to let us know how bad these things are. [LB811]

STEVE TUCKER: Uh-huh. [LB811]

SENATOR CHAMBERS: But when people from the liquor industry can tell the Legislature, I don't want you to take this particular alcoholic beverage and put it in a certain category, even though we're flavoring it so that young people will drink it, but we don't want it at this higher level, considered this type of alcoholic beverage, because the taxes will be too much. So the Legislature complies. Then when something like this comes up, here comes the Attorney General's Office, here comes various senators. And it is bad and we ought to deal with it, but the bigger things are left undone. And I want my colleagues just to know how hypocritical I think they are and we all are whenever we

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take every new item that comes along and will tell the parents who have suffered the loss, oh, we feel your pain, but the drug that is doing far more damage, more devastation, we don't touch it. My colleagues don't even want to let it be considered an ethical violation for a lawyer to drive drunk first time around. Yet they'll get all aquiver and atwitter. I think we need to set, if we're going to make this an ethical issue, a societal matter that needs to be handled by the Legislature, we need to cover the waterfront. Children see too many things that are damaging that are legal. They see their parents doing it, they see the preacher doing it, everywhere it's being done. So they get the idea, as soon as we want to do something they're going to make it against the law. I don't have an answer. If I had one, I would have given it a long time ago. But I'm not sympathetic to the Attorney General or these other politicians who, every time a variation comes along, comes up with something like this. You can make it illegal. But what's being done to address whatever it is that faces young people to make them want to turn to drugs, to find an escape, to find a way to get attention? All of these kind of things, they're not touched by this Legislature. I'm not unsympathetic with you. If I could restore life I would do it, but I can't. [LB811]

STEVE TUCKER: Nobody can. [LB811]

SENATOR CHAMBERS: So I'm trying to say we need to find a way to stop this from happening in other contexts, but I assure you we're not going to. That's all that I have to say. [LB811]

SENATOR ASHFORD: Thank you. Could you give us your name? I'm sorry we didn't... [LB811]

STEVE TUCKER: Steve Tucker out of Greenwood, Nebraska. [LB811]

SENATOR ASHFORD: Thank you, Mr. Tucker. Thanks for your testimony. [LB811]

STEVE TUCKER: Yep. [LB811]

SENATOR ASHFORD: Any other testifiers for the bill? Alex, do you want to...go ahead. [LB811]

KALI SMITH: My name is Kali Smith. I was here in 2012 in support of LB298, and I'm here again today unfortunately. [LB811]

SENATOR CHAMBERS: Excuse me. Could you speak just a little louder? [LB811]

KALI SMITH: Yeah. Can you hear me now? Is that okay? [LB811]

SENATOR CHAMBERS: Well, if that's the way you speak then that's okay. I'll...I might

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just have trouble hearing. [LB811]

KALI SMITH: Oh, okay, I'll try to be louder. September 29, 2012, my world and my heart shattered when I lost my son, Tyler. I'll just briefly share his story. Great kid, great personality, very popular, never in trouble a day in his life. He went to get gas at a gas station. He got a Coke, a beef jerky, and cherry-flavored incense. There were no warning labels on this packaging. From what I gathered from his friends, they assumed it was cherry-flavored tobacco. Saturday, on the 29th, my husband and I were home when my son Tyler walked in the door, appeared to be very sick, and my first instinct was he had the flu. He went in his room and changed his clothes and proceeded to go downstairs, and I followed him. He was laying down and I remember begging him to talk to me. My son couldn't talk. He couldn't barely even move. My husband and I ran up the stairs to call 911 and that's when we heard a gunshot. When I went downstairs to figure out what that noise was, I remember scanning the room and not seeing my son Tyler. I quickly scanned and saw my son Tyler up against the wall on the floor. I have to live with that memory every single day. It haunts me every single day. But shortly after, when they pulled a pipe and the package of incense out of my son's pocket, I became enraged because it was legal and he didn't know. We started the Tyler J. Smith Purple Project to spread awareness and educate people on the dangers of synthetic drugs. And over this past year I've heard horror stories of what these kids are doing and what's happening to them, kids who are begging me, why is this legal, why can't you do something about it, and mothers fearing for the life of their children. Today I visit my son every single Sunday at the cemetery because someone sold him a package of \$4 incense. I am in support of this law and I will continue to be in support of any law that gets rid of synthetic drugs. Our children deserve better. They deserve to know what they're buying and they don't deserve to be lied to and deceived by this type of marketing with synthetic drugs. Thank you. [LB811]

SENATOR ASHFORD: Next supporter. Do we have any opponents? Oh, I'm sorry. Excuse me. [LB811]

JENNIFER GREEN: Hello, Senators. My name is Jennifer Green, G-r-e-e-n. I am the director of the LiveWise Coalition and we are a substance abuse prevention coalition that works in the Omaha metro area. Part of our work in prevention is providing education and information to organizations and schools within our community about the dangers of drugs and alcohol, and to help deter people from even beginning to use drugs and alcohol. Over the past 18 months, one of the most requested topics that we have had for our drug trends presentations has centered around synthetic drugs, particularly in the high school settings. While I don't have the specific data about the amount of youth in Nebraska using synthetic drugs, I have several anecdotal pieces that we are told consistently when we are going to various high schools and different community organizations about these youth just not having the understanding or even a perception of harm with these synthetic drugs. A few of the major concerns that we

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have are that youth are using these substances because they perceive them as legal. In a lot of cases, they are. Especially youth who have already been in trouble in the past with regards to drugs or alcohol, if they are on probation, they see this as a way that they can still chase that high and not get in trouble or get caught or further punished. Another concern that we have is we don't know what these substances are doing, both short term and long term, to people. These are so new and so ever-changing, we don't know what type of effects they will have on our youth or the community in general long term down the line. We do know, though, that using these drugs can be like playing Russian roulette. Unfortunately, as we've seen in our communities, it takes only one time for this to cause severe illness or even death. The final concern is that those who are selling these substances have no accountability or remorse for the youth that they are hurting, and they just see this as easy income. We as a state need to send a message that we are serious about stopping synthetic drugs such as K2 and Spice, and we will not tolerate our communities being poisoned by these substances for the profit of others. [LB811]

SENATOR ASHFORD: Thank you for your comments. Senator Lathrop. [LB811]

SENATOR LATHROP: I just have, if I can,... [LB811]

JENNIFER GREEN: Yes, sir. [LB811]

SENATOR LATHROP: ...is this stuff sold for any legitimate purpose or is it sold as a way to get high and it's legal because we haven't outlawed it? [LB811]

JENNIFER GREEN: It's under a bit of a guise. The shop sellers who sell it will tell you and anyone else in this room that it is a spice, it's not for human consumption, or that it is an incense, only to be burned, similar to other incense. The youth who are using this are told, and the shop sellers will tell the youth, how to use this and how to smoke it and how to ingest it to get high. [LB811]

SENATOR ASHFORD: Senator Seiler, then Senator Coash. [LB811]

SENATOR SEILER: Is this materials being manufactured in Nebraska or shipped in? Do you know? [LB811]

JENNIFER GREEN: That I cannot answer for you. [LB811]

SENATOR SEILER: Okay. [LB811]

SENATOR ASHFORD: Yeah, Senator Coash. [LB811]

SENATOR COASH: Thank you. Where, if you know, where is this product being sold?

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You mentioned... [LB811]

JENNIFER GREEN: There are several... [LB811]

SENATOR COASH: You know, the previous testifier talked about a gas station. [LB811]

JENNIFER GREEN: Uh-huh. [LB811]

SENATOR COASH: Where is this primarily being purchased? [LB811]

JENNIFER GREEN: There are several head shops and tobacco shops that will sell some of this. One thing that we have been told with the youth that we are presenting to, you or I or any adult could go into some of these head shops and ask for it and they'll throw their hands up and say, we don't have that, we don't know what you're talking about. These youth who are in these circles of using, they have their connections. They can go in there and they can get what they need when they want it. [LB811]

SENATOR COASH: Okay. Is it in gas stations as well? [LB811]

JENNIFER GREEN: From my understanding it's gas stations, it's head shops, it's tobacco product selling places. It's anything like that can sell it. [LB811]

SENATOR COASH: Okay. Thank you. [LB811]

SENATOR ASHFORD: That's bad news. Thank you. [LB811]

JENNIFER GREEN: Thank you. [LB811]

SENATOR ASHFORD: Anyone else want to testify for the bill? Against the bill? [LB811]

CHRISTOPHER EICKHOLT: Chairman Ashford, members of the committee, Chris Eickholt, last name is E-i-c-k-h-o-l-t, appearing on behalf of the Nebraska Criminal Defense Attorneys Association in opposition of the bill. Just so it's clear, we are not opposed to the bill with respect to the parts of the bill that adds the difficult chemical compounds. We've not historically opposed the perennial or annual bill that has the new versions of K2. We are opposed to the loose language that I will refer to in the bill that Senator Chambers talked about earlier and we are opposed for the increased penalty that's proposed in the bill from an infraction offense to a felony offense. With respect to the language portion of the bill that we are opposed to, we had the same concerns that were articulated by Senator Chambers earlier with respect to the phrase: including but not limited to, or includes but not limited to. It's our position that criminal laws ought to be clear and definite so that people know what is permitted and what is not. And I suppose there could be, for some of these chemical compounds--I'm not sure--a

legitimate reason that could be contained in legitimate products or could themselves be legitimate products. And if we're going to prosecute people for selling it, out of fairness to the retailers, they ought to exactly know what they can and cannot have. With respect to another provision of the bill that we are concerned about, and that's on page 24, and the lab person talked about this before, paragraph (M) or Class (M), and that essentially lists, and I think it's meant to be the catchall provision that Senator Lathrop was talking about before. It criminalizes the possession of any other compound that's not listed in the schedules that is identified by chemical, medical, and pharmacological means as a cannabinoid receptor or tend to mimic a cannabinoid type device, or marijuana essentially. In other words, that would include presumably anything that is not listed in the bills or in the laws but has a similar effect that marijuana has. And that's likely what's attempted to be as far as the catchall. We're concerned about that because it does not clearly lay out what that means. Even legitimate marijuana or marijuana itself has different effects on different people. Additionally, what makes synthetic marijuana so bad is that it is not like marijuana. It causes things, people to hallucinate, to do violent things that marijuana does not do. So I don't know if that even actually catches that effect and I don't know how you're going to prove it in front of a jury. With respect to increasing it to a felony, it's an infraction now. There are arguments, we will concede, to increase the penalty, but there are a whole series of options less than a Class IV felony. And this is important for a couple of reasons: one, because unfortunately if you're going to charge people with possession of having K2 as a felony, you're going to get a lot of novice drug users. You're going to get a lot of kids. And you've heard from some of the parents who have lost good kids who get involved in this. They simply don't know any better. The people who do know don't touch this stuff. They smoke real marijuana or they do actual drugs. And if you're going to charge somebody for simply having, as a felon or as a felony, you're going to make a lot of felons out of people who shouldn't be there. I understand that there is a desire to send a message and make this more a distinction to do that, but we would argue it is. And if I could just go over a little bit of time, just out of respect to the committee, I don't know that the bill is written in a way that actually makes this a Class IV felony. If you look at page 50, lines 18 through 21 that deals with amending 28-416 to make it a Class IV felony, it still exempts everything in subdivision (c)(25) that is (inaudible) add on. So I think it's probably just a legislative...a drafting oversight of some sort. [LB811]

SENATOR ASHFORD: Okay. All right. Senator Seiler. [LB811]

SENATOR SEILER: Sir, do you have a copy of the fiscal note? [LB811]

CHRISTOPHER EICKHOLT: I looked at it and I left it back there. [LB811]

SENATOR SEILER: Okay. They're talk...did you read over what...there's 1,270 new inmates at the Nebraska Detention Center. [LB811]

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CHRISTOPHER EICKHOLT: That's right. [LB811]

SENATOR SEILER: And the average, 336 of them, had offenses from 29.8 to 51.1 months. [LB811]

CHRISTOPHER EICKHOLT: That's right. [LB811]

SENATOR SEILER: And average total was 35.1 to 61.3. Length of stay for these inmates was 26.2 months. Is that different than what you're seeing in the change in the law? [LB811]

CHRISTOPHER EICKHOLT: I think so, because if you look at right now, it's an infraction. And Senator Coash asked about this earlier. A lot of these things, when we get involved in these cases, they don't get challenged in court because people plead to it, they get a minimal fine. If you raise it to a felony level, not only are you going to have some increased costs in the prison system, you're going to have an increased cost in the court system because we're going to fight these cases and we're not going to...we're going to require lab people from the state lab. Celeste Laird was here earlier. She'll tell you that there's a three- or four-month backlog for testing other things that are already prohibited now. And if you have somebody charged with a felony, you're going to take your chances to see what the actual lab result is. And I don't think there's a quick and easy one to do that they can do in field like they can with meth and cocaine. [LB811]

SENATOR SEILER: Yeah, but if you're doing your job as a defense counselor, you're going to fight it anyway if you got anything to talk about. [LB811]

CHRISTOPHER EICKHOLT: If you had anything to talk about, that's right. [LB811]

SENATOR SEILER: Right. [LB811]

CHRISTOPHER EICKHOLT: You're not going to fight it just to fight it. [LB811]

SENATOR SEILER: So that doesn't bother me as much as how much more does that bill change than what they're giving. Did you have... [LB811]

CHRISTOPHER EICKHOLT: I would think that so many... [LB811]

SENATOR SEILER: ...did you have a chance to look at that? [LB811]

CHRISTOPHER EICKHOLT: I just glanced at it and I don't know how that's going to... [LB811]

SENATOR SEILER: Okay. [LB811]

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CHRISTOPHER EICKHOLT: ...affect the prison, but I think it only can. If you increase the penalties, you're going to increase the system's cost throughout. [LB811]

SENATOR SEILER: Okay. Thank you. [LB811]

SENATOR ASHFORD: Thank you. Senator Chambers, do you wish to appear in opposition? [LB811]

SENATOR CHAMBERS: My name is Ernie Chambers. Although I represent the 11th Legislative District, I'm speaking as a citizen. I am opposed to this bill because I think it is a hoax and a sham being foisted on the public by giving the impression that this is the methodology by which to address the drug problems confronted by young people in this society. Drugs are not taken, in my opinion, for themselves alone. There might be a pleasurable sensation, but there are underlying reasons that young people use drugs. Sometimes it's peer pressure. Sometimes it might be imitating what is seen in the home. It might be just for the thrill of doing it. But nevertheless, criminalizing a substance every time a new one comes into being, then trying to give the impression that something has been done to address the drug problem confronting young people is futile. This time next year, sooner than next year there will be another one, but we can't bring a bill until next year. Right now, and I don't know that anybody on this committee is aware of it or would be as upset about it as I am, but the Food and Drug Administration is going to allow an opiate on the...to be legalized that is more powerful than oxycodone. And the advisory council for the FDA voted 11 to 2 against letting it be used, but the FDA overrode them and it's going to be available. And I assure you it's going to be available on the street. It is crushable. A lot of these children are dying from overdoses of medication that they get out of the medicine cabinet or somebody else has gotten by prescription. They're not what are commonly thought of as street drugs. They are legally obtained by somebody or legally obtainable, and this is what the young people are getting, anything that will give them a thrill. But you have to look to see if there is an underlying cause. Sniffing paint, air-conditioning fluid, anything, even if it doesn't work they will try it. So we're always a step behind, as everybody knows. There will be a tragic event and then the Legislature springs into action. Am I saying that nothing should be done? I'm saying that this should not be done. It's pointless. It's pointless. Do I have the answer? If I had it, I would have given it a long time ago. But I think we need to take an approach different from the one that we're taking now. And I also think that looking at alcohol would be very, very significant. Our children are what they are, as I've said before, because we as adults are what we are. We instruct them. We teach them by our example or our failure to give an appropriate example. And I know my saying this is pointless, but I needed to go on record against a bill that everybody is going to say is the greatest thing in the world. It's not the greatest thing in the world. It's a failed policy and we add to it every time we do this. That's all that I have to say but I'll answer any questions you want to grill me with because I'm here just as a citizen now, as I stated.

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[LB811]

SENATOR ASHFORD: I don't see any questions, Senator Chambers. [LB811]

SENATOR CHAMBERS: Thank you. [LB811]

SENATOR ASHFORD: Any other opponents? Neutral testifiers? Senator Schilz. [LB811]

SENATOR SCHILZ: Thank you, Senator Ashford. I'd like to take this opportunity to thank everyone who came and testified in support and opposition of LB811 today, especially those who have personally experienced loss due to the harmful effects of these synthetic cannabinoids. Please note that their testimony is not taken lightly, as Senator Lathrop said, and they are participating in a great cause to prevent others from experiencing the pain that these folks have endured. I'd also like to thank the Attorney General's Office and Corey for all their hard work in prosecuting these cases and helping draft the language of the bill, and Christine in the Douglas County Sheriff's Department for the expertise in the chemistry of these drugs and also helping in providing insight on how best to try to prevent us from always being one step behind a new synthetic formula. And thank you as well to the Judiciary Committee for hearing LB811, and I would appreciate your support. I know we had a couple questions, I think Senator Seiler had asked whether these were just made here locally or were they made locally or were they all just shipped in, and it's both. And we've seen instances where there's certain names that come with these things that aren't anywhere else except for in the local areas and then so they know that they're made locally because they're found nowhere else, you know, as far as what they're called. So...but a lot of times it is starting overseas and then those formulations are brought here and they are copied and sold and promulgated, both here as well as other places. And we heard others asked about and wonder about the felonies for possession and things like that, and while I understand that folks could get caught up in this that maybe aren't bad people that are doing things. But remember, too, possession is also handled by the folks that sell this stuff and I think that's where the felonies apply and should apply, because these folks, you know, it's systematic what they do. They see that this won't work, they put things on the label, they change the formulation just enough that the law enforcement can't do anything about it. But the effects of these synthetic chemicals are having a very, very harmful effect upon the people. And so, you know, I look at this the same as others and I wonder, you know, is this the best way to do it. We've been back here now, whether it's on the synthetic cannabinoids or the bath salts issue or whatever, we keep coming back. I don't want to have to come back again. Senator Chambers, I know you said you don't know what the answer is and I don't disagree with you. I don't know either. But I hope that we can work together to try to find something that helps to solve this problem. And we will always have challenges, we know that. So with that, I would appreciate your support in helping to find a way to move forward to make sure that we don't have to

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come back here and that it does protect people and their rights legally so that we don't infringe upon them. So with that, I will end that and I will try to answer any other questions that anybody might have. [LB811]

SENATOR ASHFORD: Yes, Senator Seiler. [LB811]

SENATOR SEILER: I just have a comment. Looking at these numbers from the fiscal note, one-fourth of the prisoners that we have incarcerated violated this particular statutes. [LB811]

SENATOR SCHILZ: Uh-huh. Well, they use it because at this point those substances are legal now and that's why, but... [LB811]

SENATOR SEILER: No, but I mean it's not legal when they're sitting in our jails. [LB811]

SENATOR SCHILZ: Sure. Yeah. Well, here we are. [LB811]

SENATOR SEILER: Yeah, or our pens. Yeah, because we got 4,500 incarcerated and 1,272 are charged under these statutes. That's serious. [LB811]

SENATOR SCHILZ: Yeah. Yeah, it's a big problem. I mean, well, you know... [LB811]

SENATOR SEILER: Thank you. [LB811]

SENATOR SCHILZ: Yeah. [LB811]

SENATOR CHAMBERS: Senator Schilz, every time we do this we cannot say that we will stop one young person from using or turning to these substances. We're not touching the problem where it should be, namely, those who are using. All we're doing is saying we're going to try to create a criminal offense for the ones selling it. Yet in my community, when I say go after those who are making the guns available in my community, there's no response like this. The Attorney General's Office is not interested. What he could do, since he's the top law enforcement officer in this state, is talk to the sheriffs who support a bill like this, talk to the local police who will support a bill like this, talk to the FBI, ATF, and let them put together a task force; instead of chasing shadows like they do on these bills, find the source of guns coming into my community and dry it up. But they're not going to do that. I don't know how many times I've said this. My colleagues are going to get tired of hearing me say it, but I'm going to say it every time somebody from law enforcement says, we're interested in life, guns are lethal. They're designed to be lethal. Young people are getting the guns in my community and they're not built with wire, duct tape. They're the kind of guns that police officers use. They now get access to high-powered weapons. And every time a child is killed, because the people feel hopeless, helpless, dispirited, disheartened,

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disillusioned, discouraged, will have a vigil and say how sorry we are to see another child die. Mothers have cried until they have no more tears and it comes out over and over and over. I don't have an answer to that, but there are people who swore an oath to enforce the law and they will not do that. If these young kids know where to get these guns, the police don't know? The FBI doesn't? They don't care and I'm going to say it from time to time. I've said that. Is this bill prioritized, do you know? [LB811]

SENATOR SCHILZ: It has a Speaker priority, sir. [LB811]

SENATOR CHAMBERS: Okay. But that's all that I would say. [LB811]

SENATOR SCHILZ: Thank you. [LB811]

SENATOR CHAMBERS: And I'm not condemning you or criticizing you for bringing the bill. People are trying to do anything they think might help. And because this is the only approach we can take, it shows we don't have an answer and we're not going to touch this. But on the guns there is an answer. They just won't give me the answer. And I'm not a cop, I'm not deputized, I'm not to track down guns, I'm not to arrest people, I'm not to do what the police do in white communities, so I'm bitter. I have young people dying. One was killed not that many hours ago. And it will happen again and again and again. And you know what I say? That the white establishment allows it because they like it. They want to see this happen. If it happened in a white community...let one child die from the next substance that is created and watch the Attorney General's Office, watch a senator, watch the white people come and say we have to stop this because one child died and one is enough. How many will be enough in my community? [LB811]

SENATOR SCHILZ: Senator, just to... [LB811]

SENATOR CHAMBERS: Peter, Paul, and Mary Ford (sic) said, "How many deaths will it take till he knows too many people have died?" [LB811]

SENATOR SCHILZ: In my mind, sir, we're...you and I, with this bill, with your sentiments there, are talking about the same things. Young people should not have to deal with the things that they're having to deal with today. And when you talk about getting to the roots of those problems, I agree that that needs to happen. The question, the question becomes, how do you attack the roots, the base of those problems? And I think it's a monumental task and I don't know the answers either. [LB811]

SENATOR CHAMBERS: I'm going to put you on the spot. Will you cosponsor with me a resolution calling on the Attorney General to establish a task force to seek out and drive to the extent that it can be done, the source of the guns coming into my community that fall into the hands of these young people? Don't even answer. I wouldn't ask you to do it. But I am going to offer a resolution like that. [LB811]

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SENATOR SEILER: I will. [LB811]

SENATOR CHAMBERS: I will not anybody... [LB811]

SENATOR MCGILL: Uh-huh. [LB811]

SENATOR CHAMBERS: ...ask anybody to do anything. [LB811]

SENATOR SCHILZ: Sir,... [LB811]

SENATOR CHAMBERS: It's my responsibility. [LB811]

SENATOR SCHILZ: ...I would...I'd be happy to talk to you about that. [LB811]

SENATOR SEILER: Senator Chambers, I will. [LB811]

SENATOR CHAMBERS: Oh, thank you. [LB811]

SENATOR DAVIS: I will too. [LB811]

SENATOR CHAMBERS: Okay. [LB811]

SENATOR SCHILZ: Be happy to talk. [LB811]

SENATOR CHAMBERS: And I appreciate it. [LB811]

SENATOR ASHFORD: Thanks, Ken. [LB811]

SENATOR SCHILZ: Yeah. [LB811]

SENATOR ASHFORD: (See also Exhibit 3) Thank you. Okay, let's move on to Senator Karpisek and LB1027. [LB811]

SENATOR KARPISEK: (Exhibits 4 and 5) Thank you, Senator Ashford, members of the Judiciary Committee. For the record, my name is Russ Karpisek, R-u-s-s K-a-r-p-i-s-e-k. I represent the 32nd Legislative District. LB1027 was introduced as a public and private safety matter. I know you have all heard that it is a gun grab, which is simply not true. I am sure you will hear that again today, and I hope that some of your questions will ask why the opponents feel that it is a gun grab. That being said, I do have an amendment. Good thing I put that in there. I do have an amendment that will take the reference to "voluntary treatment" out of the bill. It was never my intent for someone going to marriage counseling or who has an eating disorder to be subject to this process.

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Although I do not honestly think that that would be the case if LB1027 were to pass, there has been so much concern about that language that I think it is important to clarify my intent and remove that language. The amendment, which is AM1933 that is coming around, also clarifies references to the hearing process that is referred to in the bill. For a little history, in 2012 I passed LB538 that was amended into LB807 that gave any guns back to the owner that had been seized if they weren't used in the commission of a crime, had they not been defaced or altered, and have a lawful and useful and lawful purpose. I want to repeat that because I was the one that passed the bill giving guns back to their owners, but yet the National Association for Gun Rights has labeled me a gun grabber, a radical gun grabber, and I'm carrying water for President Obama's antigun plan. I do not know what President Obama's antigun plan is. Of course, this group also asked for a donation to fight these radical gun grabbers like me on everyone of their e-mails. So now for the amended bill. LB1027 would change back the process prior to LB807 in 2012. If LB1027 were to pass, people who have been taken into protective custody or in voluntary treatment would still be able to get their firearm returned, as long as they are not prohibited from doing so under state or federal law, if the firearm were not used in the commission of a crime. They would have to go in front of a judge to make sure that they are mentally capable of getting that gun back. There are people following me who will testify and this bill is aimed at people who might have been holding a gun to their head, the police talked them down, and when they get out of EPC they get their gun back and finish the job, maybe taking someone else with them. Again, I have people behind me, but this really is something that I did, I passed the law to say give them their guns back if they didn't do anything wrong. Maybe they got pulled over for a DUI, something like that. The gun gets seized. They can go back and get it. This has come up because, again, someone holding a gun to their head gets EPCed, they haven't broken any laws. Do we really want...do we want the police to decide if that person should get the gun back? There's a great amount of liability there. Think a judge should be able to decide, which is no different than the process of it if someone goes for a gun permit now, has been EPCed or is under treatment, in voluntary treatment, it would go to the judge. So I'm not changing that much at all. I'd be glad to try to answer any questions, and if not, I will stick around to close. [LB1027]

SENATOR ASHFORD: I don't see any questions. Thanks, Russ. [LB1027]

SENATOR KARPISEK: And I'll sign on. [LB1027]

SENATOR ASHFORD: You gun grabber, you. These, okay, the next two gentlemen wanted to come up together. That's fine. Come on up and we'll have to move a chair up there. State...both of you state your names and we'll go from there. You don't have six minutes though. (Laughter) [LB1027]

SENATOR KARPISEK: I warned them. [LB1027]

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TOM WHEELER: Darn it. [LB1027]

SENATOR ASHFORD: That's a trick Senator Karpisek was going to try to pull on us, but. (Laugh) [LB1027]

SENATOR KARPISEK: I warned them, stickler Ashford. (Laughter) [LB1027]

THOMAS WHEELER: Good afternoon, Senators. My name is Tom Wheeler, W-h-e-e-l-e-r, Douglas County Sheriff chief deputy. [LB1027]

MARK GENTILE: My name is Mark Gentile. I'm a lieutenant with the sheriff's office. Name spelled G-e-n-t-i-l-e. I'm employed as a lieutenant with the Douglas County Sheriff's Office and been employed there for 24 years. One of my tasks as a lieutenant is to authorize and approve the release of property or evidence that was seized, and if it was legal, to return that property back to the rightful owners. With regard to firearms, a discussion arose what our office would do about returning firearms back to their owners that were seized during emergency protective custody, or EPC, events, because in 2012 LB807 was introduced and later passed into law which instructs law enforcement to return firearms back to the owners if no crime was committed. Currently, there are 19 firearms in Douglas County Sheriff's Office property. All were obtained a result of an EPC. An EPC is when law enforcement will take a person into custody when that person is mentally unstable and a danger to themselves or others. That person will then be seen by a mental health professional who will determine their needs and when they can be released. Since 2007, the Douglas County Sheriff's Office have averaged 93 EPCs a year. In 2013 alone, we had 135 EPCs. The 19 firearms that were seized by our office were from ten separate incidents, all involving suicidal persons that had been EPCed. I will briefly summarize each incident: person threatened to kill himself with his handgun; threatened to kill herself with her handgun; wanted deputies to kill him, had three handguns in his possession; threatened to kill himself with his handgun; overdosed and wanted her handgun to kill herself; held his shotgun to his head, threatened to kill himself; threatened to kill himself with his handgun; threatened to kill herself with her shotgun; threatened to kill himself with his firearm. This incident resulted in a one-and-a-half-hour standoff. We ended up recovering four firearms from that residence. Last one: person put his handgun into his mouth, told deputies to put a bullet in his head. In any of these situations I just mentioned, I know each of you would not want these firearms immediately released back to someone coming out of a crisis situation. Our goal is not to hinder anyone's Second Amendment right but to protect the individual and citizens of Nebraska by passing this bill to prevent a potential tragedy from occurring, such as a school or mall shooting. This bill would add another layer of scrutiny at the judicial level to help ensure the return of the firearm in the best interests of the owner and the community. Another benefit of passing this bill is a release of liability. The decision should not be held solely on law enforcement. The officer, department, county, city, and state could ultimately be held liable if this firearm is

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released back. Another fact with passing this bill is that it would already tie into decisions being made by judges at the local level. When citizens apply for gun permits, a background check is completed. If they have an EPC or Board of Mental Health, they are denied the permit. The citizen can appeal the denial to a judge in county court. If that appeal gets denied, it gets sent to the district court judge. If...I have a few more minutes? [LB1027]

SENATOR ASHFORD: Well, there may be some questions, Mark. [LB1027]

MARK GENTILE: Okay. [LB1027]

SENATOR ASHFORD: Why don't we see if there are any questions. I don't see any. Do you want to finish your point? [LB1027]

MARK GENTILE: Thank you. In 2012 there were nine appeals involving EPC or Board of Mental Health. Of those nine, the judge denied six individuals from receiving the permit. In 2013 there were 31 appeals involving EPCs or Board of Mental Health. Now there was an increase of those appeals because that was when we had the Sandy Hook shooting in Connecticut and we believe that was likely the result of people going out, purchasing more guns. Of those 31 appeals that involve the EPCs, the judge denied 13 individuals from receiving a permit. In closing, adding this judicial proceeding is a reasonable, logical safety measure and would follow in line to what is already occurring in a gun permit application process. [LB1027]

SENATOR ASHFORD: Mark, how many, just generally, and if you have this information with you, how many applications for these permits are available? [LB1027]

THOMAS WHEELER: In Douglas County, we receive about 5,000 applications per year. [LB1027]

SENATOR ASHFORD: Okay. And those are the three-year permit permits? [LB1027]

THOMAS WHEELER: Yes, sir. [LB1027]

SENATOR ASHFORD: And what...how many of those are, do you know generally, how many of those are denied... [LB1027]

THOMAS WHEELER: Denial... [LB1027]

SENATOR ASHFORD: ...percentagewise? [LB1027]

THOMAS WHEELER: Less than 5 percent. [LB1027]

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SENATOR ASHFORD: Okay. Okay, very good. Thank you. Thanks for your comments. I don't see any other questions. [LB1027]

MARK GENTILE: Thank you. [LB1027]

SENATOR ASHFORD: That's fine. Thanks. Any other...any further proponents, those for the bill? Any opponents? [LB1027]

ROD MOELLER: Chairman, members of the committee, good afternoon. My name is Rod Moeller, R-o-d M-o-e-l-l-e-r. I'm representing the Nebraska Firearms Owners Association today. I am speaking in opposition to this bill. I will say that the majority of our members' concerns have been addressed with the amendment that Senator Karpisek introduced here. A majority of our concerns had to do with the term "voluntary," so I won't go into our arguments on that. I am kind of concerned still, though, that...I'm concerned with how this might be interpreted. In a meeting with Senator Karpisek's office, we were told that this is intended to provide a path for restoring seized firearms, and certainly we're all in favor of that. And I'm just kind of concerned with some of the language in how this is worded. It really looks like, because of the reference to emergency protective custody, which certainly makes sense, it's spelled out explicitly that firearms shall not be returned, and that seems to be possibly a violation of due process. Obviously, that needs to go through the court system in order to say that this person should not get that property back. So I'm not really sure exactly how this is assisting. A couple of things that I'm...I'm not seeing, from the example that Senator Karpisek used in his introduction about the DUI, an item being seized. I'm not seeing that. When I look at page 3 on line 13, we're already...we're saying here that "firearms shall be restored to the owner only after a hearing and upon order of the district court." So I'm not really sure then how this other reference testimony, where we're saying that through an emergency protective custody situation that these firearms are being immediately returned. In 2012, Senator Lautenbaugh had introduced a bill focused on the returning of firearms because of the difficulties in getting them back, so I'm hearing some things that are in conflict. I can't point to any more specific language, but those are the concerns of our members is that the language does seem to be a little bit of conflict from what the stated intent is. We can get behind the stated intent. We're just concerned with the specific language. [LB1027]

SENATOR ASHFORD: Okay. Thank you. I don't see any questions. [LB1027]

SENATOR DAVIS: I've got a question. [LB1027]

SENATOR ASHFORD: Oh, yes, Senator Davis. [LB1027]

SENATOR DAVIS: You don't like the language that's there. Do you have specific language that you're suggesting? [LB1027]

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ROD MOELLER: Well, the majority of the specific language that I discussed with Senator Karpisek's office was introduced in the amendment so that was our primary concern. [LB1027]

SENATOR DAVIS: But you still have problems with this particular... [LB1027]

ROD MOELLER: But the remainder, no, I don't have...I don't have any recommendations at this time, but I'm willing to work with Senator Karpisek's office on addressing that. [LB1027]

SENATOR DAVIS: And once that takes place, is the Nebraska Firearms Association going to endorse the bill? [LB1027]

ROD MOELLER: We would be willing to change our position on that, yes. [LB1027]

SENATOR DAVIS: Thank you. [LB1027]

SENATOR ASHFORD: Thank you. I'm sorry, Senator Chambers. [LB1027]

SENATOR CHAMBERS: I would like a clarification. You said you saw the amendment or you did not see the amendment? [LB1027]

ROD MOELLER: I did see the amendment, yes, sir. [LB1027]

SENATOR CHAMBERS: And you still are opposed to the bill? [LB1027]

ROD MOELLER: We had a couple of concerns. The primary concern is being addressed by the amendment and that was the "voluntary." [LB1027]

SENATOR CHAMBERS: Then I would like to know what your concerns are now in view of the amendment being here. What language in the bill do you object to? I heard you say it shall be, in line 13, "only after a hearing and upon order of the district court." That would be the due process that you were concerned about, it seems to me. Let me ask you, if I give you an example, whether you can follow what I'm getting at. Do you believe that the examples given by the testifier before you really occurred or you think they were fabrications about the instances where a person put a gun in his mouth and said, to the deputy, shoot me in the head, and other circumstances where the person was menacing himself or herself or perhaps even somebody else? Did you hear those examples being given? [LB1027]

ROD MOELLER: I did hear those examples. [LB1027]

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SENATOR CHAMBERS: Do you think that they were true? [LB1027]

ROD MOELLER: I have no reason to believe they're not. [LB1027]

SENATOR CHAMBERS: If a person were in that situation with a firearm and, fortunately, the law enforcement personnel were able to get the firearm from the person before he or she did anything with it, is it your contention that the firearm should be taken and then given back to that person? [LB1027]

ROD MOELLER: I understand being taken at the time of that situation, that incident. As to whether they should be returned to that individual, I believe that there is a due process already spelled out that that should go through the court system to determine whether or not they should receive those back. [LB1027]

SENATOR CHAMBERS: And that's what this... [LB1027]

ROD MOELLER: The language in here, specifically on line 11, says "will not be restored to the owner." And it's only when we get down to line 13 and we continue on where we reference the "only after a hearing." [LB1027]

SENATOR CHAMBERS: That's indicating what I was saying should not happen, that when you take the weapon so you defuse the situation, but then you give it back. You don't give it back. You go through this process. You have the hearing. The person's conduct was observed by the officer. The officer could not turn away from that situation without taking appropriate action. As it turned out, the officer did not use deadly force so the individual survived. The weapon was taken. There is no point at which that weapon should be restored until the hearing is undertaken to see whether or not this person is suitable to have the restoration. And if that person is found to be suitable, and we consider the amendment, if there are no other legal reasons why the person shouldn't have the gun back, like defaced or whatever, then the gun will be restored. Where is due process missing from that? That is due process. Do you feel you just have to be... [LB1027]

ROD MOELLER: The time... [LB1027]

SENATOR CHAMBERS: ...against this bill to keep faith with the members in your organization? [LB1027]

ROD MOELLER: The time frame is not specified. It is not obvious to me, when I read this, that it says "shall not be restored," is in reference to the immediacy of the situation of where it was taken. [LB1027]

SENATOR CHAMBERS: Here's the way laws are interpreted. The court requires that a

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reasonable interpretation be given to a law; that no interpretation will be given that will render the law absurd or the result absurd. There is no way a law would be written saying that you take the weapon and after 12 hours give it back, or that a hearing must be conducted within 12 hours. Everything that the law says is based on the rule of reason. So there will be the hearing and if the judge determines that the weapon should be returned, it will be. Anytime there's a judicial proceeding and a final judgment is reached, if the person disagrees the person can appeal. So what in this language is a violation of due process? Or are you in the position, as the head of the organization, of having to maintain a position in opposition to this bill? Is that kind of the position you find yourself in now? Because you seem to me to be a very reasonable person. [LB1027]

ROD MOELLER: We do vote as an organization amongst our members on the position of any bill that we testify on, and, like I said, the majority of our concerns had to do with what's being addressed in the amendment. There are some concerns that have been raised on this other language. Some of it has to do with the confusion in how to interpret that. [LB1027]

SENATOR CHAMBERS: But I think after being here and having the interchanges and exchanges you've had and listening to Senator Karpisek's intentions and looking at the amendment, I think, if your members are reasonable as you are, you can explain to them that there's no problem that they'd have to worry about in terms of this being a gun grab, unless you think it's a gun grab even with this language. Is that what you think? You're hesitating. I won't force an answer. You've given me all the answer I need. You are a reasonable person. And I don't have any more questions. [LB1027]

SENATOR ASHFORD: Senator Seiler. [LB1027]

SENATOR SEILER: I have just one suggestion, is that right ahead of the word "hearing" on line 13 you put "notice," which would then they got notice of when the hearing is. And I've suggested that to the introducer. [LB1027]

ROD MOELLER: Only after a notice of hearing? [LB1027]

SENATOR SEILER: No, "after a notice, hearing and upon order of the district court." [LB1027]

ROD MOELLER: Okay. [LB1027]

SENATOR ASHFORD: All right. Thank you. Thanks. [LB1027]

ROD MOELLER: If I can make one more reference, I mean the language...I think if we had...I'm not a lawyer so that's why I may read this a little bit differently than those of you who are. But if we had...if we had reference where it says "will not be restored to

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the owner until after," and then continue on this. Being just a period, that is a finality in that statement. And that next sentence, I interpret it and many of our members that I discussed this with interpreted that as an additional statement where that could apply, perhaps, to different individuals, where that would apply to, say, that DUI scenario that was referenced with the county sheriff. [LB1027]

SENATOR ASHFORD: Well, we'll take a look at it. Thanks, Randy (sic). Next opponent. Neutral testifier? Senator Karpisek. [LB1027]

SENATOR KARPISEK: Thank you, Senator Ashford and members. Senator Chambers, you are correct, Mr. Moeller is a reasonable person and I do apologize to him. I did not get him that amendment until right before he got up, so that put him at a disadvantage. That was my fault. He was in my office and talked to mainly my staff, but was very up-front and polite about it, and I very much appreciate that because that's the way I want to work on these sort of things. He did say LB807 was Senator Lautenbaugh's bill in 2012, which is true. LB538 was my bill that was amended into LB807. So although LB807 passed, my bill, LB538, was amended in to give these guns back. If I confused anything on the DUI, what I was trying to do with LB538 was to say if I was arrested for a DUI, I had a pistol laying on my seat, they take it while I go to jail. When I get out, if I didn't use that pistol in the commission of a crime, I'd get it back. Now I'm saying if the same thing would happen, I'm shooting at people, I get EPCed, I wouldn't get the gun back. I don't have a problem with changing any of that language in the way legal counsel would see fit to help, if Mr. Moeller would feel better about it. Again, it is not my intention to take guns away from anyone that are using them legally, won't hurt themselves or someone else. I appreciate your time. I'd be glad to try to answer any more questions. I appreciate Senator Seiler's input. Yes. [LB1027]

SENATOR ASHFORD: Yes. Yes, sir, I'm sorry. [LB1027]

SENATOR CHAMBERS: Had I been here in 2012, what chance do you think that bill would have had of passing that Senator Lautenbaugh offered? [LB1027]

SENATOR KARPISEK: Probably not very much, Senator Chambers. [LB1027]

SENATOR CHAMBERS: Okay. So they can be grateful I wasn't here and that you and Senator Lautenbaugh took care of an issue that you thought should have been taken care of, as mistaken as you were. (Laughter) [LB1027]

SENATOR KARPISEK: We may have been, Senator, but the reason I brought that bill, again, the police talked about having all these weapons that they really couldn't return without that hearing and all these things, and maybe they would have to destroy them. It was their intent to get them back. It wasn't, again, used in any sort of a crime. [LB1027]

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SENATOR CHAMBERS: I do understand that. [LB1027]

SENATOR KARPISEK: I know. [LB1027]

SENATOR CHAMBERS: Okay. [LB1027]

SENATOR ASHFORD: Thanks, Russ. [LB1027]

SENATOR KARPISEK: Thank you very much. [LB1027]

SENATOR ASHFORD: Senator McGill, LB1035. [LB1035]

SENATOR MCGILL: Chairman Ashford, members of the committee, for the record, I am State Senator Amanda McGill, it's M-c-G-i-l-l, and I'm here today to introduce LB1035. This legislation adds a measure of accountability to ensure that Nebraska is meeting an existing public safety obligation. Nebraska is required to share the records of persons who are unable to purchase firearms because of disqualification or disability with the National Instant Criminal Background Check System, or NICS. When someone attempts to purchase a handgun, the owner of the store, like Scheels, checks with the NICS system to determine whether the individual is ineligible to purchase the firearm. If that person comes up in the system on the no-sale list, the person is not able to buy a gun; otherwise, the sale can be made. This public safety check is in place to ensure that individuals who are disqualified from owning a gun cannot purchase one in Nebraska or any other state. Disqualifications or disabilities are outlined in federal law. Examples are persons who have a mental disability, committed a crime of domestic violence, are subject to a domestic protection or restraining order, or are fugitives from justice. Currently, there are a lot of moving parts in the process of sharing these records with NICS. Clerks of the court send records to DHHS, which forwards them to the State Patrol for inclusion in a database that the State Patrol is tasked to create and maintain. Both agencies are then tasked with working with the OCIO's Office to ensure that the records in the database are shared with NICS electronically. I introduced LB1035 in response to a concern discovered by the National Shooting Sports federation...or Foundation. They found that few records were actually being shared with NICS from Nebraska. When the project began in May 2012, there was only a handful of mental health records shared, being less than ten. After several calls to three state agencies, multiple discussions about whose responsibility it is to get the data, the logjam was broken. Nebraska now has over 7,000 records on the list. However, I've been told that there are potentially several thousand records that are still yet to be shared. Regardless of the reason for why the initial batch of records were not shared until very recently with NICS, LB1035 would ensure that this critical step is happening for the sake of future public safety. LB1035 requires the Nebraska State Patrol and Department of Health and Human Services to report information about the database electronically to the Clerk of the Legislature so that we can make sure that that data truly is being shared. There will

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be testifiers after me to go into more detail about the problem that this bill is addressing. We need to make sure that state agencies are sharing these records with the national system. Every day that records are missing, public safety is at risk. I ask for your support. [LB1035]

SENATOR ASHFORD: Thank you, Senator McGill. I don't see any questions. Thank you. [LB1035]

SENATOR MCGILL: All right. Thank you. [LB1035]

SENATOR ASHFORD: Supporters? [LB1035]

MATT SCHAEFER: (Exhibit 6) Chairman Ashford, members of the committee, my name is Matt Schaefer, M-a-t-t S-c-h-a-e-f-e-r, appearing today on behalf of the National Shooting Sports Foundation. Thank you, Senator McGill, for introducing this bill and, Senator Ashford, for cosponsoring it. A background check is only as good as the records in the database. That is why the foundation supports improving the current NICS system by increasing the number of prohibiting records states submit to the national database, helping to prevent illegal transfers of firearms to those who are prohibited from owning firearms under current law. Last year the foundation discovered that Nebraska is only sharing three mental health records with NICS and hired my firm to figure out why and to see what could be done about it. Since then, we've discovered there's two branches of state government and at least three state agencies and one local government entity involved in the process of sharing state records...or sharing these records. As you can see from the chart the page has handed out, there are a lot of layers to our database, and that's why a bill like this one is important. It shouldn't take a Freedom of Information request or a dozen phone calls to see if our system is working for making sure guns don't get in the hands of people who aren't allowed to have them. This bill would make information about whether we are sharing records, what records are being shared, and about what computers...or whether computers are working readily available to the committee, the full Legislature, and the public. I know that significant progress has been made in the last few months on the database and I know there are hardworking, sincere people behind the scenes doing their best. But we all know that state computers don't work well all the time, and with this many entities and agencies involved, a public report is a good idea. I know there probably needs to be some work on the specific language in the bill as to what categories and what information is even possible to obtain and put in the report, but I'm confident this committee can work with the agencies to figure that out. [LB1035]

SENATOR ASHFORD: We don't have a whole lot of time to work with the agencies to figure that out. Are there some...is there some expedited way to do that or...? [LB1035]

MATT SCHAEFER: Well, I see the Colonel in the room and I'm hoping he can shed

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some light. [LB1035]

SENATOR ASHFORD: Okay. So he'd be the one to... [LB1035]

MATT SCHAEFER: Yeah. [LB1035]

SENATOR ASHFORD: ...he'd be the one to talk to. Okay, good. [LB1035]

MATT SCHAEFER: Any questions? [LB1035]

SENATOR ASHFORD: Yes. No, Senator Seiler has a question. [LB1035]

SENATOR SEILER: Just what if one of these parties doesn't like my smiling face and gives me a no, and then I'm spread out all across here? Is there an appeal level on...she's shaking her head yes. I'll wait till she testifies. (Laugh) Thank you. [LB1035]

SENATOR ASHFORD: And this always has been the dilemma, even back when we did the permit to purchase laws,... [LB1035]

MATT SCHAEFER: Yeah, it... [LB1035]

SENATOR ASHFORD: ...that having everybody working together on the records has been a roadblock. So anyway... [LB1035]

MATT SCHAEFER: Yeah, it's complex. [LB1035]

SENATOR ASHFORD: Okay. Good. Thank you. [LB1035]

MATT SCHAEFER: Thank you. [LB1035]

ANNA KOPPERUD: Good afternoon, everyone. My name is Anna Kopperud and I am the Nebraska state liaison for the National Rifle Association. I understand that you prefer that we spell our names: Anna, A-n-n-a, Kopperud, K-o-p-p-e-r-u-d. Three years ago we worked with this committee and the Legislature to change state law to allow the submission of state behavioral records for use in NICS. Upon recent review, it appears as if the records weren't being shared as intended, we understand, due to technical reasons. We are pleased that Senator McGill understood this problem and was willing to introduce the legislation that would keep this from occurring in the future. We think this legislation is important and the NRA supports it. Thank you for your time. [LB1035]

SENATOR LATHROP: Very good. That was simple. [LB1035]

ANNA KOPPERUD: Yeah, simple. [LB1035]

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SENATOR LATHROP: Thank you. [LB1035]

ANNA KOPPERUD: Right. [LB1035]

SENATOR LATHROP: Oh, wait a minute. Wait a minute. Senator Seiler wants to... [LB1035]

SENATOR SEILER: No, wait a minute. [LB1035]

ANNA KOPPERUD: Yes. [LB1035]

SENATOR SEILER: I want to ask a question. You nodded yes when I said is there... [LB1035]

ANNA KOPPERUD: Uh-huh. [LB1035]

SENATOR SEILER: ...an appeal level or a... [LB1035]

ANNA KOPPERUD: There is an appeal and I can get more detailed information for you, but there certainly is one. [LB1035]

SENATOR SEILER: Okay. [LB1035]

ANNA KOPPERUD: The system was designed in which to give a response within 30 seconds. Typically it takes about two to five minutes for that response to kick back. If the name is identified in the system--and there are three databases that they look at--if that name is accurately matched up, a denial is issued. You can appeal it. If you...if a change can be made, according to that appeal process, they will change it in the system. If it is unable to be changed and that person continues to wish to purchase a firearm, every time they seek to make that purchase they will be denied again, and they would have to submit this paperwork to start the appeal process once again. There is an internal database that you can request to be added to that if your name is consistently being flagged and until that appeal process is made, you can get your name on a list where they know you're kind of going to go through the motions. That's as far as I can speak to it right now, but they do work very hard to maintain the confidentiality of those folks but also give them an appropriate avenue to make sure that they're on that list. [LB1035]

SENATOR SEILER: Fine. Thank you. [LB1035]

ANNA KOPPERUD: Okay. Great. Thank you. [LB1035]

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SENATOR LATHROP: I see no other questions. Thank you. [LB1035]

ANNA KOPPERUD: Okay. Thank you very much. [LB1035]

SENATOR LATHROP: Appreciate your appearance. Anyone else here in support of LB1035? Anyone here in opposition to LB1035? Rod. [LB1035]

ROD MOELLER: Good afternoon, Senators. Again, my name is Rodney Moeller, R-o-d-n-e-y M-o-e-l-l-e-r. I'm representing the Nebraska Firearms Owners Association. We are speaking in opposition to LB1035. I'm familiar with the NICS system. I have no problem with what it does. I think it's a good system. So why am I speaking in opposition? First, I think the bill is unnecessary. I've discussed the bill with Senator McGill's office, spoke with representatives of the NSSF who brought the bill to Senator McGill. It became obvious that this was introduced because of the Department of Health and Human Services failing to report individuals to the FBI NICS system. They do have a legal obligation to do so but are failing in that obligation. If we know that DHHS is not reporting what they should, why are we proposing another bill? Why isn't someone getting fired? Why are those state employees that are failing to do their job not being held accountable? To ask them to publish a report to tell us if they are doing their job is just silliness. Additionally, whatever numbers do end up in that report might be meaningless. Let's say this bill passes. Once the DHHS publishes the first report, as required by this bill, that number...if that report says 170 names were submitted, who is to say that number is at all accurate? How is anyone to know if the numbers in this report has any value, accuracy, or integrity? Of course we can't know. As long as some names are being submitted, we can say they're using the system to report what they are legally obligated to. We don't know if that information is accurate though. Is it a good idea to put into law a mandate to publish a meaningless report? I ask that you not advance this bill out of committee. Thank you. [LB1035]

SENATOR LATHROP: Any questions for Mr. Moeller? I see none from the committee. Thank you once again for your thoughts. Anyone else here in opposition to the bill who wants to be heard? And looks like we have some neutral testimony, which we'll take next. Good afternoon. [LB1035]

DAVID SANKEY: (Exhibit 7) Good afternoon. Senator Lathrop and members of the Judiciary Committee, my name is David Sankey, D-a-v-i-d S-a-n-k-e-y, and I serve as the superintendent of the Nebraska State Patrol. I'm here today in a neutral capacity to provide information regarding LB1035 and the electronic reporting requirements as set forth in the bill. In 2011, LB512 was proposed to Senator Christensen by the Nebraska State Patrol and was subsequently passed requiring firearm-related disability information to be sent to the FBI for inclusion in the National Instant Criminal Background Check System, or NICS. As a result, the Nebraska State Patrol worked with the Department of Health and Human Services and the Office of the Chief

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Information Officer to develop a portal to transmit the data electronically from DHHS through the State Patrol for transmission to the FBI and, thus, to the NICS database. Utilizing existing information technology personnel, the portal from DHHS to OCIO was completed in November of 2012. The next stage of the portal from the OCIO through the NSP message switch and into the NICS system was completed in September of 2013. The State Patrol did not anticipate the completion of the portal to take nearly two years. Beginning January 2013, the State Patrol implemented a new message switch, which caused part of the delay. Additional programming was acquired after the initial installation of the message switch. A testing environment was then created to ensure smooth data transfer. After successful testing, the electronic reporting system was implemented in November of 2013. And out of approximately 10,400 records, 7,644 were submitted to the NICS database. The remaining records were old paper files which contained either duplicates or had missing information required by NICS. The district court clerks have been adding new committals and converting the old paper files to the electronic format so that as of yesterday almost 10,000 records have been reported to NICS. There are no issues with downtime of the message switch that would impact this reporting requirement, as the switch is down a minimal number of hours per year and the reporting is occurring to NICS daily. Occasionally NICS is down for standard maintenance, but that in no way impacts the ability to share records. We believe the reporting requirement proposed in section (5)(e) is unnecessary, because the data is exchanged daily and occurs as an automatic process. If for some reason the switch was down unexpectedly at the time it connects to the NICS, the switch would automatically send the data once reconnected. In addition, NICS captures firearm disability for both handguns and long guns. The bill requests records for only handguns, but there is no way to separate the data. Utilizing consistent "firearm" language elsewhere in current statute may be more appropriate. The Nebraska State Patrol fully supports the inclusion of mental health records into the NICS database. In cooperation with our agency partners, DHHS and OCIO, we are confident that Nebraska is reporting mental health records to the NICS database in order to prohibit persons adjudicated with mental health process from purchasing firearms. I appreciate the opportunity to be here today and I'd be happy to answer any questions you might have. [LB1035]

SENATOR DAVIS: I have one, Steve. [LB1035]

SENATOR LATHROP: Oh, Senator Davis. [LB1035]

SENATOR DAVIS: You heard Mr. Moeller say that HHS was not reporting the files to you in an appropriate manner. Now is that resolved? [LB1035]

DAVID SANKEY: Yes. The delay was to build the electronic portal, and really all of it, it's not like records are sent from DHS to the State Patrol. It's all electronic. We don't get any records. It's just all submitted through us to the FBI. So, yes, it's occurring now. [LB1035]

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SENATOR DAVIS: So kind of reading between the lines, you think we've taken care of most of the problems. [LB1035]

DAVID SANKEY: Yes, sir. I think the delay was unfortunate. It took some time to build it, but now it's built. I think the problem is taken care of. [LB1035]

SENATOR DAVIS: Thank you, Colonel. [LB1035]

DAVID SANKEY: Yes. [LB1035]

SENATOR LATHROP: I see no other questions. Thanks, Colonel. [LB1035]

DAVID SANKEY: Thank you, sir. [LB1035]

SENATOR LATHROP: Good to have you in Judiciary Committee. [LB1035]

DAVID SANKEY: Thank you. [LB1035]

SENATOR LATHROP: Anyone else here in a neutral capacity on LB1035? Seeing none, Senator McGill to close. [LB1035]

SENATOR MCGILL: Colleagues, I have heard that there was...it was a lot more complicated in terms of why these records aren't in the system. And certainly technology takes a while to catch up. But there was a lot of, well, this isn't my responsibility, this is your responsibility, and back and forth. And that was leading to the logjam as well, which is...we've dealt with that on lots of different levels in lots of different agencies. Which is why I brought this bill forward to make sure that moving forward we don't have that problem, that people are reporting as they should. We, obviously, do not have the authority to fire people, in the legislative branch, over in the executive branch for not doing what they need to be doing or what they are statutorily required to do. So all we can do is provide whatever oversight we can to make sure that the process is being fulfilled properly, and that's why I brought this bill. So I'd ask for your consideration. [LB1035]

SENATOR LATHROP: Very good. Thanks, Senator McGill. That brings us to the last bill of the day, Senator Christensen with LB1110. [LB1035]

SENATOR CHRISTENSEN: Thank you, Chairman and the Judiciary Committee. I'm Senator Mark Christensen, C-h-r-i-s-t-e-n-s-e-n. I'm here to introduce LB1110 which amends the Concealed Handgun Permit Act that would add language to allow active duty military personnel to have 60 days after returning home to Nebraska to renew their Nebraska Concealed Handgun Permit. Currently in Nebraska, to obtain a permit or

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renew a permit, you are required to appear in person. If a Nebraska resident, who is a concealed handgun permit holder serving in the U.S. Armed Forces, is stationed outside of Nebraska and their permit is about to expire, there is no process for them to be able to renew their permit. Because of this, they are to spend the time and money to take the course and pay the full application fee to obtain the new permit. If the same person in the military has their motor vehicle operator's license expire, Nebraska law, in Section 60-4,121, currently gives such person and their spouse and dependents 60 days after their return to renew their operator's license. LB1110 seeks to provide this same extension to military personnel and their spouses as it pertains to the concealed handgun permit. I believe this is a reasonable change to the Concealed Handgun Permit Act. There is an issue that the committee will need to look at if they decide to advance the bill from committee. If you look at page 2, lines 14 and 15, you will see that this would also include a dependent family member of such military personnel. While I don't believe it's probably necessary to include that language allowing a dependent the same provision, because an individual must be 21 years old to obtain a concealed handgun permit, I decided to leave it in the bill for the committee to review in case we missed a particular situation where someone considered to be a dependent could also be eligible for a permit. I thank you for consideration of LB1110 and encourage its advancement to General File. [LB1110]

SENATOR LATHROP: I see no questions. [LB1110]

SENATOR CHRISTENSEN: Okay. [LB1110]

SENATOR LATHROP: Thanks, Mark. Anyone here to testify in support of LB1110? [LB1110]

ROD MOELLER: Good afternoon. Again, my name is Rodney Moeller, R-o-d-n-e-y M-o-e-l-l-e-r. I'm representing the Nebraska Firearms Owners Association. We do support LB1110. Currently, an application for the concealed handgun permit must be made in person at one of the Nebraska State Patrol troop headquarters. That requirement is practical, as receiving the application involves taking a photo and fingerprints. That permit is good for five years, can be renewed up to four months prior to expiration. To renew the permit, the CHP holder must fill out the same form as the initial application. The only change is the box in the upper right-hand corner that gets checked that would indicate renewal instead of an initial application. The initial application fee is \$100; the renewal is \$50. If a CHP holder is not renewed...if the CHP is not renewed during the renewal period, a person must reapply as if it is an initial application. That requires taking the class again and paying the full \$100 application fee. Our military members are required to deploy, sometimes on short notice, sometimes frequently. Some of our military members stationed in Nebraska have been deployed during the entire four-month period where they can renew. Unable to apply for renewal in person, they have effectively lost their permit. Most state of Nebraskans on

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active duty are assigned at a duty station outside of Nebraska. For those Nebraska citizens on active duty, it is rarely practical to be in Nebraska to renew their permit in person during that renewal period. Unable to apply for the renewal in person, again, they've now lost their permit. We should be able to find a way to accommodate our military in this regard. We have made accommodations for our military members regarding the Nebraska operator's license. We provide for absentee ballots. We certainly can provide a way for our military members to retain their concealed handgun permit while serving our country on active duty service. This bill does provide a solution to that issue, consistent with how we accommodate our military members with the Nebraska operator's license. I do want to point out one thing that we would like to see enhanced actually on this bill. This bill specifically is addressing Nebraska citizens. It's not really addressing active duty military stationed in the state of Nebraska. For the purposes of Concealed Handgun Permit Act, PCS orders do establish residency for the purposes of concealed handgun permit. I am approached by active duty military members stationed in Nebraska regarding how this bill might affect them. It might be open for interpretation. It could maybe apply but it would be nice if we could expressly allow for those members stationed here that end up being deployed during that window. In fact, I was joined today by an Air Force member who this situation applied to. I've met several members from Offutt Air Force Base who had lost their permit because of the fact they were deployed during that four-month window. Thank you. [LB1110]

SENATOR LATHROP: Okay. Oh, hang on just a second. Senator Davis. [LB1110]

SENATOR DAVIS: I don't know much about the process, Mr. Moeller, so if you are coming to the end of your five years, is there a notice sent to you or is it just up to you to remember that it's time to renew your permit? [LB1110]

ROD MOELLER: There is no notice. It is up to you to recognize when it's due to be renewed, and you may renew up to four months prior to the expiration. [LB1110]

SENATOR DAVIS: Okay. Thank you. [LB1110]

SENATOR LATHROP: Senator Chambers. [LB1110]

ROD MOELLER: Yes, sir. [LB1110]

SENATOR CHAMBERS: You said that people currently on active duty wanted to get a permit to carry a concealed weapon. [LB1110]

ROD MOELLER: Yes, sir. [LB1110]

SENATOR CHAMBERS: Are members on active duty in the military allowed to carry civilian concealed weapons? [LB1110]

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ROD MOELLER: Not on a military base, but when they leave the military base they may with a permit. [LB1110]

SENATOR CHAMBERS: And you know that that's allowed. [LB1110]

ROD MOELLER: I do. [LB1110]

SENATOR CHAMBERS: I'm going to have to check that, but I still wouldn't agree with it. I don't want to see a proliferation of guns in this society in this state, so that part...well, that's not a part of the bill now though anyway, is it? [LB1110]

ROD MOELLER: It's not. I... [LB1110]

SENATOR CHAMBERS: Okay. [LB1110]

ROD MOELLER: ...I support what is in there, but I would request that the committee consider modifying the language slightly to be able to support that specific scenario. [LB1110]

SENATOR CHAMBERS: That's all that I have. [LB1110]

ROD MOELLER: Okay. [LB1110]

SENATOR LATHROP: And I see no other questions. Thanks, Rod. [LB1110]

ROD MOELLER: Okay. Thank you. [LB1110]

SENATOR LATHROP: (See also Exhibit 8) Next proponent or person in support, if any. Seeing no further proponents, anyone here in opposition? Anyone here in a neutral capacity? Seeing no one in opposition or in a neutral capacity, Senator Christensen, you're...waive closing. That will close our hearing on LB1110 and close out our hearings for the day. [LB1110]