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Judiciary Committee  
January 28, 2016

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[LB693 LB835 LB854 LB932 LB1009]

The Committee on Judiciary met at 1:30 p.m. on Thursday, January 28, 2016, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB835, LB1009, LB932, LB854, and LB693. Senators present: Les Seiler, Chairperson; Colby Coash, Vice Chairperson; Ernie Chambers; Laura Ebke; Bob Krist; Adam Morfeld; Patty Pansing Brooks; and Matt Williams. Senators absent: None.

SENATOR SEILER: The bewitching hour has arrived. And my name is Les Seiler. I'm Chairman of the Judiciary Committee. Sitting on my right, your left, is Senator Williams from Gothenburg. Josh Henningsen is our legal counsel. Oliver VanDervoort is our committee clerk. On my left is Senator Ebke from Crete. There will be a number of senators coming in and out. They are in other committees right now introducing bills, so I hope you recognize them when they come in. Don't clap for them but (laughter)...we will be discussing the agenda as it is written in the order it is written. You need to understand that these are new mikes. And you folks in the back row, if you want to say something libelous or slanderous about somebody, it'll probably become public record, so be careful. If you're testifying, please pick up a testifier sheet and hand it to our pages. They are the hardworking people of this committee and they'll be more to accommodate you and come and get your testifier's bill. Make sure you fill that out prior to your testimony. Anybody else that needs to shut off their telephone, please do. Speak clearly into the microphone when you're testifying, not for...it doesn't enhance your voice, but the people that are transcribing it will be able to understand who you are and what you're about. When you...most of you know this, from looking at the crowd--you've testified here before--pronounce your name and spell it so that we can...the transcription people can clearly understand who is testifying. With that, I believe we'll start with LB835. Senator Mello, you may introduce your bill. [LB835]

SENATOR MELLO: Good afternoon, Chairman Seiler, members of the Judiciary Committee. My name is Heath Mello, H-e-a-t-h M-e-l-l-o, and I represent the 5th Legislative District in south Omaha. I'm here today to present LB835 on behalf of Nebraska's Attorney General Doug Peterson. Nebraska's consumer protection laws are out of date, some of which haven't been updated since 1974. LB835 seeks to modernize several areas of our consumer protection laws, including the Credit Report Protection Act, the Consumer Protection Act, the Uniform Deceptive Trade Practices Act, and the Financial Data Protection and Consumer Notification of Data Security Breach Act of 2006. Some of the updates include: adding a requirement for consumer reporting agencies to create a file for a minor if the minor does not have a preexisting credit file when requesting a security freeze; allowing the Attorney General's Office to share investigative materials with other law enforcement agencies; increasing penalties for corporations who make antitrust violations; and enhancing the definition of the deceptive trade practices. My office, along with the Attorney General's Office, has been working with several groups from the business and retail industries to address concerns with the notification procedures, as well as

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adding protections for protected persons. We're still working on the final details of that amendment, but I will provide it to the committee as soon as we build the consensus with all the interested parties. A representative from the Attorney General's consumer protection division will be testifying directly after me and will walk through the specific aspects of the bill, and she will be able to address any technical questions that the committee may have. I'm encouraged to join...I encourage you to join the Attorney General's effort to modernize Nebraska's consumer protection laws with what you have in front of you in LB835. With that, Mr. Chairman, I'd be happy to answer any questions you may have. [LB835]

SENATOR SEILER: Any questions from the staff or senators? Seeing none, thank you. [LB835]

SENATOR MELLO: Thank you. [LB835]

SENATOR SEILER: You're going to be here for closing? [LB835]

SENATOR MELLO: I have another bill in another hearing, so I will stay as long as possible until my staff notifies I have to leave. [LB835]

SENATOR SEILER: Okay, thank you. The first proponent of this bill. [LB835]

ABIGAIL STEMPSON: Good afternoon, Senator Seiler and other members of the Judiciary Committee. My name is Abigail, A-b-i-g-a-i-l, Stempson, S-t-e-m-p-s-o-n, and I'm testifying on behalf of the Nebraska Attorney General's Office where I am the chief of the public protection bureau and the consumer protection division. I am here in support of LB835 as it will strengthen the ways in which we can protect Nebraskans. I wish to highlight several of the proposed changes and I welcome your questions after my statement. To begin, the change to the Credit Report Protection Act will help to prevent the identity theft of our children. According to one study of 40,000 children examined, over 10 percent had someone else using their Social Security number; that's 51 times the rate for adults. Thieves often choose children because they seldom have the credit histories of adults, making their Social Security numbers very valuable. A typical child identity theft victim may go for years without discovering the impact on his or her credit score. It affects the child's ability to obtain student loans, buy a car, and even obtain a job. As the law stands now though, the only time a minor's credit file can be frozen is when the file already exists. If a minor has an existing file, it typically means that the child's credit has already been tapped by somebody else, so the damage has already been done. This law seeks to close the loophole by allowing the credit freeze to be placed before the fraudulent activity occurs. This law would require the credit reporting agencies to create a file for the minor if there was no existing file at the time of the request. Note that approximately 20 states already require this. Now I want to turn your attention to charities fraud. Unfortunately, it's happening in Nebraska.

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For example, we became aware of a person who would hire attractive young women to go to Husker football games to solicit donations on behalf of those who have breast cancer. In reality, investigations showed that this person was using the names of various charities without their permission and often without actually turning over any donations to those charities. The nonprofit sector is vital to Nebraska's economy. Our nonprofits provide valuable services to our communities, services that the government often can't or does not provide. Nebraskans are very generous in giving their time and limited resources to nonprofits, and every charitable dollar that goes to a scam artist or some unscrupulous organization is one less dollar that goes to those charities that are making our state a better place to live. This legislation gives the Attorney General a strong tool in which to hold these scammers accountable. In addition to combating identity theft and charities fraud, LB835 will also help protect Nebraskans by allowing the Attorney General's Office to share documentary material received pursuant to a civil investigative demand, which is a type of investigatory subpoena, with other law enforcement agencies that are also charged with enforcement of consumer protection statutes. Nebraska is a small state with limited resources; however, the businesses we must investigate are often well-financed multinational corporations. To leverage our resources we often work with other state agencies, other states, and federal agencies such as the Federal Trade Commission. Enabling Nebraska to share investigatory documents will allow us to more efficiently use our resources to collaborate and achieve the best possible results for Nebraskans. [LB835]

SENATOR SEILER: Ma'am, your red light is on. [LB835]

SENATOR EBKE: Go ahead, yeah. Please go ahead. [LB835]

SENATOR SEILER: Okay. [LB835]

ABIGAIL STEMPSON: Thank you. I also want to mention the changes to the security breach notification statute. LB835 will enhance when Nebraskans receive notification that their personal information was breached. The bill expands the definition of personal information to include e-mail addresses and passwords because e-mail accounts often contain very sensitive personal information. LB835 also requires that when a Nebraskan receives notice of a breach, that the Attorney General's Office shall also receive notice. Right now the ways we find out about breaches are when a consumer contacts us, when the media reports on the breach, or when one of the approximately 20 other states that require notification of the breach to their state attorney general's office passes that information on to us. We likely miss many breaches that affect Nebraskans. This change will allow the Attorney General to more effectively ensure that consumers' personal information is protected. And finally, LB835 increases the current maximum civil penalty that a judge may award for antitrust violations from \$25,000 to \$500,000. The current civil penalty has not been changed since 1974 and needs increase to

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account for inflation and to maintain its effectiveness as a deterrent. In the past few years, the state of Nebraska, in conjunction with other states, has sued companies such as Apple and American Express for antitrust violations. A \$25,000 penalty is hardly a deterrent to companies like Apple and American Express. This ends up costing our consumers dearly. It's time to increase the maximum amount of penalties that can be awarded. Please help protect Nebraska consumers by passing LB835 into law. I thank you for your time and welcome your questions. [LB835]

SENATOR SEILER: Senator Krist. [LB835]

ABIGAIL STEMPSON: Yes. [LB835]

SENATOR KRIST: You're part of the AG's staff? [LB835]

ABIGAIL STEMPSON: Yes, I am. [LB835]

SENATOR KRIST: This the first time testifying in Judiciary? [LB835]

ABIGAIL STEMPSON: In Judiciary, yes. [LB835]

SENATOR KRIST: Okay, just a comment. [LB835]

ABIGAIL STEMPSON: Yes. [LB835]

SENATOR KRIST: When any agency or any proponent comes in and takes five or six minutes in testimony and prepared testimony, then we're obligated I think to let the opposition do five or six minutes as well. [LB835]

ABIGAIL STEMPSON: Understood. [LB835]

SENATOR KRIST: So in the future when you come in with prepared testimony, hand it to us, hit the highlights, three minutes, and then we'll ask questions. Thank you very much. [LB835]

ABIGAIL STEMPSON: Thank you. [LB835]

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SENATOR KRIST: My question is, when we go to this text, I assume you had some part in writing this bill. [LB835]

ABIGAIL STEMPSON: Yes, I did. [LB835]

SENATOR KRIST: Is it necessary, and why is it necessary, to on page 24...on page 10, line 19, "Trademark means a word, a name, a symbol, a device" or "combination of a word, name, symbol, or device," so the changes here say that we've added the "a" in front of it. Explain to me how that's going to strengthen your position. [LB835]

ABIGAIL STEMPSON: And I will tell you, Senator Krist, that was not a change that came from our office, but I do believe it was something that they felt was necessary for clarification. [LB835]

SENATOR KRIST: Okay, so it's a Bill Drafting decision. [LB835]

ABIGAIL STEMPSON: That's my understanding, yes. [LB835]

SENATOR KRIST: Okay. And then page 13, line 22...I'm sorry. That's not it. I want to start talking about the encrypted part. Let's see, page 15, starting with line 19, can you tell me, the words that were added, how does that add or strengthen the act or the statute? [LB835]

ABIGAIL STEMPSON: Absolutely. What happens sometimes in breaches, the data will be encrypted so it is protected, but in the breach the encryption code also gets taken. So in other words, that little key that protects it, since that was also part of the breach, the key is unlocked. [LB835]

SENATOR KRIST: Ah, okay. [LB835]

ABIGAIL STEMPSON: So that would mean this would help so that if that's the case...because it's really not encrypted anymore at that point if they can open the door. [LB835]

SENATOR KRIST: Got it. Okay, thank you. [LB835]

ABIGAIL STEMPSON: Yep. Sure. [LB835]

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SENATOR SEILER: Any further questions? Seeing none, thank you for your testimony. [LB835]

ABIGAIL STEMPSON: Thank you, Senator Seiler. [LB835]

SENATOR SEILER: Next proponent. [LB835]

MARK INTERMILL: Good afternoon, Senator Seiler and members of the Judiciary Committee. My name is Mark Intermill, M-a-r-k I-n-t-e-r-m-i-l-l. I'm here today representing AARP. I'll be very brief. AARP supports actions to enhance the protections that consumers enjoy in the state of Nebraska. We've looked at the bill, looked at some of the things that do need to be updated just in order to keep up with the changes in terms of the...keep ahead of the people who are trying to scam individuals. We are an organization of consumers and we appreciate any effort that you can make to update these statutes in order to assure that consumers have the best protection possible. So with that, I'd be happy to try to answer any questions. [LB835]

SENATOR SEILER: Seeing none, thank you. [LB835]

MARK INTERMILL: Thank you. [LB835]

SENATOR SEILER: Next proponent. [LB835]

JIM HEGARTY: Thank you, Chairman. Senators, members of the committee, my name is Jim Hegarty; it's H-e-g-a-r-t-y. I am the regional president and CEO of the Better Business Bureau. And we are supportive of multiple aspects of the bill and so I'll just touch on sort of where we're at with this. In particular, the ability to be able to set up credit monitoring on minors with the credit reporting agencies, this is not a new problem. I mean dating back to 2006 our friends at the FTC were telling us that there were somewhere in the neighborhood of 10,000 identity theft complaints filed with their agency involving minor victims. The actual number is obviously higher because this is just what gets reported, and that was up I think nearly double from 2003. Now our friends at the ID Theft Resource Center in San Diego tell us that the minor victims are up to about 500,000 a year. So in many cases, as they investigate this where Social Security numbers have been used to perform ID theft on minors, the average debt is around \$12,000. So this is clearly an evolving problem. It's not going away. The data breaches are incredibly common, so I think enabling parents to be able to set up monitoring on minors, regardless of whether they already have activity, is essential. We also are supportive of...we believe investigations need to be done quickly. So the Consumer Protection Act part of this, we are totally supportive of being able to share information freely among law enforcement when these

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instances occur. The Better Business Bureau is part of the Consumer Sentinel Network. We upload all of our warnings and alerts to a shared database that can be accessed by law enforcement, and it's essential when we're investigating crime to be able to do that very quickly. Also, we are supportive in the Uniform Deceptive Trade Practices Act. We believe that transparency is essential regarding ingredients obviously in products. And as far as, you know, what Abby touched on with the fraudulent charitable solicitations, you know, every time that there's a natural disaster that involves human tragedy, we see bogus charities emerge almost immediately, so reclassifying them I think is absolutely essential. And we also are supportive of the legislation that broadens the definition of personal information. So with that, that concludes my remarks, and I'm happy to answer any questions. [LB835]

SENATOR SEILER: Any questions of this witness? Seeing none, thank you for your testimony. [LB835]

JAMES HEGARTY: You bet. [LB835]

SENATOR SEILER: Next proponent. [LB835]

KEN SMITH: (Exhibit 1) Chairman Seiler, members of the Judiciary Committee, my name is Ken Smith; that's K-e-n S-m-i-t-h. I'm a staff attorney in the economic justice program at Nebraska Appleseed. I appreciate the opportunity to testify today in support of LB835. I will also be brief. LB835 would implement changes to our state consumer protection laws that would benefit many Nebraskans, including children and low-income families and individuals. A victim of identity theft typically experiences financial harm regardless of his or her income level. However, that harm can be especially devastating to a low-income individual or family. In addition to financial harm, identity theft victims can face a myriad of other difficulties, including the loss of utility services, improper child support garnishments, wrongful criminal investigations, denial of new credit, and difficulty accessing bank accounts, just to name a few. In some cases a victim may need to hire legal representation to face the issues that result from identity theft. We believe the amended notice requirement in LB835 that Ms. Stempson detailed for you would help potential victims of identity theft avoid having to face these issues and would bolster the Attorney General's ability to protect Nebraskans. We would also support the proposed amendment to subsection (2) of 8-2603 which, as Ms. Stempson said, would require consumer reporting agencies to create a file for a minor when a security freeze is requested. It is our understanding now that the consumer reporting agencies in Nebraska may not be able to implement such a freeze unless the file is preexisting. And unfortunately, we know of several cases where a child in foster care has had his or her identity stolen by a family member, which leads to severe damage to their child...to that child's credit history. This is part of why the federal Fostering Connections Act requires states to give youth a copy of their consumer report before

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they exit the foster care system. So for these added protections and because this bill would increase and bolster the Attorney General's capacity to protect Nebraskans, specifically children and low-income individuals and families, we would respectfully urge the committee to consider this bill favorably. With that, I would take any questions. [LB835]

SENATOR SEILER: Seeing none, thank you for your testimony. Next proponent. [LB835]

JIM OTTO: Chairman Seiler, members of the committee, my name is Jim Otto; that's J-i-m O-t-t-o. I am president of the Nebraska Retail Federation. First of all, I'd like to thank Senator Mello, his staff, and the Attorney General's staff on their cooperation and willingness to work with us on suggestions that we feel will improve the bill. We appreciate the valuable role that breach notice laws serve and we agree with the goal of the legislation. Our concerns primarily deal with making the legislation as comparable as possible to similar laws in other states. Our larger members face significant challenges complying with conflicting laws in different states. Both Senator Mello's office and the Attorney General's Office have assured me that they will continue to work with us on amending the bill after this hearing and before the amendment is finalized and presented to the committee. I very much appreciate that and it is with that assurance that I am here to testify in favor of LB835. For the record, here are two of the areas we feel could use improvement. First of all, minor freeze, we are all for a minor freeze. There are 21 other states that do provide a minors freeze. Our intention is to ensure that the minor freeze in Nebraska is consistent with minor freeze laws across the country to maintain the consumer experience and equal protection. And secondly, the harm trigger, Section 8 would completely eliminate any, quote, harm trigger from Nebraska's breach notice law. We understand the concern with the harm trigger in current law which requires reasonable likelihood of use of information. However, the better solution is to clarify the harm trigger, not eliminate it completely, as completely eliminating it would result in mandating breach notices in a great many situations where there is no risk whatsoever to Nebraska residences. Breach notices are costly for Nebraska businesses. Studies place the cost at about \$60 per record. Requiring notice in no-risk situations desensitizes state residents to the notice and could cause them to ignore the notice of breaches. That's all I have and be glad to try to answer any questions. [LB835]

SENATOR SEILER: Questions? Senator Chambers. [LB835]

SENATOR CHAMBERS: I've known Mr. Otto more years than either of us cares to announce, but there is one corny thing that I always have to say. When a man's name is spelled the same forward, backward, and upside down, I find no fault with him (laughter). Thank you, Mr. Otto. [LB835]

JIM OTTO: I couldn't offer you a sandwich, could I, Senator (laughter)? [LB835]

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SENATOR KRIST: No. [LB835]

SENATOR CHAMBERS: No. [LB835]

SENATOR SEILER: Any further questions? Thank you. [LB835]

SENATOR WILLIAMS: Oh, over here. [LB835]

SENATOR SEILER: Oops, excuse me, Senator Williams. [LB835]

SENATOR WILLIAMS: Thank you, Senator Seiler. And, Mr. Otto, thank you for being here. I just want to be sure about the last statement you made. You're concerned that the current legislation, where it removes that, will be triggering breach responses when they're not necessary and you would suggest that's something that could be fixed before we go forward? [LB835]

JIM OTTO: Yes. And as I understand it, in conversations with the Attorney General's Office, I don't think they're opposed to that, but... [LB835]

SENATOR WILLIAMS: Okay, thank you. [LB835]

SENATOR SEILER: Anything else for any follow-up? [LB835]

JIM OTTO: Thank you. [LB835]

SENATOR SEILER: Thank you, Senator. Next proponent. Next proponent. Seeing nobody move, anybody in opposition, the opponent? Anybody in the neutral? Senator Mello, you may close. [LB835]

SENATOR MELLO: Just as a brief closing, Mr. Chairman, as you heard, we're working on an amendment that just was not ready today to present the committee as a whole. When we finalize that amendment that addresses the two issues you've heard brought forward by the Retail Federation, we'll be able to provide that amendment to the committee for your consideration to the underlying bill. With that, I'd be happy to answer any questions you may have. [LB835]

SENATOR SEILER: Seeing none, thank you. [LB835]

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SENATOR MELLO: Thank you. [LB835]

SENATOR SEILER: That will...there is no written documents except the support of the oral testimony, so this record will be closed at this point. LB1009, Senator Williams. Folks, listen up. Senator Williams has requested that the testifiers testify in the following order: Kali Smith, Corey O'Brien, Joe Kelly, Spike Eickholt, Lincoln Police Chief Jim Peschong, and Celeste Laird. So we'll take those in that order and then the rest we can just fill in. Senator, you may go. [LB1009]

SENATOR WILLIAMS: (Exhibit 1) Thank you, Chairman Seiler and members of the Judiciary Committee. My name is Matt Williams, M-a-t-t W-i-l-l-i-a-m-s, and I am the senator from Legislative District 36. And I'm here today to introduce LB1009. I sat in this chair about a year ago and talked about K2 and synthetic marijuana, and it was at that time I became aware of how frustrated members of the Legislature had been for some time about this issue. It was also at that time that Senator Coash asked me to pronounce some names that I couldn't pronounce, and we won't have any of those in this bill today. [LB1009]

SENATOR COASH: I was looking. [LB1009]

SENATOR WILLIAMS: You were looking but they are not there. But what we kept talking about is the fact of how do we find the silver bullet with this K2 issue; is there something that we have missed or overlooked? And following the session last year, Senator McCoy and myself started talking about should we put together a working group that could help with this and bring in a lot of experts. We have circulated to you a list of the people that through the summer and through this fall participated in the LB1009 working group. And you're going to hear it from me a couple of times, but I would really like to thank these individuals for their willingness to devote their time to this particular issue. As you can see from this list, it includes prosecutors, defense counsel, law enforcement both at the city, county, and state level, crime lab participants, pharmaceutical participants, a number of interested individuals all coming together with one goal. As we brought the group together, we started on the front end by deciding what are we really trying to do and when...especially when you bring prosecutors and defense counsel to the same table trying to look at this. And our goal is to try to find a way to get K2 off the shelves of retailers and keep it off the shelves of retailers and do this in a way that doesn't increase the penalty in any form on anyone that happens to buy the product. That's not who we are trying to deal with here. We're dealing primarily with the retailers. The group started with doing research on the topic, and want to thank those people that reached out and found out that, you know, we're not alone in this fight against K2. But there are two states in particular--Alaska and Indiana--that had legislation on the books that would provide some assistance to us. So we started with that. Then we began into what I will call the drafting, redrafting, vetting, and revising portion of the

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committee's work where we were presented with a proposed piece of legislation and then this group from the prosecutor's side, law enforcement side, defense counsel side would look at it and say this is what works, this is what doesn't work, this is what we need to fix. And at the end of the day, LB1009 became the result of all of that work. I'm going to leave the very technical descriptions of what we are doing in LB1009 to those that will follow in this testimony, but I would bring your attention to four quick points. Page 9, beginning at line 18, defines what is now (inaudible) being called a look-alike substance in the legislation. We've defrayed from using anything that says K2 or synthetic marijuana. It's a look-alike substance. Then if you go to page 11, line 3, we create a violation for manufacturing, selling, distributing this look-alike substance, and it's a Class IV felony. Then one of the most important provisions jumps over to page 13, beginning on line 20, where we create the ability in law enforcement to seize this product. And you will hear testimony today from law enforcement and also from the crime lab about the problem right now under the current law when you try to do the chemical analysis and seize this product. And then the fourth thing that is unique and completely different than we have done before is line 24...excuse me, page 24, beginning on line 10, where we have created a violation of the Uniform Deceptive Trade Practices Act, UDAAP, for manufacturing/selling, you know, these kind of things with the look-alike substance. We are really attacking two things: first of all, giving law enforcement the tool to be able to seize this product from the shelves of the retailer, and then creating a penalty in the form of financial loss to a retailer that still chooses to try to engage in this behavior. Those following me will be able to testify more clearly on those things. If you have taken a look at the committee statement which has been prepared, there are some legitimate questions raised in the committee statement, and the group of people behind me will be able to address those. I would like to personally address to some degree the definition question. The easiest thing we could have done would have been to take the Indiana definition. But this group of experienced and people with expertise in the field took that definition and said this doesn't do what we need to do in Nebraska. So we didn't take the easy way by just doing that; we took the expertise of not only our AG's Office but prosecutors, defense counsel, law enforcement, to craft something that we feel is the best that we can do at this time. I mentioned LB1009 is the result of a joint effort. I'm proud of that joint effort. I'm proud of the fact that we were able to bring these people together and, therefore, when I introduce this bill, I will tell you this is not my bill, this is also not the AG's bill, this is not the prosecutor's bill, this is not the defense counsel's bill, this is not law enforcement's bill. This is truly our bill. And I don't know if it's the silver bullet or not, but I think it's the best attempt at that silver bullet that we can make at this time. And if I were a werewolf, Senator Chambers, I would be worried. There you have it. And I would be happy to answer any questions, but those following me are much more equipped to do that. [LB1009]

SENATOR SEILER: Senator Krist. [LB1009]

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SENATOR KRIST: This is just a question that I pose because you're in the chair, and legal counsel may be able to answer it. But on page 9...I like things that flow and I understand I'm in a section and it's labeled that way or I'm going to (a), (b), (c). I don't know that I've ever seen a section where its...line 18 is (44) and the definition of "look-alike substance means..." Okay, normally you see it in the list of definitions someplace. You've gone into the text here in the language, but you have sub (a), sub (b), and then we go to (A) through (H). I'm assuming that that's continuing in the definition of not just the product, but in the labeling instructions or some definition thereof. It just doesn't...the flow doesn't make sense to me. Can you comment on that? Is that deliberate? [LB1009]

SENATOR WILLIAMS: I will let the person behind me that's going to talk specifically about that answer that more. Senator Krist, we worked hard to try to make that flow better. I think there is a possibility that it could flow better. What we really worked on was trying to recognize that there were two pieces of this, and that was figuring out what the product was and then making this list of the items that are ingredients of the potential look-alike. And it's kind of an either/or. It either meets the (a) test or it meets one of the (b) tests under there. [LB1009]

SENATOR KRIST: I get it and I understand that the packaging, the definition of the packaging as well as the possession of is just as important as defining the product so we keep it off the shelves. I just don't understand that... [LB1009]

SENATOR WILLIAMS: Yeah, yeah. And what you will find, and I think you will hear this, is that however you dream or I dream that this stuff is packaged and on the shelf tomorrow, it is likely to be different. [LB1009]

SENATOR KRIST: Sure. Right. [LB1009]

SENATOR WILLIAMS: And we tried to stay flexible with that. At the same time, we were very cognizant of the fact that we know what we're trying to catch in this net, but we also don't want to try to catch things that aren't what we're trying to catch--the K2, the synthetic marijuana kind of things. And we worked very hard at that and that's why you will also see, and we'll talk about it later, letters of support from the Grocery Association, the Pharmaceutical Association, because they've looked at this in its current form and they feel these definitions leave them out of the loop. [LB1009]

SENATOR KRIST: Okay, thank you. Thank you, Chair. [LB1009]

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SENATOR SEILER: Any further questions? Seeing none. And you're going to be here for closing? [LB1009]

SENATOR WILLIAMS: I'm not going anywhere. [LB1009]

SENATOR SEILER: Okay. [LB1009]

SENATOR CHAMBERS: Just one thing. Senator, you may have been too far away, but I was sketching what would be a werewolf as you were talking before you said it. I have so much of it done that I couldn't have done it just at the time that you've said it. Am I telling the truth? [LB1009]

SENATOR KRIST: I plead the Fifth, but go ahead. [LB1009]

SENATOR CHAMBERS: That's all. Just be careful what you say and think in that chair when I'm over here. [LB1009]

SENATOR SEILER: Kali Smith, please. [LB1009]

KALI SMITH: Hi. My name is Kali Smith, K-a-l-i S-m-i-t-h. I'm here in support of LB1009. I lost my son, Tyler J. Smith, on September 29, 2012, when a friend of his purchased cherry-flavored incense sold legally, paid tax on it at a local gas station just one block from Bellevue West, where Tyler was a senior. It was passed off as a flavored tobacco. Tyler was gone within four days in the most tragic and traumatic way possible. Since I've started the Tyler J. Smith Purple Project to spread awareness about the dangers of synthetic drugs, street name "K2," I have personally reached and spoken to over 50,000 people within the last three years. This bill, LB1009, is much needed because K2 is an epidemic that is killing people and mostly our young people. It would protect us from being sold something deceptively and allow us to close up the shops, the retail stores where it's being sold, and who is selling it. There are a lot of tragic stories just like mine. We must go forward in order to prevent another life from being lost due to synthetic drugs. Thank you. [LB1009]

SENATOR SEILER: Questions? Thank you for your testimony, appreciate it. [LB1009]

KALI SMITH: Thank you. [LB1009]

SENATOR SEILER: Corey O'Brien. [LB1009]

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COREY O'BRIEN: Good afternoon, Chairman Seiler, members of the Judiciary Committee. My name is Corey O'Brien, C-o-r-e-y O-'B-r-i-e-n, and I am the criminal prosecution section chief of the Nebraska Attorney General's Office. It's my pleasure to appear today on behalf of the Attorney General's Office in support of LB1009 and the efforts of the LR211 committee that worked on LB1009. I've probably worked on about 60 bills and had them drafted or lobbied for passage of them in my 15 years in the Attorney General's Office. This was one of the most extraordinary efforts I've ever been involved in with 20 professionals providing input on how we handle the unique challenges of K2. It was one of the most difficult bills to put together and it still is something that we're open to input on in terms of how we make it better. Whether or not this is the magic bullet that we've all been searching for the last five years, I can't say that; but what I can say is that I'm very satisfied that we have an additional tool that will provide mechanisms to law enforcement that do not exist. As Senator Williams told you, this is a bill that is a hybrid between what Indiana has passed as well as Alaska has passed and put into law. The Indiana law has been challenged in their Supreme Court and passed constitutional muster. We did not follow Indiana law in its entirety. They used the same definition as we do in Section 2 of the bill for look-alike controlled substance. What one of the faults that was pointed out to us in the Indiana law is that it provided too much discretion to law enforcement and not enough guidance in terms of the particular qualities of the substance that would actually make it illegal. And so rather than leave that discretion up to law enforcement, we more specifically listed out what factors or indicia would make something a look-alike controlled substance. I'm certainly more than willing to answer the questions in terms of how things are laid out in the bill and whether or not it's difficult to understand. The second and third major provisions in the bill that I'd like to point out is we do have a new criminal penalty. This is not a drug bill. Unlike the bills that we've had before that list out the various chemical names, this is a consumer fraud, consumer protection, misrepresentation bill, and that's what it's designed to be. It's to attack the external factors of the packaging and the substance, rather than relying upon the chemical composition of the substance. So we do have that new criminal portion, which is a Class IV felony. It's going after the manufacturers and the retailers who are nefariously selling these products. And then final provision, as Senator Williams alluded to, was something that we think was desperately needed, and that's adaptation of our Uniform Deceptive Trade Practices Act and giving us several abilities to attack those for injunctive relief and for fines for those that sell this stuff. I'd open...I'm open for any questions anybody has. I ask you to pass LB1009 to the floor and I'm certainly willing to work with whomever to try to make this a better bill. [LB1009]

SENATOR SEILER: The Indiana case,... [LB1009]

COREY O'BRIEN: Yes, sir. [LB1009]

SENATOR SEILER: ...did it...was it similarly structured as a consumer bill rather than a criminal bill? [LB1009]

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COREY O'BRIEN: No, it is a criminal statute... [LB1009]

SENATOR SEILER: It is. [LB1009]

COREY O'BRIEN: ...that they have and they did not...I think they do have portions of UDAAP, but they also have a criminal provision as well. [LB1009]

SENATOR SEILER: Okay. Yes, Senator Coash. [LB1009]

SENATOR COASH: Thank you, Senator Seiler. Corey, along those same lines, what was the grounds for the litigation that went to the Supreme Court in Indiana? What was challenged at the Supreme Court? [LB1009]

COREY O'BRIEN: The challenge was the constitutionality of the definition for look-alike controlled substance, whether or not it was unconstitutionally overbroad or void for vagueness. And the Supreme Court said that their statute, which in my opinion is broader than what we've developed here because it allows law enforcement to make certain considerations, it doesn't tell them what those considerations may be. It says--the Indiana law says--the officer can consider the appearance, the color of the substance. Here we actually give specific guidance on what those things must be, you know, what the representations that the retailers must make, which Indiana does not do. But even in the Indiana case, their Supreme Court said that there was sufficient clarity in the definition of look-alike controlled substance that it was not void for vagueness or unconstitutionally overbroad. [LB1009]

SENATOR COASH: What about the effect? Is that contemplated in this bill? You talked about looks like it, it's advertised like it, but what about the effect of the look-alike? [LB1009]

COREY O'BRIEN: The effect on the human body, is that what you're asking? [LB1009]

SENATOR COASH: Yes. [LB1009]

COREY O'BRIEN: That was not part of the challenge that I saw in the Indiana case. [LB1009]

SENATOR COASH: Is it part of this bill? [LB1009]

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COREY O'BRIEN: Is it part of this bill? Yeah, well, we don't really define what the effect is other than it must replicate an effect that's commonly produced by a controlled substance. [LB1009]

SENATOR COASH: Okay, so that's the definition. It has to replicate the effect of a controlled substance in order for it to qualify here. [LB1009]

COREY O'BRIEN: There are two provisions in, if you look in Section 2, the definition of look-alike controlled substance. There are two ways to actually prove whether it's a look-alike controlled substance. And again, I understand that this might not be entirely clear, the way that it's laid out on the paper. But the first method is it's "portrayed in such a manner by a person to lead another person to reasonably believe that it produces effects on the human body that replicate, mimic, or are intended to simulate the effects produced by a controlled substance on the human body." Or it can be determined to be a look-alike controlled substance if it contains any of the indicia that are contained under (b): the packaging or labeling suggests that the user will achieve a high, and it goes down through (H) in indicating that that's a secondary way to prove that it is a look-alike controlled substance. [LB1009]

SENATOR COASH: Okay, thank you. [LB1009]

COREY O'BRIEN: Sorry if that doesn't answer your question, but... [LB1009]

SENATOR SEILER: Senator Krist. [LB1009]

SENATOR KRIST: We don't have to waste time here doing it, but just the flow of it makes it...it begged the question from Senator Coash and it begged the question from me as well. So I think that's a minor thing, it's cleanup. This, you know, I've watched these things come and go in seven years and this is one of the best ones I've seen and I think it will be around for awhile while the others seemed to go away because they find a way to get around. I applaud your efforts. [LB1009]

COREY O'BRIEN: Well, that was the intention of the bill, Senator. And I actually had brought some props today to actually demonstrate how we thought that the bill would work. But honestly, we're frustrated by having to come here every year and update and Senator Chambers torturing me by making me pronounce 13-syllable words out of 28-405, the Controlled Substances Act. So we think that this might be the tool that we're looking for that focuses on the product and the exterior qualities of the product. [LB1009]

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SENATOR KRIST: I have a theory that Senator McCoy gave this to Senator Williams because he didn't want to try to pronounce those words (inaudible). So thank you very much. [LB1009]

COREY O'BRIEN: Thank you. [LB1009]

SENATOR SEILER: Any further questions? Senator Chambers. [LB1009]

SENATOR CHAMBERS: Not to make it overly serious or complicated, but by analogy would this be similar to the FDA's banning the importation of sodium thiopental for executions because that was not an approved use of and for that drug, do you know? [LB1009]

COREY O'BRIEN: Senator, I've only followed what's been in the paper about that. [LB1009]

SENATOR CHAMBERS: I didn't understand you. [LB1009]

COREY O'BRIEN: I've only followed what's been in the paper about the FDA and... [LB1009]

SENATOR CHAMBERS: Oh, but you didn't work on that yourself. [LB1009]

COREY O'BRIEN: No, sir. [LB1009]

SENATOR CHAMBERS: Oh, okay. [LB1009]

COREY O'BRIEN: No, sir. [LB1009]

SENATOR SEILER: Any further questions? [LB1009]

COREY O'BRIEN: But this commonly is referred to in Alaska as the FDA approach to banning certain substances that we have difficulty banning and keeping out of... [LB1009]

SENATOR SEILER: Thank you very much for your testimony. [LB1009]

COREY O'BRIEN: Thank you. [LB1009]

SENATOR SEILER: Joe. Mr. Joe Kelly. [LB1009]

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JOE KELLY: (Exhibits 2 and 3) Mr. Chairman, members of the committee, my name is Joe Kelly, K-e-l-l-y. My business address is 575 South 10th, Lincoln, Nebraska. I'm the Lancaster County Attorney. I'm testifying on my own and on behalf of the Nebraska County Attorneys Association in favor of LB1009. This K2 bill, as has already been said, does not create a new crime for users, nor does it expand the existing law with regard to those who may have an addiction. The focus is on the retailers. The focus is on what is on the shelf. The three large components consist of the new Class IV felony for those shop owners, the potential for a seizure of cash on hand and, finally, the injunctive relief and civil penalties that go with that under the Deceptive Trade Act. That's the most appealing to me. I'll say a little bit about that in a minute. But again, we're dealing with these packages. This committee is very aware of it. The packages say in language at the bottom quite often, don't inhale, don't ingest, don't take into the human body, yet the artwork and the representations about what this incense does tell you just the opposite. So it's that mixed--intentionally mixed--message sent by the packaging, seen on the packaging, used by the sellers that we hope we can get at through the Deceptive Trade Act. Just last night I went and looked at a few of them on the Internet and again saw the language that they use, at least on the Internet, for some of the more well-known K2 products that are sold commercially. The terms were like "explodes with power," "has incredible power," "lingers longer than other blends," "is one of the heavyweights of incense," and, finally, one that said, "best suited for advanced incense users" and to use it sparingly. So again you have that message that's being very clearly conveyed. Excuse me. I'm over. [LB1009]

SENATOR SEILER: No, you're okay... [LB1009]

JOE KELLY: Oh, am I? Okay. [LB1009]

SENATOR SEILER: ...till the red light. [LB1009]

JOE KELLY: All right--thought we had green. That's the message that's being intentionally conveyed while their language on the bottom of the packet may say something like "don't use this, don't inject it." But it's the deceptive trade practice that's most appealing to me as an improvement in this process of trying to get at those people that put this on the shelves up to \$2000 a day fine coupled with temporary injunctions, permanent injunctions, hopefully something that allows us to get at it. Under the existing Uniform Deceptive Trade Act... [LB1009]

SENATOR SEILER: You may go ahead. [LB1009]

JOE KELLY: ...the county attorney or with...or the Attorney General or the county attorney, with the consent of the AG, may prosecute these, and I would intend to do that in Lincoln. [LB1009]

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SENATOR SEILER: Senator Krist. [LB1009]

SENATOR KRIST: Thanks, Joe. Hey, my question is in terms of...because you are the county attorney. A retailer buys the product from somebody, has it on the shelf. Who then do you prosecute, in what line, and does this allow you to go not just for the retailer but the wholesaler or the provider of the product? [LB1009]

JOE KELLY: I hadn't thought much about the wholesaler. It allows...I think the first avenue and the best avenue is against the person who put it on the shelf and sells it. And I think the reference was to the Indiana case. A lot of the language in that case was about scienter. Much like securities litigation, would a person really know when they're putting this up on their shelf that that's what it is? And we would argue, and I think we could do with adequate investigation to show, that they know exactly what they're putting on the shelf. The kids come and buy it after school. They go across the street to a park and they're using it right there. I mean everybody knows what's going on. [LB1009]

SENATOR KRIST: My concern, as it would follow, is I'd like you to think about that in terms of the change that might be made and if this law does this. You know, it's like the drug dealer: Do I want the guy whose got the nickel bag, dime bag, or do I want the guy who's got a trunk full of stuff? I want the guy who's got the trunk full of stuff, obviously, I think, because then I stop the process, so. [LB1009]

JOE KELLY: Manufacture, production, importation, distribution, they're in there. [LB1009]

SENATOR KRIST: So you can follow the whole line through. [LB1009]

JOE KELLY: Yeah. Yeah. [LB1009]

SENATOR KRIST: Thank you. [LB1009]

SENATOR SEILER: Senator Coash and then Senator Pansing. [LB1009]

SENATOR COASH: Thank you, Mr. Kelly. You said a couple times in your testimony that your intent is to go after those who put it on the shelf but yet you read some things that you found from the Internet, I mean, as far as...this product isn't just being sold at a retail location where the consumer grabs it. More and more what is happening is people are getting on-line, finding it, and it's being...UPS is delivering drugs. How does this bill or how could this bill address that on-line retailer which I think is going to become more and more prevalent? I want to stop this as much

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as anybody, but I have a fear that we may drive it underground in a way that you can't get at it. [LB1009]

JOE KELLY: It could. One thing I looked at when I was thinking in terms of what we see on the shelves today is that maybe a producer ought to just put it in a white package and say nothing, make no representations whatsoever. I don't know. I think you always have that with drugs. You could...because you aren't going to get it off the planet, you're always going to drive it somewhere else. The intent here was to get at stores that are protected by the police and fire, using our streets for their customers, and operating during the 8:00 to 5:00. That's the focus but it is, the language, is more broad. [LB1009]

SENATOR COASH: And then finally I'll ask you this, and then if you want to punt this to the chief who is going to testify soon, can you just give us your sense of this product, at least in Lincoln where you're familiar with? Because, you know, when we started talking about this bill last year, and I've...this is now my eighth year, you know, discussing this in some way, can you give me a sense of the status of the availability of this drug in our community? [LB1009]

JOE KELLY: I'll leave it to the chief. [LB1009]

SENATOR COASH: Okay, fair enough. [LB1009]

JOE KELLY: He's got a better... [LB1009]

SENATOR SEILER: Senator Pansing Brooks. [LB1009]

SENATOR PANSING BROOKS: Thank you for coming, Mr. Kelly. I was just interested, we do have some laws on imitation and also counterfeit (inaudible). So what does this do in addition to those laws? What is not working with those laws as they stand and what would this help you with? [LB1009]

JOE KELLY: For instance, analog is one of those in the statutes along with imitation. Analog doesn't fit in with this because two different scientists, that's what we learned a few sessions ago, two different scientists testing the same substance may reach a different conclusion about whether or not it is an analog. So that wasn't as successful as we thought it would be. The counterfeit is simply giving you salt and saying that I'm selling you heroin. [LB1009]

SENATOR PANSING BROOKS: Okay. [LB1009]

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JOE KELLY: The... [LB1009]

SENATOR PANSING BROOKS: Imitation... [LB1009]

JOE KELLY: ...imitation I don't... [LB1009]

SENATOR PANSING BROOKS: ...seems similar to look-alike, but I don't know. I'm just... [LB1009]

JOE KELLY: Yeah, I mean, the group certainly, as we opened the standard drug statutes in 28-405, we toyed with that. I just...I don't think it fit. [LB1009]

SENATOR PANSING BROOKS: I was just interested. And has... [LB1009]

JOE KELLY: Oh, and it says it's not a controlled substance. Well, technically these others would be a controlled substance. [LB1009]

SENATOR PANSING BROOKS: Okay. And has "look-alike" become a legal term of art... [LB1009]

JOE KELLY: It is a... [LB1009]

SENATOR PANSING BROOKS: ...other places than just us making it up or it is coming as a... [LB1009]

JOE KELLY: Indiana, Alaska, and a few of these other jurisdictions that have tried to dig in against this particular behavior, yeah. I mean it's awkward and it's... [LB1009]

SENATOR PANSING BROOKS: It is. [LB1009]

JOE KELLY: You have to know what the statute defines it as; otherwise, it means whatever any of us think it is. [LB1009]

SENATOR PANSING BROOKS: Have courts ruled on the term "look-alike" yet? [LB1009]

JOE KELLY: The... [LB1009]

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SENATOR PANSING BROOKS: Or once it's defined by statute, is it just a given as to what we mean it to be? [LB1009]

JOE KELLY: Well, back to the Indiana case, they looked at a statute that was called "look-alike." It defined it similar to the way we're defining it and said, yes, there...you can make that a crime and there's enough... [LB1009]

SENATOR PANSING BROOKS: And so the courts, have they upheld that? I just wondered if there have been cases. [LB1009]

JOE KELLY: Yeah, yes. [LB1009]

SENATOR PANSING BROOKS: Yeah. Thank you. [LB1009]

SENATOR SEILER: Any further questions? Senator Chambers. [LB1009]

SENATOR CHAMBERS: In this case you're talking about, was the term "look-alike" just a caption of the statute or it was within the text of the statute itself? [LB1009]

JOE KELLY: "look-alike" is defined. [LB1009]

SENATOR CHAMBERS: Now you were mentioning packaging. Could you go through that again, because I'm not sure that you're talking about a look-alike substance within the package or a package that looks like something else had been what...let me ask it like this. If police are going to get involved, then they have to have probable cause to do whatever it is they're going to do if they are going to behave in a law enforcement fashion. So what would give, create probable cause when we're talking about a look-alike substance, whatever it is, on a shelf? What would create the probable cause, the packaging? [LB1009]

JOE KELLY: The packaging is the first thing you're going to look at. But in...it's not uncommon also to have a complaining party saying, my son has been bringing home packages of "Space Odyssey" that he or she purchased at that store and they're goofy, they're drunk, they're drugged. [LB1009]

SENATOR CHAMBERS: So then if somebody complains and tells you that this package is what the child said the substance came in, when that package is seen, that creates the probable cause? [LB1009]

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JOE KELLY: It could, and of course any officer, whether in uniform or not, if you're working on a criminal case, could walk in and purchase the package and take it to the lab and have it tested to determine what it is. But you'd also be purchasing it to see if it's a K2 substance, if it's a look-alike substance. [LB1009]

SENATOR CHAMBERS: I'd rather have something like what you just mentioned instead of just eyeballing something, because a lot of operations will send stuff through the mail that may or may not be child pornography, and they'll say in a plain, plain brown wrapper. So anything in a plain brown wrapper, because of the way some law enforcement people operate, may be something that would give them probable cause to seize that and do whatever they're going to do with it, and it may not be anything illegal at all. So I would want something beyond just the appearance of the package in which something comes in. But when you mentioned that a purchase will be made, that creates a more solid connection and these other things that I'm thinking about would not even enter into that I don't think. [LB1009]

JOE KELLY: Sure, sure. [LB1009]

SENATOR SEILER: Any further questions? [LB1009]

SENATOR CHAMBERS: Excuse me. The fact that I'm not asking a lot of questions now doesn't mean I don't have questions about the bill, but they're not the kind that I would put to you right now. So it doesn't mean that I have no questions, but I have none that I would ask at this time. [LB1009]

JOE KELLY: Sure. [LB1009]

SENATOR SEILER: I have one. Help me with my memory, Joe. It seems like in about 1980 they passed a look-alike marijuana bill to outlaw people...I remember I tried a case, a jury case, in which the kid was manufacturing alfalfa in Sutton, Nebraska, and packaging it up, selling it to his roommates and that down here at Lincoln. And then they kicked that case out and then in came the imitation. Was it imitation or was it look-alike? [LB1009]

JOE KELLY: I'm not sure if it was either. I can't remember an imitation. What still is on the statutes and is used every so often when you can't show that something is K2 is another state statute for intoxicating substance, anything that causes you...you know, I think over the years it may have been used for helium or Pam, you know, spray, that... [LB1009]

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SENATOR SEILER: Okay. But trying to go after imitations or look-alikes is nothing new. [LB1009]

JOE KELLY: Oh, correct, correct, yeah. [LB1009]

SENATOR SEILER: It goes back to the '80s of my memory, so thank... [LB1009]

JOE KELLY: Yes, sir. [LB1009]

SENATOR SEILER: Yes, Senator Pansing. [LB1009]

SENATOR PANSING BROOKS: I just wanted to ask one more, Mr. Kelly, thank you. In this world of potpourri and candles that...I mean, we have Yankee Candle and all sorts of places. If I'm an idiot and pick up something and think that it's going to help make my house smell good and somebody decides, oh, you're using that for some sort of drug and I don't even realize it, how do we...is it clear, oh, she's...I mean I don't know. I guess I don't know enough about the product, so I don't know how easy it would be for me to buy this thing if they say it's easy to buy. And I'm looking at it but... [LB1009]

JOE KELLY: You could buy it easy, but you'd have no inclination to inhale it. [LB1009]

SENATOR PANSING BROOKS: No, but like you put out little...I put out little vases full... [LB1009]

JOE KELLY: Oh, something... [LB1009]

SENATOR PANSING BROOKS: ...and they're...they have scent on them. Is that something just a totally different world because I don't understand it? I'm sorry not to know. [LB1009]

JOE KELLY: Well,... [LB1009]

SENATOR PANSING BROOKS: But I don't want to by chance pick up the wrong product because somebody said it smells good and then all of a sudden I'm arrested for that. [LB1009]

SENATOR COASH: Do you buy your incense at head shops? [LB1009]

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SENATOR PANSING BROOKS: No (laughter), usually not, but I don't know, so it's usually at...and would I know I'm in a head shop? [LB1009]

SENATOR COASH: I'll help you out. [LB1009]

SENATOR PANSING BROOKS: Okay, Colby, hope you could help me with this. I hope everybody else in the state has somebody with as much knowledge as Colby helping them (laughter), so. [LB1009]

SENATOR SEILER: Any further questions of this...thank you very much, Joe. [LB1009]

SENATOR PANSING BROOKS: Thank you, Senator Coash. [LB1009]

SENATOR SEILER: Spike. [LB1009]

SPIKE EICKHOLT: Good afternoon, Chairman Seiler, members of the committee. Spike Eickholt, first name is S-p-i-k-e, last name E-i-c-k-h-o-l-t, appearing on behalf of the Criminal Defense Attorneys Association in support of the bill. As Senator Williams mentioned, we were invited over the interim to be part of the working group both by Senator Williams and Senator McCoy and we appreciated that. It's rare...not rare, but it was not always the case that we've been invited to take part in these things. As the committee members have said and the previous testifiers have mentioned, this committee and the body have looked at the problem and issues of K2 really every year. It seems like every year there's a bill or bills to address the issue. The defense attorneys have historically opposed any sort of effort to increase the crime for possession or using or having K2, whether it was beyond to make it a felony or just more serious misdemeanor offense. And the reason that we have done that is because our membership often comes into contact with the clients, if you will, or the consumers of K2. And they are, like Ms. Smith related, they are majority young people. To their credit, they don't know much about drugs, drug use. They think they're buying something that is either a mild option or something that could be similar to marijuana or something like that, and then horrible results come about from that. And it was always our position--it still is--that increasing the penalty for a consumer, the user of that, is really just going to compound the problem and not really address it. This bill, as Senator Williams explained and other testifiers have testified to, is a different approach. This targets the retailers. This targets the entities and the businesses that sell these things. The crimes are committed when you market them and when you sell them, and that is a little bit different than some of the existing statutes with respect to imitation of controlled substances. And when our membership looked at this bill, when we were part of the working group, our position was that if we're going to do something in the criminal code, that this is the approach that we endorse. And that's why we're supportive of the bill. [LB1009]

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SENATOR COASH: All right. Thank you, Spike. Any questions for Spike? Thanks for being involved in this. We should learn a lesson from Senator Williams' approach, bring them together. Appreciate your testimony. Chief Peschong, you're up. Welcome. [LB1009]

JIM PESCHONG: Good afternoon, Senators. My name is Jim Peschong, P-e-s-c-h-o-n-g. I'm the chief of police for the city of Lincoln and I'm also testifying as a representative for the Police Officers' Association of Nebraska. We are in support of LB1009. As many of you are aware, last spring the city of Lincoln experienced an epidemic of medical emergencies associated with the use and the subsequent overdose from the use of synthetic cannabinoids in marijuana commonly referred to as K2. More than 100 people overdosed in a matter of a few weeks, including one patient who nearly died when his heart stopped and needed to be resuscitated. As a result of these medical emergencies, our paramedics and hospitals were being pushed to their limits as they also dealt with other medical emergencies in and around our community. Investigating the emerging drug threats has historically been very complicated for a variety of reasons. Ever-changing and evolving synthetic compounds that circumvent current legal definitions and statutes, a conspiratorial nature of the investigations, an over focus on the addicted user, and the complex nature of laboratory examinations contribute to lengthy and time-consuming investigations. Our investigators and prosecutors struggled as we tried to deal with the sale of these dangerous products that were being dispensed while posing a considerable public health threat to our community. As we endeavor to find an avenue to curb this health threat, we were finally able to engage the assistance of the Food and Drug Administration. Together we focused our efforts on the marketing and advertising of substances for the purposes other than which they were intended for. After months of investigative effort and the seizure of 1,200 packets of synthetic marijuana, we were successful in slowing the sale of these products. Subsequently, a 14-count federal indictment was issued charging three people. I believe LB1009 provides law enforcement and prosecutors with some of the necessary tools to more effectively address the sale and distribution of synthetic marijuana that has created such a profound public health crisis. The bill also provides law enforcement and prosecutors with the ability to seize these operations in a more timely manner. Thank you for your consideration, and I would be happy to answer any questions from you. [LB1009]

SENATOR COASH: Thank you, Chief. I asked Mr. Kelly about kind of the status of this product in Lincoln. You mentioned the big bust we had here awhile back. What's the...what are you seeing from a law enforcement perspective with regard to the use of this...these drugs? [LB1009]

JIM PESCHONG: Right now in the city of Lincoln I think that retailers that were selling this are kind of taking a wait-and-see approach to this to see what ultimately does come out of the federal indictments. Obviously, the federal indictment of indicting three people and seizing of the assets of the owners and operators of this business and the taking of the products have had a

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pretty profound effect, and right now I don't think other businesses are willing to put themselves out at risk. [LB1009]

SENATOR COASH: Was it three people in one business or three people in three separate businesses? [LB1009]

JIM PESCHONG: Three people in one business. [LB1009]

SENATOR COASH: Okay. All right. Thank you, Chief. Senator Chambers. [LB1009]

SENATOR CHAMBERS: Chief, you're going to resign, you're going to retire pretty soon, aren't you? [LB1009]

JIM PESCHONG: Yes, I am, Senator. [LB1009]

SENATOR CHAMBERS: By what right do you do that without having discussed it with me? [LB1009]

JIM PESCHONG: (Laughter) I guess I failed to do that, Senator. [LB1009]

SENATOR CHAMBERS: It wouldn't have made any difference, would it, or might it have? [LB1009]

JIM PESCHONG: No. I just need to start slowing things down, Senator. [LB1009]

SENATOR CHAMBERS: Thank you. [LB1009]

SENATOR COASH: Thank you, Senator Chambers. Senator Pansing Brooks. [LB1009]

SENATOR PANSING BROOKS: Chief, I just wanted to thank you for your years of service, over 40 years, I understand, to the city of Lincoln and to... [LB1009]

JIM PESCHONG: Yes. [LB1009]

SENATOR PANSING BROOKS: And you started as a beat officer downtown? [LB1009]

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JIM PESCHONG: Yes, I did, walking third shift. [LB1009]

SENATOR PANSING BROOKS: Yeah, and you've done everything from motorcycle to cruiser to southwest team and northwest team and your service has been exemplary for our city and we have great public safety thanks to your efforts and the efforts of those whom you supervise and lead. And so I know that we all feel grateful for your many years of fine service. Thank you. [LB1009]

JIM PESCHONG: Thank you very much, Senator. [LB1009]

SENATOR COASH: Thank you, Chief. Senator Morfeld. [LB1009]

SENATOR MORFELD: I know I'm just kind of piling on here, but I do want to thank you and Senator Williams for introducing this and then yourself for everything that you guys have done on the K2 issue in Lincoln. Just three blocks south of my house was one of these...one of those stores that shut down. [LB1009]

JIM PESCHONG: Yes. [LB1009]

SENATOR MORFELD: And number one, it's not only a dangerous drug for the user, but it was incredibly dangerous in my neighborhood to have those folks on that walking up and down the street, sometimes walking out into traffic. One walked in front of my car while I was driving on the way, barely saw him because it was dark out. So this is a huge public safety issue and I want to thank Lincoln Police Department's work on that and Senator Williams for trying to address and tackle such a tough issue. [LB1009]

JIM PESCHONG: You're very much right. Normally you could wind up seeing these young men and women going to the stores and within a matter of 100 feet they were opening up the packages and beginning to smoke the product. [LB1009]

SENATOR MORFELD: Yeah, thank you. [LB1009]

SENATOR COASH: Thank you, Chief. Seeing no other questions, thank you again for coming in. [LB1009]

JIM PESCHONG: Thank you. [LB1009]

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SENATOR COASH: Okay, we're going to go to...is Celeste Laird available? Welcome.  
[LB1009]

CELESTE LAIRD: (Exhibit 4) Good afternoon. Senator Seiler and the Judiciary Committee, I am Celeste Laird, C-e-l-e-s-t-e L-a-i-r-d. I am the forensic laboratory manager of the chemistry unit of the Nebraska State Patrol Crime Laboratory. I would like to thank the committee for giving me the opportunity to appear before you today to offer my agency's support testimony on LB1009. The Nebraska State Patrol has participated in some interim discussions, as we've heard, and meetings to develop solutions to the ever-changing problem of synthetic drugs and their impact on Nebraska communities. My remarks today are intended to offer the committee some perspectives relevant to the testing of these substances at the Nebraska State Patrol Crime Laboratory. The current statutory scheme relies on a substance being controlled in order to make the substance prohibited. Among controlled substances, there are both natural drugs and synthetic drugs. Synthetic drugs are produced in a laboratory. Their chemical structure may be identical to or different from naturally occurring drugs. Some synthetic drugs are produced for legitimate medical use and some are produced clandestinely. Over recent years, the number of clandestinely produced synthetic substances has grown exponentially. Many states, including Nebraska, have responded to these types of synthetic drugs by passing laws banning synthetic cannabinoids and stimulants. As soon as the legislatures of these various states ban one particular molecular compound, several new substances become available on the market. Labeling, names, or appearance of these products cannot determine whether they contain a controlled substance. Laboratory testing is the only way to identify the substances and determine whether they are controlled. Testing these items is a time-consuming, labor-intensive process, and laboratory results are not available to law enforcement as quickly as desired to aid in their investigations. Additionally, the challenges of keeping the controlled substance statutes up to date with the ever-changing products has resulted in gaps of time where dangerous substances are not controlled and are available in the marketplace. By focusing on the deceptive trade practices that market these products, LB1009 provides additional avenues for removing substances from availability to the public and does not exclusively rely on testing to determine the identity of the product and would not necessitate it be included in the controlled substance statutes. This better equips the agency labs, law enforcement, and other impacted entities to account for and react to newly created synthetic substances. It is hoped that by controlling the supply side, these harmful substances can be removed from Nebraska and vendors that sell these deceptive products to Nebraskans will be deterred from doing so. I'd like to thank you for carefully considering the information we've provided and the opportunity to testify before you. And I would be happy to answer any questions that you might have. [LB1009]

SENATOR COASH: All right. Thank you, Ms. Laird. What's the turnaround time on your lab's testing for these products? [LB1009]

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CELESTE LAIRD: Currently, not just for these products but any case that's submitted to the controlled substance section, it's about four months. [LB1009]

SENATOR COASH: About four months? [LB1009]

CELESTE LAIRD: That's correct. [LB1009]

SENATOR COASH: Okay. All right, thank you. Senator Pansing Brooks. [LB1009]

SENATOR PANSING BROOKS: Thank you, Senator Coash. Thank you for your testimony today. I was just wondering, Ms. Laird, if...again, the same type of question that I asked County Attorney Kelly. Does this create such a broad and unscientific definition that people that would have potpourri in their home would have a, quote, look-alike substance? Is it going to cast such a broad net that it looks like it? This is not a scientific definition in your estimation, is it, "look-alike"? [LB1009]

CELESTE LAIRD: That is correct. It is not intended to be a scientific definition. [LB1009]

SENATOR PANSING BROOKS: Okay, so if it's not a scientific definition and it's sort of a quasi-legal definition now, or at least term of art, I guess I'm just trying to make sure that we aren't casting such a broad net that it could bring in people who, unbeknownst to them, they've got some potpourri in their house. Have you got potpourri sometimes in your house? [LB1009]

CELESTE LAIRD: Well, and truthfully what I will say is that what I rely on are the scientific definitions. So that question is one that's better posed to law enforcement and the attorneys and it may be one they need to contemplate because this really doesn't impact what we would do at the laboratory. This is for the purpose of investigations and prosecution, not for laboratory testing. So, no, it is not a scientific definition in any way. [LB1009]

SENATOR PANSING BROOKS: So if you were called into a courtroom to testify, what would you be testifying on with this change? Would you be testifying, yes, it looks like some of the chemical substances that we find that violate... [LB1009]

CELESTE LAIRD: I wouldn't be testifying, likely, on this. [LB1009]

SENATOR PANSING BROOKS: Okay. [LB1009]

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CELESTE LAIRD: This statutory change would be outside of the purview of the scientific testing and the laboratory personnel, so this is intended to not be part of the laboratory testing or testimony. I would not testify to that. It's not a scientific definition. This is a legal definition. [LB1009]

SENATOR PANSING BROOKS: Okay. So I guess I'm just interested, so do you go and testify sometimes as to whether or not a substance is some sort of drug substance? [LB1009]

CELESTE LAIRD: We testify to our testing results. So if we are able to test it and identify it and it falls in the controlled substance statutes, we testify to that. [LB1009]

SENATOR PANSING BROOKS: Okay. [LB1009]

CELESTE LAIRD: I don't testify to look-alike or imitation. [LB1009]

SENATOR PANSING BROOKS: Okay. So would potpourri normally fall within any kind of substance, do you know? Have you ever tested potpourri or...I get given things. Like even a car place, I had my car detailed one time and they gave me a bag of potpourri that smelled really good. So I don't know whether or not, if I'm arrested for driving too fast and they find this bag of potpourri, could I be arrested for possession of a substance? Would it test? [LB1009]

CELESTE LAIRD: What the laboratory tests for are things that fall into the controlled substance statutes. [LB1009]

SENATOR PANSING BROOKS: Okay. [LB1009]

CELESTE LAIRD: So unless that potpourri that you were given contained a controlled substance, so something that is listed in 28-405, then we would not testify to it, nor would it be something that would fall under that. [LB1009]

SENATOR PANSING BROOKS: Okay. Have you ever received potpourri that...would potpourri automatically or do you know if it naturally has controlled substances in it, because as I understand, some of the things can be inhaled or ingested if they're burned or...I'm just...I guess maybe I... [LB1009]

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CELESTE LAIRD: I don't believe potpourri that typically would be sold in a legitimate retail facility such as Yankee Candle, as you mentioned, would contain any of the substances that are controlled. [LB1009]

SENATOR PANSING BROOKS: Okay. That helps. Thank you. [LB1009]

CELESTE LAIRD: Okay. [LB1009]

SENATOR COASH: Thank you. [LB1009]

SENATOR SEILER: Senator... [LB1009]

SENATOR COASH: Senator Krist. [LB1009]

SENATOR SEILER: Sorry, go ahead. [LB1009]

SENATOR KRIST: This is...am I okay? Okay. All right. Thanks for coming. We've had a discussion ongoing with the Attorney General's Office, and I know that General Peterson is taking a look at the turnaround time for the labs and the state labs. [LB1009]

CELESTE LAIRD: Yes. [LB1009]

SENATOR KRIST: Is the four-month that you described a function of how long it takes to test or a function of how long it takes to get to that sample to test? [LB1009]

CELESTE LAIRD: It's a function of how long it takes to get to the sample to test. [LB1009]

SENATOR KRIST: And for the record, that means that whoever is being charged is either sitting in jail for four months waiting for a trial or a hearing or is out on bail or bond during that (inaudible) or during that time. [LB1009]

CELESTE LAIRD: I don't know what that means for the people that are waiting, but that means it takes that long to get to them. [LB1009]

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SENATOR KRIST: Yeah, just for the record, the Attorney General representative is saying yes-- he's shaking his head--so it is another issue for another hearing at another time. But we need to fix that problem in the state. Thank you. [LB1009]

SENATOR COASH: Thank you, Senator Krist. Don't see any other questions. Thank you, Ms. Laird. [LB1009]

CELESTE LAIRD: Thank you. [LB1009]

SENATOR COASH: Appreciate your testimony. Is there any other testifiers in support of LB1009? Is there anyone here to testify in opposition of LB1009? Seeing none, is there anybody here to testify in the neutral capacity on LB1009? [LB1009]

MARVIN HAVLAT: Good afternoon, Senator Seiler and members of the Judiciary Committee. My name is Marvin Havlat; that's M-a-r-v-i-n H-a-v-l-a-t, and I live at 1010 Carriage Way, Lincoln, Nebraska. I'm a behavioral scientist and a farmer. And I pay special attention to the drug war because I personally believe that the drug war was started by Richard Nixon on the backs of the Vietnam vets that were coming home. I've personally felt that prejudice because I was totally shut out of this society. I went down to the state employment bureau for a year. I couldn't even get a job interview. It seemed that we were all drug-crazy, PTSD, and we're off our rockers. So you're all going to fail at this, been failing for 40 years. When I worked for the State Patrol, I worked the Denise Stawkowski murder. Three ounces of marijuana, that didn't kill her. The laws that you drew up in here killed her. All the laws you draw up here, they create the Joaquin Guzmans, the Pablo Escobars, "El Chapo." I lived on the Mexican border for 30 years. I detested what was going on down there. I went into Mexico in a square called Tecate. I had 150 Mexicans around and I'd tell them, stop the drugs, why don't you organize and help yourself? Mexicans can't own firearms? And a guy calls up, pulls me--hey, I know what you're trying to do--highly educated--but if anybody tries to organize in Mexico, the government will come out and shoot them dead. And that's the facts. I've seen this drug war from in prison and outside of prison. I've been indicted twice, once at the Nebraska State level and once at the federal level. The Nebraska State Patrol sold (inaudible) from the evidence storage locker when I worked for them into the (inaudible). They used...trustees don't get searched. You want to know something about the prison system, correctional center? No, it's a diseased pit. I spent time in Salt Lake County Jail, 700 percent capacity. People tell me I should write books about what I saw in there. You're not going to win. (Inaudible) smoke this stuff...well, I went to a convention in Colorado last year. Doctors spoke, nurses for medical marijuana spoke, state senators spoke, I mean, people who made things out of hemp. And I left there and I said, wow, these people, especially that lawyer that graduated from the University of Nebraska who is working, formulating the laws... [LB1009]

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SENATOR COASH: Thank you. [LB1009]

MARVIN HAVLAT: ...that are in flux... [LB1009]

SENATOR COASH: Thank you, Mr. Havlat. [LB1009]

MARVIN HAVLAT: You're failing. [LB1009]

SENATOR COASH: (Exhibits 5-7) Thank you for your time, testimony. Is anybody else here to speak in the neutral capacity? Seeing none, Senator Williams, did you want to close? And while you're coming up here, I'm going to read into the record a few letters of support the committee has received from the Nebraska Pharmacists Association, the State Board of Health, and the Nebraska Petroleum Marketers and Convenience Store Association as well. So, Senator Williams, you're recognized to close. [LB1009]

SENATOR WILLIAMS: Thanks, everyone, for taking the time to work on this today. A couple of comments back to questions that were made. Remember, the intent of this bill is to take K2 off the shelves and keep it off the shelves and not criminalize the possession of K2. So to Senator Patty Pansing Brooks, this bill does not criminalize the possession of a look-alike substance. [LB1009]

SENATOR PANSING BROOKS: Okay. [LB1009]

SENATOR WILLIAMS: So your potpourri... [LB1009]

SENATOR PANSING BROOKS: So I... [LB1009]

SENATOR WILLIAMS: (Laughter) Unless your potpourri is packaged like this,... [LB1009]

SENATOR PANSING BROOKS: "Scooby Doo"? Okay. [LB1009]

SENATOR WILLIAMS: ...and you look like that Scooby Doo... [LB1009]

SENATOR PANSING BROOKS: Okay. [LB1009]

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SENATOR WILLIAMS: Also I wanted to read this into the record because I think this is helpful. This was handed to me by Corey O'Brien for a definition. In current statute, imitation controlled substance is when a person sells alfalfa and represents it to a buyer to be marijuana and it later turns out to test as alfalfa because they are...cannot be found guilty then of delivering a controlled substance. This doesn't work for K2 because there they are representing the product as a legal product or something that is not a controlled substance, and that's why the definitional change with staying away from the use of imitation drug. A big thanks to everyone, especially those that are on this list, that devoted their time and efforts to trying to do what we've been trying to do for a time. We have, as Senator Coash mentioned, and Senator Morfeld, in Lincoln in particular we just have a very small handful of retailers that are trying to profit from the sale of a very, very dangerous product. And I find that detesting to me, I mean, that these people would prey on our young people in particular in a way that they know what they are selling. And hopefully, with the penalties that we would create with LB1009, we can stop that. I do want to make it clear, and I think Celeste Laird hinted at this. Don't think for a minute we probably won't be back at some time to have to continue to update that pharmaceutical list. We'll still probably be needing to do that even with LB1009, but that's not our goal today. So thank you for your time and your work today and hopefully we'll be able to move quickly on this. Thank you. [LB1009]

SENATOR SEILER: Any further? [LB1009]

SENATOR COASH: Thank you, Senator Williams. [LB1009]

SENATOR SEILER: LB932, Senator Crawford. Thanks, Colby. Go ahead. [LB932]

SENATOR CRAWFORD: (Exhibit 1) Good afternoon, Chairman Seiler, members of the Judiciary Committee. My name is Sue Crawford, S-u-e C-r-a-w-f-o-r-d, and I represent the 45th Legislative District of Bellevue, Offutt, and eastern Sarpy County. Condo associations are substantially similar to many other nonprofit organizations in terms of their governing structure and treatment in the tax code. The organizations are served by a board of directors, serve some public function, along with private functions, and do not pay income taxes, yet condo associations are treated differently than other nonprofit organizations in our nonprofit laws that provide individual civil immunity for directors, officers, and trustees. LB932 would include condo associations in the list of nonprofit organizations that have individual civil liabilities protections. Let me clarify this immunity is for the individuals serving in these organizations; it is not an immunity for the organizations themselves. In 1987, LB67 granted individual sole immunity to several kinds of nonprofit organizations. The list in current law includes hospitals, homeowner associations, and fraternal associations, among others. A review of the legislative record of the floor debate and hearing on LB67 from 1987 does not show evidence of discussion of condo associations, so there's not a record they were considered and rejected. Although condo

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associations are similar to homeowner associations, they have a different tax code, so they are not covered under the existing statute. The pages are now circulating a copy of the relevant statutes for the bill for your review. And you'll see at the top of the statute has a list of several IRS designations that are included in our individual civil liability protections, and that is how those are designated, is which kinds of nonprofit organizations are covered. The idea for LB932 was brought to me a constituent, Chuck Hutchison, who is here to testify today. Chuck currently serves on a condominium board that has faced difficulties because of their individual liability exposure. As you will hear from Chuck, this exclusion has been used by a real estate developer when negotiations over financing broke down. In this case the developer tried to intimidate the condo association into meeting his demands by naming not only the association but individual board members in his suit. The association's attorney tried to get the individual board members dismissed from the case twice using the nonprofit immunity statute. However, the court ruled that condo associations do not meet the current definition of nonprofit organizations in this chapter of our statutes that provides the individual civil liability protections for nonprofit organizations. This current provision has made it difficult for the association to recruit board members, who serve a valuable role in the association. Potential board members are unwilling to serve out of the fear of being sued, which is clearly a realistic fear since past individual members were recently sued. LB932 adds not-for-profit condominium associations organized under the Nebraska Condominium Act to the definition of nonprofit organizations in Chapter 25-21 for the purposes of providing civil immunity for individual condominium association board members. I propose that individual board members of condo associations should have similar protections to those afforded to board members of homeowner associations, which are 501(c)(4) organizations, and other nonprofit organizations that we currently grant this protection. I'm happy to answer any questions you have now; however, I will be here for closing and can answer questions then if you prefer to hear other testimony first. [LB932]

SENATOR SEILER: Questions? Seeing none, thank you. [LB932]

SENATOR CRAWFORD: Thank you. [LB932]

SENATOR SEILER: First proponent. [LB932]

CHUCK HUTCHISON: (Exhibit 2) Chairman Seiler and members of the Judiciary Committee, thank you for the opportunity to testify in support of LB932. My name is Chuck Hutchison; that's H-u-t-c-h-i-s-o-n, from Bellevue, and I moved into my condo at Tregaron Ridge in 2007. Developer went out of business less than a year later and I was elected president of the first board that consisted of unit owners in 2010. I have served as the association's president since that time. After a new real estate developer purchased the remaining undeveloped land, we negotiated for two years and crafted an agreement on how to allocate shared expenses and replat the lot so

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their development could proceed. Six weeks after signing the agreement, the developer insisted we make changes to satisfy their lender and threatened to sue us if we did not. We agreed to most of the changes, but could not resolve the final issue, and they filed suit in June of 2012 for tortuously interfering with their business objectives. Suit was filed against the association and five current and former board members, including one who sold his unit before any of these events occurred. Basically, the plaintiff obtained a copy of the biennial report filed with the Secretary of State's Office and filed against each person listed without any reason to suspect that the individuals had personally interfered with their ability to obtain financing. It is clear to me that the plaintiff filed suit as a negotiating tactic and included the individuals in order to obtain greater leverage. Fortunately, we had a directors and officers liability policy that paid for our defense. Unfortunately, the same carrier dropped us from further coverage after paying more than \$100,000 in defense costs, and our annual premium increased from about \$1,000 to nearly \$8,000 with a specialty high-risk carrier. During the three and a half years of the lawsuit, our attorney filed two motions for summary judgment to dismiss the individuals from the lawsuit; both motions were denied due to the high bar necessary to prove that there were not any material fact questions. The first motion attempted to use the nonprofit immunity statute, but the court ruled that condo associations do not meet the statute's definition for nonprofit. The statute's definition of nonprofit is actually better described as tax exempt as it references some of the exempt sections of the Internal Revenue Code. Condo associations are not exempt although the income received from owner assessments is exempt from taxation. I believe our association is typical in that our only taxable income is interest earned in our bank account, although it does not exceed the \$100 deduction allowed by the IRS. As a result, our association has never paid income taxes. In other words, even though our association is a nonprofit corporation, has never paid taxes, our volunteer directors are not covered by the state's nonprofit immunity statute. As with most condominiums, our condo units are individually owned and all other portions of the real estate are owned in common by all of the owners. For the management of the condominium, an owners association is required that consists exclusively of the unit owners. The association is organized as a nonprofit corporation and has a board of directors elected by the owners. Serving on the board of directors of an association is an important responsibility and can be a rewarding experience. But many people... [LB932]

SENATOR SEILER: Sir, your red light is on. [LB932]

CHUCK HUTCHISON: Okay. Are there any questions? [LB932]

SENATOR COASH: Did you have anything you wanted to finish up? It sounded like you were just about done. [LB932]

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CHUCK HUTCHISON: All I would say is they put our board through quite a bit, both the current and former board members, through quite a bit of stress during the three and a half years. And when the other members of our association heard of that, they did not want to serve on the board and it made it very difficult. The duties that we do is a lot like a village board. It's very important and I think it's up to the state to help provide us with immunity. Thank you. [LB932]

SENATOR COASH: Okay. Thank you. [LB932]

SENATOR SEILER: Any questions? Did you or the senator receive a...some kind of a letter from an attorney saying this would be a tax-exempt and you would be not subject to the liabilities acts in Nebraska? [LB932]

CHUCK HUTCHISON: In our lawsuit where the attorney that was defending us that was retained by the insurance company filed to have a motion for summary judgment in order to have us dismissed from the lawsuit based on the current statute, and the court ruled that we did not meet the standards by the statute because of... [LB932]

SENATOR SEILER: I understand. But did he give you an Opinion that if we pass this law, you will be exempt? [LB932]

CHUCK HUTCHISON: He has not done that, but I think it's pretty clear to me that... [LB932]

SENATOR SEILER: Okay. That's what I wanted to know. [LB932]

CHUCK HUTCHISON: ...that should work. He did write a letter on behalf. The same attorney wrote a letter on our behalf for this particular bill in support of the bill, but did not render that specific Opinion. [LB932]

SENATOR SEILER: Okay, thank you. Any further? Senator Pansing Brooks. [LB932]

SENATOR PANSING BROOKS: Thank you. Does the...does your organization have insurance? [LB932]

CHUCK HUTCHISON: Yes, we do. We have a directors and officers liability policy that defended us, so the \$100,000 in costs that were incurred were paid by our insurance company. And they also helped to pay to settle the lawsuit, so the entire amount that the insurance company paid was probably on the order of about \$500,000. [LB932]

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SENATOR PANSING BROOKS: And is the insurance company here today, do you know? [LB932]

CHUCK HUTCHISON: The insurance company is not here today as far as I know. I will say that it took three and a half years. The association and each of the defendant individuals were also...received compensation out of that settlement package. [LB932]

SENATOR PANSING BROOKS: Thank you. Thank you for coming today. [LB932]

CHUCK HUTCHISON: Sure. [LB932]

SENATOR SEILER: Any further questions? Thank you. Any further proponent? Seeing none, any opposition? [LB932]

JOHN LINDSAY: Thank you, Senator Seiler, members of the committee. For the record, my name is John Lindsay, L-i-n-d-s-a-y, appearing on behalf of the Nebraska Association of Trial Attorneys in opposition to the bill. I first want to thank Senator Crawford, who reached out to our association prior to introducing the bill to see if there was some way to address the issue prior to the introduction of the bill, and we really do appreciate that and we will continue to work with Senator Crawford on the issue. First I...you've heard me here say it before that when you relieve people of responsibility for their actions, which is fundamentally what this would do, we simply become less careful because there is no accountability for their actions. And so that's the standard I think comment that you hear from us on any type of an immunity from liability situation. But in this case, as I did more research--I actually did more research this morning on the Condominium Act--it appears to me that the Legislature very carefully considered liability issues when they passed the Condominium Act in 1983, 1984, which of course the only one in the room who was around at that time has stepped out for a moment. But the...at that time they passed that they, the Legislature, specifically addressed liability. And one of them, Senator Pansing Brooks, the...was raised in a question of is there insurance and, as you heard, there was, which is exactly how it's supposed to work. The defense costs I think were mentioned were \$100,000. If they don't insure because they have no liability, they're going to personally absorb those defense costs, which are...it's typically the greatest benefit of an insurance policy. But in 76-860, one of the powers of a unit owners association is, specifically, "provide for the indemnification of its officers and executive board and maintain directors' and officers' liability insurance." The Legislature when they adopted the act said, hey, we're going to specifically empower you to go get the insurance that their association very responsibly did, and it benefited those directors and officers who received that defense. I suggest that a condo association, a unit owners association is a little bit different from a homeowners association in that there's a financial interest that the condo association owners jointly own the common areas and that board

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has a financial interest in what the association dues is set at, and so their question of how much do we put into maintenance and repair, replacement of common areas, which again is a specific power of the unit owners association. Secondly, the Legislature at that time adopted 76-869 which had specific tort and contract...I'm sorry. We would urge that the Legislature...that this committee indefinitely postpone. [LB932]

SENATOR SEILER: Senator Pansing. [LB932]

SENATOR PANSING BROOKS: I'd like to hear whatever that statute was. [LB932]

JOHN LINDSAY: Thank you, Senator. (Chapter) 76-869 specifically addressed tort and contract liability, in this case vis-a-vis the declarant or the entity that would own multiple units in the process of selling those units. But it was clearly on the Legislature's mind at that time. Then finally: suggest you look also at 76-871 which clearly specifies insurance that the condo unit association must obtain. So I think liability was carefully considered by the Legislature at that time. A scheme was established to protect those officers and board members, and I would suggest that I think it worked in the case that was just specified. [LB932]

SENATOR SEILER: Go ahead. [LB932]

SENATOR PANSING BROOKS: So thank you, Chairman Seiler. That was 76-871 and 70...I didn't get that first one on the specific contract liability. [LB932]

JOHN LINDSAY: 76-... [LB932]

SENATOR PANSING BROOKS: 689? [LB932]

JOHN LINDSAY: ...869. And it's...I think the three to take a look at are: 76-860, which is the authority of the unit owners association which specifically authorizes the purchase of D&O coverage; and then 76-869 showing that the Legislature looked at tort and contract liability between the declarant and the association; and then 76-871, which talks about specific insurance requirements that the association must adhere to. [LB932]

SENATOR PANSING BROOKS: So I was just wondering, as you looked at...you were looking at the history of some of the legislative history on the bill or whatever created the condo association legal form and so I'm wondering, when they created that, they made a difference between townhomes because townhomes you do own the ground underneath, is that correct? And then whereas condos... [LB932]

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JOHN LINDSAY: That's my understanding. I didn't get that far into the weeds on the research end. [LB932]

SENATOR PANSING BROOKS: Okay. So I presume that there are specific reasons people want a condo where they share in the joint ownership of the common areas, as you said. So I don't know if that has different tax ramifications. I presume that it does if you jointly and severally own the common land, versus another kind of situation where you own what's directly beneath your property, so you would be taxed only on the property underneath what you have and then some sort of assessment. So I don't know. I'm just trying to figure out. It sounds like there's a difference in liability because of the directors in a condo association have different kinds of liability from a townhome situation. Is that your understanding of that? [LB932]

JOHN LINDSAY: There's...I think you're absolutely correct that there's different treatment of a condo units association and a, for example, homeowners association. I think that, yes, there's clearly a difference in the treatment. One is covered by the general statute and one is not. [LB932]

SENATOR PANSING BROOKS: Okay, so I guess part of it is just people going into a situation where they buy property and don't realize how they're going to have to follow through on the treatment of their...I mean they can be forced to do certain things under the condo laws versus the other kinds of laws that govern other types of home ownership. [LB932]

JOHN LINDSAY: Yeah, and I think that's totally true, which is...but those individuals who are sitting on that board and face the potential exposure are the same people who decide whether to obtain directors and officers liability coverage to protect themselves. It's totally within their control to protect themselves and that cost, being that they're volunteer members of the board, that cost is spread over the entire condo association because it's a cost of doing business for that condo unit association. [LB932]

SENATOR PANSING BROOKS: Okay, thank you. [LB932]

SENATOR SEILER: I can tell you the Lancaster assessor is not very kind to condo owners (laughter). Anything further? Thank you. [LB932]

SENATOR CRAWFORD: Thank you. [LB932]

SENATOR SEILER: Any further opposition? Seeing nobody moving, anybody in the neutral? You may close. [LB932]

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SENATOR CRAWFORD: Thank you. Thank you, committee members. I believe that really a key question for the committee and for the body is whether or not condo associations are distinctly different than those other organizations that we provide this protection for. And I know that you have just heard that we do have the condo association act that allows the condo association to purchase insurance and indicates they actually must purchase insurance. And I think that that actually provides an important protection so that it is possible to grant the immunity, because I think one of the concerns that gets raised when you grant immunity is that then people don't buy insurance and that creates a challenge. And so I think the fact that in this case we have provisions that allow for the purchase of insurance and actually mandates the purchase of insurance, that helps to not leave us in the situation that we sometimes are worried about with the risk of give someone liability immunity and then that they don't protect themselves with insurance, and we've already taken care of that. It is true that they had insurance that did take care of the members; however, it is the case that after this suit their annual premiums increased from \$1,000 to nearly \$8,000. So it's not as if being mentioned in the lawsuit had no financial impact on them or the whole, the entire condo association, because the condo association has to pay that increase in premiums because of that suit. So I would....I'm happy to work further with members of the committee on this question and to assess whether or not to include them in this list. Again, as you see in the statute, we provide this protection to many of our different kinds of nonprofit organizations and the key question is, does it make sense to provide it to this condo association which happens to not be on that list? [LB932]

SENATOR SEILER: Senator Pansing Brooks. [LB932]

SENATOR PANSING BROOKS: Okay, well, so how would your bill...thank you for coming, Senator Crawford. [LB932]

SENATOR CRAWFORD: Yeah. [LB932]

SENATOR PANSING BROOKS: How would your bill stop that kind of lawsuit? I don't really get... [LB932]

SENATOR CRAWFORD: So in the case...the lawyer asked to have individuals removed from the lawsuit and the response was that they could...the individuals could not be removed because the condo associations aren't in that list that's in our current statutes of nonprofit organizations that are exempt. So our...this bill would add condo associations to that list that exempts the individual boards of directors. And so in that case, if the...it's my understanding if we pass this bill, if a similar suit is made, then there would be...the attorney would be able to remove the individual board members from the suit because they would have individual civil... [LB932]

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SENATOR PANSING BROOKS: Well, all the boards I've been on, we all get directors and officers liability insurance. So those are all for us as board members. [LB932]

SENATOR CRAWFORD: Right, right. [LB932]

SENATOR PANSING BROOKS: So... [LB932]

SENATOR CRAWFORD: And I think what you want insurance, one of the reasons you need insurance is you need to pay that attorney to go take your names off of that suit. [LB932]

SENATOR PANSING BROOKS: I think it's much farther than that, but anyway, I'll check into this on that. Thank you. [LB932]

SENATOR CRAWFORD: Sure. Absolutely. Thank you. [LB932]

SENATOR SEILER: (Exhibit 3) Any further questions? I have a letter here from Terry Grennan from Cassem, Tierney, Adams, Gotch and Douglas, a law firm in Omaha, and they are just asking us to support this to protect the board members. Anything further? I'll close the record. [LB932]

SENATOR CRAWFORD: No. Thank you. [LB932]

SENATOR SEILER: Okay. Thank you. LB854, Senator Coash. [LB854]

SENATOR COASH: Thank you, Chairman Seiler. Good afternoon, members. Colby Coash, C-o-l-b-y C-o-a-s-h. I represent the 27th District right here in Lincoln, and I'm here to introduce LB854, which creates the Self-Service Storage Facilities Act and modernizes its lien statutes. As a property owner, an investment property owner, I've always found it curious that our...the statutes that govern the Landlord and Tenant Act are also the statutes that include the Self-Storage Act, and really those are two very separate things. Renting a house to somebody, or an apartment, and then renting a storage facility really have very different dynamics to them. So one of the things that this bill does is give them their own set of statutes under the Self-Storage Act, as it's being called here. Alaska and Nebraska are the only two states where there are no state laws establishing a process allowing self-storage facilities to apply liens or conduct auctions if their renters violate their lease agreements. Currently self-storage facilities rely on contracts with tenants and those contracts vary and there is no universal contract for each facility. Passing LB854 will provide some clarity for self-storage facilities in order to enable an updated process for self-storage operators to create efficiencies that benefit both the customers and the

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businesses. The Nebraska Self Storage Owners Association was formed a few years ago and now includes over 40 owners and vendor members; however, there are hundreds of owners across the state. And in the past few years, over 20 states have passed similar legislation to LB854. LB854 will help reduce self-storage facilities' costs while more effective operating methods...when more effective operating methods are employed. In delinquent tenant cases, the fewer expenses related to the late and lien notice procedures will result in less cost owed by these tenants. LB854 modernizes methods of notice delivery to allow for e-mail, hand-delivery, or any verified mail through the U.S. Postal Service. E-mail notifications are typically the preferred method for being contacted and e-mails cut down on paper resources and postage. The bill does not allow for a self-storage facility to be used for residential purposes and allows the operator upon reasonable request to enter the leased space for inspection or repair. But if an emergency exists, the operator may enter the leased space for inspection without consent of the occupant. The operator of a self-storage facility shall have a lien upon all of the occupant's personal property located in the self-storage facility for rent, labor, or other charges incurred pursuant to the rental agreement, and for expenses incurred for the preservation, sale, or disposition of the property. The personal property stored in the leased space may be sold to satisfy the lien if the occupant is in default. If an occupant is in default, the operator may refuse access to the leased space at the facility. If the occupant is in default for over 45 days, the operator may enforce the lien and sell the occupant's personal property for cash in any public or private proceeding. The operator must send notice of default at least 45 days prior to the sale and request payment for default which shall be no less than 10 days after the notice. And at least seven days before the sale, the operator must advertise it as in the newspaper. LB854 provides an alternative solution for self-storage operators if the delinquent or abandoned rental is a vehicle, recreational vehicle, or watercraft. If rent remains unpaid for 60 days, the operator has the option to tow the vehicle from the property, rather than sell it at a lien sale. Vehicle liens are more complicated than typical self-storage lien circumstances, and providing an option to have the vehicles towed provides a simple solution because towing companies are better prepared to proceed with a vehicle lien situation, similar to garages or retail parking facilities. If a sale is held, an operator shall satisfy the lien with the proceeds of the sale and hold the balance for a year. If the occupant does not claim the property after one year, the remaining proceeds shall be considered abandoned property to be reported and paid to the State Treasurer in accordance with the Uniform Disposition of Unclaimed Property (Act). LB854 is designed to give the self-storage operator some clear control over the rented premises. And I thank you for your time. And I have some people from the Nebraska Self Storage Facilities Association who will follow my testimony, could also answer some questions for you. [LB854]

SENATOR SEILER: Senator Krist. [LB854]

SENATOR KRIST: On any of those times that you read to us, when does the actual timetable start? [LB854]

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SENATOR COASH: Well, the lien attaches at the time of...that you rent the property, so the minute...it's not like the lien doesn't...the lien attaches the minute you put something in the self-storage facility, but the time lines--I want to be clear that I get this for you--is that it is 45 days is considered late, and then you have extra time for notices. And any time--and I didn't say this in my opening--at any time in that process prior to the sale, if the tenant comes in and says, okay, here's all the money I owe you, all bets are off, the liens are removed and you move forward. [LB854]

SENATOR KRIST: Is the lawyer Wesely going to come up and talk to us? [LB854]

SENATOR COASH: I hope so. [LB854]

SENATOR KRIST: Okay, thank you. I'll ask him the other question. Thanks. [LB854]

SENATOR SEILER: Any further questions? Senator Williams. [LB854]

SENATOR WILLIAMS: And maybe this is a question better for Mr. Wesely, but so you said the lien attaches from the minute they put the stuff in. [LB854]

SENATOR COASH: Yes. [LB854]

SENATOR WILLIAMS: What about prior liens that could be on the property already? [LB854]

SENATOR COASH: There are two things that I would point you to, and I'm looking at page 4. Line 3 says the lien attaches on the date wherein it's placed in the leased space, so that... [LB854]

SENATOR PANSING BROOKS: What line are you on? Sorry. [LB854]

SENATOR COASH: Page 4, line 3 identifies when the lien attaches. So the lien described here attaches on the date on which personal property is placed in the space. The language prior to that, which starts on page 3 and goes into page 4, talks about that the lien established shall have priority over all other liens, except for liens that have been perfected and recorded on such personal property and tax liens. [LB854]

SENATOR WILLIAMS: Okay, thank you. [LB854]

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SENATOR COASH: To be frank, and I've dealt with this industry before, this...we're usually talking about junk and what a storage facility operator has to do with items that don't have a lot of value. Vehicles have value, but they have a title attached to them and that's easy to deal with and that's...those are easy to track. What this is designed to do is give some clarity over how long do you have to hang on to somebody's property before you can say, you know what, I'm going to try to sell it, if I can't sell it, I can get rid of it if it doesn't have any value, and this is what I can do with it. Thank you. [LB854]

SENATOR SEILER: Thank you. Proponent. [LB854]

WILLIAM LANGE: Chairman Seiler, members of the Judiciary Committee, my name is William, W-i-l-l-i-a-m, Lange, L-a-n-g-e. I am the president of the Nebraska Self Storage Owners Association, or NSSOA, come before you to ask for some clarity in the laws for self-storage owners. Nebraska and Alaska are the only two states in the nation that do not have self-storage laws that are written particularly for self-storage. Right now a lot of people are using the Landlord and Tenant Act. Some people, when they want to get rid of the property that had...you know, that there's past due rent on, are using the abandoned property act. I've seen places where somebody's brother-in-law out of Florida, which supposedly have the best lien laws in the country, they're using that lease agreement and changing Florida to Nebraska. What we're looking for is some clarity and guidelines from the law to put some order into how these self-storage facilities are run and narrow the scope of what can be done. Kind of in summary, we're looking for a time line and a process to execute lien loss that generally everybody has to follow. In addition, we're asking that the storage units not be allowed to be used for residential purposes. And also, referring to the electronic mail, we would like to use that as some of the...a lot of the units are rented to people that are in transition, moving from one place to another, and it is really hard and difficult to keep up with the moves they're making. And almost everybody uses e-mail today, so that would be a, you know, a lot better ways to keep track of where the renters are. So basically that's all I have. If you have any questions, well, I... [LB854]

SENATOR SEILER: Senator Williams. [LB854]

SENATOR WILLIAMS: Thank you, Chairman Seiler, and thank you, Mr. Lange, for being here. In driving around my district, which is a rural district, it doesn't seem to matter how small the community is, there are storage units. [LB854]

WILLIAM LANGE: Correct. [LB854]

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SENATOR WILLIAMS: Can you give me an idea from being president of your association how many storage units...or what size of this amount of business is in our state? Do you have any concept of that? [LB854]

WILLIAM LANGE: I have a list of about 550 facilities in Nebraska, you know, basically, like you say, every town, so the number... [LB854]

SENATOR WILLIAMS: So just to be on the record, so this is not just an issue here in Lincoln or Omaha. [LB854]

WILLIAM LANGE: Oh, no. [LB854]

SENATOR WILLIAMS: This issue exists across the entire state. [LB854]

WILLIAM LANGE: It probably...what the people use for their lease agreements is probably a lot less structured in the rural areas than it is, you know, in the metropolitan areas. [LB854]

SENATOR WILLIAMS: Thank you. [LB854]

WILLIAM LANGE: You're welcome. [LB854]

SENATOR SEILER: Seeing no further questions, thank you. [LB854]

WILLIAM LANGE: Thank you. [LB854]

SENATOR SEILER: Next proponent. [LB854]

BERNARD ZELASNEY: Chairman Seiler, members of the committee, my name is Bernard Zelasney, B-e-r-n-a-r-d Z-e-l-a-s-n-e-y. I'm appearing here today on behalf of the Nebraska Self Storage Owners Association and on behalf of my own property, Secure Care Self Storage, located in North Platte, Nebraska. And I'm asking to be treated like an auto repairman or like a contractor. I want a lien. I want an opportunity to collect a debt. I want to be paid. That's all I'm asking for. In the past we've had to rely on the abandoned property act. And the abandoned property act, while it does give us some relief, it in many cases raises more questions than answers. And so following with 48 other states, we're requesting basically what is a uniform self-storage act. Each state probably has some minor differences, but the substance of it is a process

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by which we address a very serious problem, which is the abandonment or the nonpayment by tenants. And with that in mind, I respectfully ask for your support of LB854. [LB854]

SENATOR SEILER: Any further questions? Thank you for your testimony. [LB854]

DON WESELY: (Exhibits 1-3) Mr. Chairman, members of the Judiciary Committee, for the record, my name is Don Wesely, D-o-n W-e-s-e-l-y, here representing the Self Storage Association. Thank you very much, Senator Coash, for introducing the bill; Senator Seiler, for cosponsoring the bill. I think what you've heard is that we've had this gray area now for many years. And the self-storage industry is just booming. I mean it's amazing how many more units there are, and it continues to grow. We need clarity in how to deal with these limited situations. In talking to Bernie earlier, it's like less than 1 percent of the time you have a situation where this act or this proposal would come into play. So it doesn't happen often, but it causes all kinds of problems for these owners and it causes problems for those who are renting as well. I'll give you one example. In one of our meetings we talk about there was one of these self-storage units had a car that somebody brought in and they were for awhile paying rent, then they disappeared and the owner wanted to deal with this: What can I do with this car sitting on my property, because it's taking up space, I'd like to rent it to somebody else. Went to the sheriff. It's in a rural county here. And the sheriff says, I don't see any law to deal with this, I don't know what to do. So this poor owner of this self-storage unit facility, six years that car has been sitting on his property. He still doesn't know what to do with it. And the situation is repeated with some of these other units as well. We need to figure out a time line and a process. So these individuals, it's not that they're going to make a whole lot of money; they just don't want the property sitting there for months and months and years and years in some cases. In the case of the motor vehicle, for instance, or a boat now under this statute, I think it's after 60 days they could tow it off somewhere, and at least it's off their property and they could rent it to somebody else, that space. So there it's clarity-- here's what you can do, here's the law--and then you can take action, and that's what this proposal will do. Senator Krist, you were talking about maybe the time frame that this would follow. Essentially it's a 45-day default period where you're due to pay, you don't pay for 45 days. Then essentially there would be notice that you're in default and that a potential sale can occur. That's in another 45 days, so basically you're talking about a 90-day period from the point you don't pay through the point that something can be done about it. I don't think these guys are going to adhere to a strict, you know...they're pretty willing to work with folks on things. But it's a minimum of 90 days. There also has to be notice seven days prior to the sale--public notice, e-mail, Internet, what have you--and then they have to have at least three bidders for that property that they want to put up for sale. So that's the process they have in place. The bankers association has come and talked to us, and it's that last step on notices that we need to work with them on an amendment, and we're committed to do that with the bankers association that they don't know that everybody that needs to know about the sale of property will. And so we're willing to work on that as well. And also, on the 45-day period, the bar association has raised concern about that

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time frame and, again, we're willing to work on it. Our goal is to get something that everybody feels comfortable with but to get something, because what we have now is just unmanageable for these individuals and unclear to the public, as well as the owners. So, happy to answer any questions. [LB854]

SENATOR SEILER: Senator Krist. [LB854]

SENATOR KRIST: So you described the time line and you're going to work a time line out with the bar association. I understand the concern from the bankers' perspective because they don't want to lose their lien first and at the first...you're saying this goes first except where there is...and that's language I'm sure you're going to work out with the banks. [LB854]

DON WESELY: Well, that part of it is fine because if there is already a lien on a perfected lien, that takes precedence over this lien. [LB854]

SENATOR KRIST: Okay. [LB854]

DON WESELY: So that's fine. The problem is letting the folks with that perfected lien know about the situation, know about the sale, and so that's where we've got to enhance the notice sections of this. [LB854]

SENATOR KRIST: Okay. And then so my only concern, having heard your discussion and knowing what you're going to work out with that one, my only concern is that you're going to consider a notice delivered to an individual when you put it in the mail or when you send the e-mail? And I quite frankly, I mean, I've gotten phone calls 20, 30 days after somebody sent me an e-mail saying, don't you ever read your e-mails? Okay, I got it. So when...I think that somehow I think we have to have a two-way communication to notify someone that you're going to take action. [LB854]

DON WESELY: Okay. [LB854]

SENATOR KRIST: So I'd like to see something that says e-mail notification will be verified by return sender,... [LB854]

DON WESELY: Okay. [LB854]

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SENATOR KRIST: ...registered mail is required, whatever it takes to actually notify. And I come at this from a deployed military side where you leave for 90 days, you may give a gentleman your home e-mail address and you're deployed to a location where you're on government, which you don't give to anybody. Now there is an e-mail notification that goes out. It goes to your home or apartment. You're a single guy. You get my scenario here. [LB854]

DON WESELY: Absolutely. [LB854]

SENATOR KRIST: So positive feedback from the person that you're going to take action... [LB854]

DON WESELY: Some confirmation of notice or...? [LB854]

SENATOR KRIST: Yes, sir. Yep. Thanks. [LB854]

DON WESELY: I should... [LB854]

SENATOR SEILER: You... [LB854]

DON WESELY: Oh, I'm sorry. I should notice...note that I did pass out some handouts for you: from Charlie Faulk in support of the bill; and then from the Self Storage Association, Marcus Dunn, there's a letter there. So I just wanted you... [LB854]

SENATOR SEILER: And they will be made part of the record. [LB854]

DON WESELY: Thank you very much. [LB854]

SENATOR SEILER: I have one problem even though I'm the cosponsor (laughter). The lien takes effect immediately. I'm not in default. I take merchandise out of that lien...or property, it's still got a lien on it, and I sell it. I have just committed a crime in Nebraska by selling property that has a lien on it. [LB854]

SENATOR KRIST: You just thought of that? [LB854]

SENATOR SEILER: I just thought of that as you were...as Colby was describing it. The alternative is I have to go to the storage people every time I want to remove something because I'm transferring lien property, and I'm sure your clients don't want that. [LB854]

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DON WESELY: No. [LB854]

SENATOR SEILER: So I think that needs an adjustment. [LB854]

DON WESELY: One of the things we can do is, like was mentioned, 48 states have some version of this, and the notice issues, the, you know, perfected liens, we... [LB854]

SENATOR SEILER: No, no, I think the bill is very necessary. [LB854]

DON WESELY: We've got...but we can go to other states and figure out how to deal with that is what I'm saying. [LB854]

SENATOR SEILER: Okay. [LB854]

DON WESELY: There's got to be some language that takes care of that issue. It's not unique to us, so we'll keep working on it. [LB854]

SENATOR SEILER: Okay. Senator Pansing Brooks. [LB854]

SENATOR PANSING BROOKS: Thank you for being here, Senator Wesely. I'm just trying to check about...on page 6, can you walk me through a little bit of the balance of the proceeds, because it's, as I'm reading it, it's a year. They get to hold it for a year and pay it back to other lien holders and no liability to any other party for the excess proceeds, so I'm just trying to figure out. And then if you go through that whole act, do they just get to keep the proceeds, the extra (inaudible)? [LB854]

DON WESELY: No, no, if it... [LB854]

SENATOR PANSING BROOKS: It goes to the occupant after a year? They hold it for a year? No. [LB854]

DON WESELY: They hold it for a year. Okay. They pay off the expenses. [LB854]

SENATOR PANSING BROOKS: Right. [LB854]

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DON WESELY: And one of the things we need to clarify is, if there are perfected liens prior, we have to take care of those first. [LB854]

SENATOR PANSING BROOKS: Hold the balance for a period of one year after the date of the sale. [LB854]

DON WESELY: So...right. That's right. So you hold the balance. And what it says is if the occupant...if the lessee doesn't come and claim that, then it goes into the Unclaimed Property Fund. That's where it goes into. [LB854]

SENATOR PANSING BROOKS: But hold the...oh, hold the proceeds, I still don't get that really if you have extra proceeds. [LB854]

DON WESELY: Right. So let's say you owe \$200 to the storage unit... [LB854]

SENATOR PANSING BROOKS: Right, or say it's a...yes. [LB854]

DON WESELY: ...and you get \$500, so that's \$300 extra and there's no other lien on there. So you hold...you let them know that, you know, there's that money. If they don't come and claim it in a year, it goes into the unclaimed property department. [LB854]

SENATOR PANSING BROOKS: Okay, I... [LB854]

DON WESELY: So they don't benefit. The self-storage... [LB854]

SENATOR PANSING BROOKS: So is there discussion about efforts made to get it back to the person? That's what I'm trying to... [LB854]

DON WESELY: If I remember right. [LB854]

SENATOR PANSING BROOKS: But hopefully they have notice and they understand that it's there, but... [LB854]

DON WESELY: There are notice provisions throughout, but we can always enhance them, as was mentioned. [LB854]

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SENATOR PANSING BROOKS: Okay, thank you. [LB854]

DON WESELY: Um-hum. [LB854]

SENATOR SEILER: Any further questions? Seeing none, thank you. [LB854]

DON WESELY: Thank you. [LB854]

SENATOR SEILER: Any further proponent? Any further proponent? Any opponents? Anybody in the neutral? [LB854]

ROBERT HALLSTROM: Chairman Seiler, members of the committee, my name is Robert J. Hallstrom, H-a-l-l-s-t-r-o-m. I appear before you today in a neutral capacity on behalf of the Nebraska Bankers Association with respect to LB854. My comments with respect to the green copy will probably be more negative than neutral, but I have visited with Mr. Wesely and some representatives of the Self Service Storage Facility Association and I believe that we can probably work out some amendments that will make this bill better. As was indicated, currently the self-storage facility people have to look to the abandoned property under the Landlord and Tenant Act, which causes hardships when they have situations like somebody won't pay their rent and they can't get them out and do things like that. So we don't begrudge the effort to provide some clarity in the law. What we do have some difficulties with is we're not exactly sure or clear on what they are attempting to achieve or whether the bill ultimately gets to that objective. What I'd like to do real quickly is just show a few of the issues with regard to the bill, and Senator Pansing Brooks already pointed out some of them that are a little bit conflicting. This bill seems to be giveth and taketh away, if you will. If you look at the bottom of page 3 and the top of page 4, Senator Coash referenced the fact that we do provide subordination of these self-service storage facility liens that are being created to perfected and recorded liens and tax liens. It doesn't indicate whether that's prior perfected or perfected after the fact, once they are put into the facility. But that issue becomes important because these are hidden liens. They do create in essence by operation of law without any filing or anyone knowing that they exist. Now, having created a priority of some sort for a traditional creditor, it also then goes in, in Section 7, pages 4 and 5, to establish a notice of default and a procedure for the sale of the property, which is all fine and good, but there's no notice of sale other than a general advertisement that goes to either the occupant or the lien holder. So if we have a priority lien position and the property that serves as collateral for our loan is going to be sold, there's no way to provide notice under the current bill that that sale is going to take place to allow the creditor to protect their interest. Then we get to the top of page 6 and it talks about the distribution of proceeds. And if a prior perfected security interest holder at a minimum has priority, when you look at the distribution, the first part of the proceeds go to the self-service facility lien holder, and then they hold the balance. If we

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knock on their door and demand distribution, we can get the money that we're entitled to, but they've already taken their money off the top. If we haven't had notice of the sale, it's going to be pretty hard to knock on their door to know that we have some proceeds that may be held for us. On page 6, lines 5 and 6, it says the operator has no liability if the excess proceeds are paid to the occupant, but then Section 7, subsection (9) indicates that the liability is limited to the net proceeds of the sale to either the occupant or the lien holder. So it's a little conflicting and confusing in terms of whether we do have a priority, if we have a priority, why don't we get the proceeds first, those types of things, and I'm confident that we can work out some amendments that will clarify that and look at other state laws that may have some better opportunities for us to do so. One of the issues with regard to the attachment of a lien, Senator Seiler, that you noted, I've just noticed in some brief testimony that, rather than when the property is placed in storage, it's when the rent becomes delinquent, which is probably more in conformity with traditional law that there has to be a dead or an unpaid debt at that time. [LB854]

SENATOR SEILER: Okay. Senator Krist. [LB854]

SENATOR KRIST: It just should be noted, particularly for the two gentlemen that have spent your time and are in the industry, we're not saying this is not an absolutely needed piece of legislation, but this is how the sausage gets made. We get in here and we start talking about it and we kind of pick it apart, guaranteed that with the Chairman of Judiciary and his Vice Chair we'll get something worked out. That just needs to be said for the record. [LB854]

SENATOR SEILER: But I'd like to know how you testified in the neutral: just to be a nice guy (laughter). [LB854]

ROBERT HALLSTROM: They prevailed on my kinder, gentler side, Senator. [LB854]

SENATOR KRIST: Thank you. [LB854]

SENATOR SEILER: Thank you, Bob. [LB854]

BOB HALLSTROM: Thank you. [LB854]

SENATOR SEILER: (Exhibit 4) I have two...three letters of support: Faulk Enterprises, Inc.; and McGregor Interests, Inc. And then the one that has to top the group, the understatement of the year: "I truly regret my inability to be with you today. Severe weather has made (sic--had) a major impact on travel to and from the D.C. area and as a result, I am unable to make the trip to Lincoln today." And you know they got 41 inches of snow there yesterday, so I assume that that's

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the understatement of the year. But that's from Marcus C. Dunn and he's a member of the Self Storage Association and we will make his letter part of the record. Any further neutral? Senator Coash, you may close. Senator Coash waives. That closes the record and the hearing. Senator Morfeld, you've got LB693. And remember, you're the only thing stopping us to going home (laughter). [LB854]

SENATOR MORFELD: This could be pretty noncontroversial if everybody wants it to be. [LB693]

SENATOR SEILER: Go ahead. [LB693]

SENATOR MORFELD: Senator Seiler, members of the Judiciary Committee, my name is Adam Morfeld; that's A-d-a-m M-o-r-f-e-l-d, representing the "Fighting" 46th Legislative District, here today to introduce LB693. Under the Political Subdivisions Tort Claims Act, a claim must be filed with a political subdivision before a claimant may file a lawsuit. That filing must be made within one year of the occurrence or discovery of a tort. After the claim is filed, a political subdivision then has six months in which to act or not act on the claim. If the political subdivision chooses not to act on the claim, the claimant may withdraw the claim and then file a lawsuit. The statute of limitations for filing a lawsuit is two years. Existing law provides that if a political subdivision chooses not to take action on the claim within the six-month period, the statute of limitations may be extended for an additional six months if the statute of limitations expires prior to the time when the claimant withdraws that claim. LB693 would bring the time frame for the filing of claims under the Political Subdivisions Tort Claims Act in line with the time frame under the State Claims Tort...excuse me, State Tort Claims Act, which is two years. I want to note that LB693 does not change the statute of limitations for political subdivisions. It does not change any of the existing protections for political subdivisions that exist under the Political Subdivisions Tort Claims Act. It simply brings into the...brings the time for filing the claim to the same time frame allowed by the State Tort Claims Act, so from one year to two years. I would be happy to answer any questions and I urge your favorable support of LB693. [LB693]

SENATOR SEILER: Questions? Seeing none, I assume you'll be here for closing? [LB693]

SENATOR MORFELD: I'll hang around. [LB693]

SENATOR SEILER: Proponents. [LB693]

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MARK RICHARDSON: Good afternoon. My name is Mark Richardson, R-i-c-h-a-r-d-s-o-n. I am here on behalf of the Nebraska Association of Trial Attorneys in support of LB693. Very simply, as Senator Morfeld had said, we are simply bringing...this bill simply brings the Political Subdivisions Tort Claims Act right in line with the State Tort Claims Act. And the way it works right now is if you are a private entity anywhere in the state, you have a statute of limitations of four years. If you...and so if you have a negligent act brought against you, that can happen for up to four years. If it is a professional negligence, it's a two-year statute. If it is a state act, if it's state negligence, that's a two-year claim, a two-year statute, and you have two years to file your claim with the state. It is only the Political Subdivisions Tort Claims Act that partially abrogates that two-year statute of limitations. You still have your two-year statute of limitations to file your lawsuit, but you can't get to that step unless you go through this step first. And so it does impose a one-year statute of limitations in a way on anybody that was injured. And one of the primary issues with this is it causes confusion among injured citizens. It is unfair to injured citizens in the state of Nebraska to know that they've been injured, to know that they may have been injured by a specific party and they know it's a governmental entity, but unless they are able to find out on their own whether or not this is a state actor or this is a local political subdivision actor, that will sometimes what we call kind of put a trap door underneath of them where they think they've got a claim but they find out, you know, 13 months after the fact, oh, wait a second, this wasn't a state actor, this was a...it was governmental, but it happened to be a political subdivision, and now I'm out of luck, my claim is barred. We just feel that this is a...it makes all the sense in the world to bring this in line and make it consistent, make it consistent for the people so that they know what their rights are and they don't have this trap door pulled out from underneath of them. [LB693]

SENATOR SEILER: Any further questions? Thank you very much. [LB693]

MARK RICHARDSON: Thank you. [LB693]

SENATOR SEILER: Further proponent. [LB693]

ROBERT BARTLE: Senator Seiler, members of the committee, my name is Robert Bartle, B-a-r-t-l-e. I appear before you in my own behalf, as well as a past president of and on behalf of the Nebraska State Bar Association, who supports this legislation. I think, first and foremost, the reason that the diversity of private and governmental attorneys is represented by the bar, supports the bill, is out of just a simple, as I think has been alluded to, sense of uniformity. The same rationale that drives the time limitations of the Tort Claims Act ought to drive it in the context of political subdivisions. Secondly, I'd point out, as a practicing trial attorney for now near...I guess I'm in my 40th year. I began as a state attorney with the Attorney General in my first five. And in my last 35 of private practice I've represented both plaintiffs and defendants, I've represented

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both cities and counties, as well as county officials, as well as injured parties. And I think the two-year window makes sense as a uniform window. In the first instance, it has the type of limitation you have on a private entity; and secondly, it is, quite frankly, sometimes not easy to discern the injured party's claim in the expanse of simply a year. A person can have a serious head injury--if you...if your practice is personal injury--and not know that, as many of you may well know, as clients of mine have discovered, within a year. You may not know on certain entities whether or not that entity is a state entity or a political subdivision entity. It is simply an...and juris colleagues as well as private colleagues have told me that it is a trap for the unwary. There is no good, logical reason that we don't have uniformity. I expect there will be folks that disagree with me, but I would respectfully suggest that that is why the diversity of the 6,000 members of the State Bar Association are represented here by simply saying let's have it consistent, state and political subdivision alike. And with that, I thank you for your time. [LB693]

SENATOR SEILER: Any questions? Thank you very much. Oh. Senator Williams. [LB693]

SENATOR WILLIAMS: Thank you, Senator Seiler. At some point in time, those people that were sitting in our seats that adopted the Political Subdivisions Tort Claims Act made a decision that one year made sense. Why did they do that? [LB693]

ROBERT BARTLE: To be candid, sir, I can't tell you because I don't know the legislative history that well. I think at one time there were one-year types of limitations in a number of different actions. We've heard of professional malpractice as one of the examples. My response would be that one year is a relatively short amount of time to both discern an injury and to get the injury in such a situation as, well, do I act on my own behalf, do I consult with counsel, and do I act with some dispatch. I think two years makes a great deal more sense. [LB693]

SENATOR WILLIAMS: I'm not disagreeing with that at all. [LB693]

ROBERT BARTLE: Yeah. [LB693]

SENATOR WILLIAMS: I'm just trying to figure out why at some point it was one year to start with. [LB693]

ROBERT BARTLE: I... [LB693]

SENATOR WILLIAMS: Thank you. [LB693]

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ROBERT BARTLE: I'm not prepared to answer your question with any degree of certainty. [LB693]

SENATOR SEILER: Any further questions? Thank you very much. [LB693]

ROBERT BARTLE: Thank you, sir. [LB693]

SENATOR SEILER: Any further proponents? Seeing none, any opponents? [LB693]

VINCENT VALENTINO: Mr. Chairman, members of the Judiciary Committee, my name is Vincent Valentino, V-i-n-c-e-n-t V-a-l-e-n-t-i-n-o. I represent the Nebraska Intergovernmental Risk Management Association of 80 counties and political subdivisions in this state. We oppose LB693. This is the third or fourth time that I can think of in the last seven or eight years that this proposal has been brought forward by the Nebraska Association of Trial Attorneys to expand the statute of limitations in this matter. And they keep bringing up the State Tort Claims Act as why it should be expanded, which is a two-year statute of limitations. I can tell you from representing the various counties, not only in York County from 1976 to 1992, but from 1990...1988 forward, I was involved with the inception of the Nebraska Intergovernmental Risk Management Association, consisting of...beginning with approximately 33 counties. I can tell you that county resources are no match for the state in terms of investigation of claims. I can tell you that county employees are more apt to leave sooner than later. You folks have already dealt with the Corrections Department here with the state of Nebraska. You know that corrections officers have been underpaid. They leave. Accidents that happen within the jails or on the county roads, county road department people don't stay around for a long time either. Most of these types of claims that we're talking about are usually involving either county roads or possibly Corrections officers or possibly law enforcement, involving car accidents. I can tell you there's a four-year statute of limitations for 1983 actions that involve civil rights and Title VII claims. That is not governed by the Tort Claims Act. Thirty-two other states have limitations of one year or less. Nebraska is not alone in terms of that. There are states, and there's a letter from the executive director of NIRMA, Craig Nelson, that provides a list of the number of states that actually have limitations periods of one year or less, in some cases 60 to 90 days. I don't really buy off on the idea that this is a simplification issue. I don't buy off on the idea that it causes confusion. I have yet, in 41 years of practice, I have yet to see an attorney miss a one-year filing claim statute involving a tort claim against a county. I have never seen it before, to be real honest with you, and I've litigated a lot of these cases over the years. The issue that Bob Bartle brought up about the head injury, there is a discovery rule that still applies even to claim filings. And I would venture to guess, if you have somebody who has a head injury in a severe accident, if their family hasn't hired an attorney within a month after the accident, I would be absolutely shocked. Most of these catastrophic injuries that Bob speaks of usually involve attorneys. I can tell you

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that I got into a car accident one time and I had letters from attorneys from all over the place in Nebraska telling me to contact them. I mean there's nothing here that's new that's changed since the Political Subdivisions Tort Claims Act was adopted many, many years ago. When I started practicing in 1976, it was already on the books. The Legislature picked that one year for a reason. Thank you. [LB693]

SENATOR SEILER: Further questions? Wait a minute. [LB693]

VINCENT VALENTINO: Oh, I'm sorry. [LB693]

SENATOR SEILER: (Inaudible.) Any questions? Thank you. [LB693]

VINCENT VALENTINO: Thank you. [LB693]

SENATOR SEILER: Next. [LB693]

TOM MUMGAARD: Good afternoon, Mr. Chairman, members of the committee. My name is Tom Mumgaard, T-o-m M-u-m-g-a-a-r-d. I'm a deputy city attorney for the city of Omaha and I'm here today on behalf of the city of Omaha to oppose LB693. This bill is the most current effort to give people more time to sue a city. These efforts have always been described, as they are being today, as an effort to benefit people who are losing their opportunity to get redress for torts that are committed by public employees. Well, Omaha likely has the highest number of tort claims that are submitted against any city in the state under the Tort Claims Act and we think that our history should be instructive of whether the current law really has that effect. Our history shows, we believe, that the proponents' claims are exaggerated and this is really a solution looking for a problem. The one-year tort submission period has existed, I believe, since the Tort Claims Act was adopted in 1969. In 2015, there were 536 tort claims submitted to the city of Omaha, and we average about 453 such claims each year over the past five years. Typically, of that number, we see less than five claims each year that are turned down because they're submitted beyond the one-year time period. So that is that typically less than 1 percent of the people who identify that they have a claim against the city of Omaha don't get it submitted in a timely fashion. The...although of course we can't determine how many people there are that just never get their claim submitted, we think we can tell from these numbers that many, many people over the years have no trouble at all meeting that current one-year time period and very few need extra time. Indeed, the ones that we see that are later, typically the result of attorneys who overlook the period or misread the statute. The limited time period recognizes the budget limitations that we have. We operate on a one-year period, so getting claims in and processed is important. It also avoids stale claims, such as all statutes of limitations do. As was pointed out, it's important that the claim be brought to the city's attention quickly so that the city can look into

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it and find out what it is. Typically an injured person has all the information soon, sooner than the city does, in fact. With the advance in technology we find that it is easier and easier every year to submit a claim and meet the one-year tort period. This was adopted in 1969, as I say, when it was much more difficult to submit your claim to a city. Today we regularly receive e-mail inquiries. All it takes is to get a message to the city clerk in writing that you have a claim and that beats the one-year time period. So we would respectfully request that this committee not advance the bill. I'd answer any of your questions. [LB693]

SENATOR SEILER: Senator Krist. [LB693]

SENATOR KRIST: Thanks for coming, Tom. Just to clarify, what you said was all I have to do is notify the city clerk that I am going to employ a lawyer and I have a claim and the time starts then, or does the time go back to the time of the accident or the incident? [LB693]

TOM MUMGAARD: Well, the one-year time period starts at the time of the accident. [LB693]

SENATOR KRIST: Okay. [LB693]

TOM MUMGAARD: It ends one year thereafter. [LB693]

SENATOR KRIST: Okay. [LB693]

TOM MUMGAARD: And during that one year you just have to submit something in writing to the city clerk saying you have a claim and describing what it is. [LB693]

SENATOR KRIST: Okay, thank you for that (inaudible). [LB693]

TOM MUMGAARD: There are no magic words. There is no bills that have to be submitted. You just have to notify the city that something happened, what it was, and you're making a claim against the city. [LB693]

SENATOR KRIST: And I mean this in a comical way, but you think the ratio of lawyers to population has something to do with the number of tort claims that you have? You don't have to answer that. [LB693]

TOM MUMGAARD: Well, I hope it has nothing to do with the quality of the city employees. How is that? [LB693]

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SENATOR KRIST: I won't comment on that one. Thank you, Tom. [LB693]

SENATOR SEILER: Any further questions? Seeing none, thank you for your time and your testimony. [LB693]

TOM MUMGAARD: Thank you. [LB693]

SENATOR SEILER: Next opponent. [LB693]

ROGER COX: Good afternoon, Senator Seiler, members of the committee. I apologize for my crutches. My name is Roger Cox. I'm a lawyer in private practice here in Lincoln. I'm appearing today on behalf of the League of Nebraska Municipalities and also the League Association of Risk Management. I don't have any prepared written remarks, but before I get into the substance of things I do feel obliged to say this is a first for me, and I daresay it may be a first for every legislative committee, that anyone who is a tenant in a building has been testifying on the opposite side of the bill of his landlord, Mr. Bartle. So I do hope that I have an office when I get done here in a few minutes. I think Mr. Mumgaard and Mr. Valentino have stated things very, very well. I think Senator Williams hit the nail on the head when he said, what was the reason? And obviously we can't go back and psychoanalyze a prior Legislature. But as the members of the committee and all the lawyers in the room know, the courts try to do that when they play the legislative history game. And for what it's worth, in 2003 the Nebraska Supreme Court gave us exactly the reason. It said that the primary purpose of the notice provisions in connection with actions against political subdivisions is to afford municipal authorities prompt notice of the accident and injury in order that an investigation can be made while the occurrence is still fresh and the municipal authorities are in a position to intelligently consider the claim and to allow it, if deemed just, or, in the alternative, to adequately protect and defend the public interest. I think Mr. Valentino's comments were very well taken, as were Mr. Mumgaard's. We have smaller entities, especially our smaller cities and our villages. They don't have the staff that the State Claims Board does. A lot of this stuff is self-insured. And frankly, a lot of these claims get allowed for smaller things or for things that are clear. So, yes, there are some big claims, but even though my brethren in the bar have talked about this being unfair and people missing deadlines, anecdotally they haven't mentioned anyone specifically and, even if they did, every statute of limitations has that possibility built into it. I would say that uniformity is not really a reason to do this. You could just as easily say let's make the state act one year instead of two. But be that as it may, this has been the case for almost 50 years at this point. There was a reason for the legislative body. And this is the third time, excuse me, in I believe five years--LB115 in 2011 tried to do exactly this, LB284 in 2013 tried to do it also and to modify the cap--and here they're back at it again. This body and its predecessors have said let's not advance this bill before. I'd urge you to make that same outcome today, and I'll be happy to answer any questions. [LB693]

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SENATOR SEILER: Sir, would you spell your name for the record? [LB693]

ROGER COX: Yes, I'm sorry, and I talk too fast. It's C-o-x, and the first name is R-o-g-e-r. I apologize, Mr. Chairman. [LB693]

SENATOR SEILER: Not a problem. Senator Krist. [LB693]

SENATOR KRIST: Did you file your tort claim for that one? [LB693]

ROGER COX: Well, it did happen on a political subdivision's property (laugh). But unless the committee wants to help me with doing away with contributory negligence as a defense, I just slipped and fell down, (laughter) so. [LB693]

SENATOR KRIST: Different day, different hearing. [LB693]

ROGER COX: There you go. [LB693]

SENATOR KRIST: Thank you, sir. [LB693]

SENATOR SEILER: Just a second. Senator Williams, did you have your hand up? [LB693]

SENATOR WILLIAMS: No, that was my question. [LB693]

SENATOR SEILER: Thank you very much. [LB693]

ROGER COX: Thank you very much. [LB693]

SENATOR SEILER: Any further opponent? [LB693]

ELAINE MENZEL: (Exhibits 1 and 2) Chairman Seiler and members of the Judiciary Committee, for the record, my name is Elaine Menzel, E-l-a-i-n-e M-e-n-z-e-l, appearing here today on behalf of the Nebraska Association of County Officials. And I will make my testimony short because my predecessors before me have done a fantastic job and, in fact, they took a good share of my testimony for what I was hoping to say. I can though tell you that, not this year but in prior years, as Roger Cox testified, there has been previous legislation. And so I know one of the first times I would have evaluated this legislation being introduced, I went back to the

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legislative history to see if I could find out why that one-year/two-year distinction occurred. And much like the folks that testified before me, there was not a basis to indicate what that rationale was. At the time, it was both bills. The State Tort Claims Act and the Political Subdivisions Tort Claims Act were introduced as separate pieces of legislation as the result of an interim study prior to introduction. And then they were both introduced with two-year statutes...or notice provisions. And at some point there was an amendment on the floor to have it just the one year, and during that time we don't go far enough back to have testimony transcribed, so. Oh, one of the letters that I submitted to you was from Lancaster County. They asked me to include that in my testimony. And then I also handed out the chart that indicates the states that...the different notice provisions, and that's been referenced previously as well. [LB693]

SENATOR SEILER: Those will be received into evidence. [LB693]

ELAINE MENZEL: Okay, thank you. And I would just respectfully request that you do not advance this legislation. Thank you. [LB693]

SENATOR SEILER: Any questions? Thank you very much. Further opposition. [LB693]

JOHN BONAIUTO: Senator Seiler, members of the committee, John, J-o-h-n, Bonaiuto, B-o-n-a-i-u-t-o, appearing on behalf of the Nebraska Association of School Boards here in opposition to LB693. And I won't repeat what the previous testifiers said. But the school boards association 25 years ago, right after the counties formed their pool, insurance pool, did something similar. And so we have about half the school districts in the state that are insured with the risk management pool. I've testified in opposition to this bill before that as you extend, if you look at extending that period, the claims for the pool will be just kept open longer. And the money that is in the pool, when we close out claim years, actually goes back to the participants. So school districts can use the dividends that they receive from the insurance pool to pay for their next year's insurance. So there's a fiscal impact here as we keep these claim years open longer and longer. So, you know, that's just something that, as I looked at the fiscal note, there was no way to tell what kind of a fiscal impact this might have, definitely will have one. Thank you. [LB693]

SENATOR SEILER: Any questions? Thank you. Any further opponent? [LB693]

CHRIS DIBBERN: Good afternoon, Chairman Seiler and members of the committee. My name is Chris Dibbern, C-h-r-i-s D-i-b-b-e-r-n. I am the general counsel for the Nebraska Municipal Power Pool and a registered lobbyist for the power pool and I'm here today on behalf of the Nebraska Power Association. We are a voluntary group of over 160 power...either political subdivisions...most of us are political subdivisions and we are opposed to the bill. In my opinion,

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the state of Nebraska has a balanced approach to torts and tort reform. The Legislature has consented to allow people to bring a claim against a political subdivision but told them a reasonable amount of time to bring the action and caps on the action have been endorsed by this Legislature for over 50 years. Both the United States and the Nebraska Constitution give government sovereign immunity for...but they must take responsibility for their actions. But the balance is bringing the action quickly so that it is not a stale action, so that we can do something about the action, make changes if they're necessary. The longer you allow a claim to be out there, the less information the political subdivision has to change. So I don't think we have a common disinterest in this group. You want a forum to take the action. You want to give redress for it to correct anything. We want to have a balance that we're providing an important service, like schools, roads, and power, and the one year is that balance of bringing an action but still allowing the individual to bring...to limit the action within one year. Any questions? [LB693]

SENATOR SEILER: Seeing no questions, thank you for your testimony. [LB693]

CHRIS DIBBERN: Thank you. [LB693]

SENATOR SEILER: (Exhibits 3 and 4) Any further opponent? Anyone in the neutral? We have opposition letters from Metropolitan Utilities District of Omaha, the Nebraska Intergovernmental Risk Management Agency...Association, so those will be received. You may close. [LB693]

SENATOR MORFELD: Thank you, Chairman Seiler, members of the committee. Well, after hearing the opposition, I think I have my priority bill now. In any case, you know, I think that there's just a few different things I want to note. First off, it seemed to me that this...the bill that was originally introduced years back actually had this as two years, along with the rest of the state, and it sounded like there was a floor amendment. So there was a reason that we were keeping it uniform and probably a reason why we adopted the floor amendment. But I think that that also lends credibility and validity to the fact that maybe we should look at extending this to two years. And also, you know, in my time--just two years--as a legal clerk working at a firm that defended insurance companies and did some plaintiffs' work as well, I can tell you that for us it seems like it's common sense, like, oh, you should know who injured you and you should be able to make that claim right away and a year is a pretty long amount of time. That's not always the case. There is a lot of people who get injured, know that they have an injury, and then only after discovering that maybe there is going to be more extensive medical work that needs to be done, things like that, do they look into, well, hey, I should have redress and justice based off of who is responsible for this injury. That can go a long...well beyond one year. And I know that a lot of folks, you know, think that one year seems long enough, more than reasonable. But for the attorneys in here, I think that we all know that there are circumstances that come up that we did not anticipate that sometimes take longer than a year. Also, you know, there were a lot of local

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political subdivisions that came up and talked and talked about how, oh, we don't have a lot of resources, all this, I mean, and, granted, resources are always tight with any political subdivision. I'm not going to diminish that. That being said, companies that are much smaller than these political subdivisions are subject to a four-year statute of limitations with no notice and no claim option...or, excuse me, requirement for them. And so there is a bunch of companies, some bigger than maybe some political subdivisions and many much smaller, that currently operate under much longer statutes of limitations with no claim period, notice of claim at all. I also have to point out that the city of Omaha came up and said there's...there were only five claims in Omaha, well, that were past the one-year claim time. Well, to me that indicates that there were five people that clearly were confused and didn't...and filed their claims thinking that they were not past the deadline but, in fact, were. And those are just the folks that filed a claim and not the folks that realized, hey, listen, I'm past the amount of time, so they didn't file a claim at all. So there's people out there that could have legitimate claims that were cut off by this one-year claim time. And so I think that we need to take a relook at this. I think that we need to make sure that it's uniform with the state level. And I also think that it does provide a trap door for a lot of attorneys and a lot of people with genuine claims. And I thank you guys for your time and be happy to answer any questions. [LB693]

SENATOR SEILER: Seeing none, thank you. [LB693]

SENATOR MORFELD: Thank you. [LB693]

SENATOR SEILER: I declare this hearing day ceases. [LB693]