

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee January 24, 2020

**LATHROP:** Even before I get to my opening, which I typically do, I'll just suggest something to you. So when this room was redone, they took down some panels, which keep it from echoing. I know that it's sometimes hard to hear when you're in back. If you have trouble, just kind of wave your hand and, and I'll get the attention of the testifier so that we make sure you can hear. It also makes it more important not to have background noise because of the acoustics in here. And with that, we can get started. Good afternoon and welcome to the Judiciary Committee. My name is Steve Lathrop and I represent Legislative District 12 in Omaha and I am the Chair of the Judiciary Committee. On the table inside the doors, you will find yellow testifier sheets. If you are planning on testifying today, please fill out one of those sheets and hand it to the page when you come up to testify. There is also a white sheet on the table if you do not wish to testify, but would like to record your position on a bill. For future reference, if you're not testifying in person, but would like to submit a letter for the record, all committees have a deadline at 5:00 p.m. the last workday before the hearing. Keep in mind that you may submit a letter for the record or testify in person, but not both. And only those actually testifying in person at a hearing will be listed on the bill's committee statement. We will begin testimony with the introducer's opening statement followed by the proponents of the bill then opponents and finally, anyone here to speak in a neutral capacity. And then we'll finish with a closing statement by the introducer if they wish to give one. We utilize an on-deck system. We have chairs in the front row there, to the left of the testifier's table. Please keep the on-deck chairs filled with the next person to testify to keep the hearing moving along. We ask that you begin your testimony by giving us your first and last name and spell them for the record. If you have any handouts, please bring 12 copies with you and give them to the page. If you don't have enough copies, the page can make more. If you are submitting testimony on someone else's behalf, you may submit it for the record, but you will not be allowed to read it. We are using a three-minute light system. When you begin your testimony, the light on the table will turn green. The yellow light is your one-minute warning and when the light turns red, we ask that you wrap up your final thought and stop. As a matter of committee policy, we'd like to remind everyone that the use of cell phones and other electronics is not allowed during public hearings, though you may see senators use them to take notes or to stay in contact with staff. At this time, I'd ask everyone to make sure their cell phones are on a silent mode. Also, verbal outbursts and applause and things of that

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nature are not permitted in the hearing room. That behavior may get you a request to leave the hearing. You may notice committee members coming and going. That has nothing to do with the importance of the bill being heard, but senators may have other bills to introduce in other committees or have other meetings to attend to. And with that, I think we can get started. We'll have senators introduce themselves beginning with Senator Slama.

**SLAMA:** Senator Julie Slama, representing District 1: Otoe, Nemaha, Johnson, Pawnee, and Richardson Counties.

**CHAMBERS:** I have to be-- I can't be modest. I'm Ernie Chambers. I represent the good, bad, the ugly, and everybody that needs representation, but my district is 11 in Omaha.

**BRANDT:** Senator John Brandt, District 32: Fillmore, Thayer, Jefferson, Saline, and southwestern Lancaster County.

**LATHROP:** Assisting the committee today are Laurie Vollertsen, who is to my left, our committee clerk, and Neal Erickson to my right. And our committee pages are Ashton Krebs and Lorenzo Catalano, both students at UNL. And with that, we'll begin our hearing. And the first bill up today is LB914. Senator Hunt, welcome back to the Judiciary Committee.

**HUNT:** Thank you, Senator Lathrop, and thank you to the members of the Judiciary Committee. My name is Megan Hunt, M-e-g-a-n H-u-n-t, and I represent District 8, which includes the neighborhoods of Dundee, Benson, and Keystone in midtown Omaha. Last year, the Legislature enacted LB433, which amended the Uniform Residential Landlord Tenant Act. However, it did not update the Mobile Home Landlord and Tenant Act at the same time. After discussions with several interested groups, landlords, tenants, and with Senator Hansen's office, I decided to bring LB914 to ensure uniformity in our state law with regard to the landlord-tenant issues addressed by LB433. Currently, the Mobile Home Act requires a landlord to return the security deposit within 30 days from the termination of tenancy or receipt of a forwarding address from the tenant. LB914 would change that to require the landlord to return the security deposit and/or an itemized list of deductions within 14 days. And that would make it harmonized and the same as the residential act requires. LB914 also harmonizes the two acts by providing that a tenant should not have to pay for damages resulting from the removal of a tenant by order of a government entity because the home was not fit for habitation due to negligence or

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neglect by the landlord. The urgency of being evacuated prevents a tenant from going through the usual steps of cleaning or making repairs and so that's necessary to include as well. As did the updates to the Uniform Residential Landlord Tenant Act, LB914 adds to the Mobile Home Act that if the landlord willfully and in bad faith fails to comply with a security deposit process, they could be liable for liquidated damages equal to one month's rent or two times the security deposit. This is in addition to what the landlord already owes to the tenant for a violation of this section, which is the security deposit plus reasonable attorney's fees. This section is key because without it, if a landlord fails to return a security deposit, the tenant is only entitled to money owed and the attorney fee if there is a judgment. And as the testimony on LB433 revealed last year, this fails to have a deterrent effect on the landlord. Finally, state statute requires that when a mobile tenant is late on rent, a landlord must provide written notice to the tenant if they fail to pay within five days. The landlord will terminate the lease and initiate eviction proceedings. Last year, LB434, which was passed as part of LB433, amended the Uniform Residential Landlord Tenant Act to provide for seven-days notice instead of five. This number was agreed upon because it still gives landlords enough time to evict a tenant and get a new tenant into the unit before the next month. And it ensures that no new burdens are placed on the landlord and no additional rent money is lost. LB914 does not make it harder for landlords who are already using good practices. The landlords who are rightfully returning tenants' deposits, as required in the law, will not be affected at all. So overall, what this bill does is it harmonizes the Mobile Home Landlord Tenant Act with Senator Hansen's LB433, which was voted out unanimously by this committee last year. And with that, I'd be happy to answer any questions.

**LATHROP:** OK. I don't see any questions at this point, but I assume you'll stick around to close?

**HUNT:** I will, thank you.

**LATHROP:** Very good, we'll take proponent testimony. How many people are going to testify on this bill, by show of hands? OK, thank you. Welcome back.

**RYAN SULLIVAN:** Senator, good to see you. My name is Ryan Sullivan, R-y-a-n S-u-l-l-i-v-a-n. I'm an assistant professor of law at the University of Nebraska College of Law. I teach in the clinic and I supervise the clinic's Tenants' Rights Project. I'm testifying today

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as a citizen, not on behalf of the university. As the Senator mentioned, last session we passed LB433 and that was intended to amend two sections in the Residential Landlord Tenant Act. The final version of the bill was a product of significant discussion and debate and agreement between those representing both the interests of the tenants and interests of landlords. And as a result, it passed with almost no opposition. When the dust settled and the new law went into effect, we soon recognized that we had failed to include or consider Nebraska's other landlord tenant act, the one that applies to mobile home lots. LB914 is intended to correct that oversight and harmonize those two bills to ensure consistency within the rental home market. The same reasons given for-- in support of LB433 are applicable here, so I won't go into them. But I think it's sufficient to say that renters of mobile homes deserve the same rights as renters of apartments and traditional housing. I will add that consistency between these two acts is of particular importance in situations where both acts are implicated simultaneously. Our clinical program has represented individuals who rented a mobile home lot, so the Mobile Home Act applied, but they also rented the home that sat on that lot, so the residential act applied. When the two acts are not in harmony, as the case is now under the current law, it really makes it impossible for either party to know and understand their rights and you end up with debates that leave it to the courts to determine. For example, it's difficult right now for a landlord to know how many days after nonpayment of rent to deem the lease terminated. Is it five under the Mobile Home Act or is it seven under the Residential Act? Similar confusion will come up as it relates to the return of a security deposit. LB914 will make the two acts identical, as it relates to those provisions, and it is going to avoid any unnecessary confusion and litigation on these issues going forward.

**LATHROP:** Very good. Thank you, Professor. I do not see any questions, but I appreciate you being here today.

**RYAN SULLIVAN:** Yeah, thank you.

**LATHROP:** Next proponent. Good afternoon.

**HANNES ZETZSCHE:** Good afternoon, Senator Lathrop, and members of the committee. My name is Hannes Zetzsche, H-a-n-n-e-s Z-e-t-z-s-c-h-e. I'm a senior certified law student at the University of Nebraska College of Law, where I colead the Civil Clinic's Tenants' Rights Project. Today, I'm testifying in favor of LB914 as a citizen and not on behalf of the university. LB914 is an uncontroversial bill to

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harmonize the Mobile Home Landlord and Tenant Act with provisions the Unicameral last year adopted in the Uniform Residential Landlord Tenant Act as it relates to lease termination and the return of a security deposit. Although mobile home lots and other residential tenancies are covered by separate statutes under Nebraska law, functionally, the landlord-tenant relationship is no different. This bill is thus common sense in that it harmonizes the rights set forth in these two acts. In fact, if these provisions are not harmonized, Nebraska will be unique among its neighbors for prescribing different substantive rules to mobile home lots and other residential tenancies. Although some other states also have separate acts for these two types of tenancies, they tend to provide identical substantive provisions between the two. For example, it appears that all five of our neighbors-- Kansas, Iowa, Colorado, Missouri, and South Dakota-- apply the same rules for the return of a security deposit, whether the tenant is renting a mobile home lot or a traditional residence. In other words, our neighboring states have harmonized their acts and LB914 would allow Nebraska to do the same. Consistency between the mobile home and residential tenancy act would be good for both landlords and tenants in this state, giving each confidence that the tendency provisions applicable to most residences are also applicable to mobile home lots. This simplification would benefit tenants who often struggle to understand their rights under the various laws and are unable to afford legal counsel. But it would also benefit landlords who often lease both mobile home lots and residences and would prefer not to apply two different legal standards between them. As the testimony on LB433 last year showed, there are many reasons that the substantive provisions in this bill are desirable. But purely for the sake of harmonization, LB914 is a sound extension of current law. Last year, the Unicameral adopted these changes in the residential act by a 43-1 vote. To harmonize those benefits in the context of mobile home tenancies, I would urge this committee to now advance LB914 as drafted. Thank you. I would welcome any questions from the committee members.

**LATHROP:** I do not see any questions, but thanks for being here and for your work on this topic.

**HANNES ZETZSCHE:** Thanks.

**LATHROP:** Proponents. Good afternoon.

**SCOTT MERTZ:** Thank you. Good afternoon, Chairman and members of the Judiciary Committee. My name is Scott Mertz, S-c-o-t-t M-e-r-t-z. I am

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here as an attorney with the Legal Aid of Nebraska. We are the only statewide organization that provides free legal services and free representation to low-income Nebraskans. The focus of my practice at Legal Aid Nebraska is on housing matters with our housing justice project. And so on a daily basis, I am working with tenants that face eviction, substandard housing conditions, and the loss of their security deposit. These are individuals who call us and come to our offices seeking answers to find out what they can do and what their rights are under the law. As you can imagine, most of these individuals are often scared and confused and it can be difficult for a, a layperson to understand what their rights are under Nebraska landlord-tenant law. Any effort made to simplify the law such that it is consistent, no matter if one is a renter of a residence or of a mobile home, will have tremendous value to our income population and to the bench as well in such that anybody appearing in court on a judicial action, whether that be for an eviction or an effort to recover a security deposit or any other effort to recoup damages for substandard housing, that these individuals will be treated consistently under the law and fairly under the law. The individuals that I talk to are often scared because of the lack of options for them, lack of affordable housing options. And those fears, I would say, are great in the community of individuals who reside in these mobile home parks. When an individual in a mobile home park receives a notice of nonpayment or a notice to vacate, they are at risk of not only losing their immediate shelter and a home for their families, but also their property. I mean, their mobile home may be lost to them forever. So any effort that gives these individuals just a little more time in order to cure any of these violations, that is to come up with late rent even if it's a minute change of just two extra days, that, that can mean the world to these families because it's two more days to preserve their housing and preserve their access to their property. Similarly, funding parity with the law on security deposit ensures that landlords in a mobile home lot have the same responsibility that any other landlord does to provide the accounting for and the option to recoup that security deposit. The burden should not be on the tenants to recover these security deposits. That is-- it should be treated as their money and not the possession of the, the landlord's. Again, I believe this is a commonsense measure that seeks parity with the individuals who reside in these lots with every other tenant in Nebraska and it will be of tremendous value to low-income tenants in this state. I thank the committee for their time and if there are any questions?

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**LATHROP:** Senator Brandt.

**BRANDT:** Thank you, Chairman Lathrop. Thank you, Mr. Mertz, for testifying. Could you clarify for me if, if the rent on the-- the, the tenant owns a mobile home and then he rents the lot from the mobile home court. He receives notice that he has to vacate. Where do they go? I mean, if you have a-- you know, the guy can't pay his rent on his lot and it's his mobile home, what happens in that situation?

**SCOTT MERTZ:** That is a very real and serious problem. Again, the law affords them the opportunity to take their mobile home with them, assuming in, in your hypothetical, they're unable to cure the violation, whether it be for, for nonpayment or for any other lease violation. They could, in theory, take their mobile home with them. The problem is more practical and one of cost. A lot of individuals who have to rent mobile home space do not have the resources necessary to pay to have their mobile home relocated. And a lot of times, these mobile homes are old enough and it's just not an option at all to effectively move these mobile homes. So the reality is individuals who are evicted from these mobile home lots, they often lose access to and possession of their mobile homes, even if they were, in fact, the owner at the time they were evicted.

**BRANDT:** All right, thank you.

**LATHROP:** I don't see any other questions. I do want to thank you for the work you do at Legal Aid.

**SCOTT MERTZ:** Thank you, members.

**LATHROP:** Yep, thanks for being here today too. Any other proponents? Seeing none, is anyone here to testify in opposition to LB914 or in a neutral capacity? Seeing none, Senator Hunt, you may close. Now as you approach, we do have letters of support from Kasey Ogle from Nebraska Appleseed and Michelle Devitt from Heartland Workers Center.

**HUNT:** Thanks, Senator Lathrop. Thank you, committee members. Simply the reason this is important that we pass this bill is because right now, there's different laws that are governing what we do for people who are renting houses and apartments and what we do for people who are renting mobile homes and the lots that they sit on. And so when there's legal questions about what's going to happen if they're evicted, what's going to happen with their security deposit, the law is a little bit confusing around that. So given that we passed Senator

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Hansen's bill last year, which affected renters of apartments and houses, I just want to make sure that we're doing something in the Legislature to make it cohesive with other types of renters as well. So I, I would ask for your support and thank everybody who came here to testify and close on that.

**LATHROP:** Very good.

**HUNT:** Thank you.

**LATHROP:** I don't see any questions. Thanks, Senator Hunt.

**HUNT:** Thanks.

**LATHROP:** That will close our hearing on LB914 and bring us to LB938, Senator La Grone's bill, and I understand his LA is going to introduce that. Good afternoon.

**DAYTON MURTY:** Good afternoon, Chairman, members of the committee. My name is Dayton Murty, spelled D-a-y-t-o-n M-u-r-t-y. I'm the legislative aide to State Senator Andrew La Grone. I'm here to introduce LB938 on his behalf. He apologizes that he was not able to be here today. LB938 simply adds to the Nebraska Uniform Power of Attorney Act language, which clarifies that a third party acting on reliance upon a certification, a translation, or an opinion of counsel for an acknowledged power of attorney is immune from liability for such actions taken in good faith. I believe Mr. Hallstrom with the Nebraska Bankers Association is here and will be testifying after me. Thank you very much.

**LATHROP:** Very good, thank you. Welcome.

**ROBERT J. HALLSTROM:** Thank you, Chairman Lathrop, members of the Judiciary Committee. My name is Robert J. Hallstrom, H-a-l-l-s-t-r-o-m, and I appear before you today as registered lobbyist for the Nebraska Bankers Association in support of LB938. Last session, this committee and the Legislature adopted LB146, a bill brought on behalf of the Nebraska State Bar Association to expand the damages that may be recovered when a third party fails to accept an acknowledged power of attorney. After that law was enacted, the NBA was contacted by some bank attorneys that suggested that the Uniform Power of Attorney Act should be clarified to ensure that the immunity or the protection that is provided to an individual or a third party that is relying on one of these certifications, translations, or

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opinions of counsel is clear. The issue is that the current law simply states that a third party can rely upon a certification, translation, or opinion of counsel without further investigation, but it doesn't go on to specifically or expressly provide that a third party may avoid liability for actions taken in reliance of one of those documents. The way that the current system works is that if a third party is presented with an acknowledged power of attorney, they may request a certification, translation, or opinion of counsel within seven business days. If that request is made once they receive the certification, translation, or opinion of counsel, they have five business days within which to accept. What we look at here is that that certification or opinion of counsel or translation is provided, in many cases, by an attorney for either the agent or the principal. As you are aware, the third party that's accepting or has requested that particular document does not have privity with that attorney, so that if there is some error or fraudulent activity associated with the issuance, for example, of an opinion of counsel, the third party would not have any right to go back against the attorney. Attached to my testimony is a provision of 30-38,105 from the Uniform Trust Code that has very similar provisions in terms of the protection or immunity when you are acting on a certification from a trustee. And we think a similar application of an immunity or protection should apply under these circumstances. And this bill would simply clarify that that immunity would apply, with regard to these particular circumstances. I have visited with the representatives of the trial lawyers, who I think will be appearing to testify in opposition this afternoon. But we're hopeful that we may be able to put some language together to work within the existing confines of the act, which currently has a no actual knowledge standard for other provisions that allow for immunity. So hopefully, we'll be able to work with them on that. I'd be happy to address any questions from the committee.

**LATHROP:** OK. You'll let us know how that goes.

**ROBERT J. HALLSTROM:** I certainly will, Senator.

**LATHROP:** Good. Any questions for Mr. Hallstrom? Seeing none, thank you.

**ROBERT J. HALLSTROM:** That's fine.

**LATHROP:** Thank you. Next proponent. Anyone else here to speak on behalf of or in support of LB938? Anyone here in opposition?

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**DON WESELY:** Mr. Chairman, members of the Judiciary Committee, for the record, my name is Don Wesely, D-o-n W-e-s-e-l-y, representing the Nebraska Association of Trial Attorneys. We are here in opposition to LB938, as Mr. Hallstrom talked about. We have talked to Senator La Grone and we'll talk to him as well to see if there's some language we can work out. But I think all of you probably are familiar that the trial attorneys oppose immunity language that we feel that in-- I mean, there are ways in which you can construct it that are reasonable and that's actually the term that we're concerned about. In this bill, it talks about good faith, but the standard, usually, in the law is whether you're reasonable or not. And in our view, immunities that allow people to be unreasonable or negligent is not in the public interest. So we oppose that kind of immunity and that's the kind of immunity that's provided in this legislation. So we're always trying to find a way to work with people. But generally, we see immunity bills come in seven, eight, nine every session. And I know everybody would like the chance to be immune from any kind of liability, but we feel, again, the standard is to protect the public from people that are being unreasonable and do harm to others. And that's a standard we think we have now and that we'd like to maintain and so we oppose that language in this bill.

**LATHROP:** OK. Senator DeBoer.

**DeBOER:** What would you do instead of an immunity? What would you do-- is there something like an affirmative defense or something that could be used or what would you do?

**DON WESELY:** Well, the standard would be whether they acted reasonably or not. That's what--

**DeBOER:** So you would just keep the status quo.

**DON WESELY:** We think the status quo is a good--

**DeBOER:** OK.

**DON WESELY:** --good standard. But again, we have talked and worked with-- on other legislation. We're always willing to try and work something out if we can.

**DeBOER:** OK.

**LATHROP:** As I said, Mr. Hallstrom, you'll let us know.

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**DON WESELY:** He will let you know.

**LATHROP:** We appreciate that. Thanks for being here today, Mr. Wesely.

**DON WESELY:** Thank you.

**LATHROP:** Anyone else here to testify in opposition to LB938? Anyone here to testify in a neutral capacity? Seeing none, that will close our hearing. I don't think we let legislative assistants close, do we, Ernie? We don't let legislative assistants close, do we?

**MORFELD:** We've never, we've never--

**LATHROP:** I think they can introduce the bill, but--

**MORFELD:** --let the committee ask questions or anything like that.

**LATHROP:** OK. All right, that will close our hearing on LB938. We had no letters of support or in opposition, so that will bring us to Senator Bolz and LB951. How many people are here to testify on this bill, by the way? It looks like three, OK-- four, all right, good. In fairness to Senator Bolz, we don't usually go through two bills in a half-hour, so--

**BOLZ:** Hi, Senator.

**LATHROP:** Hello, Senator Bolz.

**BOLZ:** Forgive me--

**LATHROP:** Welcome to the Judiciary Committee. You're free to open on LB951.

**BOLZ:** Thank you. Forgive me for making the Legislature's hardest-working committee wait. As you know as well as anyone, Senator Chambers and Senator Lathrop, Nebraska is one of--

**LATHROP:** We better start with your name, right?

**BOLZ:** That's right, yes. Senator Kate Bolz, that's K-a-t-e B-o-l-z. I'm here introducing LB951. As this committee knows, Nebraska is one of 33 states that has a process for receiving compensation on the basis of a wrongful conviction. That legislation, passed in 2009, provides at least \$50,000 per year of wrongful incarceration. Under that current law, damage awards are to be given in cases where the Board of Pardons pardons a claimant, courts have vacated a crime, or

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the conviction has been reversed and retired with an unsuccessful conviction. I brought this bill after hearing directly from a woman who you will hear from today named Charlene. She's an example of a wrongful conviction being overturned here in Lincoln and her conviction was overturned by the parole board after it was found that she had been acting in self-defense when she shot and injured her abusive husband. The court found that she lacked the intent to be fully innocent since she had fired a weapon as opposed to saying someone else had committed a crime of which she was accused. Since we don't legislate retroactively, changing this law will not change Charlene's ruling, but her case highlights a gap in existing law. If the state establishes that someone is innocent and a conviction is overturned, we shouldn't deviate from our basic principles of innocence until proven guilty. With this in mind, LB951 adds language to allow those who have been wrongfully imprisoned to receive compensation after innocence has been established by proving either the absence of the elements of a crime or that they have an affirmative defense to that crime. I do have a, a fact sheet that very simply outlines how LB951 would change the Wrongful Claims Act. And you will hear both from Charlene and from her attorney about her experiences directly this afternoon. So with that, I'll take any questions you have and leave it there.

**LATHROP:** Senator Brandt.

**BRANDT:** Thank you, Chairman Lathrop. Real quickly, so today in Nebraska, if your conviction gets overturned down the road, you don't have any regress against the state, is that correct?

**BOLZ:** You can file along a wrongful claim, just like the, the most famous example, the Beatrice Six. Those individuals were found fully innocent. The, the little wrinkle in the law here is that we would argue you shouldn't have to prove yourself to be innocent, that an individual is innocent until proven guilty, right? But under the circumstances of Charlene, she was, she was incarcerated and later found innocent on an affirmative defense. In other words, she was let go because it was found that she was acting in self-defense. So this would add the ability for someone to file a wrongful claim if down the road, they were found to be not guilty based on the basis of an affirmative defense.

**BRANDT:** Thank you.

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**BOLZ:** Sure.

**LATHROP:** I see no other questions. Are you going to stay to close? OK.

**BOLZ:** Thank you.

**LATHROP:** Thank you, Senator Bolz. Proponents, you may come forward.  
Good afternoon.

**CHARLENE MARIE:** Good afternoon. My name is Charlene Marie. I am grateful for the opportunity to address this committee. Thank you. I am in favor of LB951 because it promotes justice. Twenty years ago, when I was in prison on a four to 20-year sentence at the Nebraska Correctional Center for Women, there was no compensation law in Nebraska for people who had been wrongfully convicted or wrongfully incarcerated. When a person is innocent or unjustly punished, they are robbed of nearly everything; dignity, time, freedom to name a few. And the collateral damage can be devastating as well. It wasn't until 2009 that the Nebraska Legislature passed our first wrongful conviction and imprisonment act. For over a decade now, countless hours of work have gone into trying to make the statute right. If adjusting, revising, amending makes the law clearer or better, that's what should happen. Making these changes could reduce the chances of wrongful convictions or incarcerations and correct the life-changing catastrophe of unjust imprisonment. Two years ago, I lost a claim under the old Nebraska Claims for Wrongful Conviction and Imprisonment Act. Ever since then, I've wondered why. Did losing make all those outstanding people who believed in my case for so many years, did it make them wrong and me as well? I don't believe so. Maybe we didn't use the right words. Please keep trying to make the Nebraska Claims for Wrongful Conviction or Incarceration Act [SIC] or the Nebraska Innocence Compensation Act-- whatever the name is, I don't know anymore-- fair and clearly accessible, not ambiguous. You are the guardians of justice and you increase the system's integrity by making things better. It's, it's important to do what's right. Every day, we must make decisions that determine the direction in which our lives will move. No one can make the right decision every time; to err is no disgrace. The disgrace lies in not learning from our mistakes, picking ourselves up, dusting ourselves off, and trying again.

**LATHROP:** Very good.

**CHARLENE MARIE:** Thank you.

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**LATHROP:** Let's see if there's questions before you, before you leave. Any questions for this testifier? I see none, but thank you for being here.

**CHARLENE MARIE:** You're welcome. Thank you for letting me speak.

**LATHROP:** Sure.

**DANIEL FRIEDMAN:** Thank you.

**LATHROP:** Dan, welcome to the Judiciary Committee.

**DANIEL FRIEDMAN:** Thank you. Good afternoon, Senator Lathrop, members of the committee. You'll have to excuse my hoarse voice, I'm struggling with a cold. My name is Daniel Friedman, D-a-n-i-e-l F-r-i-e-d-m-a-n. I am an attorney with Friedman Law Office here in Lincoln. Because of our firm's work with the wrongfully convicted, I'm here to speak in support of LB951, a bill that is sorely needed in order to clarify who may seek compensation for suffering at the hands of a wrongful conviction. Our firm had the great privilege of representing Ms. Charlene Marie. Our firm has also represented the victims of other wrongful convictions, including Mr. Darrel Parker, as well as Mr. James Dean, one of the Beatrice Six. The committee may recall that the Nebraska Wrongful Conviction Compensation Act was passed in the wake of the exoneration of the Beatrice Six. When Senator Rogert introduced the bill that became the act, he stated that it was his "sincere hope that Nebraska joined the 25 other states that have statutes that compensate the wrongfully convicted." An innocent person that is wrongfully convicted and incarcerated for a crime is subjected to the pain involved in the separation of family and relationships and community ties, a loss of livelihood, and the ability to find work when released after years of being isolated and sequestered from the rest of society. In 1998, Charlene Marie was in an exceptionally abusive marriage. Ms. Marie was victimized by physical and verbal abuse at the hands of her often intoxicated husband. At the time of the incident for which she was ultimately convicted, Ms. Marie was protecting herself and her 9-year old son from violence. Ms. Marie had been shaken, thrown to the floor, and kicked. She'd been victimized previously with violence. She was clearly the victim of repetitive domestic abuse and was in real and imminent fear that the violence perpetrated against her would continue if she did not take steps to protect herself. Ms. Marie raised a gun to protect herself and the gun accidentally discharged, injuring her then-husband. Nevertheless, she was convicted for use of a deadly

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weapon to commit a felony and for making terroristic threats. Ms. Marie's sentence was ultimately found to be excessive and she was subsequently pardoned after she was released. The act currently reads, in relevant part, that the claimant needs to prove by clear and convincing evidence "that he or she was innocent of the crimes." The word "actual" does not appear in this section of the act. Nevertheless, for reasons that I think are largely inconsistent with the purposes of the act and our common understanding of what it means to be innocent, our Supreme Court affirmatively injected the word "actual" into the act. While we did our level best to argue that a person is actually innocent of a crime if they're engaged in self-defense, the Nebraska Supreme Court did not agree, thus depriving a group of innocent people like Ms. Marie the opportunity to seek just compensation for wrongful conviction. In common parlance, there is really no question that a person is innocent of any crime if she acts in self-defense. If someone broke into your home in the middle of the night intending to do you or your family harm and a gun was discharged in an act of self-defense, would anyone think that you were guilty of a crime? Of course not. That's why Nebraska law defines self-defense and makes the use of force justifiable. By any reasonable measure, Charlene Marie was innocent of any crime. LB951 is necessary to clarify that people who have been pardoned or had a conviction reversed or vacated can qualify for just compensation if they also can show, by clear and convincing evidence, that there was an absence of any element necessary to prove a crime or that an affirmative defense applied. A few more-- another 20 seconds?

**LATHROP:** Sure.

**DANIEL FRIEDMAN:** Ms. Marie was quite obviously not intending to terrorize her then-husband. Quite to the contrary, Ms. Marie was motivated by self-defense. LB951 rectifies a reading of our current law, which clearly has led to an unjust result that is contrary to both the letter and spirit of an act passed by our Legislature. Thank you very much.

**LATHROP:** Thank you. Senator DeBoer.

**DeBOER:** Was the issue of self-defense raised in the trial court?

**DANIEL FRIEDMAN:** There was, there were some flaws in the manner in which the self-defense issue was presented in the trial court and the instructions were flawed and the, the evidence was not presented in

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the way that it really should have been for Ms. Marie. But the evidence came in the way it came in and ultimately, she was convicted.

**DeBOER:** But the issue was preserved from the trial court?

**DANIEL FRIEDMAN:** The issue had not been preserved appropriately. I mean, there were, there were problems with the, the manner in which Ms. Marie's defense was portrayed in the trial court and those were addressed in the appellate decision in the criminal case. But that's really neither here nor there.

**DeBOER:** Right.

**DANIEL FRIEDMAN:** I mean, we're dealing with a situation where somebody who is truly innocent because of self-defense is deprived of compensation because of a rather peculiar and activist read of the law, in my view.

**DeBOER:** Could we do this without the-- so could we do this just by changing that he or she was not guilty of the crime or crimes under subdivision 1 of this section?

**DANIEL FRIEDMAN:** And, and remove sub (a) and (b)?

**DeBOER:** Yeah, I'm just curious. I'm trying to figure this out.

**DANIEL FRIEDMAN:** I mean, I suppose in theory, but I think that the subdivisions (a) and (b) are, are important and do more, do more-- they're good, they're not bad. They benefit the read of the, of the statute.

**DeBOER:** OK.

**LATHROP:** Would those have to be established by clear and convincing evidence?

**DANIEL FRIEDMAN:** Yes. Yes, Senator, the same burden of proof would apply.

**LATHROP:** OK. I don't see any other questions, but thanks for being here, Dan.

**DANIEL FRIEDMAN:** Thank you, Senator.

**LATHROP:** Any other proponents? Good afternoon.

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**GREGORY C. LAUBY:** Good afternoon, Senator Lathrop, members of the committee. My name is Gregory C. Lauby, G-r-e-g-o-r-y, C as in Christian, L-a-u-b-y. I'm here to bring to your attention the Nebraska Supreme Court case titled James Dean and Ada Joann Taylor, which was decided in the Nebraska Supreme Court. They qualify for compensation under the act that the bill now seeks to amend and I fully support that amendment. In this particular case, these two individuals were found innocent; so much so that the Assistant Nebraska Attorney General that chaired the task force that investigated their period of wrongful incarceration told the pardons board that they were not just innocent beyond a reasonable doubt, they were innocent beyond any doubt and that was the statement of Corey O'Brien. But when these two particular individuals of the Beatrice Six sought to seek a claim and compensation for their periods of incarceration, the state of Nebraska opposed those claims. And the district court judge who heard the case found that their confessions were the result of coercion and threats of the death penalty, intimidation of being told they were questionable on a lie detector test, and periods of incarceration. They ended up giving false testimony, but the district court found that that was, in essence, false, but coerced. And they believe that it was true at the time they gave it and therefore, they were not disqualified under the language of the act. I bring this case to your attention because if they had that much trouble getting a claim approved, imagine what somebody who has a feather of a suggestion of guilt might have under the present language requiring them to demonstrate actual innocence. They don't have a task force similar to the one that cleared the Beatrice Six. And I wholeheartedly support the amendment that Senator Bolz has brought and I would suggest to you that there are some other improvements that could be made as well. I think those are in this committee in the form of LB474. Thank you. I apologize--

**LATHROP:** You came late and you didn't get the admonition.

**GREGORY C. LAUBY:** What?

**LATHROP:** That's okay.

**GREGORY C. LAUBY:** OK. I'm sorry I missed that.

**LATHROP:** Yeah, yeah. Any questions for the testifier? I see none, thanks for being here today--

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**GREGORY C. LAUBY:** You bet. Thank you, Senator.

**LATHROP:** --for your thoughts on the topic. Anyone else here as a proponent of LB951? Anyone here to testify in opposition? Good afternoon.

**DANIELLE ROWLEY:** Good afternoon. Chairman Lathrop and members of the Judiciary Committee, my name is Danielle Rowley, D-a-n-i-e-l-l-e R-o-w-l-e-y, and I'm an Assistant Attorney General with the Nebraska Attorney General's Office. The Attorney General opposes LB951. The Nebraska Wrongful Conviction Act was designed to compensate individuals who are actually innocent, but this bill would remove that requirement that a claimant prove actual innocence. Right now, the claimant has to prove legal and actual innocence. Legal innocence refers to subsection 2, namely that the claimant was pardoned, the court had vacated the conviction, or the case was reversed and remanded for a new trial, and there was no subsequent conviction. Actual innocence is when the claimant did not commit the crime for which he or she was charged or convicted. This bill would allow individuals pardon decades after a crime they committed to seek money from the state based on an alleged lack of evidence for a particular element of a crime. By then, the evidence showing that element of the crime may be gone or the witnesses deceased. It is also not uncommon after a reversal and a remand for a county attorney to elect, not to retry an individual. This bill would encourage individuals who committed the crime, but were not retried, for whatever reason, to seek money from the state and the Attorney General does not support compensating individuals who are not actually innocent. And I'm happy to answer any questions you may have.

**LATHROP:** OK, any questions for Ms. Rowley? I see none, thank you for--

**DANIELLE ROWLEY:** Thank you.

**LATHROP:** --your testimony and for coming down today. Anyone else here in opposition to LB951? Anyone here in a neutral capacity? Seeing no additional testifiers, Senator Bolz, you may close. We have no letters of support or opposition or otherwise.

**BOLZ:** I'll be very brief. I just wanted to add the brief clarification that this applies to overturned cases, not the normal appeal process. This applies to cases that were actively overturned. That's my only addition.

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**LATHROP:** OK.

**BOLZ:** Thank you.

**LATHROP:** Thanks, Senator Bolz. That will close our hearing on LB951 and bring us to Senator McCollister and LB968. Welcome, Senator McCollister.

**McCOLLISTER:** Good afternoon, Chairman Lathrop and members of the committee. I am John, J-o-h-n, McCollister, M-c-C-o-l-l-i-s-t-e-r, and I represent the 20th Legislative District in Omaha. I'm here today to introduce LB968 to amend provisions of the Nebraska Treatment and Corrections Act. The Nebraska Board of Pardons and its powers are created in Article IV, Section 13 of the Nebraska Constitution. The board's powers include granting respites, reprieves, pardons, commutations. The Legislature has enacted sections of law in the Nebraska Treatment and Corrections Act that define the procedures that the board follows in carrying out its responsibilities. The Legislature does this for all executive officers authorized by the Constitution. This legislative process-- does this legislative process encroach on executive authority? The answer is no. The executive officers still decide what to do to exercise their authority. The Legislature appropriately defines processes and procedures that the executive is to follow. I would call your attention to the handout I provided that shows the board's data from the last decade. The information was collected by the legislative research from the Nebraska Commission of Law Enforcement and Criminal Justice. The numbers for fiscal years 2009-10 to 2017-18 are hard to understand. What concerns me are-- with the data from 2017. For calendar years 2017, 2018 and 2019, 492 pardons were received. Only seven hearings were held, but 21 pardons granted and an equal number denied. Representatives from the Board of Pardons recognized the need to improve the board's administrative procedures. Last year, the board transferred administrative duties for both the Board of Parole and the Board of Pardons to the Crime Commission, where their work to support both boards can be performed more efficiently by several people. The board's representatives assured me that they are committed to resolving the current backlog of work so that all viable applications can be heard in a timely manner. I should say I've had conversations with this group, typically from the AG's office, and we are working on solutions to this, along with the Judiciary Committee. Witnesses today will supply the committee background information and will help discuss the importance of the Nebraska Board of Pardons carrying out, in a

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timely manner, the duties where it was created. I'm happy to answer any questions.

**LATHROP:** Senator McCollister, I have a couple of them for you. You've given us this handout that shows that in 2018-19, there were 205 petitions received and the pardons hearings held were three.

**McCOLLISTER:** Yeah.

**LATHROP:** So are we just not holding hearings on petitions for pardons?

**McCOLLISTER:** They did hold hearings, but I'm not sure they actually-- the data we collected is before you and that's, that's all I can answer.

**LATHROP:** Well, there were 12 pardons and 12 pardons denied; that's 24. So they acted on 24 cases out of 205?

**McCOLLISTER:** That's what I'm showing, sir.

**LATHROP:** OK. Is your bill required-- your bill requires that they actually have a hearing and then say what they did and why they did it--

**McCOLLISTER:** Right.

**LATHROP:** --in each case, is that right?

**McCOLLISTER:** And every year they have to provide a report to the Legislature--

**LATHROP:** OK.

**McCOLLISTER:** --on the disposition of the applications.

**LATHROP:** All right. I don't see any other questions, are you going to stay to close?

**McCOLLISTER:** Yes, I think I will.

**LATHROP:** Good, good, we'll look forward to that. Proponents of LB968. Professor, welcome back.

**RYAN SULLIVAN:** Thanks, Senator Lathrop, members of the committee. Again, my name is Ryan Sullivan, R-y-a-n S-u-l-l-i-v-a-n, assistant professor of law at University of Nebraska College of Law, where I

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teach in the clinic and I supervise the Clean Slate project, testifying in my individual capacity and not as a representative of the university. I'm here this afternoon to share with the committee some of my research on the historical activity of Nebraska Board of Pardons, as well as my views on the importance of the pardon mechanism in our criminal justice system and why having these hearings on a consistent basis is important. I've collected empirical data on every board hearing held since 2006 through 2016, during which time the board considered 1,600 applications. During this period, the board met to review and consider applications approximately six to eight times per year, holding full testimonial hearings three to four times per year. Beginning in 2017, however, the frequency of scheduled hearings diminished greatly. In the last few years, the board has convened to hear pardon applications on only a couple occasions and on those occasions, only reviewed a handful of applications. In 2019, they only had one pardon board hearing. This significant decrease in pardon board activity has a detrimental impact on our criminal justice system, which relies on criminal record rehabilitation mechanisms such as pardons to help reduce recidivism. On many occasions, I have observed judges and defense attorneys and sometimes even prosecutors tell an individual at their sentencing that if they stay free from crime for a requisite period of time, that at some point, they'll have an opportunity to go before the Board of Pardons and request a pardon and, and have an opportunity for a fresh start. The opportunity to seek and obtain a pardon gives these individuals something to strive for, something to help encourage them to stay crime free, and importantly, it's an opportunity for them to have a formal removal of that label of criminal. It's my understanding that the board has made some changes, administratively, in recent months and there is indication they may be scheduling hearings more frequently going forward. And I was very pleased to hear this news and I, and I hope there is follow-through on that. Whether the board does it on its own initiative or whether it's through legislative action, what's important is that these hearings are held so these rehabilitated Nebraskans have a chance for a new beginning. No matter the results of this bill, I hope the board recognizes that it is of great benefit to all of Nebraska, not just these individuals, that there be consistency and reliability in this pardon process, which plays a vital role in our criminal justice system.

**LATHROP:** Very good, I see no questions--

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**RYAN SULLIVAN:** Thanks.

**LATHROP:** --but thanks for being here again. Next proponent. If you're going to testify, you can fill in these front chairs, though. That's kind of our on-deck circle. Good afternoon.

**JOSH WALTJER:** Good afternoon, Chairman Lathrop and members of the Judiciary Committee. My name is Josh Waltjer. It's spelled J-o-s-h W-a-l-t-j-e-r, and I'm a third-year law student in the University of Nebraska's Civil Law Clinic, where I, where I specialize in the Clean Slate project. I'm testifying and speaking in favor of LB968 as a private citizen and not as a representative of the university. I'm here to speak about the life-changing benefits that the pardon process provides to Nebraskans and why it's important for our citizens to have access to the pardon process in this state. Too often, Nebraskans who have committed crimes, but who have fulfilled their sentences, continue to be haunted by a criminal record that impedes their ability to reintegrate into society. Criminal records can restrict an individual's ability to gain employment, sign an apartment lease, or even obtain insurance. The goal of the corrections process is to introduce prior offenders to a more productive and meaningful lifestyle in society. Unfortunately, because of the existence of a record forever labeling these individuals as criminals, they're sometimes never able to fully reintegrate. The pardon process gives Nebraskans a chance for redemption. Nebraskans with criminal records who have fulfilled their sentences and who have met requirements for a pardon, as established by the pardons board, should be given this opportunity. Our state's criminal justice system relies on rehabilitation systems such as pardons to help limit recidivism and ensure that individuals can become productive members of society once again. Our clinic program has represented some individuals throughout the pardon process, many of whom are still waiting for their hearing, some for over two years now. These clients have worked hard to improve their lives and address their past mistakes by maintaining clean records, seeking out jobs, and becoming productive members of society. For these reasons and others, it is important that the Board of Pardons meets regularly to provide hearings for eligible individuals. I know that the Senator is working with the board to resolve the concerns that resulted in this bill and hopefully that dialog, if nothing else, will result in the board recognizing how important it is for these Nebraskans to have an avenue to seek a fresh start. For the

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clients we represent in the clinic, the opportunity to seek and obtain a pardon can be life changing. Thank you.

**LATHROP:** Thank you. I do not see any questions for you today, thanks for being here. We appreciate the work you're doing in the clinic.

**JOSH WALTJER:** Thank you.

**LATHROP:** Yeah.

**TEELA MICKLES:** Good afternoon, Senator Lathrop and the rest of the committee.

**LATHROP:** Good afternoon.

**TEELA MICKLES:** Thank you. My name is Teela Mickles, that's T-e-e-l-a M-i-c-k-l-e-s. I am the founder and CEO of Compassion in Action, that's an organization that works with confined individuals and I've been working with confined individuals since 1983. I'm here in support of this bill because I have witnessed firsthand the-- I have to be nice. I have witnessed firsthand the lack of whatever was supposed to happen regarding the Board of Pardons. My associate in the room here with me, we attended two in the last four years. The first Board of Pardons was a shock to me. Individuals are in that room to testify and anyone who had put in an application for a commutation of sentence, it was moved that their, their plea or their petition or whatever be tabled for two years. Therefore, there was no hearing. One of the ladies in the audience was so devastated, she just wanted her brother, who was incarcerated for 48 years and elderly and her last living sibling, she just wanted him to have an opportunity to come out so they could die together. And her cry was, you're not even going to hear us? Because there was no hearing, it was moved that it be tabled and they named-- they gave the names and they gave the numbers and that was that. On the second hearing that we attended, it was worse because they gave a-- on the agenda, it actually said no testimony will be heard. And they named the names and they gave a number and they said we-- these are denied. Boom, that was that. And if your name-- if you're here to represent any of these individuals, you can leave the room. And the room was packed. And it was packed with families, it was packed with people. The first one that we went to, there was an individual who was coming to represent the person that we were coming to represent. He drove seven hours. He was an individual who said that he was for capital punishment until he had met our participant and now his mind was changed. And he had driven seven

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hours to testify and there was no hearing. The second time that they did it, they made a motion and they just simply denied. We asked the people who are confined, what do they expect of the Board of Pardons? And they expect positive things and just like have been reported already, they are looking forward to their opportunity. There is a 17-page application they have to complete to get a letter that says they have a hearing and no hearing has taken place. So there's a lot of things that need to be done. The people have expectations of this board. This board has -- it's just like you're just a little puppy in a bag and this just drowned them all and it's, it's, it's disgusting and it's humiliating. It's like-- these individuals have come to testify for their family members; testify. It's a hearing. Nobody gets to go home, but there was no hearing. In the past four years, there was no hearing. There was a move, there was a motion, and it was a wrap. So this definitely needs to be checked.

**LATHROP:** OK. I think Senator McCollister is working on that and this bill has certainly helped bring all of this to light. We'll see if there's any questions--

**TEELA MICKLES:** Questions?

**LATHROP:** --from any of the folks on the panel. Not today, but thanks for coming down, we appreciate--

**TEELA MICKLES:** Thank you so very much, I appreciate it.

**LATHROP:** --you taking the time to share your thoughts. Anyone else here to testify as a proponent? Good afternoon.

**MATT KOSMICKI:** Senator Lathrop and members of the Judiciary Committee, my name is Matt Kosmicki, M-a-t-t, and Kosmicki is spelled K-o-s-m-i-c-k-i. I'm a criminal defense attorney. I've been practicing criminal law in Lincoln for 20 years and over the 20 years, have filed numerous pardons. And in the past, the board used to meet at least quarterly. They would meet three times a year, four times a year and that hasn't been the case as of recent. I have three pardons right now that I filed in October 2018 and they have not had a hearing. It's difficult when clients call regularly. They've hired a lawyer. They have a lot of expectations behind this, or at least hopes. And I tell them there's-- I have no news for them. I'm going to give you a little example to give you a background of what type of people that, you know, come to me typically and this is-- they're all almost the same. I have a single mother of three kids who's trying to make a better

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life for herself. She's gone to school part time to be a nurse. It would definitely improve their financial situation and she believes that a pardon would help her achieve that goal. I have a regional salesman for a sporting goods company; you know, handles, like, camping and hunting and fishing equipment. He can't handle or be near, you know, firearms or ammunition and he would like to have a pardon to try to help him get that-- at least get the firearm part restored. I also represented or filed an application for a young man from central Nebraska and he just simply wants to hunt with his children again. And almost all of these people, they are crimes that were over 20-years old almost and they're different people now. They've, you know, got families and jobs. They're part of this community and they want to, to move on and they feel a pardon would help them. A lot of them just want to just be-- actually just move past those past transgressions. And I think we should help people who do that; who have committed, while they were young, a crime of some kind and then a long period of time goes by where they haven't committed any kind of crime and they want to, to move on and have that forgiven in a way. I read the letter from the Board of Pardons and it's encouraging that they'll make these changes. And I forgot to add that I'm testifying on behalf of the Nebraska Criminal Defense Attorneys Association so that's all I have.

**LATHROP:** All right. Senator Brandt has got a question for you.

**BRANDT:** Thank you, Chairman Lathrop. Mr. Kosmicki, how many years have you been doing pardon law?

**MATT KOSMICKI:** Ever since day one. I mean, it's all-- I've been out-- I mean--

**BRANDT:** Ten years?

**MATT KOSMICKI:** --criminal defense is always filled with questions. A lot of people won't-- in the beginning, a lot of people just couldn't make that step and wouldn't do it. But I mean, I've filed pardons over the years, I couldn't tell you-- I mean, I've been-- I've been doing this 20 years.

**BRANDT:** OK. That's, that's-- so you've been doing this for 20 years and this chart that Senator McCollister gave us, it looks like in the last three or four years it has dramatically been reduced. Do you have an opinion on that?

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**MATT KOSMICKI:** Well, that's true. I mean, I haven't-- I didn't see that chart, but when those-- the hearings are published in the paper and I have clients call me and think that we missed some kind of hearing and then I'd find out about those-- that there were these hearings, yeah, and that there were-- have been reduced quite a bit. I think there was just two last year. I think-- wasn't there one in March and there was a commutation of sentence hearing in July so-- I mean in 2019? So does that answer your question?

**BRANDT:** Well, I guess I was just-- if you had an opinion on why it changed?

**MATT KOSMICKI:** I don't and I'd just be guessing; I don't know why it changed. I mean, when I get calls from clients about where is my pardon at, what's going on? I'd turn around and contact the Board of Pardons and sometimes, I didn't get a response for a while. And then I got some of the things that Senator McCollister talked about, that there was some change over and they had to research the applications.

**BRANDT:** All right, thank you.

**MATT KOSMICKI:** Yep, anything else?

**LATHROP:** I see no other questions, thanks for coming down today. Good afternoon.

**KENNETH ACKERMAN:** Good afternoon, Senator Lathrop and the Judicial [SIC] Committee members. My name is Kenneth Ackerman, K-e-n-n-e-t-h A-c-k-e-r-m-a-n. I work with RAN, the Reentry Alliance of Nebraska and like many working there, I'm a former fellow. Our goal is to help those completing their prison confinement sentence; find them safe housing, obtain further education or job training, and get a job. This also includes successfully reentering their community and becoming productive and helpful citizens; the most successful volunteer in their community, helping others in need. The problem is the label of felony that creates so many obstacles that some failed and returned to prison, adding to our overcrowded prisons and destroying all our efforts of hard work. A felony label limits the kinds of jobs available, as many licensed jobs are denied to felons. Many housing locations are denied. All too many employers and apartment managers refuse felons subtly by giving some other excuse to turn down felons. So therefore, a mistake, oftentimes a serious mistake, ends up labeling one for life and always limiting the potential talents one is born with. How many of us have made serious mistakes as a youngster,

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but not been caught? Imagine carrying these mistakes with you for life. Interestingly, the current law reads that the Board of Parole is the first agency that has the power to recommend a pardon. Not that they have enough of a responsibility to predict whether someone might not succeed in society and deny them parole, but I suspect if they were to look closely, they might see the possibility, too, of recommending a pardon. Perhaps we need to look at pardons in a totally different way; perhaps those in prison-- reformed, disabled, or even over 60. That's the new term-- the federal First Step Act's definition for consideration of early release-- could be also considered for pardon in order to help them better succeed in society. Perhaps those former felons could be considered for a pardon after 10, 15, or 25 years of good behavior. We certainly would improve their outlook and their success. Get rid of labels that handicap and disable productive citizens. This LB968 law could be the first step in a totally different outlook and purpose for the Board of Pardons. Perhaps asking them for a follow-up report on those who have been given a pardon, how have they succeeded?

**LATHROP:** Very good. Thank you, Mr. Ackerman. I do not see any questions, but thanks for being here today. Good afternoon.

**SPIKE EICKHOLT:** Good afternoon, Chairman Lathrop and members of the committee. My name is Spike Eickholt, S-p-i-k-e E-i-c-k-h-o-l-t, appearing on behalf of the ACLU of Nebraska as their registered lobbyist. We are testifying in support of LB968. I'm not going to repeat a lot of the testimony you heard earlier. I think the committee has an idea of what the issue is. I'd just like to emphasize a couple of points that our Supreme Court has interpreted a pardon as an act of grace and no one is entitled to it, but at least the process ought to be meaningful. A person ought to be able, if they request a pardon, to have their day in court, if you will. And showing up at a hearing, finding out that you've already lost, right? Or filing your request for a hearing and never even hearing back is not meaningful and it just seems to be fundamentally unfair. And I have reviewed the letter from the Board of Pardons, where they seemingly are going to change the process and that's encouraging, I don't want to disparage that effort. I want to make another point that is-- reform to the reentry part of our criminal justice system, Professor Sullivan mentioned this before, is something that a lot of states have done. When they reform their criminal justice system, that's a key part of it. And this is also part of it as well. Other states, their reform efforts have been a little easier in the sense that their legislatures can pass laws

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that provide for a pardon process or their courts can provide for a pardon process similar to our set-aside. That's why it's important for our Board of Pardons to also want to reform our criminal justice system to play an active role in that. And part of that is having regular hearings, hearing people out, and granting pardons for those people who deserve it. I think the Legislature has done what it can do to assist in the reentry programs. I don't want to just be dismissive of that. For instance, last year, this committee and the Legislature passed the record sealing part to provide for someone who gets a pardon. They can have their official court records sealed. Just yesterday, we heard a bill on the set-aside provision, which is a limited postconviction, a postsentence remedy. But I would encourage this committee, even though there may be, admittedly, perhaps somewhat difficult for the Legislature to direct the Board of Pardons to do certain things, I think it's important that the bill at least be advanced or considered because it's certainly a legislative expression and benchmark to the Board of Pardons for what the Legislature, perhaps, and people expect. So I'd encourage the committee, even though it seems like the Board of Pardons has pledged to do something different, to still consider moving this bill from committee. I'll answer any questions that you want to ask.

**LATHROP:** OK. I don't see any questions from the committee, thanks for being here. Any other proponents?

**GREGORY C. LAUBY:** Senator Lathrop, members of the committee, my name is Gregory C. Lauby, G-r-e-g-o-r-y C. L-a-u-b-y. I brought today, to be passed out, a document that is a seven-page summary report of the investigation by the task force, which reviewed the investigation of the Helen Wilson homicide. Nebraska Assistant General Corey O'Brien referred to the report in ranking his presentation to the Nebraska Board of Pardons on behalf of the six individuals who have been convicted of crimes arising out of the Helen Wilson homicide. He assured the board that they were all innocent based on the information contained and were at least summarized in this report. And the reason that I bring it here to your attention today in support of Senator McCollister's bill is that it is so thorough and so convincing that if it could become widely known, I think it would go a long ways to dispelling a widespread belief that somehow the six convicted individuals participated in the crime itself, which they did not. There is no physical evidence and there is no other credible evidence that they had any part in it. But this report and other documents that were available to me at the parole office could go a long ways towards

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dispelling those beliefs. And if this kind of material was made available for every applicant for a pardon, I think it would go a long ways to explaining why some pardons were given and justifying that and helping confirm the validity of the pardon. And in the case of a denial, it would give the applicant some information about how he might possibly cure whatever objection the pardons board had. And I think for those two reasons alone, Senator McCollister's bill will be a great improvement for our prison system.

**LATHROP:** Very good, I see no questions, but thanks for your testimony.

**GREGORY C. LAUBY:** Thank you.

**LATHROP:** Anyone else care to speak as a proponent on LB968? Anyone here in opposition to LB968? How about a neutral capacity? Seeing none, Senator McCollister, you are free to close. We do have a letter in opposition from the Nebraska Board of Pardons that's been entered into the record.

**McCOLLISTER:** Well, thank you, Chairman Lathrop and members of the committee. I want to thank the testifiers today. I thought they did a good job of explaining the problem we have with the pardons board. You may look in your, your booklet and see that in this bill's short life, it's had three fiscal notes. Every time we get a new fiscal note, it goes up a bit. I would contend that this should not be a fiscal note. This is the cost of government and a functioning parole board needs to not consider that to be an additional burden that they need to pay for. It's-- that's not right. So once again, I thank you for your attention. I'll be happy to work with the AG or whoever else and also members of the committee to move this thing along. Thank you very much.

**LATHROP:** Sure, John. I understand that you're working with the pardons board and its members to try to rectify this problem. You'll keep us apprised on how that's going?

**McCOLLISTER:** Count on it.

**LATHROP:** OK, good.

**McCOLLISTER:** Thank you.

**LATHROP:** Thank you. I don't see any questions. That will close our hearing on LB968 and bring us to our own Senator Chambers and LB925. We'll just let him finish clearing the room. The sound is terrible, as

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you can probably tell, and so the background noise makes it hard to record. OK, with that, Senator Chambers, you're free to open on LB925.

**CHAMBERS:** Mr. Chairman, members of the committee, I'm Ernie Chambers. I represent the 11th Legislative District in Omaha and this will be my last appearance before this committee. Because of term limits, I am through with this Legislature and the Legislature is through with me. This is a bill which is very meritorious. And before I even go into my statement of intent, there are processes and procedures that are devised by the Legislature and put in place to facilitate the proper functioning of government and its parts. When those procedures are violated, if one of them relates to the right of citizens to participate in the rulemaking process as an administrative agency, should that provision be violated, the citizens ought to have a right to come forward and challenge that appropriateness of that rulemaking activity. And for the Legislature to give them this kind of consideration is an indication that the public does actually have a role to play. Now there was actually a case that went to the Supreme Court and somebody else may testify on that in more detail, but I just wanted to indicate that this is not just a theoretical exercise. I will read this statement of intent, make a couple of comments, and then answer questions. I don't want to prolong the hearing. I will not say a great deal because I will be here to close, if necessary. Section 84-911 provides that a person who seeks to determine the validity of any rule or regulation may petition for a declaratory judgment in the District Court of Lancaster County. In a declaratory judgment, the court may declare the rule or regulation invalid if the rule or regulation violates constitutional provisions, exceeds statutory authority of the agency, or was adopted without compliance with the Administrative Procedure Act. And this is the part I'll be touching on; "adopted without complying with the Administrative Procedure Act." In order to bring a petition pursuant to this section, a person must have standing or the legal ability to bring a claim. LB925 would provide statutory standing to the following individuals: (a) any Nebraska taxpayer, (b) any person whose legal rights or privileges are interfered with or threatened by a rule or regulation, (c) any person acting on behalf of a person whose legal rights or privileges are interfered with or impaired. In the case of Griffith and Chambers v. DCS-- that's the Department Correctional Services and it gives the citation. The Nebraska Supreme Court interpreted Section 84-911 as providing standing only to individuals who can show a concrete injury in fact, as a result of any challenged rule or regulation. This bill is intended to correct this decision and broaden

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the category of persons who have standing to seek relief under Section 84-911. Standing just means that this person has a legal basis to be there and therefore, the court has jurisdiction to entertain the action. Since a citizen is given, pursuant to the Administrative Procedure Act, to participate in the rulemaking process public hearing, certain documents have to be made available to the public and other information. If that is not complied with, that constitutes a violation of a statutory provision. But what the Nebraska Supreme Court said, despite that, you're dealing, there, only with what they have called a procedural violation. The only way a person's procedural rights are violated does not give a person a basis to challenge the rules or regulation involved. Well, why would the Legislature provide for the public to participate if it meant nothing? The only way that participation would have any value and not be a mockery is if there are citizens with enough interest to participate by attending a hearing, by obtaining the type of documentary information that the statute says must be made available. It is a mockery if after you've done all that and there have been violations by the agency, there is no recourse, then that means nothing. The court said the only way you will have standing to challenge-- we were talking about the execution protocol-- is if that particular action, that particular rule or regulation impacts you personally. Since neither I nor the Minister was under a sentence of death, we have no standing to challenge the inappropriate drafting and creation of that protocol, which to me, makes the whole thing a mockery. So what this bill would do is to state specifically that a Nebraska citizen has a right to challenge a rule or regulation of an agency or department if there has been a violation of statutory requirements involved in the adoption of that rule or regulation. And I don't want to just go on and on, which I could do on this, but I'm showing some restraint. If you have questions you'd like to put to me, you can do so now or at the time that I close. Other testifiers, if any, may give you more details than I have. But unless you have questions, that will be my opening.

**LATHROP:** OK. Senator DeBoer has a question.

**DeBOER:** Senator Chambers, is there any concern that-- and help me out here-- that any citizen who doesn't like any rule or regulation could then just go file for declaratory judgment and sort of keep our courts going through the process of going through every rule and regulation that sort of adds a second step to the rule and regulation process?

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**CHAMBERS:** Well, the way I would view it and considering the circumstances that led to this, there would be individuals who have gone to the agency to obtain the material or information that is to be provided. When somebody makes that request, the agency refuses to do so; that is a violation of the right of that citizen to participate in the rulemaking process. And on that basis, there can be a challenge because the rule was not adopted pursuant to what the statute required. Even now, they talk about an exception if the issue is one of broad public interest. So regardless of anything else, if you just happen to pick up a newspaper and see that they were dealing with an execution protocol and they did not follow the statute, that, in and of itself, is an issue of broad public concern. You should not have to be under a sentence of death. You should not have to have anything to give you a basis to challenge it other than to show that the person, the agency did not follow the law in adopting this rule or regulation. And any citizen should be allowed to make that claim and have the right to go to a court and challenge it.

**DeBOER:** That language of the broad public interest, where does that come from?

**CHAMBERS:** Well, that's something that the court would interpret. And sometimes they have-- for example, when I brought an action some time ago about-- it had to do with redistricting of a city council, something like that--

**DeBOER:** Um-hum.

**CHAMBERS:** --then that was ruled to be something of broad public interest, so I had standing to challenge that.

**DeBOER:** Oh, I see.

**CHAMBERS:** And they had allowed it in other instances. But I think because of the nature of this particular issue, dealing with the death penalty, there was not going to be an allowance by the Nebraska Supreme Court of a challenge like that. If they did, as they did, allow an execution to occur under the cloud that existed at that time, there is no way-- even though there's pending litigation, there's no way the court is going to rule in any of those actions that something inappropriate was done. To rule that way would indicate they allowed an execution to be carried out, which violated the law. And the reason the court wanted this particular execution carried out so hastily-- there was an expiration date on these drugs. So even before pending

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legislation challenging certain aspects of that protocol and the death penalty itself, the court would not allow anything to be resolved before carrying out that execution. Once the execution was carried out, that guaranteed-- and I wrote a letter to that effect before it happened-- any pending legislation would receive a negative ruling by the Supreme Court, even though there had been no review by the Supreme Court of any evidence, any arguments that had occurred in a trial court. They predetermined the outcome of all that litigation when they allowed the execution to occur under these clouds. There's no way the court is going to go back and say, well, this was done inappropriately, because that would also mean there ought not to have been an execution because it wasn't carried out in accord with the law or the Constitution. And when you try to explain things like this, sometimes the explanation becomes so involved that the number of details becloud the issue, which is not really that complicated.

**DeBOER:** So I guess my question is, is this bill limited, then, to standing for declaratory judgments in the area of something of broad public interest or is this bill about every administrative rulemaking that is possible?

**CHAMBERS:** The bill, itself, deals with any rulemaking that is done--

**DeBOER:** Whether--

**CHAMBERS:** --and a citizen felt that something had been violated, can bring it. The reason I'm talking about the exception, the Supreme Court has recognized exceptions.

**DeBOER:** Right.

**CHAMBERS:** They could have taken that challenge to the protocol under the exception that they had already established--

**DeBOER:** Right.

**CHAMBERS:** --that nothing could be a broader public interest than the state extinguishing a life. If there are challenges to the procedure that created the protocol, that issue is of such broad public interest that citizens who have participated in the hearing process and so forth would have standing to challenge. That would mean-- it would mean you're not guaranteed a win, but it meant you could raise those issues to the court. What the court decided is that there was no basis to even allow those people to--

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**DeBOER:** Would you--

**CHAMBERS:** --challenge it.

**DeBOER:** Would you be willing to work on an amendment that would codify the exception so that this law doesn't apply-- so that standing of the type you speak about doesn't apply to every--

**CHAMBERS:** In addition to what we're doing?

**DeBOER:** --that doesn't apply to every regulatory instance and every administrative rulemaking, but only applies to rulemaking in instances like the exception you described?

**CHAMBERS:** I didn't want to get into too much ancillary arguing because the Nebraska Supreme Court also talked about what are called common law bases for standing--

**DeBOER:** Standing.

**CHAMBERS:** --and those common law bases are not codified here. So if you would do that, then you would draw into this issue and I'm not opposed to doing it, all of those bases for standing or that would justify standing. But I would want what we have here included so that the court could not interpret or through interpretation, take away the right of a citizen to make the challenge. And that's what it boils down to. If they say you don't have standing, you cannot--

**DeBOER:** Right.

**CHAMBERS:** --challenge. You can file anything you--

**DeBOER:** Right.

**CHAMBERS:** --want to, but they'll throw it out right away.

**DeBOER:** Right, yeah. OK.

**LATHROP:** Senator Brandt.

**BRANDT:** Thank you, Chairman Lathrop. Thank you, Senator Chambers. A real quick question; on line 21 to have standing, "(a) any Nebraska taxpayer," what's a taxpayer? I mean, is that just a general term?

**CHAMBERS:** You said line 23?

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**BRANDT:** 21.

**CHAMBERS:** Oh, 21. Yeah, that's all-- I got-- I had standing to make the challenge I did all those years ago. I challenged as a taxpayer. I pay sales tax, I pay, you know, any kind of tax that you pay.

**BRANDT:** So it could be really any Nebraska citizen because everybody--

**CHAMBERS:** Virtually any Nebraska citizen, right.

**BRANDT:** OK, thank you.

**LATHROP:** I do not see any other questions, I assume you'll want to close?

**CHAMBERS:** Maybe; it may not be necessary, but I'll be here just in case.

**LATHROP:** All right, OK.

**CHAMBERS:** OK, thank you.

**LATHROP:** Thank you, Senator Chambers. First proponent. Good afternoon.

**ROBBIE McEWEN:** Good afternoon. Thank you, Chairman Lathrop and members of the Judiciary Committee. My name is Robbie McEwen, R-o-b-b-i-e M-c-E-w-e-n. I'm the legal director of Nebraska Appleseed and Nebraska Appleseed is a nonprofit organization that fights for justice and opportunity for all Nebraskans. And before I, I go through my statement, if I could, I'd just like to respond with my answers to Senator DeBoer's and Senator Brandt's questions, if that's OK. The exception for great public concern and the status of Nebraska taxpayer standing was most recently pronounced in Thompson v. Heineman in 2016 in a majority and it's not a plurality opinion as it relates to standing. And so they go through the history of Nebraska taxpayers' standing for declaratory judgments as they exist in Chapter 25, which is not the declaratory judgment act in Chapter 84. The difference is Chapter 84 declaratory judgment acts are focused on the validity of rules or regulations. Chapter 25 declaratory judgement actions focus on the validity of statutory enactments, contracts, and the like. And so what the Nebraska Supreme Court did in Griffith and Chambers v. DCS is focusing on the validity of rules and regulations in Chapter 84-911. And under my reading of the case, they precluded taxpayer standing for anybody that's challenging the validity of a rule or regulation. And we are here in support of LB925 because the

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Administrative Procedures Act establishes minimum procedures for state agencies to follow in making rules or regulations. It's about public accountability and so that ensures that the government remains accountable to the public. We support the concept behind LB925 because it "rebroadens" the class of persons that are able to challenge rules or regulations promulgated by state executive agencies that may violate the law. So while we believe the bill as drafted could be more narrowly tailored to specifically include limitations that exist in other contexts for taxpayer plaintiffs seeking declaratory judgments like the great public concern exception, LB925 helps to ensure that government actors do not promulgate those unlawful rules or regulations. So currently with the status of the law under Griffith v. NDCS is that only those persons that are directly regulated by an agency can challenge the validity of that agency's regulation under 84-911. However, we at Appleseed have worked with a variety of classes of people where they would have no real ability to challenge the regulations that affect them. For example, children in foster care would have a great deal of difficulty challenging the validity of regulations in Lancaster County District Court, even if they're constitutionally violative. Also, individuals that are regulated in industries where the regulations would only benefit those that are regulated, there would be no taxpayer that could come in and challenge the validity of a regulation when those who are regulated have no incentive to do so. So as such, allowing a taxpayer to raise a challenge in district court when it's not practical, not practical for children in foster care or others in those types of classes to do so will help ensure that DHHS, as it relates to children in foster care and others within the state executive, are held to account for their actions. So we just want to thank everybody on the committee for your work on this. And if you have any questions, I'd be happy to answer them. Yes.

**LATHROP:** Senator DeBoer.

**DeBOER:** Sorry, thank you, maybe you can clarify some things for me.

**ROBBIE McEWEN:** Sure.

**DeBOER:** So there's, there's statutory declaratory judgment standing-- is what you're saying under-- what was the statute that--

**ROBBIE McEWEN:** Oh, you're going to recall my memory. It's-- so there's a declaratory judgment act under Chapter 25 in the code and I--

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**DeBOER:** That's--

**ROBBIE McEWEN:** --don't quote me, I think it's 25-21,149.

**DeBOER:** That's, that's fine. You don't have to be-- OK. And so under that, under that standing then, there is no exception for anyone outside of those who are directly regulated by the agency, is that correct?

**ROBBIE McEWEN:** No, the status of the law is that there are taxpayer exceptions--

**DeBOER:** OK.

**ROBBIE McEWEN:** --for that kind of declaratory judgment action, currently. The Supreme Court decision that Senator Chambers is referring to removed all of those taxpayer exceptions for this type of declaratory judgment action. So the status of the law is those taxpayer exceptions exist, except for now when there's rules or regulations at issue because of the language written in 84-911.

**DeBOER:** Is there a way to, to find a middleground here? I mean, is there a way to still try to prevent the harm that Senator Chambers is trying to prevent, where taxpayers are unable to get standing, but on the other hand, maybe narrow this a bit so that it's not every regulation, every time, by every taxpayer?

**ROBBIE McEWEN:** Yes. I think if, if you codify the majority opinion in *Thompson v. Heineman*, that would treat this class of declaratory judgment like any other taxpayer action.

**DeBOER:** OK, thank you.

**LATHROP:** I got a question.

**ROBBIE McEWEN:** Yeah.

**LATHROP:** I see-- and this, this has to do with just this section and not so much the bill. But it says regulation, which of course we have the APA for, for establishing regulation, when they refer to rule in this statute, is this rules promulgated by an agency as opposed to a regulation?

**ROBBIE McEWEN:** That would be my understanding.

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**LATHROP:** OK.

**ROBBIE McEWEN:** So it would be, it would be rules promulgated by-- it would be, I believe, rules and regulations and because it should be rules and regulations.

**LATHROP:** I happen to have some experience with the Department of Corrections promulgating rules when it looks like they ought to be going through the APA and promulgating regulations. This would apply to those rules?

**ROBBIE McEWEN:** Yes.

**LATHROP:** OK.

**ROBBIE McEWEN:** So that-- my understanding-- and this is something that we've seen quite a bit with executive agencies; things that they actually should be promulgating as regulations, but choose to do informal agency guidance that don't comply with the APA. Normally, you can challenge those deficiencies under something like 84-911.

**LATHROP:** Yeah, I think health, health was going--

**DeBOER:** Yep.

**LATHROP:** --to establish reimbursement rates for Medicaid by rule as opposed to going through the APA process, for example.

**ROBBIE McEWEN:** Yes. So that would be an example of something that, normally, you could challenge under 84-911. If there's a deficiency in something that actually should be a regulation, the agency action should be invalid and you should be able to challenge it under 84-911.

**LATHROP:** OK, thanks, I appreciate that. Senator Wayne.

**WAYNE:** So in a hypothetical-- hypothetically, if this bill doesn't pass, what recourse does citizens have? I know we've got the fear of too many lawsuits, but what can you do; underneath political tort claims or in-- what could a citizen actually do to challenge a reg or something that is happening if this bill doesn't pass?

**ROBBIE McEWEN:** If this bill doesn't pass, under 84-911 and the way that the Supreme Court talked about it, if you're just focusing on rules or regulations, there would be nothing that any citizen could do. You would have to be directly regulated by the regulation in order

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to challenge it. So if-- I mean, DHHS has not done this, but say they promulgated a facially unconstitutional statute saying all children in foster care are not allowed to go to church; facially unconstitutional. It would be really difficult for that 11 or 12 year old to go to Lancaster County District Court, like I said, to do it and they would be the only entity or person that's being regulated. So the taxpayer, under the current status of law, could not step in to sue on behalf of those children in foster care.

**WAYNE:** OK.

**LATHROP:** You just have to go find a plaintiff that's directly affected.

**ROBBIE McEWEN:** Right and--

**LATHROP:** So I do have another question. In the, the case that Senator Chambers was involved in, would anybody on death row have been a suitable plaintiff or did it have to be Carey Dean Moore?

**ROBBIE McEWEN:** My understanding in the-- the concurring opinion that was also added to the end that any death row inmate could have been sufficient to challenge those regulations in that case.

**LATHROP:** OK, thank you for your testimony. I don't see any other questions.

**ROBBIE McEWEN:** Thank you.

**LATHROP:** Good afternoon.

**SPIKE EICKHOLT:** Good afternoon, Chairman Lathrop and members of the committee. My name is Spike Eickholt, S-p-i-k-e E-i-c-k-h-o-l-t, appearing on behalf of the ACLU of Nebraska as their registered lobbyist testifying in support of LB925. I want to thank Senator Chambers for introducing the bill. Senator Chambers provided a good overview of the bill. I'm having my testimony distributed. I'll try to summarize it. As Senator Chambers indicated before, the APA provides for a process. I cite a statute that relates to this in the APA, that explains the legislative intent. And essentially the Legislature has found that because agencies have regulatory authority and have an impact on people's lives, the people ought to have some sort of say over the rulemaking process; a right to be heard, a right to see the rules, and that sort of thing. And if a rule or regulation-- whatever you want to call it, a regulation, I'll refer to it-- is enacted-- and

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to react to what Senator DeBoer said earlier, not just because it says it disagrees with the rule, but if that rule either, (1) violates constitutional provisions, (2) exceeds the statutory authority of the agency, or (3) was adopted without compliance of the APA, then that citizen may bring a claim. For years, our Supreme Court allowed and recognized taxpayer standings for declaratory judgments under 84-911. I cite the case that really discusses it most completely and that's Project Extra Mile. And I'll just explain the facts in that case and I think it may kind of illustrate, hopefully, the distinction. In Project Extra Mile, that entity-- which isn't even a person but was recognized as has taxpayer standing-- and some people who were affiliated with that organization brought suit against the Nebraska Liquor Control Commission because the Nebraska Liquor Control Commission adopted a regulation that taxed malt beverages at the rate that they taxed taxpayers and not what they taxed spirits, which matter a lot for those people who bought alcohol because they paid a lot less tax. And it was also, perhaps, a convenience for those people who sold the alcohol. Project Extra Mile brought a claim and they were given and recognized to have taxpayer standing. And the theory is, is that they are paying taxes, that what this government agency is doing is impermissible; it's illegal. The Legislature is what the court decided-- the Legislature sets the parameters or recognizes what malt beverages are supposed to be. The agency just doesn't come up with that because it can be interpreted two different ways. And not only did the Supreme Court allow or recognize that they had standing, but it also found that that regulation exceeded their authority. That was-- that case was reversed and that line of cases were reversed in Chambers and Griffith v. DCS, in which they said that you're not entitled taxpayer standing. Even if there was a procedural violation in the adoption of the rules, whatever it may be, it can only be brought by those people who are directly affected by that rule. And in that case, it was the people on death row, which is a little bit, with all due respect to the court, illogical because people on death row don't pay taxes, right? They don't have an opportunity to even testify or appear at the rulemaking process. But of course, they'll recognize that they're the only people who have standing to challenge a violation of the APA in declaratory judgment of 84-911. The bill is good because it reverses that whole thing and hopefully goes back to the law before. I'll answer any questions.

**LATHROP:** I do want to ask you a question, though. Going back to standing, we all learned this--

**SPIKE EICKHOLT:** Right.

**LATHROP:** --the principle of standing in law school, which is to make sure that the person who's bringing the case has an actual stake in the matter. And while I appreciate Senator Chambers certainly had an interest in the subject matter of the protocol, if we changed the standing, do we run the risk that we're just going to have a phony declaratory judgment action? Let's say some friend of the administration or a friend of Health and Human Services files a taxpayer declaratory judgment action and they don't give it their all or they're not invested in it like somebody whose benefits are going to be deprived.

**SPIKE EICKHOLT:** Well, I don't think we had that problem when the law was-- before the law for taxpayer standing. So I don't think you saw that then; at least I didn't see it then so I don't think that's the issue. Perhaps the bill, as proposed, may open up for that scenario. But not doing anything, not passing the bill, I think is problematic because even though this dealt with execution protocol, people on death row, the bill has more consequences. For instance, I was just thinking-- looking at Senator Brandt-- if you are helpless, OK, if you are unsatisfied with what Game and Parks is doing with respect to issuing deer permits and you're a taxpayer sort of watching from the sidelines with only the privilege of paying for this all? Unless you can somehow show you want a permit or didn't get one or something, that you were directly affected by the process, I don't think you can do anything about it. And that's just an example.

**LATHROP:** I'm going to give another example, which, which I think works for the bill, which is when we-- in 2014, in the Special Investigative Committee, we got into the reentry furlough program. What we found is that the Department of Corrections established an entire furlough program and started letting convicted murderers out of jail or out of prison before they were even at their parole eligibility date in a policy adopted outside of the APA. And I don't know what we expect somebody who got out on furlough early--

**SPIKE EICKHOLT:** Right.

**LATHROP:** --from prison to--

**SPIKE EICKHOLT:** To sue--

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**LATHROP:** --be the only person that could bring a cause of action.

**SPIKE EICKHOLT:** That's right. And that's an incident where people in the public would have an opinion about that. I mean, some people don't like the existing furlough parole system and they certainly don't like a self, in-house made one that they're paying for.

**LATHROP:** Right, OK. I don't see any other-- Senator Wayne.

**WAYNE:** So I was just thinking about the case and how I could finally talk about it. My wife texted me and said her judge wasn't a part of it. If it's only people affected by it and we know that the protocol has not moved, then nobody else, even on death row, could challenge it because the protocol, itself, was moved because they can't get the drugs.

**SPIKE EICKHOLT:** Well, I mean, nothing moved because you can't get the drugs. I don't know if people on death row-- they may still be able to challenge it and that's what the current plea had sort of alluded to--

**LATHROP:** Alluded to, yeah.

**WAYNE:** All right.

**SPIKE EICKHOLT:** --that they still may have a claim under there. I mean, it's slippery there. I can't really--

**WAYNE:** OK.

**SPIKE EICKHOLT:** I was just thinking--

**WAYNE:** Thank you.

**SPIKE EICKHOLT:** Of course.

**LATHROP:** I don't see any other questions, but thank you for your testimony, as always. Any other proponents here to testify? Any opponents? Good afternoon.

**JOHN ALBIN:** Good afternoon.

**LATHROP:** This is not the Business and Labor Committee.

**JOHN ALBIN:** I realize that.

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[LAUGHTER]

**LATHROP:** I don't know what you're doing here.

**JOHN ALBIN:** I have flashbacks to eight years ago in your--

**LATHROP:** Yeah and you should, so am I. Welcome, John.

**JOHN ALBIN:** Thank you. Chairman Lathrop and members of the Judiciary Committee, my name is John Albin, J-o-h-n A-l-b-i-n, Commissioner of Labor, and I appear before you today as the Commissioner in opposition to LB925. LB925 amends who may bring a petition for a declaratory judgment to determine the validity of any rule or regulation. As proposed, LB925 allows for any Nebraska taxpayer or any person whose legal rights and privileges are interfered with or any person acting on behalf of a person whose legal rights and privileges are interfered with are impaired-- this essentially means any person who has ever worked in Nebraska or any business with ties to Nebraska can challenge a Department of Labor regulation and unemployment whether or not they have ever filed for unemployment. This opens the agency up to administrative burdens unnecessary and could potentially put our federal funding and Nebraska's federal unemployment tax credit at risk. Nebraska's unemployment insurance program is a state-federal partnership. In order to receive federal dollars to administer Nebraska's unemployment program, the state must meet certain federal conformity requirements. Nebraska receives approximately \$14 million annually in federal grant funding for the unemployment insurance program. Further, Nebraska's employers receive a federal unemployment tax credit. The credit is 6 percent of the first \$7,000 that an employee earns. Any earnings beyond \$7,000 are not taxed. Currently, the tax credit is 5.4 percent and losing this tax credit could increase the taxes on Nebraska employers in excess of \$400 million per year. LB925 does not, in and of itself, create a federal conformity issue. However, it greatly expands the potential risk for one. For example, one federal conformity requirement is, as a condition of eligibility, a claimant must actively seek work. This has been interpreted by U.S. DOL to require a claimant to search for work each week. The department requires that work search through Regulation 219 NAC 4. This regulation already went through the legislatively-required process that includes a public hearing, approval by the Attorney General, and approval by the Governor. Challenges to this regulation could hold up enforcement of any work search requirement and put federal conformity at risk. That concludes my testimony, but I'd also like to offer Director Dolan's testimony on behalf of Department of

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Labor, in a letter and he sends his apologies for not being here today.

**LATHROP:** OK, I don't see any questions for you today.

**JOHN ALBIN:** All right. I'll see you in Business and Labor on Monday.

**LATHROP:** We'll see you Monday. Yeah, that's exactly right. Anybody else here in opposition?

**STEPHANIE CALDWELL:** Good afternoon, Chairperson Lathrop and members of the committee. My name is Stephanie Caldwell, S-t-e-p-h-a-n-i-e C-a-l-d-w-e-l-l. I am an Assistant Attorney General in the civil litigation section and I'm here to testify in opposition to LB925 on behalf of the Nebraska Attorney General's Office. Our office has also submitted a fiscal note for the committee's review that sets forth our concerns with this bill. As testified earlier by Senator Chambers and others, LB925 would amend the current Administrative Procedures Act, the APA, with regards to declaratory judgment lawsuits. Specifically, the proposed legislation would expand who may bring a lawsuit under 84-911. This section of the APA, as written now, allows an individual to challenge the validity of any rule or regulation, which interferes, impairs, or threatens to interfere in his or her legal rights. The proposed amendment language would now allow any taxpayer, any individual to bring a suit even if they lack what we've been talking about today, legal standing; that is, even if the rule or regulation does not directly interfere, impair, or threaten their individual legal rights or privileges. The Nebraska Department of Justice opposes this bill for two reasons. One, it would go against the basic legal standing principles of-- or legal principles of what is called standing; that is the right to file a suit. In this case, a suit against the state of Nebraska or a state of Nebraska agency in which the Nebraska Department of Justice or Attorney General would defend. Two, it would allow persons to bring suits on behalf of another individual, even without that individual's consent. Standing is a basic legal principle and jurisdictional requirement that applies to almost all lawsuits. As explained by the United States Supreme Court in one of its opinions, at the core of the standing doctrine is the requirement that a plaintiff allege a personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. Standing also arises from the United States Constitution in Article III, which requires the plaintiff to demonstrate the defendant's actions have or will cause concrete harm. While the Nebraska Constitution does not have a similar

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provision, it has long been recognized at the Nebraska Supreme Court that it is a prerequisite to a suit. As demonstrated in our fiscal note that was submitted to the committee, the legislation would increase the number of suits filed each year against the state and places no limit on, repeat, what could be deemed frivolous lawsuits by, perhaps, inmates or other persons purportedly attempting to file suits on behalf of others. Since suits are currently barred, the Nebraska Attorney General's Office is unable to project the number of suits resulting from LB925. In a sense, though, the proposed language would allow limitless lawsuits by nonimpacted litigants, or even without a person's consent, to second-guess policy decisions through the court. As proposed, language goes against the basic legal standing and jurisdictional requirements to file suit. The Nebraska Attorney General opposes this legislation. I'm happy to entertain any questions.

**LATHROP:** So in your comments-- so you just, you just spoke about how these could be used to challenge policy decisions, but it's not about the policy decisions as much as it is the process employed in coming to the regulation that's ultimately adopted, right?

**STEPHANIE CALDWELL:** Not necessarily; 84-911 allows a person to challenge the process of which the rule or regulation was promulgated or adopted, but also the rule or regulation itself. So both--

**LATHROP:** But not as to its wisdom?

**STEPHANIE CALDWELL:** Yeah, but you can challenge that.

**LATHROP:** No, you can't-- the taxpayer can't say this is bad policy. They can say it-- this policy does not comport with controlling statute or the Nebraska or the federal Constitution, but the taxpayer can't say I think this is a bad idea; judge, overturn it, right? So ultimately, the, the taxpayer lawsuits that we're talking about are all processed. Whether they violate a statute or whether they were done and you skipped a step, you didn't file it with the Secretary of State, right?

**STEPHANIE CALDWELL:** But they could be under 84-911. I mean, you'd have to allege some type of mishap that we've spoken about.

**LATHROP:** In the process.

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**STEPHANIE CALDWELL:** In the process, but you can also challenge the substantive of it as well.

**LATHROP:** Because it violates a statute or the Constitution--

**STEPHANIE CALDWELL:** Correct.

**LATHROP:** --but not just because you disagree with a policy--

**STEPHANIE CALDWELL:** You'd have to have some legal basis for it, correct, but--

**LATHROP:** --right? So let me ask a, a second question since you've expressed fear that this will result in multiple lawsuits. Let's say that taxpayer A files a declaratory judgment. This becomes law. Taxpayer A files a lawsuit and challenges the process by which a regulation was promulgated. What happens-- and, and loses, OK? You guys defended that the process was proper. Taxpayer B files the same lawsuit and-- for the same reasons. What happens to taxpayer B? Do they go through the whole litigation process or do we get rid of them on a motion to dismiss?

**STEPHANIE CALDWELL:** They could very well file a whole new process. I mean, yeah, more than likely, we would attempt to file a motion to dismiss. It depends on if the pleadings were identical, but our office would have to open a new case, assign a new attorney to it, review the case file, determine the appropriate pleading that would need to be filed and see what--

**LATHROP:** So--

**STEPHANIE CALDWELL:** --the courts would do.

**LATHROP:** --let me ask this question then. If Carey Dean Moore had brought the lawsuit that Senator Chambers brought to challenge the protocol and lost, what would happen when the next guy on death row brought that lawsuit?

**STEPHANIE CALDWELL:** That's a hypothetical I don't know if I'd be able to answer. I know that the--

**LATHROP:** Well, it's about whether there is issue preclusion--

**STEPHANIE CALDWELL:** Right.

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**LATHROP:** --whether that's, whether that's the result.

**STEPHANIE CALDWELL:** There could very well be an issue preclusion or a res judicata issue that could arise if we, we have a decision or an opinion from the Supreme Court that addresses those if it-- and the person would have filed the same lawsuit. Basic preclusion would apply in that case. I think that's the answer.

**LATHROP:** Yeah, it is, which gets me back to the last hypothetical. Once somebody makes that challenge and says the process was flawed, the next guy is-- you can't have a blizzard of lawsuits because the question has been decided by a court in a lawsuit, right?

**STEPHANIE CALDWELL:** And I understand what you're saying, but we do and it will happen. We would still have the case. We would still have to open it. Unless that case goes up on appeal and we get a ruling by the Supreme Court, if we just have a district court decision dismissing a case, et cetera, are we successful in raising that? We'd still have to do a motion to dismiss and cite to it, so it can't preclude the litigant or the person from filing the lawsuit. It would give us another defense.

**LATHROP:** Well, we can't do anything to stop that from--

**STEPHANIE CALDWELL:** Right, but this-- our concern is it will most definitely-- we're not able to quantify it, but it would increase the number of lawsuits that could and would be likely filed.

**LATHROP:** OK. I mean, I get us trying to stop people from filing lawsuits. That can happen in any context, though, right?

**STEPHANIE CALDWELL:** Right and it's not so much that we are here to say we don't want people to file lawsuits. It's-- we're looking at what is the intent of the Administrative Procedures Act. It's a model act that was adopted by all of the states back in 1946. All the states have uniform language. What was the reasoning and purpose behind it? I mean, if you really want to get scholarly and look at it, it really dealt with separation of powers. Is this really the jurisdiction imprudence of the courts to be going into and deciding these issues for nonimpacted litigants--

**LATHROP:** Oh.

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**STEPHANIE CALDWELL:** --for these types of cases, unless they have a true standing or injury in fact?

**LATHROP:** OK. Senator DeBoer.

**DeBOER:** So I was wondering about all of that and I-- this discussion was helpful, but I also-- sort of on the other side of this, under the status quo of what we have right now, haven't we pretty much eroded taxpayer standing? Because if the only people that are able to make a declaratory judgment claim are those who are specifically-- I mean, this is the problem, right? There are categories of regulations for which there are very few folks who would be able to file for a declaratory judgment. And there may be all sorts of reasons why they may be precluded from it. And so, isn't the point of declaratory judgment action to sort of hold accountable those agencies to the process and the various things that they're supposed to do? And if, through eroding standing or taxpayer standing, we've eroded the ability of anyone to, to handle that, haven't we effectively taken away that safeguard from our governments?

**STEPHANIE CALDWELL:** I don't know if I would agree with that phrasing. I don't believe that 84-911 takes away taxpayer standing. It's still recognized and acknowledged by the Supreme Court for certain types of actions. If it involves, I guess, the expenditure of public funds, that's where the taxpayer standing-- I guess, exception has been applied where it involves the expenditure of public funds. But with regards to your question about oversight, I don't believe that is the purpose of the courts to provide that type of oversight, to provide the continuous second-guessing of executive decisions if that should instead be perhaps something the Legislature does either through-- well, you know, term of power of the purse or oversight in that way, I don't believe that is the intent and purpose behind separation of powers for the judiciary to then step in and second-guess all of the executive decisions in that capacity.

**DeBOER:** So then who is-- who has the authority or the ability to, to ensure that agencies stay to the procedures and things that they're supposed to do? If you take that away from, from folks who could make declaratory judgment claims, then, then who does that? Who is able to watch to make sure that all of these regulations are properly promulgated?

**STEPHANIE CALDWELL:** Well, I think we have procedures built in place through the executive branch itself to make sure that they're

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promulgated or through persons that are impacted or affected by these rules or regulations. They absolutely do have that right. And in the case of Griffith, while it was recognized that Senator Chambers and the Reverend did not-- and though Mr. Moore was not bringing a claim, I think what was spoken about earlier in a concurring opinion, the other death row inmates did and still to this day have that right to pursue litigation or to have it challenged in that way. There's, there's a multitude of other actions that could be taken. I might be at a loss, you know, reaching out to the state agency and asking them in that way, I guess; going to your state senator, reaching out to the executive. In any fashion, there's still oversight. I just don't think what-- the purpose of the Administrative Procedures Act was to have that oversight be through the judiciary in all of those instances or circumstances.

**LATHROP:** I want to go back to-- I, I got a question for you. And this goes back to this reentry furlough program, which was the source of some heartburn in 2014. You'll remember that the Director promulgated rules, not through the Administrative Procedures Act, but set up a reentry furlough program where inmates were allowed to go sit on their couch and leave the Department of Corrections before their parole eligibility date. That was not done through the Administrative Procedures Act, where there would have been notice of a hearing and that sort of thing, where people can come and testify. Who is supposed to, who is supposed to bring-- if, if someone-- if I'm a taxpayer and I just found out that Neal, here, is my next door neighbor and he's on the reentry furlough program and I don't like it, who, who is-- if we don't do anything, the only person with standing is the person who benefited from a rule that was promulgated-- and I'm, I'm just going to say in the dark because rules are promulgated without the benefit of hearings, notice, and that sort of thing. Who in that circumstance would you say, if anyone, would be-- would have standing to challenge that rule by the Department of Corrections?

**STEPHANIE CALDWELL:** I mean, there's a multitude of vehicles on which persons can file lawsuits, civil rights, et cetera. I don't know if I'm here-- I just don't know if I'm here to be able to testify as to what or all the other different avenues-- would I possibly--

**LATHROP:** I'm talking about this statute right here--

**STEPHANIE CALDWELL:** Right and I--

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**LATHROP:** --because I'm a taxpayer and I just found out Neal is on the reentry furlough program that the department made up as a rule and not a regulation--

**STEPHANIE CALDWELL:** Well, you might then be able to--

**LATHROP:** --and by the way, Neal is not worried about bringing that--

**DeBOER:** [LAUGHTER]

**STEPHANIE CALDWELL:** Right, but I think in that case, you might be able to say that you have a possible injury or you could be a person with standing. The way you've described it, you possibly could because--

**LATHROP:** He hasn't trespassed on my lawn. He hasn't done anything. It just bugs me that he's-- but that--

**STEPHANIE CALDWELL:** Well, I don't--

**LATHROP:** --he's out before his parole eligibility date.

**STEPHANIE CALDWELL:** I don't know that the Administrative Procedures Act is meant to address issues that bug people. But if you have a legal claim or concern or a threat of an injury, then absolutely, you would be able to assert standing under 84-911.

**LATHROP:** I'm just a taxpayer. I'm not affected other than the fact that he lives next door to me and his parole eligibility date never came along and the department let him out on a rule they made up outside of the APA.

**STEPHANIE CALDWELL:** Well, maybe that's not the purpose of the APA. It's just-- it's to address actual injuries, threats--

**LATHROP:** No, but this statute, this statute-- I asked somebody earlier. It's not just about regulations adopted by the APA, but it's a rule promulgated by an agency. And let's say that they-- that our friends here from the Department of Labor start giving a bunch of money away-- more money away to people on unemployment. Those people are not going to complain, but I may have a problem with it as a taxpayer.

**STEPHANIE CALDWELL:** And then you'd fit under the taxpayer exemption of the other avenues that we spoke about earlier; where you would be able to file claim and file suit under that, as a taxpayer, because you're

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talking about expenditure of public funds. But if you're talking about your previous scenario where you're-- and I'm not trying to paraphrase what you're saying if--

**LATHROP:** No, you can make fun of my hypothetical if you need to--

**STEPHANIE CALDWELL:** --if you're--

**LATHROP:** --but it's not just a hypothetical. This actually happened.

**STEPHANIE CALDWELL:** Right, OK. And then I think in that instance, if you have-- if you are in fear of that fact pattern, I think you could plead that you have a possible threat of injury under that and you might be able to file a claim.

**LATHROP:** OK, I appreciate it. I know you probably didn't come down here prepared for those questions, but-- Senator Morfeld.

**MORFELD:** Thank you, Senator Lathrop. So I guess the thing I'm confused by is why would there be so many more lawsuits if right up until the Chambers decision, the rule had already allowed what the bill does? Or am I missing something?

**STEPHANIE CALDWELL:** No, I don't-- the Chambers decision, I think, interpreted it and provided it, but the, the statutory language had always been that you have to assert an injury or have the threat of injury. So the Supreme Court, in the Chambers decision, just acknowledged that or recognized that. The statutory language that's already there does already require standing in that a person has to show an injury or the threat of an injury, et cetera, and that's what the Chambers decision was recognizing. They tried to-- you know, what we do is seek other interpretations--

**MORFELD:** Um-hum.

**STEPHANIE CALDWELL:** --and the court disagreed so--

**MORFELD:** OK.

**STEPHANIE CALDWELL:** If that clarifies it--

**MORFELD:** I think so.

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**STEPHANIE CALDWELL:** --this was always a rule or reg before the Chambers decision. The Chambers decision kind of just recognized it and analyzed it.

**MORFELD:** OK.

**LATHROP:** Senator Brandt has got a question or two.

**BRANDT:** Thank you, Chairman Lathrop. Thank you, Assistant Attorney General Caldwell. I'd like to shift gears a little bit to the fiscal note. You-- the state is adding one paralegal, through DHHS, to assist the Attorney General because of an anticipated increase in declaratory judgments, am I reading this correctly?

**STEPHANIE CALDWELL:** And I'm not sure about that. Is that the fiscal note prepared by HHS or by the Attorney General's Office? I don't know if we actually computed actual staff numbers. We, instead, said that we were unable to compute that. But I saw that HHS--

**BRANDT:** This is, this was computed by HHS to assist the AG's Office.

**STEPHANIE CALDWELL:** OK, so that was not a fiscal note prepared by my office. It was prepared by HHS.

**BRANDT:** So your office has no fiscal note; it's zero, right?

**STEPHANIE CALDWELL:** I don't-- I think within our text of our fiscal note said that we were unable to compute the actual numbers because it's a little bit hard to predict at this time.

**BRANDT:** Yeah and I understand that, so I'm a little surprised-- not-- that, you know, they're adding one-- one paralegal may have no basis, really, to base that judgment on do they?

**STEPHANIE CALDWELL:** Well, I would say that the majority of our APA cases that come in are from Corrections and HHS. We do see a lot of HHS administrative appeals, so if this were-- and I'll let the representative from HHS discuss this. If it were to cause an influx and increase in cases, it could absolutely require an increase in staffing; paralegal. I could see the same for our side as well if we were to see an increase in these types of cases. We just weren't able to quantify it and we didn't for the purpose of our fiscal note.

**BRANDT:** All right, thank you.

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**LATHROP:** OK, thank you for your testimony and your answering our questions. Anyone else here as an opponent? Good afternoon.

**BO BOTELHO:** Good afternoon, Chairman Lathrop and members of Judiciary Committee. My name is Bo Botelho, B-o B-o-t-e-l-h-o. I'm chief operating officer and general counsel for the Department of Health and Human Services. I'm here today to testify in opposition to LB925 that would amend the Administrative Procedures Act to permit all Nebraska taxpayers to file a suit and challenge the validity of agency rules and regulations. The bill would also permit anyone, including interest groups from other states, to bring third-party suits on behalf of those who are affected by a rule or regulation. The bill would adversely impact all agencies that rely on rules and regulations to inform in their missions on behalf of Nebraskans. Although the Attorney General's Office will represent agencies and the taxpayer or third-party suits, agencies will still face serious operational difficulties in planning for and responding in such lawsuits. It does not appear that this new class of litigants or their concerns could be identified through the regulation promulgation process. Agency staffing is currently sufficient to meet present litigation demands, but it would not be sufficient to handle anything more than a minimal increase. Persons whose standing would derive solely from being taxpayers would generally have been unable to challenge rules and regulations when they were issued. However, LB952 [SIC] would let them challenge the rule or regulation now, even if the parties actually affected by the agency action have no concerns about the regulation or have already resolved any concerns with the agency or through the courts. Thank you for the opportunity to testify.

**LATHROP:** Thank you. Any questions for Mr. Botelho? I don't see any, you're going to get off easy.

**BO BOTELHO:** Thank you.

**LATHROP:** Thank you. Any other opponents to testify? Anyone here in a neutral capacity? Seeing none, Senator Chambers, are you ready to close?

**CHAMBERS:** First of all, to explain my silence, the one who introduces a bill and is a member of the committee can sit with the committee, but does not participate as far as asking questions and so forth of the witnesses. I think what you see is a knee-jerk reaction here, which shows why this kind of legislation is necessary. Some of the kind of theoretical or hypothetical issues raised here today are not

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really going to happen at all. They haven't been happening. The public does not know, right now, that they cannot file. They would not have standing to file a suit. Third-party groups have not been filing lawsuits. The passage of this bill is not going to automatically lead to the things that these people bring, but a lot of them have much to hide. They have gotten away with things for a long time. I've been in the Legislature a long time and I've dealt with some of the kind of issues that I had to get involved in. Anytime an agency is operating almost *carte blanche*, that agency does not want anybody to dare to raise questions or challenge what is being done. If they are doing as they should do, they have nothing at all to worry about. And to keep from having to get involved in a long, complicated discussion, let's say that in order to properly promulgate a rule or regulation, the kind that would fall under the APA, there would be five steps that have to be taken. If the five steps have been taken, anybody can file a lawsuit who chooses. And it will not take a long time to dispose of that, but what they're worried about is the fact that they've cut corners. They have misled the public. They have been, in some cases, outright deceptive. I've gotten letters from people, especially from HHS, about activities by people that those people ought not to engage in. But it's not the kind of thing that I have time to do anything with. So I think what we see here are people protecting their turf and they don't want much in the way of challenge. They don't want much in the way of oversight. If the Legislature did not feel that these agencies and entities needed any oversight, there would be no process for the public to participate or to challenge their rules and regulations. I just wanted to say something to wrap it up and mainly to make it clear why if a member of a committee has offered a bill, he or she may sit with the committee, but not question the witnesses. But if you have any questions of me after all of this, I will answer them repetitiously as has been going on. But this committee is too intelligent for that. They've been here a long time. They don't want to waste anybody's time. However, if you want to lob some hardballs at me, or softballs, I'm at your disposal for the last time.

**LATHROP:** As tempting as that is, I'm going to pass and it looks like everybody else feels the same way.

**CHAMBERS:** OK.

**LATHROP:** Thank you for introducing and bringing the bill, Senator Chambers. With that, we will go to the next bill, which are-- the next two, which are mine. Do you want to chair the committee?

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**WAYNE:** Sure, joint hearing?

**LATHROP:** What?

**WAYNE:** Joint hearings?

**LATHROP:** No, no.

[LAUGHTER]

**DeBOER:** Joint hearing? They seem related, Steve.

[LAUGHTER]

**WAYNE:** As Chairman Lathrop is coming up, wait for them to clear the room. Chairman Lathrop, welcome to your Judiciary Committee.

**LATHROP:** Thank you, Senator Wayne, and good afternoon, committee members. Hopefully, the next two bills are fairly noncontroversial and straightforward. My name is Steve Lathrop, L-a-t-h-r-o-p. I'm the state senator from District 12 and I am here today to introduce LB868. This bill was brought to me by the Bar Association, the Office of Dispute Resolution, and the court administrator's office. This is a cleanup bill that follows last year's passage of LB595. That bill, if you recall, allowed licensed attorneys to serve as parenting plan mediators if all parties to a case agreed to that arrangement. The bill I'm presenting today, LB868, updates one of the required duties of the parenting plan mediator to acknowledge that we also now have attorneys serving in that capacity. Specifically, those attorneys serving as mediators by agreement will, like the other mediators, have a duty to screen the parties for potential issues such as child abuse, domestic abuse, or intimidation before proceeding with the mediation. It's pretty straightforward. And with that, I would ask for your support of LB868.

**WAYNE:** Any questions for Chairman Lathrop? Seeing none, thank you. First, we'll take proponents. Welcome to your Judiciary Committee.

**BILL MUELLER:** Thank you, Senator. Members of the Judiciary Committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear here today on behalf of the Nebraska State Bar Association in support of LB868. As Senator Lathrop explained, this really is a, a follow-up to a bill that passed last year, LB595, to clarify that an attorney serving as a parenting plan mediator must provide the domestic violence screening that is required under 43-2939. That really is what the bill does. We would

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ask the committee to advance the bill to the floor. I'd be happy to answer any questions that you may have.

**WAYNE:** Any questions from the committee? Seeing none--

**BILL MUELLER:** Thank you.

**WAYNE:** --thank you for being here. Any other proponents? Seeing no other proponents, any opponents? Seeing no opponents, anyone testifying in a neutral capacity? No testifiers in a neutral capacity, Chairman Lathrop.

**LATHROP:** I'll waive close. No, it's very, it's very, very simple and it is a cleanup bill and that will end my hearing on LB868.

**WAYNE:** But the-- do we have any letters? No letters in the record, this will close the hearing on LB868. We will now open on LB869. Chairman Lathrop, welcome back to your Urban Affairs Committee. I mean, Urban-- Judiciary Committee.

[LAUGHTER]

**LATHROP:** That's what happens when you put him-- it looks a lot easier than it actually is. Good afternoon, fellow Judiciary Committee members. My name is Steve Lathrop, L-a-t-h-r-o-p, and I'm the state senator from District 12, here today to introduce LB869. I brought LB869 at the request of the Bar Association and the Nebraska Uniform Law Commission. The goal of this bill is to position the Supreme Court to establish, by rule, a uniform system for deposition and discovery for out-of-state civil lawsuits. Currently, each district court handles these situations a little differently. This bill also takes the opportunity to clean up some oversights in addressing witness fees for state employees and security guards as well as fixing language in various sections to recognize that deposition and discovery subpoenas may involve organizations in addition to individuals. I believe there are others here who are prepared to offer more specifics on these changes and why they would be beneficial, but I'm happy to answer any questions that you might have. And with that, I would ask for your support of LB869.

**WAYNE:** Any questions from the committee? Seeing none, thank you. First, we would like to have proponents. Welcome to your Judiciary Committee.

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**DWYER ARCE:** Hi, good afternoon. My name is Dwyer Arce; first name is spelled D-w-y-e-r, last name, A-r-c-e. I'm an attorney at Kutak Rock at 1650 Farnam Street in Omaha. I am also the chair of the Nebraska State Bar Association's practice and procedure committee. LB869 would grant the Supreme Court the authority to adopt the Uniform Interstate Deposition and Discovery Act by court rule. In doing so, Nebraska would join 42 states, the District of Columbia, and the U.S. Virgin Islands in adopting this uniform act. Permitting the Supreme Court to adopt the uniform act will have significant benefits to parties in litigation in and out of Nebraska. By way of example, a few years ago, I was conducting discovery in a case pending in South Dakota and needed to take discovery from a witness that was in Nebraska. Typically, as a Nebraska attorney, I could simply issue a subpoena to that witness and it would be enforceable without a court intervention. But because the case was pending in South Dakota and not Nebraska, I had to open a miscellaneous action in the district court to get a district court judge to sign off on that subpoena. So I had to go to Madison County, Nebraska. They had no idea what I was talking about when I asked them if they could help me with the subpoena. And so we engaged in a process in which we kind of figured out together what we were supposed to do. Eventually, we got an order from the judge and we got our subpoena then we got our discovery but it, it took a while and this uniform act would short-circuit that process pretty significantly by allowing out-of-state attorneys and out-of-state litigants to issue subpoenas in compliance with the state law from wherever they're coming from transmitted to the district court of the county in Nebraska that they want to take their discovery. And then the district court clerk's office would be authorized, then, to perform the, the, basically, administrative duty of issuing a Nebraska subpoena that has the same terms as the out-of-state subpoena. And that-- this-- even though it's not going to help Madison County that much because they don't do a lot of these in counties like Lancaster and Douglas, where there are hundreds of these occurring every year, this will reduce the caseload significantly by removing all of those miscellaneous actions from the dockets in Douglas County and Lancaster. And with that, I would urge you to please support LB869. Thank you.

**WAYNE:** Thank you for coming today. Any questions? Senator Chambers.

**CHAMBERS:** If this process were in place right now, would you all both testify before the house committee?

**DWYER ARCE:** I'm sorry, say that again?

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[LAUGHTER]

**CHAMBERS:** That's fine, I can't even get it out.

**DWYER ARCE:** OK.

[LAUGHTER]

**WAYNE:** Any other questions?

[LAUGHTER]

**MORFELD:** I had some questions, but they've already been answered.

**WAYNE:** Seeing no more questions, thank you for being here.

**DWYER ARCE:** Thank you.

**WAYNE:** This is what happens after 3:00. Any other proponents? Welcome to your Judiciary Committee.

**LARRY RUTH:** Senator Wayne and members of the committee, my name is Larry Ruth, L-a-r-r-y R-u-t-h, and I'm here representing the Nebraska Uniform Law Commission and I appear in support. First of all, just a bit about the Uniform Law Commission; there was a national conference established back in 1892 so this is an old concept. Nebraska adopted the Uniform Law Commission in 1951 and proceeded to adopt the Uniform Commercial Code. Many of us have gone to law school and those of you who have laws, statues on your desk, it's a volume about this large. And what it does is you have a uniform set of rules for commercial law. But we do more than that and in the case in front of us, we have adopted a uniform bill for the issuance of subpoenas and other activities related to depositions and discovery when it's outside the state of the trial court. This is really an unusual bill and you won't find it very often because it is not the adoption of this act, it is the authority given to the Supreme Court to allow for clerks to issue subpoenas. And I'm sorry, I keep hitting your microphone. And I'm sure that's just-- anyway, all this bill does is authorize that the Supreme Court may issue a-- it's-- when authorized by the rules promulgated by the Supreme Court, clerks and district courts may issue subpoenas, which are then given to foreign jurisdiction clerks to, in effect, have the necessary proceedings to subpoena. And it's necessary because in Nebraska, these kinds of rules are handled by the Supreme Court and not put in statute. So what we're doing here is, as Senator Lathrop said, is providing for this to be done, in essence, by the Supreme

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Court. You've been given a map of the United States and there are 42 or 43 jurisdictions that have adopted the Uniform Interstate Deposition Discovery Act; this is as of September of last year. And 13 of those states have done what you're being asked to do here; going to the Supreme Court and saying, you adopt this, please, because it's a good, it's a good uniform act. And if you need some help getting-- authorizing legislation, that's what this bill does. So of the, of the 43 states that have adopted this act, 13 have been done by court rule and 30 have been done by statutory passage.

**WAYNE:** Any questions?

**LARRY RUTH:** Thank you.

**WAYNE:** Thank you. Any questions? Senator Chambers.

**CHAMBERS:** Mr. Ruth, did you have, have this document handed out to us? Are you familiar with it?

**LARRY RUTH:** I'm sorry?

**CHAMBERS:** Are you familiar with this document?

**LARRY RUTH:** Yes.

**CHAMBERS:** It has to do with the Uniform Law Commission and the states that have adopted this and ones that have not?

**LARRY RUTH:** Yes.

**CHAMBERS:** On yours, does it show Wyoming, Nebraska, Missouri, Oklahoma, and Texas as not having adopted it yet?

**LARRY RUTH:** That's correct.

**CHAMBERS:** Well, you know, in the old days when we used to have a lot of bantering back and forth at one time, I asked what would you have if Larry Ruth were on the back of a motorcycle riding and somebody took a sharp turn and they fell off, what would be the result? Your motorcycle would be ruthless.

[LAUGHTER]

**CHAMBERS:** You'd be familiar with that, so you'll understand this: the abbreviation from Missouri is MO. I have to have something occupy my

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mind. If you take the first letter of Texas, Oklahoma, Wyoming, and Nebraska and use Missouri, you'd have Motown.

[LAUGHTER]

**CHAMBERS:** Well you want them to become go-town, so keep doing what you're doing and maybe you'll succeed.

**LARRY RUTH:** And I was also sitting here one time, Senator, when I noticed all the senators were laughing and smiling and I finally was shown a cartoon that you drew of me testifying and all I could, all I could see in the cartoon were my hands looking up--

[LAUGHTER]

**LARRY RUTH:** --like this and my feet dangling.

**CHAMBERS:** [INAUDIBLE]

**LARRY RUTH:** That was about 35 years ago. I've never forgiven you, Senator.

[LAUGHTER]

**CHAMBERS:** You got me.

**LARRY RUTH:** Thank you.

**WAYNE:** Any more stories?

[LAUGHTER]

**WAYNE:** All right, thank you. Thank you for today. Any other proponents? Anyone testifying in opposition, any opponents? Seeing none, anybody testifying in a neutral capacity? Seeing none, Senator Lathrop, you may close.

**LATHROP:** I'll waive close.

**WAYNE:** Chairman Lathrop waives closing. For the record, there are no letters of support or opposition and this closes the hearing on LB869.